



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Conditional Approval #670
January 2005

December 27, 2004

William P. Ruhlman, II
Borrego Springs Bank, National Association
La Mesa Executive Offices
7777 Alvarado Road, Suite 515
La Mesa, California 91941

Re: Application for Reverse Stock Split
OCC CAIS Control Number: 2004-WE-12-0371

Dear Mr. Ruhlman:

This responds to the Bank's application under 12 C.F.R. § 5.46 to elect the corporate governance provisions of Delaware law and complete a reverse stock split in accordance with those provisions. Based on the representations and commitments made by the Borrego Springs Bank, National Association (the "Bank"), the application is hereby approved, subject to the conditions set forth below.

I. Background

A. Facts

The Bank is amending its bylaws to elect the corporate governance provisions of Delaware law to engage in a reverse stock split as permitted by Delaware law. The Bank proposes the reverse stock split to provide minority stockholders with a return on their investments by allowing them to liquidate their shares for cash at a fair value and the Bank to decrease its administrative expenses incurred in servicing many stockholders who own relatively small numbers of shares, including corporate expenses associated with stockholder communications and meetings.

The Bank proposes to conduct the reverse stock split through a multi-step process. The Bank currently has over 250 shareholders, but over 80 percent of the outstanding shares are held by 10 stockholders. The Bank will reduce the par value of its shares of common stock from the current \$2.50 per share to \$0.0007 per share. This will reduce capital stock by \$704,315.20 from \$765,560.00 to \$61,244.80. The Bank will increase its capital surplus account by the same amount. The proposed reverse stock split would be at a ratio of 1 for 135,256. After conducting

the proposed reverse stock split, 5 full shares plus fractional shares totaling 2.33 shares will remain outstanding. In lieu of issuing fractional shares, the Bank will cash out fractional shares at a price of \$22.00 per pre-split share, which the board of directors believes is fair, thereby leaving the Bank with only one stockholder from its pre-split level of approximately 250 shareholders. The Bank will supplement the dissenters' rights outlined in OCC Advisory Letter 2002-6 ("AL 2002-6") with certain aspects of the dissenters rights set forth in 12 U.S.C. § 215a, provided that any such additional rights afforded by Section 215a do not conflict with the rights set forth in AL 2002-6. Directors will purchase qualifying shares to comply with 12 U.S.C. §72.

As a result of the stock split and pay out to holders of fractional shares, capital levels will decline by \$8.8 million. To restore Bank capital, immediately after the stock split the Bank's principal shareholder, the Viejo Tribe, will purchase newly issued Bank common stock totaling \$6.6 million. The Tribe also will reduce its own deposits held at the Bank by \$35.0 million, thus reducing average assets at the Bank. Consequently, the Bank will remain well-capitalized.

B. Corporate Governance

National banks may adopt corporate governance procedures that comply with applicable federal banking law and safe and sound banking practices. OCC regulations provide that:

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 as 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.¹ [Emphasis added.]

The OCC has promulgated 12 C.F.R. § 7.2023 that codifies its decisions permitting reverse stock splits. The OCC confirms in the regulation the authority of national banks to conduct reverse stock splits where "the transaction serves a legitimate corporate purpose and provides adequate dissenting shareholders' rights."² The regulation specifically recognizes that reducing costs associated with shareholder communications is an example of a legitimate corporate purpose supporting a reverse stock split.³ In the preamble to the rule, the OCC stated its intent was to recognize the flexibility that national banks have to restructure their ownership interests. The

¹ 12 C.F.R. § 7.2000(b).

² 12 C.F.R. § 7.2023(a).

³ 12 C.F.R. § 7.2023(b)(2).

OCC also noted the consistency of its regulation with case law recognizing Congressional intent in the National Bank Act to simplify and encourage national bank consolidations.⁴

Counsel for the Bank represents that Section 242 of the Delaware General Corporation Law (the “DGCL”) authorizes Delaware corporations to effect reverse stock splits.⁵ Delaware law does not provide for dissenters’ rights in connection with a reverse stock split.⁶ The Bank has made the certifications required by AL 2002-6 for situations where corporate governance provisions do not provide for dissenters’ rights. These certifications are that the Bank will provide:

- Advance notice of dissenters’ rights to shareholders before the shareholders’ meeting at which the shareholders will vote upon the reverse stock split
- An independent third-party appraisal of the shares of common stock if the Bank and any dissenting shareholders are unable to agree on the value of the dissenting shares
- Payment by the Bank of the cost of appraising dissenting shares
- Binding arbitration by an independent third party, to be paid for by the Bank, if the court that would ordinarily hear an appraisal action under the corporate governance procedures refuses jurisdiction to appraise the shares of a national bank. Conduct of the arbitration will be consistent with the rules and procedures of the American Arbitration Association or other organization with expertise in alternative dispute resolution.

II. Discussion

The Bank may adopt Delaware corporate governance procedures to the extent that those procedures are not inconsistent with applicable Federal banking statutes or regulations. OCC regulations expressly permit a national bank to elect the corporate governance procedures of the state of Delaware.⁷

The Bank represents that reverse stock split transactions are permitted under Delaware law, and are consistent with applicable Federal banking statutes or regulations. No provision of Federal law expressly prohibits reverse stock splits. Several provisions of the National Bank Act authorize the elements of a reverse stock split and, when read together, allow a national bank to engage in a reverse stock split for a legitimate corporate purpose if the bank provides adequate dissenting shareholder rights.⁸ Based on these authorities, the OCC has promulgated a regulation expressly permitting reverse stock splits if the transaction serves a legitimate

⁴ OCC, Investment Securities; Rules, Policies and Procedures for Corporate Activities; Bank Activities and Operations (final rule), 64 Fed. Reg. 60092 (Nov. 4, 1999).

⁵ Letter dated November 12, 2004, from Kurt L. Kicklighter to Mr. Louis Gittleman.

⁶ Under the DGCL, dissenters’ rights, or appraisal rights as they are called in the DGCL, are only available to stockholders in connection with mergers and consolidations effected pursuant to specific enumerated sections of the DGCL. See DGCL § 262.

⁷ See 12 C.F.R. § 7.2000(b).

⁸ See OCC Advisory Letter No. 2002-6 (July 17, 2002)(Reverse Stock Split Procedures); Conditional Approval 434 (Dec. 15, 2000); Interpretive Letter No. 786 (June 9, 1997); and Interpretive Letter No. 275 (Oct. 21, 1983).

corporate purpose and provides adequate dissenting shareholders' rights.⁹

The Bank will reduce the par value of the Bank's shares to comply with 12 U.S.C. § 52 by amending its articles of association. Banks may amend their articles of association by the vote of the holders of a majority of the voting shares of stock to determine the number and par value of bank shares.¹⁰ The National Bank Act permits a national bank to reduce its capital upon the vote of shareholders holding two-thirds of its capital stock and OCC approval.¹¹

The Bank next proposes to replace each of the outstanding shares of common stock with new common stock at the rate of one share of new common stock for each 135,256 shares of common stock outstanding. The Bank will pay cash for the fractional shares outstanding. National banks have express authority to pay the cash equivalent of fractional shares of stock.¹² The cash equivalent must be based on the market value of the stock or, if no market exists, a reliable and disinterested determination as to the fair market value of the stock.¹³

Judicial authority provides support for concluding that reverse stock splits for legitimate corporate purposes are consistent with the National Bank Act, where banks provide appropriate dissenters' rights. While the only Federal Court of Appeals case to address reverse stock splits directly, *Bloomington Nat'l Bank v. Telfer*, decided on the facts that the transaction before it violated the National Bank Act, the court declined to determine if reverse stock splits would be permissible for valid business purposes if dissenting shareholders' rights were provided.¹⁴ The court also noted that the decision was limited to the facts of the case.¹⁵

In *NoDak Bancorporation v. Clarke*, the Eighth Circuit held that national banks could effect freeze-out mergers to allow a holding company to obtain 100 percent ownership so long as the national bank has a valid corporate purpose and observes dissenters' rights.¹⁶ The *NoDak* court found that a national bank may engage in any merger not inconsistent with 12 U.S.C. 214a and 215-215a, and that freeze-out mergers are consistent with those sections.¹⁷ More recently, a district court in the Tenth Circuit relied on *NoDak* to hold that a bank may effect a freeze-out

⁹ See 12 C.F.R. § 7.2023

¹⁰ See 12 U.S.C. § 21a; see also 12 U.S.C. § 52 (par value may not exceed \$100 per share)

¹¹ See 12 U.S.C. § 59

¹² See 12 C.F.R. § 5.67(c).

¹³ "The cash equivalent is based on the market value of the stock, if there is an established and active market in the national bank's stock." *Id.* In the absence of an established and active market in the Bank's stock, the Bank obtained an independent valuation as to the fair market value of its shares.

¹⁴ *Bloomington Nat'l Bank v. Telfer*, 916 F.2d 1305 (7th Cir. 1990) ("*Bloomington*").

¹⁵ See *id.*, 916 F.2d at 1308 n.4, 1309.

¹⁶ *NoDak Bancorporation v. Clarke*, 998 F.2d 1416 (8th Cir. 1993) ("*NoDak*").

¹⁷ See *id.*, 998 F.2d at 1419-20 and 1425.

merger to consolidate with another bank and become a wholly-owned subsidiary of an existing bank holding company.¹⁸

In *Lewis v. Clark[e]*, the Eleventh Circuit determined that a national bank may not offer different consideration to shareholders when the bank effects a freeze-out merger under 12 U.S.C. § 215a.¹⁹ The court held that the OCC lacked authority to approve mergers where minority shareholders receive cash for their shares and majority shareholders receive stock in the resulting bank, even in cases where the minority shareholders have appraisal rights. That case did not involve a decision, like the present case, where a regulation expressly permits reverse stock splits. Since the OCC has adopted section 7.2023 following a notice and comment procedure, courts reviewing an OCC decision approving a reverse stock split should give deference to the OCC's reasonable interpretation of a statute that it administers.²⁰ Moreover, the OCC has permitted national banks to conduct reverse stock splits in numerous situations since *Lewis* and *Bloomington* were decided. In the period since *Lewis* and *Bloomington*, the OCC has approved reverse stock splits for banks located in fourteen states in cases where the banks had legitimate corporate purposes in conducting the transactions.²¹ Thus, applicable statutory and regulatory provisions and the weight of judicial precedent would permit reverse stock splits for legitimate business purposes, provided dissenters' rights are available.

The Bank has articulated legitimate business purposes in effecting a reverse stock split. The Bank indicates it wants to decrease the administrative expenses incurred in servicing many stockholders who own relatively small numbers of shares, including corporate expenses associated with stockholder communications and meetings. Eliminating burdens associated with a shareholder constituency is a proper business purpose.²² It also is a valid business purpose to effect a merger in order to reduce corporate expenses associated with shareholder communications and meetings.²³ The OCC expressly recognizes these corporate purposes in its regulation permitting national banks to conduct reverse stock splits.²⁴

To avoid undermining the shareholder protections of 12 U.S.C. §§ 214a and 215-215a, however, a reverse stock split must provide shareholders adequate dissenters' rights to ensure that they receive a fair price for their shares. Those dissenters' rights need not be identical to those located in sections 214a, 215, and 215a. Accordingly, the Bank may effect a reverse stock split as long as it has a valid corporate purpose for the transaction and observes appropriate dissenters' rights.

¹⁸ See *Moody v. First National Bank, Sallisaw*, CY-00-306-5 (E.D.Ok. July 5, 2001).

¹⁹ *Lewis v. Clark[e]*, 911 F.2d 1558 (11th Cir. 1990), *reh 'g denied*, 972 F.2d 1351 (1991) ("*Lewis*")

²⁰ *NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995); *United States v. Mead Corp.*, 533 U.S. 218, 231 n. 13 (2001).

²¹ See Advisory Letter 2002-6, *supra*; Conditional Approval 541 (July 30 2002).

²² See *Leader v. Hycor, Inc.*, 479 N.E.2d 173, 178 (Mass. 1985); see also *Nash v. Farmers New World Life*, 1976 U.S. Dist. 15,846, *48 (S.D. Ohio, 1976).

²³ See *Teschner v. Chicago Title & Trust Co.*, 322 N.E.2d 54, 58 (Ill. 1974).

²⁴ 12 C.F.R. § 7.2023(b).

AL 2002-6 does not specify all aspects of dissenters' rights that a bank must offer to dissenting stockholders in connection with a reverse stock split. For example, AL 2002-6 states that a bank must provide "[a]n independent third-party appraisal of the shares if the bank and any dissenting shareholders are unable to agree on the value of the dissenting shares." However, AL 2002-6 does not state whether the independent third-party appraisal is to be made by one appraiser or by a committee of appraisers. As such, to the extent that specific aspects of dissenters' rights are not covered by the guidelines set forth in AL 2002-6, the Bank proposes to follow the procedures set forth in 12 U.S.C. 215a. In effect, the Bank will supplement the dissenters' rights outlined in AL 2002-6 with certain aspects of the dissenters rights set forth in 12 U.S.C. § 215a, provided that any such additional rights afforded by Section 215a do not conflict with the rights set forth in AL 2002-6.

Consequently, minority shareholders in the reverse stock split will receive dissenters' rights comparable to those under the National Bank Consolidation and Merger Act (the "NBCMA").²⁵ Specifically, the Bank has represented that it will provide notice of dissenters' rights to the minority interest holders before the shareholder meeting acting on the reverse stock split proposal; pay the cost of an independent third party appraisal of the shares if the Bank and any dissenting shareholders are unable to agree on the value of the dissenting shares; and pay the cost of a binding arbitration by an independent third party, if the court that would ordinarily hear an appraisal action under the corporate governance procedures refuses jurisdiction to appraise the shares of a national bank. The Bank will not pay the costs of attorneys' fees incurred by and costs of experts retained by dissenting shareholders for any such proceeding.

C. Conclusion

For the above reasons, including the representations and commitments made by the Bank, we find that the reverse stock split application is legally authorized and meets the other statutory criteria for approval. Accordingly, this application is hereby approved, subject to the following conditions:

1. The Bank will elect the corporate governance provisions of Delaware law.
2. The Bank will provide for dissenters' rights comparable to those found in 12 U.S.C. §§ 214a, 215, and 215a.
3. If any shareholders dissent from the reverse stock split, the Bank will pay the cost of any appraisal that may occur, but not the costs of attorneys' fees incurred by and costs of experts retained by dissenting shareholders.

²⁵ Under the NBCMA, a dissenting shareholder must either vote against the merger, or give written notice of dissent prior to or at the shareholder meeting at which the shareholders vote on the merger. The value of the dissenting shareholders' shares is determined by an appraisal made by a committee of three persons: one chosen by the dissenting shareholders, one chosen by the directors of the bank (as it exists after the merger), and one chosen by the other two members of the committee. If the committee fails to determine a value of the shares, or a dissenting shareholder is not satisfied with the value determined, the OCC must make an appraisal of the shares. See 12 U.S.C. §§ 214a(b), 215(b)-(d), and 215a(b)-(d).

4. If the appropriate court(s) decline to accept jurisdiction of an appraisal action, the Bank will pay for binding arbitration by an independent third party to appraise the stock but not the costs of attorneys' fees incurred by and costs of experts retained by dissenting shareholders.

Please be advised that the above conditions of this approval shall be deemed to be conditions "imposed in writing by the agency in connection with the granting of any application or other request" within the meaning of 12 U.S.C. § 1818(b)(1).

Please notify the OCC when the change in capital has been completed in accordance with this approval. The notification should state the date of the change, and the dollar amount of the reduction in the common stock and surplus account associated with the payment for fractional shares. The notification should include a certification that shareholders approved the change in capital structure according to law, regulations, and the Bank's Articles of Association. A secretary's certificate of shareholder approval and a certified copy of the amendment to the Articles of Association should be included. The notification also should include a statement that the change in the capital structure complies with all applicable laws and regulations. Upon receipt of the notification, the OCC will review the reduction in capital attributable to the payment for fractional shares.

If the reverse stock split 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 advise Louis Gittleman, Senior Licensing Analyst, within 10 days of the effective date of the reverse stock split.

Please include CAIS Control Number 2004-WE-12-0371 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, 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.

If you have any questions, please contact Louis Gittleman, Senior Licensing Analyst, at 404-588-4525.

Sincerely,

/s/ Lawrence E. Beard

Lawrence E. Beard
Deputy Comptroller
Licensing