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April 13, 1939

Honorable Preston Delano,
Comptroller of the Currency,
Washington, D. C.

My dear Mr. Comptroller:

This is in response to your letter of April 13, 1939, addressed to the Board of Governors of the Federal Reserve System, enclosing a draft of a proposed letter which it is understood the Bank of America N.T. & S.A. may be requested to address to the Comptroller of the Currency, agreeing to declare no further dividend "if in the opinion of either the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation, the payment of such dividend would impair the capital stock of the bank or would constitute an unsafe or unsound banking practice." It is understood that this is in connection with a proposed loan by the Reconstruction Finance Corporation to the stockholders of the bank to finance the purchase of additional stock of the bank for the purpose of increasing the bank's capital.

You ask to be advised whether the Board is prepared to assume this responsibility and, further, the opinion of the Board as to the procedure outlined therein.

It is the opinion of the Board that it cannot properly assume this responsibility and cannot approve of the procedure, for the following reasons:

1. An agreement not to pay dividends which in the opinion of the supervisory authorities would impair the capital stock of the bank is superfluous, because the payment of dividends which impair the capital of a national bank is expressly prohibited by section 5204 of the Revised Statutes and the Comptroller of the Currency is clothed with authority to take remedial action if this prohibition is violated;

2. If the bank's capital is unimpaired, if it has actual net earnings within the meaning of section 5204 of the Revised Statutes, and if it transfers ten per cent of its net earnings to surplus (until the surplus equals 100 per cent of its capital) as required by section 5199 of the Revised Statutes, the question whether it is expedient to distribute any or all of

its remaining net earnings in the form of dividends is a question which the law expressly leaves to the judgment of the bank's directors. For the supervisory authorities to undertake to tell the directors whether or not they may pay dividends under these circumstances would be to assume a responsibility which the law places upon the directors;

3. The duty of determining whether the foregoing provisions have been complied with by a national bank is placed by law primarily on the Comptroller of the Currency and as a matter of practice is not assumed by any other bank supervisory authority. No such other supervisory authority would be in possession of independent information except as a result of expensive and unnecessary duplication of examinations; and

4. If the bank should violate this provision or otherwise engage in unsound practices in paying dividends and the Comptroller should decide to institute proceedings under section 30 to remove the directors from office, the Board would preside as a judge in such proceedings and it ought not to prejudge the case by a prior approval of the payment of dividends, either expressly or by implication.

Very truly yours,

(Signed) L. P. Bethea

L. P. Bethea,
Assistant Secretary.