



**Interpretive Letter #1162
February 2019**

July 6, 2018

Subject: Capital Stock-Related Activities of a National Bank

Dear []:

This letter responds to your April 4, 2018 letter on behalf of [] (Bank) and [](BHC). You have requested that the Office of the Comptroller of the Currency (OCC) confirm the Bank's authority to engage in a variety of corporate practices involving capital stock issuances and repurchases. You have also requested confirmation that the OCC's authority to require capital assessments of shareholders to eliminate capital impairment is limited to assessing the par value of the stock. For the reasons discussed in this letter, the OCC concludes that the corporate practices described in your letter are consistent with applicable requirements in the National Bank Act and its implementing regulations. The OCC also confirms that the authority the OCC has to require the capital assessments of shareholders is limited to the par value of each share.

Background

This request is made in connection with the proposed restructuring of the Bank and the BHC. In the restructuring, it is anticipated that the BHC would merge with and into the Bank, and the Bank would become a publicly traded entity without a holding company. The BHC is a Utah corporation, and the Bank has elected, under OCC regulations, to be governed by the corporate governance procedures of Utah law.

Under 12 C.F.R. § 7.2000, a national bank may designate in its bylaws and elect to follow the corporate governance procedures of the law of the state in which the bank is located, to the extent not inconsistent with applicable Federal banking statutes or regulations and bank safety and soundness. Consistent with the corporate codes of many states, Utah has adopted corporate governance principles that provide the board of directors broad authority to approve capital stock issuances and repurchases.

You note that although certain provisions of the National Bank Act reflect corporate practices that predate corporate governance principles recognized in modern corporate codes, the existing statutory and regulatory framework allows for interpretation of the Act in a manner that is consistent with modern corporate governance. Specifically, you have requested that the OCC confirm that the National Bank Act and its implementing regulations support the following conclusions:

1. Managing a national bank's capital through the ordinary repurchase of common and preferred shares constitutes a legitimate corporate purpose within the meaning of 12 C.F.R. § 7.2020.
2. Pursuant to 12 U.S.C. § 59, the holders of two-thirds of a national bank's shares may approve in advance:
 - a. the repurchase of common and preferred shares through an amendment to the articles of association that would empower the board of directors to authorize future share repurchases.
 - b. redemptions of preferred stock issued under blank check preferred stock procedures by voting to amend the articles of association to authorize the issuance and redemption of blank check preferred stock.
3. Pursuant to 12 U.S.C. § 57, a national bank may issue common stock up to the amount previously approved and authorized by holders of two-thirds of the bank's shares without obtaining additional shareholder approval for each such issuance.
4. Pursuant to 12 U.S.C. §§ 51a and 51b, a national bank may issue and maintain noncumulative preferred stock.
5. Pursuant to 12 U.S.C. § 55, the OCC may require the capital assessment of the holders of common stock only up to the par value of each share.

Discussion

1. Share Repurchases for Capital Management Purposes

You request the OCC's confirmation that managing capital through the repurchase of common and preferred shares constitutes a legitimate corporate purpose under OCC regulation 12 C.F.R. § 7.2020.

A national bank is permitted to repurchase its shares and hold them as treasury stock pursuant to 12 U.S.C. § 59, the statute governing reductions in capital.¹ OCC regulation 12 C.F.R. § 7.2020

¹ Treasury stock is stock that a bank issues and then repurchases, reducing the amount of its outstanding stock. Once purchased, a national bank is allowed to sell, retire, cancel, or otherwise dispose of the treasury stock. *See* Comptroller's Licensing Manual, Capital and Dividends (Nov. 2017), p. 13.

further provides that such a repurchase must be for a legitimate corporate purpose and may not be speculative.

Section 7.2020 does not define the term “legitimate corporate purpose,” although it lists five examples of legitimate corporate purposes for repurchasing and holding shares as treasury stock.² Repurchasing shares for capital management purposes is not among the listed examples. The examples in Section 7.2020 are not exclusive, however, and the OCC has made it clear that it will evaluate other purposes on a case-by-case basis.³

Share repurchases have become an increasingly common tool used by corporations, including bank holding companies, to manage their capital and return capital to shareholders. As described in your letter, there are a variety of legitimate and non-speculative reasons for national banks to conduct capital management-related repurchases. For example, a repurchase program may allow a bank to use its excess cash to maximize value for its shareholders when alternative investment opportunities are scarce. Further, with respect to preferred shares that pay dividends or other distributions based on prevailing interest rates, repurchases may be used to manage interest rate risk and the cost of capital. In addition, a share repurchase can be a tax-efficient alternative to declaring a dividend if the amount of gain that would be recognized by an investor on the repurchase is less than the amount of earnings and profits that would be allocated to such investor’s shares with respect to a dividend. Share repurchases can also be used to offset the dilutive impact caused by stock grants to employees. Thus, the OCC concludes that repurchasing treasury stock for capital management purposes satisfies the “legitimate corporate purpose” requirement of 12 C.F.R. § 7.2020.⁴ Moreover, such a procedure would enable the Bank to flexibly manage capital in a manner similar to public corporations organized in Utah.

We further conclude that, given the safeguards that apply, repurchasing treasury stock for capital management purposes is consistent with bank safety and soundness. In conducting such a repurchase program, the Bank would have to adhere to the safeguards of 12 U.S.C. § 59, requiring a national bank to obtain OCC and shareholder approval of such repurchases.⁵ In

² Section 7.2020(b) lists the following examples: (1) having shares available for use in connection with employee stock option, bonus, purchase, or similar plans; (2) selling to a director for the purpose of acquiring qualifying shares; (3) purchasing a director's qualifying shares upon the cessation of the director's service in that capacity if there is no ready market for the shares; (4) reducing the number of shareholders in order to qualify as a Subchapter S corporation; and (5) reducing costs associated with shareholder communications and meetings. These examples are not exclusive.

³ *See* Investment Securities; Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations, 64 Fed. Reg. 60092, 60094 (Nov. 4, 1999) (final rule adopting 12 C.F.R. § 7.2020) (“The examples listed as legitimate corporate purposes are non-exclusive . . . The OCC will continue its practice of evaluating other purposes for the acquisition and retention of a bank’s shares on a case-by-case basis.”).

⁴ In adopting 12 C.F.R. § 7.2020, the OCC recognized that a national bank has authority under 12 U.S.C. § 24(Seventh) to fulfill a legitimate corporate need, so long as it complies with the requirements of 12 U.S.C. § 59. *See* Interpretive Rulings, 60 Fed. Reg. 11924, 11928 (Mar. 3, 1995) (proposed rule to adopt 12 C.F.R. § 7.2020).

⁵ As a reduction in permanent capital under 12 U.S.C. § 59, such stock repurchases require the approval of the OCC and two-thirds of a bank’s shareholders. *See also* 12 C.F.R. § 5.46(f). A national bank proposing to decrease its

addition, the board of directors has a fiduciary duty to shareholders to protect against inappropriate use of share repurchases.⁶

2. Shareholder Approval for Share Repurchases

You seek the OCC's confirmation that the Bank's proposal to obtain advance shareholder approval for certain share repurchases is consistent with 12 U.S.C. § 59. The proposal applies to two types of share repurchases – general share repurchase programs and the redemption of blank check preferred stock issued under state authorized blank check procedures. You have represented that the proposed shareholder approval for both types of share repurchases is consistent with the corporate governance procedures of Utah law.

As noted above, the Bank has elected to follow Utah law pursuant to 12 C.F.R. § 7.2000.⁷ Section 7.2000(b) provides, in part:

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 * * * *

We interpret the applicable provisions of the National Bank Act to determine whether your proposal to obtain advance shareholder approval satisfies this standard.⁸

a. Advance Shareholder Approval for Share Repurchase Programs

You request that the OCC confirm that holders of two-thirds of a national bank's shares may approve repurchases of the national bank's common and preferred shares in advance by approving an amendment to the articles of association authorizing the board of directors to implement share repurchase programs from time to time. These programs are defined by certain board-determined parameters that can limit the frequency, type, aggregate limit, or purchase price of repurchases.

permanent capital is required to submit an application that describes the type and amount of the proposed change in permanent capital and explains the reason for the change, among other information. *See* 12 C.F.R. § 5.46(i)(1).

⁶ A national bank's share repurchase activities may also be subject to anti-fraud and anti-manipulation provisions under the Securities Exchange Act of 1934 (Exchange Act) and its implementing regulations. *See, e.g.,* 15 U.S.C. §§ 78i(a)(2), 78j(b), and 78n(e); 17 C.F.R. § 240.13e-4; 17 C.F.R. §§ 240.14e-1- f-1. *See also* 17 C.F.R. § 240.10b-18 (providing a safe harbor from liability for manipulation under Exchange Act sections 9(a)(2) and 10(b) by guiding companies' bids for and purchases of their outstanding shares in the open market).

⁷ We accept your representations on the Bank's behalf that each practice is permissible, though not required, under Utah law.

⁸ For the sake of avoiding a confusing double negative, this letter uses the phrasing "is consistent with" to describe our conclusions. Our determination that a corporate governance practice is consistent with bank safety and soundness or with Federal law necessarily satisfies the "not inconsistent" standard in 12 C.F.R. § 7.2000 since "consistent" could be viewed as a slightly stricter standard than "not inconsistent."

Under 12 U.S.C. § 59 and subject to OCC approval, a national bank can repurchase its shares and reduce its capital by a vote of its shareholders owning two-thirds of its capital stock. Specifically, the statute provides, in relevant part, that:

(a) In general. Subject to the approval of the Comptroller of the Currency, a national banking association may, by a vote of shareholders owning, in the aggregate, two-thirds of its capital stock, reduce its capital.

It is the view of the OCC that the shareholder action requirement in 12 U.S.C. § 59 may be satisfied by a vote of two-thirds of the national bank's shareholders approving an amendment to the bank's articles of association authorizing the board of directors to implement share repurchases or programs from time to time. In reaching this conclusion, the OCC notes that the plain language of the statute does not prohibit advance shareholder approval or prescribe exactly when or in what level of detail shareholders must approve reductions in capital, such as share repurchases. Further, the statute's implementing regulation, 12 C.F.R. § 5.46, does not impose additional requirements with respect to shareholder approval. Thus, we determine that the proposed shareholder action is consistent with the plain language of 12 U.S.C. § 59.

The OCC reached a similar conclusion in Interpretive Letter 921 with respect to the issuance of preferred shares under shareholder approved blank check preferred procedures.⁹ In that letter, the OCC concluded that 12 U.S.C. §§ 51a and 51b, the statutes governing the issuance of preferred shares, do not specify precisely when in the process shareholder approval must be obtained. Moreover, the OCC noted that 12 U.S.C. § 51a does not provide that shareholders must separately approve each issuance. The OCC thus concluded that shareholders' approval of an amendment to the articles of association establishing a blank check procedure for preferred stock constitutes the shareholder action required to issue and establish the terms of preferred stock. The OCC further concluded that the bank could issue preferred stock through shareholder approved blank check procedures because such procedures were consistent with bank safety and soundness.¹⁰

Similarly, the OCC concludes that, given the safeguards that apply, permitting the Bank to obtain advance shareholder approval for repurchases is consistent with bank safety and soundness. Such a procedure would enable the Bank to flexibly manage capital through repurchases in a manner similar to publicly-traded entities organized in Utah and other jurisdictions. OCC approval would

⁹ See OCC Interpretive Letter 921 (December 13, 2001) (Interpretive Letter 921).

¹⁰ See Interpretive Letter 921, *supra*. To assess whether bank safety and soundness was disrupted by the "blank check" regime, the OCC balanced the importance of a bank's ability to raise capital against any potential perceived loss of shareholder protections. We found that an interpretation of 12 U.S.C. § 51a requiring a shareholder meeting for each issuance (as the OCC had previously required) could adversely affect the ability to raise capital expeditiously. We also concluded that the fiduciary duties owed by the bank to its shareholders, coupled with the requirement that banks submit the terms of the sale of the preferred stock to the OCC for its review before issuing any of the preferred shares, provided an adequate safeguard against issuances detrimental to the bank's safety and soundness.

still be required for any reduction in capital.¹¹ Moreover, the board of directors has a fiduciary duty to shareholders to protect against inappropriate use of share repurchases.¹²

b. Advance Shareholder Approval of Redemptions of Blank Check Preferred Stock

You request the OCC's confirmation that the holders of two-thirds of a national bank's shares may approve in advance redemptions of preferred stock issued under blank check preferred stock procedures by voting to amend the articles of association to authorize the issuance and redemption of such preferred shares. A blank check procedure means that shareholders approve an amendment to the articles of association 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.¹³ You represent that such procedures are permissible under Utah law.

As discussed above, the OCC has previously determined in Interpretive Letter 921 that a majority of shareholders may vote to amend a national bank's articles of association to establish blank check procedures for issuing preferred stock. In authorizing such blank check procedures, the shareholders grant the board the authority to issue and determine the terms of one or more series of preferred stock, including any issuer redemption features that the board specifies for future issuances of preferred stock. The OCC did not specifically address in the letter, however, whether shareholders could provide advance approval of redemptions of preferred shares issued under such blank check procedures by voting to amend the articles of association to authorize the issuance and redemption of preferred stock.

As a reduction of capital, the redemption of shares must be approved by holders of two-thirds of the bank's shares under 12 U.S.C. § 59. As explained above, 12 U.S.C. § 59 does not prescribe exactly when or in what level of detail shareholders must approve the reduction. Thus, if holders of two-thirds, rather than a majority, of a bank's shareholders vote to approve an amendment to the articles of association providing for blank check procedures that expressly grant to the board the power to issue, set the terms of, and repurchase or redeem preferred stock, that vote will satisfy the shareholder action requirement under 12 U.S.C. § 59 with respect to later redemptions of such preferred stock.¹⁴ In other words, if shareholder approval for the redemption of preferred stock is provided through an amendment to the articles of association, additional shareholder

¹¹ OCC regulation 12 C.F.R. § 5.46 requires the OCC's prior approval for each repurchase or a repurchase plan spanning up to four consecutive quarters.

¹² You note that a publicly traded national bank's repurchase of its shares will remain subject to the anti-manipulation and anti-fraud provisions of the Exchange Act and the regulations promulgated thereunder.

¹³ See Interpretive Letter 921, *supra*.

¹⁴ In order for the shareholder action requirement under 12 U.S.C. § 59 to be satisfied in this manner, the amendment to the articles of association establishing blank check procedures cannot merely authorize the board to issue and set the terms of preferred stock. Instead, the amendment must include language expressly vesting the board with the authority to approve the repurchase or redemption of preferred shares.

approval is not required at the time of redemption. Thus, we determine that the proposed shareholder action is consistent with the plain language of 12 U.S.C. § 59.

Further, permitting the Bank to obtain advance shareholder approval for redemptions is consistent with bank safety and soundness. Such a procedure would enable the Bank to flexibly manage capital through redemptions of preferred stock in a manner similar to public corporations in Utah.¹⁵ Additionally, safety and soundness would continue to be safeguarded through the separate OCC approval requirement for all such repurchases.

3. Shareholder Approval for Issuance of Authorized Common Stock

Your letter requests the OCC's confirmation that a national bank's board of directors may issue common stock without shareholder approval at the time of each issuance so long as those issuances do not exceed the previously approved and authorized amount of common stock set forth in the bank's articles of association. As with shareholder approval for share repurchases, we interpret the shareholder approval requirement in 12 U.S.C. § 57 to determine whether the bank's proposal to issue common stock up to an amount authorized by shareholders is consistent with Federal banking law and bank safety and soundness.

Pursuant to 12 U.S.C. § 57, a national bank may issue common shares up to an amount previously approved by shareholders without obtaining a new shareholder vote for each issuance. Increases in capital by a national bank are governed by 12 U.S.C. § 57, which provides in relevant part the following:

Any national banking association may, with the approval of the Comptroller of the Currency, and by a vote of shareholders owning two-thirds of the stock of such associations, increase its capital stock to any sum approved by the said Comptroller, but no increase in capital shall be valid until the whole amount of such increase is 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 increase in capital stock and his approval thereof, and that it has been duly paid in as part of the capital of such association.

The OCC has previously interpreted 12 U.S.C. § 57 to require a two-thirds shareholder vote to increase the number of authorized but unissued shares in the articles of association, with the board of directors then being authorized to determine the terms and timing of common stock issuances up to the authorized amount without further shareholder approval.¹⁶ In other words, the

¹⁵ Requiring national banks to seek separate shareholder approval for each redemption of preferred shares (which would not be required of, for example, a similarly situated bank holding company) could introduce a unique element of risk to issuing banks, as well as investors in national banks, that could effectively result in national banks becoming reluctant or unable to access this form of capital or being able to access it only on less favorable terms.

¹⁶ See, e.g., 12 C.F.R. § 5.46 (1981). Before Part 5 was amended in 1994, section 5.46, the implementing regulation for 12 U.S.C. § 57, provided that shareholder approval would not be required to increase common stock through the

OCC has interpreted the two-thirds vote requirement under 12 U.S.C. § 57 to be satisfied for issuances within the authorized amount of common stock approved by shareholders in the articles of association. Thus, we determine that having shareholders approve the authorized amount of common stock but not future issuances within the authorized amount is consistent with the plain language of 12 U.S.C. § 57. In addition, it is consistent with bank safety and soundness because OCC approval for each issuance of common stock is generally required under 12 C.F.R. § 5.46, the implementing regulation for 12 U.S.C. § 57.¹⁷

4. Issuance of Noncumulative Preferred Stock

Your letter seeks confirmation that a national bank may issue and maintain noncumulative preferred stock.¹⁸ Under 12 U.S.C. § 51a, national banks have the authority to issue preferred stock, subject to shareholder and OCC approval. The permissible terms of preferred stock are addressed in 12 U.S.C. § 51b, which provides in part that preferred shareholders:

shall be entitled to receive such cumulative dividends . . . as may be provided in the articles of association ... and no dividends shall be declared or paid on common stock until cumulative dividends on preferred stock have been paid in full

The OCC has long recognized that a national bank may issue noncumulative preferred stock under 12 U.S.C. § 51b.¹⁹ The OCC has interpreted 12 U.S.C. § 51b as describing limitations on the portion of the preferred stock dividend which may be cumulative rather than imposing a

issuance of a class of common up to an amount previously approved by shareholders. Specifically, section 5.46 stated: “if the Articles of Association have been previously amended by a vote of shareholders owning two-thirds of the outstanding common stock to provide for a class of authorized but unissued stock, such stock may be issued for purposes approved by the Board of Directors and the Office without further shareholder approval.” Subsequent amendments to 12 CFR § 5.46, which were intended to simplify Part 5, did not change this interpretation, as the amended regulation does not outline a new or different procedure for approval of common stock increases, but rather states generally that necessary shareholder approvals must be obtained. *See also, e.g.*, Comptroller’s Licensing Manual, Articles of Association, Charters and Bylaws (June 2016), p. 3 (indicating that two-thirds of a national bank’s shareholders must vote to increase or decrease the authorized number of common shares in the articles of association).

¹⁷ An after-the-fact notice and certification procedure is generally available for issuances of common stock for cash. *See* 12 C.F.R. § 5.46(g) and (i).

¹⁸ Preferred stock typically has a fixed dividend yield based on the par value of the stock which is paid out over set intervals, often quarterly. Cumulative preferred stock refers to preferred stock that requires any missed dividends to be paid out to its holders in subsequent periods, before holders of other classes of preferred stock or common stock can receive dividends. Noncumulative preferred stock refers to preferred stock that does not pay its holders any missed dividends. Specifically, if the stated dividend is not paid in a particular period, the holder does not have the right to claim any of the unpaid dividends in the future.

¹⁹ *See* OCC Letter from Martin Goodman, OCC Associate Chief Counsel, reprinted in [1978-1979 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,059 (October 3, 1977) (concluding that 12 U.S.C. § 51a provides national banks with broad authority to issue preferred stock containing such terms as may be desired, subject to OCC approval, and indicates that a national bank may issue preferred stock bearing noncumulative dividends, notwithstanding the language of 12 U.S.C. § 51b).

requirement that preferred stock dividends always be cumulative. Accordingly, the OCC confirms that 12 U.S.C. § 51b permits a national bank to issue preferred stock bearing noncumulative dividends, subject to OCC approval.²⁰

5. Capital Assessment of Common Stock

You request the OCC's confirmation that common stock is assessable only up to its par value under 12 U.S.C. § 55.

Under 12 U.S.C. § 55, the OCC has authority to determine that a national bank's capital stock has been impaired and to require capital assessments of shareholders to eliminate the impairment. Specifically, 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 OCC has previously said that common stock is assessable under 12 U.S.C. § 55 only up to its par value. Specifically, the OCC has determined that common stock is not "impaired," and therefore not subject to assessment under 12 U.S.C. § 55, when there is no deficiency between the amount credited to the common stock account and the aggregate par value of the common stock.²¹

We note that the OCC has not used this assessment authority since 1933. This provision provided a mechanism for addressing capital deficiency that has long since been overtaken by developments in statute and regulation, including robust capital standards, prompt corrective

²⁰ The OCC has also recognized that noncumulative preferred stock is permissible Tier 1 capital. For example, Appendix A of the OCC's capital regulation, 12 C.F.R. Part 3, includes noncumulative preferred as a component of Tier 1 capital. *See* 12 C.F.R. Part 3, Appendix A, Section 2(a). *See also* Comptroller's Licensing Manual, Capital and Dividends (Nov. 2017), p. 8 (indicating that preferred stock may or may not allow for cumulative dividends).

²¹ *See, e.g.*, OCC Interpretive Letter 1112 (February 17, 2009) (indicating that a national bank may issue common stock at an issue price below par value and that the assessment provisions of 12 U.S.C. § 55 did not apply because the bank would transfer from its capital surplus account to its capital account an amount equal to the difference between the sale and par value of the stock).

action requirements, and supervisory and enforcement authorities requiring an institution to raise or maintain capital at a particular level.²²

Conclusion

For the reasons discussed above, the OCC concludes that the corporate practices described in your letter are consistent with applicable requirements in the National Bank Act and its implementing regulations and with bank safety and soundness.

Our conclusions are based on your representations and written submissions describing the facts and circumstances. Any change in facts or circumstances could result in a different conclusion, including a determination that the Bank may no longer engage in the corporate practices described in your letter.²³

If you have any questions regarding this matter, please contact Robert Parisot, Senior Attorney, Securities and Corporate Practices Division, at 202-649-6532.

Sincerely,

/s/

Karen Solomon
Acting Senior Deputy Comptroller and Chief Counsel

²² See 12 C.F.R. Part 3 (establishing minimum capital requirements and overall capital adequacy standards for national banks and federal savings associations); 12 U.S.C. § 1831o (requiring insured depository institutions and federal banking regulators to take prompt corrective actions to resolve capital deficiencies and establishing a framework of supervisory actions for insured depository institutions that are not adequately capitalized); 12 C.F.R. Part 6 (implementing 12 U.S.C. § 1831o for insured national banks, federal savings associations and federal branches).

²³ These practices and the activities and communications by OCC employees in connection with these practices, 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 law and regulations. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.