



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

December 13, 2001

Interpretive Letter #921
January 2002
12 USC 21 - 23
12 USC 51B
12 USC 51A

Re: [] (In Organization), [], California ("Bank")

Dear []:

This is in response to your letter of November 29, 2000, asking whether the Bank may adopt articles of association that permit its board of directors to issue blank check preferred stock. For the reasons discussed below, including your representations, we have concluded the Bank may adopt such articles.

I. Background

The Bank has elected in its bylaws to be governed by the California Corporations Code, and it would like to adopt articles of association ("articles") containing a provision authorizing the Bank's board of directors ("Board") to issue preferred stock using a blank check procedure ("blank check preferred stock"). Under current OCC procedures, shareholders typically approve an amendment to the articles for each separate issuance of preferred stock. The amendment sets forth the specific terms of the preferred stock.¹ Under the Bank's proposal, shareholders will instead approve an amendment to the articles setting an overall authorized amount of preferred stock and delegating to the Board the ability to issue and determine the terms of one or more series of preferred stock.² From time to time,

¹ Under 12 C.F.R. § 5.46(k), a national bank shall obtain the necessary shareholder approval required by statute for any change in its permanent capital. Since 1989 the OCC has not permitted the use of a blank check procedure by national banks to issue preferred stock, as discussed below. Prior to 1989, the OCC had expressly permitted national banks to use the blank check procedure.

² The term "series" is defined in the California Corporations Code as "those shares within a class which have the

the Board will pass resolutions approving and defining the terms of series of preferred stock. You state that the Bank will amend its articles to provide that such resolutions will be incorporated by reference into the articles of association. No further separate shareholder action to amend the articles will be required to issue or determine the terms of preferred stock that may be issued within the authorized amount.

II. Discussion

A. Interpretive Ruling 7.2000(b)

Under Interpretive Ruling 7.2000(b), a national bank may designate in its bylaws and elect to follow the corporate governance procedures of the state in which it is located, to the extent not inconsistent with applicable Federal banking statutes or regulations and bank safety and soundness. The Bank has designated California corporate governance procedures in its bylaws. Therefore the Bank may issue preferred stock through the proposed blank check procedure if consistent with California law, and if not inconsistent with Federal banking statutes or regulations and bank safety and soundness.

B. California Law Permits Blank Check Preferred Stock

You represent that California law permits corporations to issue blank check preferred stock. The Bank is proposing to use an article derived from Section 202(e) of the California Corporations Code to issue blank check preferred stock.³

C. The Bank's Proposed Issuances of Preferred Stock through the Blank Check Procedure are Consistent with Federal Banking Statutes and Regulations

The principal issue is whether blank check preferred stock is consistent with 12 U.S.C. §§ 51a and 51b. We have concluded that the blank check procedure satisfies the shareholder approval and other requirements of these statutes. Neither the plain language nor legislative history of 12 U.S.C. §§ 51a or 51b preclude a national bank from using the blank check procedure. Shareholders' adoption or approval⁴ of a blank check preferred stock article constitutes the shareholder action required by 12 U.S.C. §§ 51a and 51b to issue and establish the terms of preferred stock. Thus, the Bank may incorporate into its articles, Board resolutions setting forth the terms of the preferred stock, in the manner specified in the articles.⁵

same rights, preferences, privileges and restrictions but which differ in one or more rights, preferences, privileges or restrictions from other shares within the same class." Cal. Corp. Code § 183 (West 1990).

³ Section 202(e) of the California Corporations Code authorizes the filing of articles with blank check preferred stock features. Sections 401 and 156 of that Code require the board to execute and file certificates of determination that include resolutions setting forth the number of shares of series and terms of classes or series of stock. State banks in California may use the blank check procedure to issue preferred stock. *Cf.* Cal. Fin. Code §§ 600.8 & 112 (West 1990) (filing of certificate of determination with Secretary of State and Commissioner of Financial Institutions).

⁴ This shareholder action must be consistent with the requirements of 12 U.S.C. §§ 21 or 21a. These statutes govern the adoption of, and amendments to, national banks' articles of association.

⁵ The language of 12 U.S.C. § 51a may also be interpreted to require a shareholders' vote and approval for each

(1) 12 U.S.C. §§ 51a and 51b

Two pertinent Federal statutes governing the issuance and terms of preferred stock by national banks are 12 U.S.C. §§ 51a and 51b. These two statutes generally require shareholder approval and appropriate article amendments for issuance of preferred stock, and that the terms of preferred stock be set forth in the articles. 12 U.S.C. § 51a states:

Notwithstanding any other provision of law, any national banking association may, with the approval of the Comptroller of the Currency and *by vote of shareholders owning a majority of the stock of such association*, upon not less than five days' notice, given by registered mail or by certified mail pursuant to action taken by its board of directors, issue preferred stock of one or more classes, in such amount and with such par value as shall be approved by said Comptroller, and make such amendments to its articles of association as may be necessary for this purpose; but in the case of any newly organized national banking association which has not yet issued common stock, the requirement of notice to and vote of shareholders shall not apply. No issue of preferred stock shall be valid until the par value of all stock so issued shall be paid in and notice thereof, duly acknowledged before a notary public by the president, vice president, or cashier of said association, has been transmitted to the Comptroller of the Currency and his certificate obtained specifying the amount of such issue of preferred stock and his approval thereof and that the amount has been duly paid in as a part of the capital of such association; which certificate shall be deemed to be conclusive evidence that such preferred stock has been duly and validly issued (emphasis added).

The relevant language in 12 U.S.C. § 51b provides

(a) Notwithstanding any other provision of law, whether relating to restriction upon the payment of dividends upon capital stock or otherwise, the holders of such preferred stock shall be entitled to receive such cumulative dividends and shall have such voting and conversion rights and such control of management, and such stock shall be subject to retirement in such manner and upon such conditions, as may be provided in the articles of association, with the approval of the Comptroller of the Currency.

(2) The Blank Check Procedure is Consistent with the Literal Requirements of 12 U.S.C. §§ 51a and 51b

Under current procedures permitted by OCC, the board of directors of a bank approves the terms of each proposed issuance of preferred stock, and submits each proposal to the Comptroller and to shareholders for approval. Before the stock is certified, the board and shareholders each approve

an article amendment to reflect the increased level of issued and outstanding stock and the terms of the stock. The plain language of the statutes may be read to be consistent with this procedure.

However,

issuance of preferred stock. However, the statute does not explicitly require this outcome and the interpretation herein is consistent with the language of the statute and OCC's policy on corporate governance generally, as described below.

other procedures, including the blank check procedure, also are consistent with a plain reading of the statutes.⁶ The statutes do not specify precisely when in the process shareholder or Comptroller

approval must be obtained or when the articles must be amended. Section 51a does not say that shareholders must separately approve each separate issuance.

Shareholders' adoption or approval of an article or article amendment establishing a blank check procedure for preferred stock constitutes the shareholder action required to issue and establish the terms of preferred stock.⁷ In addition, the other statutory requirements are met through the blank check procedure. The board of directors approves a proposed blank check article and its submission to a shareholder vote. Shareholders receive the required notice of the vote (unless no vote is required

due to the exception clause).⁸ The Comptroller approves the amounts and par values of each issuance of the preferred stock (or classes of preferred stock) at the appropriate time, and in the appropriate manner, in the process. The bank makes other amendments to the articles of association (e.g., to reflect the issued and outstanding preferred stock and its terms after it is issued) in the manner specified in the blank check article.⁹ Finally, the bank and the Comptroller comply with the appropriate procedures for certification. These actions satisfy all of the requirements of the statutes.¹⁰

D. Blank Check Preferred Stock is Consistent with Bank Safety and Soundness

Permitting national banks to issue blank check preferred stock is consistent with bank safety and soundness. Preferred stock offers banks an attractive way to raise needed capital.¹¹ If banks

⁶ Prior to 1989, the OCC had permitted national banks to have articles containing provisions for blank check preferred stock. *See, e.g.*, Letter from Sharon Miyasato, dated April 16, 1985 (unpublished); Letter from Elizabeth Malone, dated April 15, 1988 (unpublished). However, in 1989 the OCC limited the scope of those provisions to articles that delegate to directors only the authority to determine exact interest rates and define maturity dates of preferred stock. Interpretive Letter No. 488, March 23, 1989. The OCC stated that as a matter of policy, national bank directors should not have unfettered discretion to change the capital structure of a bank without shareholder approval. In 1996, however, the Office adopted Interpretive Ruling 7.2000, reflecting a general policy to authorize state law governance of corporate practice issues. Therefore, OCC policy has evolved since 1989 in a manner that supports this proposal.

⁷ All U.S. jurisdictions today allow the blank check procedure. MODEL BUSINESS CORP. ACT. ANN. § 602, Statutory Comparison (1999). Under 12 U.S.C. §§ 21, 21a and 51a, national banks generally may incorporate any lawful corporate procedures for adopting or amending articles to issue preferred stock.

⁸ The exception clause in the statute provides that "in the case of any newly organized national banking association which has not yet issued common stock, the requirement of notice to and vote of shareholders shall not apply."

⁹ Under 12 U.S.C. §21a, a national bank's articles may be amended in the manner specified in the articles, unless otherwise specifically provided by law. Thus the bank may incorporate into the articles, resolutions setting forth the terms of the preferred stock, as approved by the Comptroller, in the manner specified in the articles.

¹⁰ We also have examined the legislative history of 12 U.S.C. §§ 51a and 51b. Nothing in the legislative history of those statutes specifically precludes national banks from issuing blank check preferred stock in the proposed manner. The statutes were passed under emergency conditions during the banking crisis of 1933 with no hearings and little debate. None of the debate concerned the degree of shareholder approval for the issuance or terms of preferred stock.

¹¹ The original provisions authorizing national banks to issue preferred stock were added to enable shareholders, the

must hold a shareholder meeting to authorize each separate issuance of preferred stock, they may be unable to raise needed capital expeditiously or compete for funds in a changing market.

Blank

check preferred stock enables banks to respond quickly to market conditions and sell preferred stock to meet their capital needs.

Issuance of blank check preferred stock affects the interests of existing shareholders. However, a bank board's fiduciary duties to shareholders provide protection against inappropriate use of blank check preferred stock. In addition, banks are required to submit the terms of the sale of the preferred stock to the OCC for its review before issuing any of the preferred shares. *See* 12 C.F.R. § 5.46(g). This OCC review provides a safeguard against issuances of preferred stock that are detrimental to a bank's safety and soundness.

IV. Conclusion

In conclusion, the Bank may amend its articles of association to authorize it to issue preferred stock through the blank check procedure, as discussed above. If so, the articles should require resolutions issuing and defining the terms of series of preferred stock to be incorporated by reference into the articles. If you have any further questions, please feel free to contact me at 202-874-5210.

Very truly yours

-signed-

Michael C. Dugas

Senior Attorney

Securities and Corporate Practices Division