



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

April 14, 2003

Interpretive Letter #963
May 2003
12 U.S.C. 548
12 U.S.C. 52

Subject: Arkansas Franchise Tax and Par Value of National Bank Shares

Dear []:

This is in response to your letter inquiring whether 12 U.S.C. § 52 prohibits a national bank from decreasing the par value of its shares to \$0.01 per share with an offsetting increase to the bank's "capital in excess of par" account. For the reasons discussed below, we conclude that section 52 does not prohibit a national bank from decreasing the par value of its shares and increasing the bank's capital surplus. To the extent that a national bank avails itself of these options, it may affect its State tax obligations pursuant to the operation of 12 U.S.C. § 548.

I. Background

You have indicated that banks located in Arkansas are required to pay an annual franchise tax pursuant to the Arkansas Corporation Franchise Tax Act of 1979¹ (the "Arkansas Franchise Tax Act"). For a bank with all its property located in Arkansas, the amount of the franchise tax is computed by multiplying the number of the bank's shares outstanding times the par value per share times 0.27%.² The par value of a bank's shares thus significantly affects the amount of franchise tax payable.

II. Discussion

The National Bank Act does not prohibit a national bank from having shares with a par value of \$0.01.³ Section 52 provides that "[t]he capital stock of each association shall be divided into shares of \$100 each, or into shares of such less amount as may be provided in the articles of

¹ Ark. Code Ann. §§ 26-54-101 *et seq.* (Michie 2001).

² The product of shares outstanding times par value per share may be considered the "tax base." The 0.27 percent may be considered the "tax rate."

³ You have represented that it is legally permissible under Arkansas law for a State bank organized in Arkansas to have shares with a par value per share of \$0.01.

association.” That provision thus establishes a maximum par value per share for a national bank’s shares, but does not establish any minimum par value. Prior to December 27, 2000, 12 U.S.C. § 51 imposed on national banks a minimum aggregate par value requirement ranging from \$50,000 to \$200,000. Section 51 was repealed in the Financial Regulatory Relief and Economic Efficiency Act of 2000 (the “2000 Act”).⁴ The legislative history of the 2000 Act indicates that Congress considered the section 51 minimum capital requirement obsolete since Congress had granted the Federal banking agencies the regulatory authority to establish minimum capital requirements in 1983.⁵ The minimum capital requirements currently applicable to national banks under this authority are set forth in Part 3 of the OCC’s rules.⁶

The OCC has previously determined that a national bank could decrease the par value of its shares to \$0.01 per share, provided that the bank continued to meet applicable capital requirements.⁷ Because the National Bank Act no longer contains a minimum aggregate par value requirement and because section 52 provides only for a maximum par value of \$100 per share, a national bank may decrease the par value of its shares to \$0.01 and transfer the amount resulting from that decrease to capital surplus.⁸ In effecting the decrease in par value and increase in capital surplus, a national bank would of course need to comply with all other applicable legal requirements, including requirements for procedures to amend its articles of association⁹ as well as requirements for notifying the OCC.¹⁰ In this connection, the bank must,

⁴ Pub. L. No. 106-569, Title XII, § 1233(c), 114 Stat. 3037.

⁵ 146 Cong. Rec. H11991 (daily ed. Dec. 5, 2000)(section-by-section analysis inserted into record by House bill sponsor, Rep. Leach); 146 Cong. Rec. S11607 (daily ed. Dec. 5, 2000)(section-by-section analysis inserted into record by Senate bill sponsor, Sen. Allard).

⁶ 12 C.F.R. § 3.1 *et seq.*

⁷ See Interpretive Letter No. 275 (“IL 275”), reprinted in [1983-1984 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 85,439 (October 21, 1983)(national bank could meet aggregate par value requirement with a combination of common and preferred shares). Subsequent to IL 275, the aggregate par value requirement was eliminated by the repeal of section 51. See also Letter from Anthony DosSantos, Licensing Manager, Northeastern District Office, OCC, to John H. Smith, Associate Counsel, Mellon Financial Corp. (March 3, 2003)(to be published)(bank converting from State to national bank charter may issue zero or no par common shares).

⁸ The national bank would not be reducing its capital, but merely transferring amounts between two permanent capital accounts. Thus, 12 U.S.C. § 59, which establishes procedures for a national bank to reduce its capital, would not apply. Except as provided in section 59 and 12 C.F.R. § 5.46, a national bank may not withdraw, or permit to be withdrawn, by dividend or otherwise any portion of its permanent capital. Transferring amounts between the two permanent capital accounts will not affect the bank’s obligations under 12 U.S.C. § 56 (prohibition on withdrawal of capital) or 12 U.S.C. § 60 (restrictions on dividends). See 12 C.F.R. § 5.63(a).

⁹ The shareholders of a national bank must approve any amendment to the bank’s articles of association to change the par value of the bank’s capital stock. A certified copy of the amendment to the articles of association also must be forwarded to the OCC. See 12 U.S.C. § 21a. A national bank with shares that are registered under section 12 of the Securities Exchange Act of 1934 must file proxy materials with the OCC pursuant to 12 C.F.R. Part 11.

¹⁰ Changing the par value of a national bank’s capital stock when the change is offset by an equal change in the bank’s capital surplus does not require prior approval of the OCC. The change, however, does require notice to the OCC and does not become effective until the OCC certifies the change. See *Comptroller’s Corporate Manual, Other Changes and Activities, Capital and Dividends* (April 1998).

of course, continue to comply with all applicable capital requirements set forth in the OCC's Part 3. National banks also should be cognizant that a reduction in par value may affect future directors' qualifying share requirements under 12 U.S.C. § 72.¹¹

When a national bank decreases the par value of its shares, it may have an effect on the bank's State tax liability if the relevant State taxes its State banks, to any degree, based on the par value of those banks' shares. This occurs because 12 U.S.C. § 548 provides that:

For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Without reaching the question of whether the Arkansas Franchise Tax is the type of tax authorized by section 548,¹² were such to be the case, a national bank nevertheless may still take advantage of corporate options available to it under federal law with regard to its corporate or business configuration, such as setting the par value of its shares. In certain States, that look to the par value of a bank's shares in calculating a bank's tax obligations, taking advantage of such corporate options may, pursuant to section 548, affect the national bank's tax obligations.

I hope the foregoing is responsive to your inquiry.

Sincerely,

/s/ Julie L. Williams

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

¹¹ Under section 72, a national bank director must own a qualifying equity interest of \$1,000 in the stock of a national bank or its holding company. In an interpretive ruling, the OCC has stated that the qualifying equity interest may include common or preferred stock that has an aggregate par value of \$1,000, an aggregate shareholders' equity of \$1,000, or an aggregate fair market value of \$1,000. The value of the qualifying interest is determined as of the date purchased or the date on which an individual became a director, whichever value is greater. See 12 C.F.R. § 7.2005.

¹² *First Agricultural National Bank v. State Tax Comm'n*, 392 U.S. 339, 341-46 (1968) (States may only tax national banks as specifically permitted by Congress). See also, *U.S. v. State Board of Equalization*, 639 F. 2d 458 (9th Cir. 1980), *cert. denied* 451 U.S. 1028 (1981) and *Michie on Banks and Banking*, Ch. 19, Sec. 1 (1998).