Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

December 12, 2007

Corporate Decision #2008-01
February 2008

Robert L. Carothers, Jr., Esquire
Miller, Hamilton, Snider & Odom, L.L.C.
Post Office Box 46
Mobile, Alabama 36601

Re: Commonwealth National Bank, Mobile, Alabama
Reorganization and Formation of a Holding Company
Application Control No. 2007-SO-12-0259

Dear Mr. Carothers:

The Comptroller of the Currency (OCC) hereby approves the application to reorganize Commonwealth National Bank, Mobile, Alabama (the "Bank"), to become a wholly-owned subsidiary of CNB Bancorp, Inc. (the "Holding Company"), which will be located in Mobile, Alabama. This approval is granted based on the commitments and representations made by the Bank in the application and through its representatives.

Description of the Reorganization and Legal Authority

The Bank has applied to the OCC for approval to reorganize into a subsidiary of a holding company under 12 U.S.C. § 215a-2 ("§ 215a-2"). Under the reorganization, shareholders will receive five shares of Holding Company common stock for each share of Bank common stock, and one share of Holding Company common stock for each share of Bank preferred stock. Shareholders residing in states that do not exempt the conversion from state securities registration requirements will receive cash for their shares,[1] except in one state, where the Bank determined that the cost of registration is significantly less than the cost of cashing out the number of shareholders located in that state.
A national bank may form a *de novo* holding company under § 215a-2 by exchanging cash or securities of the holding company, or both, for shares of the bank. The bank's reorganization plan must specify "[t]he amount of cash or securities of the bank holding company, or both, or other consideration to be paid to the shareholders of the reorganizing bank in exchange for their shares of stock of the bank."[2] By authorizing banks to use both cash and securities as compensation in a

[1] Cash payments to shareholders will be based on the book value of the Bank's stock as of June 30, 2007.

[2] § 215a-2(b)(3). The reorganization plans also must be approved by both the shareholders and the board of directors, state the consideration to be paid for bank shares and provide dissenters' rights to all shareholders.

reorganization, and by not restricting how banks allocate this compensation, § 215a-2 allows banks to offer different forms of compensation to different classes of shareholders. Accordingly, under § 215a-2, banks may offer cash to shareholders residing in states where registration of Holding Company securities is not cost-effective, and offer shares to shareholders residing in other states.[3]

The legislative history of § 215a-2 provides further support for this interpretation of the provision. Congress enacted § 215a-2 as part of Title XII of the American Homeownership and Economic Opportunity Act of 2000 to enable national banks to restructure in a more efficient and less expensive manner. The bill summary explains that the provision amends the National Bank Consolidation and Merger Act to prescribe "expedited procedures" permitting a national bank to reorganize into a subsidiary of a bank holding company.[4] A Senate Report on proposed legislation containing an identical provision explained that the provision was intended to

> facilitate expeditious restructuring while retaining a role for legitimate regulatory oversight. The Committee believes that management is best positioned to make informed decisions regarding corporate restructuring. Clearly, management should be permitted to implement these decisions as cheaply and efficiently as possible – in such a way that both shareholders and customers can enjoy the full benefit of the efficiencies that can be achieved through restructuring. [Emphasis added.][5]

Based on the plain language and legislative history of § 215a-2, prior OCC precedent has specifically concluded that § 215a-2 authorizes banks to offer cash consideration to some shareholders and securities to others in order to conduct a reorganization in a cost-effective manner.[6]

No court cases have addressed the issue of compensating shareholders with different forms of consideration under a § 215a-2 holding company reorganization. Courts have addressed whether different forms of consideration may be paid to shareholders under § 215a. In *NoDak Bancorporation v. Clark[e]*[7] the court held that a national bank may use differing forms of consideration to cash out minority shareholders in a freeze-out merger. Similarly, in *Bloomington*

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[3] The language "cash or securities of the bank holding company, or both" in § 215a-2 is broader than language in 12 U.S.C. § 215a ("§ 215a"), which governs mergers of national or state banks into national banks. Under § 215a, a merger agreement must "specify the amount of stock (if any) to be allocated, and cash (if any) to be paid, to the shareholders of the association or State bank being merged into the receiving association." Section 215a does not provide that the reorganization plan may pay bank shareholders "cash or securities of the holding company or both." (Emphasis added.) As discussed above, inclusion of this language in § 215a-2 clearly indicates that banks may adopt reorganization plans that compensate some shareholders with cash and others with securities.

[4] Bill summary accompanying Pub. L. No. 106-569 introduced into the Congressional Record by The Hon. James A. Leach in the House of Representatives (Oct. 25, 2000), 147 Cong. Rec. E1929 (Oct. 25, 2000).

[5] S. Rep. No. 346, 105th Cong., 2nd Sess. 8 (1998) *at* 7.

[6] Corporate Decision No. 2002-08 (May 15, 2002) ("Corporate Decision 2002-08").

[7] 998 F.2d 1416, 1425 (8th Cir. 1993) ("*NoDak*").

Nat'l Bank v. Telfer,[8] the court found that a national bank may freeze-out some, but not all shareholders and repurchase the bank's stock under 12 U.S.C. §§ 214a-215a provided there is a legitimate corporate purpose for the transaction. In contrast, the *Lewis v. Clark[e]*[9] court concluded that a merger under § 215a was invalid where a national bank attempted to freeze out minority shareholders by requiring them to accept cash over their objections, thus permitting the majority to become 100% owners of the merged corporation.[10]

The OCC has concluded that the *Lewis v. Clark[e]* decision is inconsistent with the more well-reasoned decisions in other circuits and has not followed the decision in approving corporate applications for banks located outside of the Eleventh Circuit.[11] Moreover, *Lewis v. Clark[e]* dealt solely with mergers under Section 215a. Thus, the case is distinguishable from a transaction, such as here, that is based on Section 215a-2. Notably, Section 215a-2 expressly authorizes reorganization plans that compensate shareholders with "cash or securities of the holding company or both." Congress enacted § 215a-2 after *Lewis v. Clark[e]* was decided to provide banks expanded flexibility to implement reorganizations in a more cost effective manner.[12] In addition, *Lewis v. Clark[e]* represents a minority view of § 215a.[13]

The Bank will, as required by § 215a-2, afford all shareholders appropriate dissenters' rights. Accordingly, the Bank's proposal is consistent with the requirements of § 215a-2.

Approval and Conclusion

[8] 916 F.2d 1305 (7th Cir. 1990) ("*Bloomington*").

[9] 911 F.2d 1558 (11th Cir. 1990).

[10] The court cited the longstanding equity tradition in American jurisprudence of protecting minority shareholders. 911 F.2d 1558, 1561 (11th Cir. 1990). The court was unable to "discern the permissive and explicit authority from Congress that is necessary to support the Comptroller's approval of the take out merger in this banking case." *Id.* The court then held that "without express statutory authority, the Comptroller has no authority to approve a merger which requires holders of stock of equal standing to take different forms of consideration." *Id.*

[11] *See* Corporate Decision 2002-08, fn 16.

[12] Even if *Lewis v. Clark[e]* could arguably apply to § 215a-2, the decision would not be based on the "unambiguous terms" of the statute, and therefore the OCC would not be foreclosed from revisiting the proper meaning of the statute, despite the court's decision. The Supreme Court recently has held that an agency may revisit a statutory interpretation adopted by a court unless the court's interpretation "follows from the unambiguous terms of the statute and leaves no room for agency discretion." See *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 125 S. Ct. 2688, 2700 (2005).

[13] The Bank's proposal to cash-out certain minority shareholders is consistent with standards the OCC has applied to freeze-out mergers and reverse stock splits, which can be used to achieve similar results. *See, e.g.*, Interpretive Letter No. 786, *supra*; Conditional Approval Nos. 369, 342, 344, *all supra*. The Bank seeks to avoid expenses required to register securities under multiple state securities laws and thus has a legitimate business purpose for offering different forms of compensation. The transaction's business purpose, to avoid costs associated with registration of holding company shares under the Securities Act, is virtually identical to a legitimate purpose recognized in 12 C.F.R. § 7.2023(b)(2), to "reduce costs associated with shareholder communications and meetings." The OCC also has recognized as a legitimate business purpose the reduction of costs associated with shareholder communications and registration requirements under the Securities Exchange Act of 1934. *See* Conditional Approval No. 329, *supra*.

We approve the Bank's reorganization, based on the plain language of § 215a-2, its legislative history and relevant case law. As noted above, Section 215a-2 authorizes banks to offer different classes of shareholders different consideration. The legislative history reflects congressional intent to provide banks expanded flexibility to reorganize in more efficient and less costly ways. The Bank's proposal to offer cash to some shareholders in order to avoid the expense and delay involved in registering under multiple state securities laws, and conduct the reorganization in the most cost-effective manner, is consistent with the language and legislative intent of § 215a-2. The Bank's proposed share exchange and reorganization into holding company form meets all the requirements in Section 215a-2, including provisions governing dissenters' rights.

The Licensing district office must be advised in writing in advance of the desired effective date of the reorganization transaction so it may issue the necessary certification letter. The OCC will issue a letter certifying consummation when we receive:

- A certification that shareholder approval was obtained, indicating the percentage of shares voted in favor of the transaction.

- A certification that the Board of Governors of the Federal Reserve System approved the transaction.

If the reorganization is not consummated within one year from the approval date, the approval shall automatically terminate unless the OCC grants an extension of the time period. Please include the CAIS control number on all correspondence related to this application.

This approval, and the activities and communications by OCC employees in connection with the filing, do not constitute a contract, express or implied, or any other obligation binding upon the OCC, the United States, any agency or entity of the United States, or any officer or employee of the United States, and do not affect the ability of the OCC to exercise its supervisory, regulatory and examination authorities under applicable laws and regulations. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.

A separate letter is enclosed requesting your feedback on how we handled the application. We would appreciate your response so we may improve our service. If you have any questions concerning this decision, please contact Senior Licensing Analyst Brenda E. McNeese at (214) 720-7052.

Yours truly,

signed

Lawrence E. Beard
Deputy Comptroller Licensing

Enclosure