



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Conditional Approval #329
October 1999

September 21, 1999

Michael G. Wooldridge, Esquire
Varnum, Riddering, Schmidt, & Howlett, L.L.P.
Bridgewater Place
Post Office Box 352
Grand Rapids, Michigan 49501-0352

Re: West Michigan National Bank & Trust, Frankfort, Michigan ("Bank")
Application Control Number: 1999-CE-12-0076

Dear Mr. Wooldridge:

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

Background

The Bank proposes to amend its bylaws to elect the corporate governance provisions of Michigan law, and proposes to engage in a reverse stock split as provided by Michigan law. The Bank proposes the reverse stock split to enable it to transform from a reporting company under the Securities Exchange Act of 1934 to a nonreporting company, and to reduce administrative expenses and costs of shareholder communications incurred as a result of being a public company and maintaining a large shareholder base.

The Bank proposes to conduct the reverse stock split through a multi-step process. The Bank will reduce the par value of its shares from the current \$10.00 per share to \$1.00 per share.¹ This will reduce capital stock from \$4,045,260 to \$404,526. A temporary account titled "Temporary Capital Over Par" will be created, with a balance of \$3,640,734.

¹ The Bank has 404,526 shares outstanding.

The Bank will conduct a reverse stock split at a ratio of 1 to 100. Par value will subsequently increase from \$1.00 to \$100.00 per share. After the reverse stock split and subsequent increase in par value, 3,985 full shares plus fractional shares totaling 60.26 shares will remain outstanding. In lieu of issuing the fractional shares, the Bank will cash out fractional shareholders at \$25.00 per share.

The Bank will then declare and pay a stock dividend of 100 shares for each outstanding share, increasing total outstanding shares to 398,500. Simultaneously, the par value will decrease from \$100.00 to \$10.00. The Bank will transfer the stock dividend from the "Temporary Capital Over Par" account to capital stock and surplus, thus raising capital and surplus and eliminating the "Temporary Capital Over Par" account.

Applicable Law

National banks may adopt corporate governance procedures that comply with applicable federal banking law and safe and sound banking practices. An OCC regulation provides 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.²

You have represented that Michigan law authorizes corporations to effect reverse stock splits, and corporations in fact do conduct them.³ Michigan law permits, but does not require, corporations to offer dissenters' rights in reverse stock splits.⁴ You have represented that the Bank has agreed to provide the dissenters rights provided in Mich. Stat. Ann. § 21.200(761) et seq. and to pay the costs of any resulting appraisal. You have also represented that the Bank will provide for binding arbitration if a court declines to accept jurisdiction in any action seeking appraisal.

Discussion

The Bank may adopt Michigan corporate governance procedures, to the extent that those procedures are not inconsistent with applicable Federal banking statutes or regulations. OCC regulation expressly permits a national bank to elect the corporate governance procedures of the law of the state in which

²12 C.F.R. § 7.2000(b).

³See also Mich. Stat. Ann. §§ 21.200(602)(d) and (g), and 21.200(781)(1)(d)(ii).

⁴See *id.* at § 21.200(762)(1)(f).

the main office of the bank is located.⁵ Because the main office of the Bank is located in Michigan, the Bank may elect Michigan corporate governance procedures.

Michigan laws allowing for reverse stock splits are not inconsistent 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 dissenting shareholder rights.⁶

After reducing the par value of the Bank's shares to ensure compliance with 12 U.S.C. § 52, the Bank proposes to amend its articles of association to decrease the number of authorized shares of common stock and to increase the par value of each share. 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.⁷

The Bank then proposes to replace each of the currently outstanding shares of common stock with new common stock at the rate of one share of new common stock for each 100 shares of currently outstanding common stock. The Bank would pay cash for any fractional shares outstanding. National banks have express authority to pay the cash equivalent of fractional shares of stock.⁸ 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.⁹

Although 12 U.S.C. § 83 generally prohibits a national bank from purchasing its own stock, this prohibition is not absolute. Section 83 was enacted to prevent a national bank from impairing its own capital, and risking injury to creditors in the event of insolvency, by purchasing and holding its own capital stock.¹⁰ The OCC has interpreted section 83 to permit a national bank's ownership of its own stock as long as a legitimate corporate purpose for the ownership exists.¹¹

Judicial authority also provides support for concluding that reverse stock splits for legitimate business purposes can be consistent with the National Bank Act. 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. The *NoDak* court found that a national bank may engage in any merger not

⁵12 C.F.R. § 7.2000(b).

⁶See Interpretive Letter No. 786, *reprinted in* [1997 Transfer Binder] Fed. Banking Law Rep. (CCH) ¶ 81-213 (June 9, 1997), and Interpretive Letter No. 275, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking Law Rep. (CCH) ¶ 85,439 (Oct. 21, 1983).

⁷See 12 U.S.C. § 21a; *see also* 12 U.S.C. § 52 (par value may not exceed \$100 per share).

⁸12 C.F.R. § 5.67(c).

⁹*Id.*

¹⁰Letter from Donald N. Lamson, Assistant Director, Securities and Corporate Practices Division (March 27, 1992) (unpublished).

¹¹See 12 C.F.R. § 7.2020; Interpretive Letter No. 786, *supra*; Interpretive Letter No. 660, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking Law Rep. (CCH) ¶ 83,608 (Dec. 10, 1994).

inconsistent with sections 214a, 215, and 215a and that freeze-out mergers are not inconsistent with those sections.¹² Thus, applicable statutory provisions and certain 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. Eliminating the responsibilities associated with a substantial shareholder constituency, including regulatory burden, is a proper business purpose.¹³ It also is a valid business purpose to effect a merger in order to reduce corporate expenses associated with shareholder communications and meetings.¹⁴

To avoid undermining the purposes of 12 U.S.C. §§ 214a, 215, and 215a, however, a reverse stock split must provide shareholders reasonable 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.¹⁵

Michigan law provides that a corporation may make dissenters' rights available in corporate transactions, but it does not require dissenters' rights in reverse stock splits. The Bank has agreed to provide dissenters' rights under Michigan law in the proposed reverse stock split that are comparable to those under the National Bank Act in mergers and consolidations.¹⁶

¹²*NoDak Bancorporation v. Clarke*, 998 F.2d 1416, 1419-20, and 1425 (8th Cir. 1993). Although the Eleventh Circuit in *Lewis v. Clarke* held that national banks may not effect freeze-out mergers that require holders of stock of equal standing to take different forms of consideration, this is a minority view. 911 F.2d 1558 (11th Cir. 1990), *reh'g denied*, 972 F.2d 1351 (1991). The only Federal Court of Appeals case to address reverse stock splits directly, *Bloomington Nat'l Bank v. Telfer*, 916 F.2d 1305 (7th Cir. 1990), decided on the facts that the transaction before it violated the National Bank Act. It declined to determine if reverse stock splits would be permissible for valid business purposes if dissenting shareholders' rights were provided. *Id.* at 1308 n.4, and 1309. The court also specifically noted that the decision was limited to the facts. *Id.*

¹³*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).

¹⁴*See Teschner v. Chicago Title & Trust Co.*, 322 N.E.2d 54, 58 (Ill. 1974).

¹⁵Michigan law requires corporations to provide shareholders with advance notice of the right to dissent. Mich. Stat. Ann. §§ 21.200(764)(1). Advance notice of dissenters' rights is important to allow minority shareholders to decide whether to exercise dissenters' rights.

¹⁶Under the National Bank Act, 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 shareholder's 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. 12 U.S.C. §§ 214a(b), 215(b)-(d), and 215a(b)-(d). Under Michigan law, a dissenting shareholder *must* provide advance notice to the corporation, and may not vote in favor of the action. After the shareholder meeting, the corporation must send another notice to shareholders that are eligible to demand payment. The post-meeting notice must set a date, between 30 and 60 days after delivery of the notice, by which the shareholder must make a written demand on the corporation for fair value of the shares. If the dissenting shareholder and the corporation cannot agree on the fair value of the shares, the corporation may, within 60 days after the dissenter provides an estimate of fair value, file a petition for appraisal in the appropriate state court. *See Mich. Stat. Ann. § 21.200(761) et seq.*

Both statutory schemes provide mechanisms whereby a nonvoting shareholder may dissent and receive payment for

Because Michigan law does not expressly provide for dissenters' rights in reverse stock split transactions, a Michigan court might decline to hear any resulting appraisal action that may arise. However, the Bank has agreed to provide for binding arbitration if the court declines jurisdiction. Thus, dissenting shareholders (if any) will have access to a forum for the impartial valuation of their shares.

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 Michigan law.
2. Notwithstanding the corporate governance provisions of Michigan law, the Bank will provide for dissenters' rights as described in Mich. Stat. Ann. § 21.200(761) et seq.
3. If any shareholders dissent from the reverse stock split, the Bank will pay the cost of any appraisal that may occur.
4. If the appropriate court(s) decline to accept jurisdiction of an appraisal action, the Bank will provide for binding arbitration to conduct an appraisal.

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 should also include a statement that the change in the capital structure complies fully with all applicable laws and regulations. Upon receipt of the notification, the OCC will review the reduction in capital attributable to the payment for the fractional shares.

the shares. Under both provisions of law, a minority shareholder in a reverse stock split has the right to dissent and receive fair value for the shares. If the parties are unable to settle on the fair value of the shares, a state court (under Michigan law) or the Comptroller (under the National Bank Act) determines the fair value of the shares.

The reverse stock split should be completed within one year of the date of this letter. If you have any questions, please contact Tena Alexander or Frederick Petrick, Senior Attorneys, Securities and Corporate Practices Division at 202-874-5210, Giovanna Cavallo, Attorney, Central District

Office, at 312-360-8805, Robert A. Sihler, Licensing Expert, Bank Organization and Structure at 202-874-5060, or Kerry Rice, National Bank Examiner/ Corporate Analyst, Central District Office, at 312-360-8851.

Sincerely,

/s/

Steven J. Weiss
Deputy Comptroller
Bank Organization and Structure