



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

April 3, 2009

Interpretive Letter #1115
May 2009
12 USC 24(7)

Donna M. Harris
Deputy General Counsel
Wachovia Legal Division
NC0630
301 South College Street
Charlotte, NC 28288

Subject: Purchase of Auction Rate Preferred Securities

Dear Ms. Harris:

This is in response to your request to confirm the authority of OmniPlus Capital Corporation (the “Corporation”), a wholly-owned subsidiary of Wachovia Bank, N.A. (the “Bank”), to purchase and hold for the Corporation’s own account shares of auction rate preferred securities (the “Securities”), as described below. For the reasons described below, and subject to the representations and conditions set forth herein, the OCC hereby confirms that the Corporation may purchase these securities.

Background¹

The Corporation will purchase the Securities from certain affiliates.² As described below, Wachovia Corporation, (the Bank’s “Holding Company”), has agreed to indemnify the Corporation against any losses arising from the purchase of those Securities. The Bank and the Corporation will enter into an operating agreement with the OCC.³ The operating agreement

¹ These facts are based upon the Bank’s representations.

² The affiliates, Wachovia Securities, LLC, Wachovia Capital Markets, LLC, and Wachovia Securities Financial Holdings, LCC, will purchase the securities from their customers at par value. The Corporation will purchase the securities from its affiliates at fair market value, which is lower than par value. The Bank states that it will comply with the requirements of sections 23A and 23B of the Federal Reserve Act and the Federal Reserve Board’s Regulation W. The Bank represents that it has reviewed the permissibility of purchases from trust customers under applicable state law and 12 C.F.R. Part 9.

³ On December 29, 2008, the Federal Reserve Board issued a letter granting a Section 23A Waiver (“Section 23A Waiver”) to the Bank for the purchase of the Securities subject to similar conditions.

will require the Bank and the Corporation to enter into an indemnification agreement with the Holding Company. Pursuant to the indemnification agreement, the Holding Company will agree to indemnify the Corporation for certain losses should they occur and also to repurchase all of the Securities from the Corporation, no later than July 31, 2010.⁴

The Securities share many common characteristics. The Securities all pay a fixed yield or a specified yield based on a rate or index not under the control of the issuer or the purchaser. The fixed yield is determined through an auction process when functioning. When auctions fail, the yield is fixed as a spread over a reference rate with the amount of the spread generally dependant upon the rating of the shares at the time.⁵ Dividends are cumulative.

The Securities rank senior to the issuers' common stock in the event of liquidation and the Securities are not convertible into common stock. The Securities are rated investment grade and are registered under the Securities Act of 1933.⁶

The Securities are perpetual, rather than limited in life. However, the Securities may be redeemed at the option of the issuer, so long as the issuer has adequate funds to redeem and the redemption would not violate the Investment Company Act of 1940 or other applicable laws.⁷ Some of the Securities contain provisions that provide the issuer the option not to redeem (or redeem only at a premium) during default rate periods.⁸

In addition to optional redemption provisions, the Securities contain mandatory redemption provisions that require the issuer to redeem the Securities at par plus accumulated dividends under certain conditions. Redemption is required if the Securities fail to meet asset coverage requirements imposed under the 40 Act or by certain rating agencies. Redemption in those instances is generally limited to the number of shares required to be redeemed to bring the issuer into compliance with asset coverage requirements.

⁴ The indemnification agreement must be satisfactory to the OCC. Pursuant to the indemnification agreement, the Holding Company will immediately repurchase from the Corporation, at the original purchase price plus any accrued but unpaid interest, any Securities that become low-quality assets for the purposes of the Federal Reserve Board's Regulation W, 12 C.F.R. § 223.3(v).

⁵ Due to disruptions in the auction rate securities market in 2008, the markets currently are not functioning.

⁶ ("33 Act"). See 15 U.S.C. § 77a, *et seq.* The Securities are rated AAA.

⁷ ("40" Act"). See 15 U.S.C. § 80a-1, *et seq.*

⁸ Default rate periods are periods during which the auctions have failed.

Discussion

Part 1 Authority

A national bank “may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.”⁹ OCC regulations define the term “investment security” as “a marketable debt obligation that is not predominantly speculative in nature.”¹⁰

Preferred stock is a hybrid instrument that can be structured to resemble either a debt instrument or common stock. OCC precedent recognizes that national banks may purchase preferred stock as an investment security when the characteristics of the instruments are predominately debt-like.¹¹ The overall characteristics of the Securities support a finding that they are investment securities under OCC precedent. The Securities all possess characteristics commonly associated with debt instruments: fixed yields, priority over equity shareholders in the case of issuer default, and cumulative dividends. Also, the Securities meet the quality and marketability requirements of 12 C.F.R. Part 1.¹²

Two of the features of the Securities are often associated with common stock: the perpetual term and the voting rights of the Securities holders. As discussed below, the Corporation will limit its voting rights under the Securities and has contractual rights to sell the Securities within two years. Overall the Securities will sufficiently resemble debt instruments to qualify as investment securities.

Perpetual Term

The Securities are perpetual, a characteristic that has traditionally been associated with common stock.¹³ However, based on other characteristics, the OCC has recognized that a perpetual preferred stock may qualify as an investment security for the purposes of Part 1.¹⁴ In IL No.

⁹ 12 U.S.C. § 24 (Seventh). An operating subsidiary may engage in these activities to the same extent as a national bank may engage in these activities. *See* 12 C.F.R. § 5.34(e)(3). “An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank.”

¹⁰ *See* 12 C.F.R. § 1.1(e).

¹¹ *See, e.g.*, OCC Interpretive Letter No. 1086 (Aug. 23, 2007) (“IL No. 1086”).

¹² All of the Securities are rated investment grade (AAA rating). The Securities meet the definition of marketability because they are registered under the 33 Act. *See* 12 C.F.R. 1.2(f)(1).

¹³ More recently, the marketplace has experienced a growth in perpetual debt instruments. *See* IL No. 1086, *supra*.

¹⁴ *Id.*; *see also* OCC Interpretive Letter No. 781 (April 9, 1997) (national banks may acquire perpetual money market preferred securities with no set maturity date, but with returns that were reset periodically through Dutch auctions).

1086, the OCC permitted a national bank's acquisition of perpetual preferred securities that possessed many characteristics of debt, specifically, a fixed yield, perpetual life, cumulative dividends, limited voting rights, and priority over equity shareholders in the case of issuer default. Although the preferred securities were perpetual, they were callable by the issuer, potentially limiting the term of the securities. Based on the particular facts and circumstances, the OCC determined the securities had sufficient characteristics of debt to qualify as investment securities.

Here the Securities similarly have many characteristics of debt: a fixed yield, cumulative dividends, and priority over other equity holders. Because the Holding Company has agreed to purchase the Securities after a three year period of time, the Corporation has effectively limited the duration of its investment. Also, the Securities contain both optional and mandatory redemption provisions that potentially limit the Securities' term.

Voting Rights

The voting rights of the Securities are limited, but include the right to vote for at least two directors at all times. The Bank represents that the 40 Act requires that holders of preferred shares have the right to vote, as a separate class, for at least two directors at all times.¹⁵ However, the 40 Act does not require the *exercise* of voting rights. In order to limit its voting rights to those commonly associated with the holders of debt instruments, the Bank has agreed to limit the Corporation's exercise of voting rights only in situations where the rights or seniority of the preferred holders could be adversely impacted.¹⁶

The OCC has previously recognized that a national bank may limit its exercise of certain rights in order for a security to qualify as an investment security for the purposes of Part 1.¹⁷ In IL No. 1086, as a condition for finding that the bank's purchase of preferred securities was permissible, the bank agreed to limit its right to convert preferred securities into the common stock of the issuer. This limitation was a "condition imposed in writing by a Federal banking agency" within the meaning of 12 U.S.C. § 1818. Similarly, as a condition for the OCC finding that the Securities are permissible, the Bank has agreed to limit the Corporation's exercise of voting rights, so that those rights resemble those commonly held by holders of debt instruments. This limitation is a condition imposed in writing within the meaning of 12 U.S.C. § 1818.

¹⁵ The 40 Act also requires holders of preferred shares to have the right to vote for a majority of the directors if the dividends are unpaid in an amount equal to two years of dividends, and in certain other instances where the rights or seniority of the preferred shareholders would be adversely impacted. *See* 15 U.S.C. § 80a-18.

¹⁶ Those rights may be characterized as follows: any breach by the issuer with respect to the terms of the preferred stock; any modification of the terms or seniority of the preferred securities; failure to pay dividends or distributions for a period of at least 180 days; incurrence by the issuer of liabilities that are not permitted under the terms of the preferred stock; and change in law, regulatory or accounting treatment with respect to the bank's investment in the preferred stock.

¹⁷ *See* IL No. 1086, *supra*.

Conclusion

Accordingly, in consideration of the foregoing analysis, based upon the facts and representations provided by the Bank and subject to the conditions below, we conclude that the Bank, through its operating subsidiary, the Corporation, may acquire the Securities as investment securities in accordance with 12 C.F.R. Part 1.

Based on the facts and representations provided by the Bank, the Bank's acquisition of the Securities is subject to the following enforceable conditions:¹⁸

- 1) The Corporation will not exercise its voting rights under the Securities, except in those instances where the rights or seniority of the Securities' holders could be affected as discussed above. The Corporation will not exercise voting rights in order to meet quorum requirements;
- 2) The Bank and the Corporation will enter into an operating agreement with the OCC, satisfactory to the OCC, which will require the Bank and the Corporation to enter into an indemnification agreement with the Holding Company, as described below; and
- 3) The Bank and the Corporation will enter into an indemnification agreement with the Holding Company, satisfactory to the OCC, for the Holding Company to cover certain losses should they occur and pursuant to which the Holding Company will be required to repurchase all of the Securities, no later than July 31, 2010.¹⁹

These conditions are a "condition imposed in writing by a Federal banking agency" within the meaning of, and enforceable under, 12 U.S.C. § 1818. The Bank must seek prior OCC supervisory non-objection before terminating, modifying, or amending either agreement described above. Our conclusions herein are specifically based on the Bank's representations and written submissions describing the facts and circumstances of the subject transactions. Any change in the facts or circumstances could result in different conclusions.

This approval and the activities and communications by OCC employees in connection with this approval, 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.

¹⁸ These conditions apply to all applicable auction rate securities, including the Securities, that the Bank seeks to purchase pursuant to the Section 23A Waiver.

¹⁹ Pursuant to the indemnification agreement, the Holding Company will immediately repurchase from the Corporation, at the original purchase price plus any accrued but unpaid interest, any Securities that become low-quality assets for the purposes of the Federal Reserve Board's Regulation W, 12 C.F.R. § 223.3(v).

If you have any questions concerning this letter, please contact Tahmineh I. Maloney, Senior Attorney, Securities and Corporate Practices Division, at (202) 874-5210.

Sincerely,

signed

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel