



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

February 17, 2009

Interpretive Letter #1112
March 2009
12 USC 55

Subject: Issuance of Common Stock Below Par Value

Dear []:

This letter responds to your letter of December 4, 2008, in which you request the confirmation of the Office of the Comptroller of the Currency (“OCC”) that [] (the “Bank”) may issue shares of its common stock at an issue price less than its par value and that the assessment provisions of 12 U.S.C. § 55 for a deficiency in capital do not apply to this particular transaction. For the reasons described below, and subject to the representations set forth herein, we confirm that the Bank may issue shares of its common stock below par value and that the assessment provisions of 12 U.S.C. § 55 do not apply to this particular transaction.

I. Background

The Bank proposes to conduct a non-public stock offering to raise capital. The Bank represents that the current “market value” for its stock is less than the stock’s \$5.00 par value. The bank proposes to sell its stock below par. However, the Bank represents that it will take measures to ensure that any below par sale will not cause its capital stock to become impaired. To this end, the Bank represents that it will accompany any below par sale with a simultaneous transfer of funds from its preexisting capital surplus account to its capital stock account in an amount equal to the difference between the issue price and the \$5.00 per share par value.¹ In other words, through the transfer from capital surplus,

¹ Thus, for example, if the bank issues 1,000,000 shares at \$4.00 per share, it will transfer \$1,000,000 from its capital surplus account to its capital stock account.

the Bank's capital stock account will continue to equal par value multiplied by its outstanding common shares.²

II. Discussion

A. Authority To Issue Stock Below Par Value

The Bank proposes to issue stock below par value pursuant to Tennessee corporate law and OCC Regulation 7.2000(b). Under 12 C.F.R. 7.2000(b), a national bank can elect to follow state corporate governance procedures when not inconsistent with federal banking law and safe and sound corporate governance procedures. The OCC's regulation provides:

To the extent not inconsistent with applicable Federal banking statutes or regulations, or bank safety and soundness, a national bank may elect to follow the corporate governance procedures of the law of the state in which the main office of the bank is located, the law of the state in which the holding company of the bank is incorporated, the Delaware General Corporation Law, Del. Code Ann. Tit. 8 (1991, as amended 1994, and amended thereafter), or the Model Business Corporation Act (1984, as amended 1994, and as amended thereafter). A national bank shall designate in its bylaws the body of law selected for its corporate governance procedures.

12 C.F.R. § 7.2000(b). The Bank's main office is located in [], Tennessee. The Bank has designated Tennessee corporate law in its bylaws for its corporate governance procedures.

1. Tennessee Law Permits Shares To Be Issued Below Par Value

Under Tennessee corporate law, a corporation may issue its shares at less than par value. Tennessee's Business Corporation Act contains the following provision:

48-16-101(c) The charter may authorize one or more classes of shares that... (5) have a par value; provided, that the mere recitation of a par value for shares shall not create a requirement for a minimum consideration for the issuance of any such shares or impose any other restriction on their issuance or create any other right or liability with respect thereto.

² The Bank's Articles of Association provide for authorized capital stock of 10 million shares of common stock, \$5.00 par value each. As of June 30, 2008, the Bank had 3,333,013 shares of common stock outstanding and \$16,665,065 recorded in its common stock account. The aggregate consideration received for these shares was \$35,656,000. Therefore, the Bank had \$18,990,935 recorded as capital surplus pursuant to 12 C.F.R. § 5.46(e)(3)(i), reflecting the amount paid for the Bank's stock in excess of the stock's par value.

2. Pricing Stock Is A Corporate Governance Procedure

The Bank's decision to issue stock below par value, is a "corporate governance procedure" under 12 C.F.R. § 7.2000(b). The regulation does not define the term "corporate governance procedure." However, the OCC has stated that the term is meant to refer to "those matters involving the operation and mechanics of the bank's internal organization, including relations among the owners-investors, directors and officers, as distinct from the bank's banking powers and activities and its relationship with customers and third parties."³ The OCC has previously authorized national banks to follow "corporate governance procedures" under state law permitting the division of a financial institution into two separate entities, reverse stock splits, share exchanges and the issuance of blank check preferred stock.⁴ Because issuing stock below par value involves relations among owners-investors, it constitutes a corporate governance procedure.

3. The Sale Of Stock Below Par Value Is Not Inconsistent With Federal Banking Law And Safety And Soundness

Tennessee corporate law permitting the sale of stock below par value is not inconsistent with federal banking statutes and regulations, or with bank safety and soundness. No provision of federal law expressly prohibits the sale of stock below par value. The only provision of the National Bank Act ("NBA") that expressly relates to the par value of common stock is 12 U.S.C. § 52.⁵ This provision provides, in relevant part:

The 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 association...

Thus, the plain language of the NBA does not expressly preclude sales of: (i) no par stock; (ii) stock below \$100 per share; or (iii) stock below par.⁶ Consistent with this view, the Comptroller's Licensing Manual, Capital and Dividends, provides that: "[c]ommon stock may be par value stock or no par stock. *Banks should consult with the*

³ OCC Conditional Approval No. 696 (June 9, 2005).

⁴ See e.g., OCC Conditional Approval No. 859 (June 13, 2008); OCC Conditional Approval No. 670 (December 27, 2004); OCC Interpretative Letter No. 879 (November 10, 1999); OCC Interpretative Letter No. 921 (December 13, 2001).

⁵ Four other sections of the NBA refer to "par value." 12 U.S.C. §§ 51a, 51b, 51b-1, 72. None of these provisions preclude below par value stock sales. Three of these sections primarily address preferred stock. 12 U.S.C. §§ 51a, 51b, and 51b-1. The fourth section, Section 72, requires directors to hold shares "the aggregate par value of which is not less than \$1,000 or an equivalent interest..." Per the latter element, *i.e.* "equivalent interest," the statute does not require par value and, in any event, does not prohibit sales below par.

⁶ The phrase "or into shares of such less amount..." was added in 1927; prior to this addition, Section 52 required a par value of \$100 per share. McFadden Act, § 16, Pub. L. 69-639, 44 Stat. 1233 (Feb. 25, 1927)

OCC prior to considering a sale of common stock at a price below par value.” (emphasis added).^{7 8}

Below par value sale of stock is not inconsistent with bank safety and soundness provided the bank maintains adequate capital. The Bank represents that its proposed sale of stock below par and concurrent transfer from its capital surplus account to the capital account will not affect its ability to maintain adequate capital. Safe and sound banking practices require that banks maintain adequate capital⁹ and operate in compliance with national banking laws, regulations and guidelines establishing standards for safety and soundness. The Bank represents that it will comply with all applicable federal banking laws, regulations and guidelines in connection with any below par stock sale.

B. The Bank’s Below Par Sales Will Not be Assessable

The assessment provisions in 12 U.S.C. § 55 for a deficiency in capital do not apply to this particular transaction, provided that the Bank makes a concurrent transfer from its capital surplus account to its capital account, as described above. Section 55 provides, in pertinent part, as follows:

[E]very [national bank] whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller..., pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each... If any [national bank] shall fail to pay up its capital stock, and shall refuse to go into liquidation,... for three months after receiving notice from the [C]omptroller, a receiver may be appointed to close up the business of the [bank]...

The Bank has represented that, concurrent with any below par sale, it will transfer from its capital surplus account to its capital account an amount equal to the difference

⁷ The Comptroller’s Licensing Manual, Capital and Dividends, pg. 5.

⁸ Prior OCC interpretive opinions have discussed par value considerations in the context of capital and surplus requirements for national banks. *See, e.g.*, Investment Securities Letter No. 64, *reprinted in* [1992-93 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,410 (Mar. 27, 1992)(permitting a national bank to issue stock in redemption of stock appreciation rights, provided the stock is issued at a market price that exceeds par value, and thus does not create a deficit in the bank’s capital stock account); Interpretive Letter 313, *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,483 (Oct. 24, 1984)(finding that a bank’s proposed reverse stock split did not comply with capital requirements in 12 U.S.C. § 51 (repealed), which required minimum capital of \$50,000 to \$200,000; OCC noted that the amount of stock considered capital traditionally has been determined to be an amount equal to the par value of the shares issued multiplied by the number of shares issued); Interpretive Letter 275, *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,439 (Oct. 21, 1983)(permitting proposed reduction in capital, provided capital was not reduced below statutory minimum either prior to the stock split or subsequent thereto; transaction was structured to ensure that par value of the stock did not exceed \$100 maximum set forth in 12 U.S.C. § 52). These letters did not opine on whether or not the plain language of the NBA permits or precludes the sale of stock below par value.

⁹ 12 C.F.R. § 6.4.

between the sale and par value. Per this transfer, the amount in the Bank's capital stock account will equal the aggregate par value of the stock, and, thus, the Bank will not have "failed to pay up" its common stock and its common stock shall not be "impaired." For these reasons, the assessment provisions in Section 55 do not apply to this particular transaction.

III. Conclusion

Accordingly, in consideration of all the foregoing, and in reliance upon the Bank's representations described herein, we conclude that the Bank may issue shares of its common stock at an issue price less than its par value and that the assessment provisions in 12 U.S.C. § 55 do not apply to this transaction. Our conclusions herein are also specifically based on the Bank's representations and written submissions describing the facts and circumstances of the subject transaction. Any change in the facts or circumstances could result in different conclusions. If you have any questions on this matter please contact Ted Dowd, Senior Attorney, Securities and Corporate Practices Division, at 202-874-5327.

Sincerely,

signed

Julie L. Williams
First Senior Deputy Comptroller
And Chief Counsel