



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

September 5, 2007

Interpretive Letter #1087
September 2007
12 USC 72

Re: Opinion Request on Deferred Share Units Qualifying as Directors' Qualifying Shares

Dear []:

This letter responds to your inquiry about whether national bank directors may use deferred share units of a parent holding company to meet the requirement that they own directors' qualifying shares under 12 U.S.C. § 72. Based on the specifics of your proposal, as described herein, we believe the deferred share units will qualify as directors' qualifying shares.

[] ("Bank") is an indirect, wholly-owned subsidiary of [] ("the BHC"), a []. The deferred share units are phantom share units that track the value of the BHC's common shares. Each deferred share unit represents one share of the BHC's common stock, and the value of a deferred share unit fluctuates with the value of the BHC's common shares. Deferred share units have no voting rights and accrue dividend equivalents equal to dividends paid on the BHC's common shares.

Non-employee directors of the Bank receive compensation in cash, BHC common shares, and deferred share units. The BHC requires non-employee directors to acquire common shares, or their equivalent, with a value equal to at least six times their annual retainer. The Bank considers deferred share units to be the equivalent of the BHC's common shares for purposes of this requirement, and a minimum of 60% of the annual fees payable to a director shall be received in the form of deferred share units or common shares until the share ownership requirement has been met. Deferred share units must be held by the director until retirement. Deferred share units will be paid out in cash upon retirement of a director, based on the value of the BHC's common shares on that date.

Twelve U.S.C. § 72 generally requires that "[e]very director must own...capital stock of the association of which he or she is a director the aggregate par value of which is not less than

\$1,000, or an equivalent interest, as determined by the Comptroller of the Currency, in any company which has control over such association [as determined by the Bank Holding Company Act].” The purpose of the statute is to ensure that a national bank director has a financial stake in the operations of the bank (or its parent company) so that the director will have the incentive to be vigilant in protecting the bank’s interests.¹

Twelve C.F.R. § 7.2005 generally provides that (i) a national bank director must own a qualifying equity interest of common or preferred stock with a value of \$1,000 in the national bank or in a company that controls the national bank; and (ii) the OCC may consider whether other interests in a company controlling a national bank constitute an interest equivalent to \$1,000 par value of national bank stock.

The OCC has found that a variety of different holdings can provide a national bank director with an “equivalent interest” that satisfies the qualifying share requirement of 12 U.S.C. § 72. For example, the OCC has permitted directors to invest in a bank’s trust preferred securities to meet the qualifying shares requirement on the basis that the trust preferred stock had characteristics similar to equity holdings and would create comparable incentives for bank directors to be vigilant.²

The overriding principle the OCC has consistently applied to its interpretations of 12 U.S.C. § 72 is that the interest must assure that bank directors have a financial stake in the operations of the bank, evidenced by an equity or an equivalent interest. An “equivalent interest” includes a financial interest in a bank or holding company that creates incentives similar to stock ownership for directors to be vigilant in overseeing the bank’s operations.³

You have observed that the BHC’s deferred share units have characteristics similar to equity holdings and are, in almost all respects, equivalent to common shares of the BHC. Their value is tied directly to the value of the BHC’s common shares, they are long-lived and of indeterminate duration (settling in cash only upon retirement of the director), and they accrue dividend equivalents equal to dividends paid on the BHC’s common shares. The only attributes of equity interests that they lack are voting rights and transferability.

Further, you argued that the deferred share units create financial incentives comparable to those of equity interests for bank directors to be vigilant in protecting the Bank’s interest. The deferred share units’ value, as mentioned, is tied directly to that of the BHC’s common shares.

¹ See OCC Interpretive Letter No. 83 (March 29, 1979), citing *Cupo v. Community National Bank and Trust Company*, 324 F. Supp. 1390 (E.D.N.Y. 1971). Qualifying shares must constitute both legal and beneficial interests. OCC Interpretive Letter No. 83, *supra*, citing *Transamerica Corporation v. Parrington*, 115 Cal.App.2d 346, 252 P.2d 388 (1953).

² See OCC Interpretive Letter No. 1020 (February 8, 2005). See also Letter from Emory W. Rushton, Deputy Comptroller for Multinational Banking (April 11, 1988) (unpublished).

³ See OCC Interpretive Letter No. 1020, *supra*.

Accordingly, based on the foregoing, we agree that the deferred share units are equivalent to stock of the BHC pursuant to 12 C.F.R. § 7.2005(b)(iii) and will therefore qualify as directors' qualifying shares under 12 U.S.C. § 72. If you have any questions, or need any additional information, please feel free to contact Jeanne Devine, Counsel, Northeastern District, at 212-790-4041.

Sincerely,

/s/

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel