



**Comptroller of the Currency
Administrator of National Banks**

Licensing Department
250 E Street, S.W.
Washington, D.C. 20219

**Conditional Approval #970
October 2010**

September 8, 2010

Pinchus D. Raice, Esq.
Pryor Cashman LLP
7 Times Square
New York, New York 10036

Re: Preferred Stock Issuance and Capital Increase
The Upstate National Bank -- Charter Number 12018

OCC Control Number: 2010-NE-12-0232

Dear Mr. Raice:

This is in further response to your letter dated June 29, 2010, submitted on behalf of The Upstate National Bank (“Bank”), and subsequent communications with the Office of the Comptroller of the Currency (“OCC”). This matter involves the creation of a new class of preferred stock of the Bank and the issuance of some of that stock. The OCC hereby grants approval for the terms of the preferred stock and grants conditional approval for issuance of certain of the preferred stock as set out below. These approvals are granted after a thorough review of the application, other materials you have supplied, and other information available to the OCC, including commitments and representations made in the application and by the Bank’s representatives during the application process. The conditional approval is also subject to the conditions set out herein.

Background

In your June 29th letter, the Bank applied to the OCC for a change in its capital structure by amending its Articles of Association to authorize the issuance of up to 20,000,000 shares of Series D Preferred Stock. Your letter included draft Amended and Restated Articles of Association of the Bank that included amended provisions regarding the Series A, Series B, Series C, and the new Series D Preferred Stock. By your June 29th letter, the Bank also notified the OCC of the Bank’s planned issuance of that number of the shares of the Series D Preferred Stock that is equal to \$500,000 divided by the net equity value of the Bank’s common stock according to a specified formula (the “\$500,000 Issuance”). Through other communications, the

Bank advised the OCC that the \$500,000 Issuance would be made to one of the current controlling shareholders of the Bank, George Karfunkel (“Mr. Karfunkel”),¹ and that as of June 30, 2010, Mr. Karfunkel had invested the \$500,000 in the Bank as capital in anticipation of the issuance of the Series D Preferred Stock. The Bank also advised the OCC that it was in negotiations with Mr. Karfunkel, the other Principal Stockholders, and a third-party, FNBNY Bancorp, Inc., (“FNBNY”) to enter a Stock Purchase Agreement under which Mr. Karfunkel and FNBNY would each invest \$4 million in the Bank in Series D Preferred Stock.² Your June 29th letter also notified the OCC of the Bank’s plans to change the par value of its common stock.

By letter dated July 9, 2010, the OCC notified the Bank that the Bank’s application for the amendment of its Articles to create the Series D Preferred Stock was not subject to the 15 day approval process, but would require full OCC review, as discussed below. The OCC’s July 9th letter also notified the Bank that it was required to file an application for any increase in permanent capital, as discussed below.

By letter dated August 11, 2010, the Bank notified and certified to the OCC that the investment of \$500,000 had been made as of June 30, 2010, as the purchase price for a specified amount of Series D Preferred Stock and that, upon OCC certification, the capital of the Bank would increase by the amounts included in the letter. The letter noted that the Bank could not issue the shares of Series D until the amendments to the Bank’s Articles had been approved. The letter also enclosed revised draft Articles that contained a clarification about one aspect of the rights of Series D Preferred Stockholders, as well as an earlier revision that addressed the scope of regulatory approvals referred to in the provisions on preferred stock. On September 8, 2010, further clarifications of the revised draft Articles were submitted to the OCC.

Amendment of Articles to Create Series D Preferred Stock

The June 29th letter included a request pursuant to 12 C.F.R. § 5.46(g)(2) for the approval of the OCC for the provisions in the Bank’s Articles of Association concerning preferred stock dividends, voting and conversion rights, retirement of the stock, and rights to exercise control over management. In its July 9th letter, the OCC notified the Bank that the Bank’s application for the amendment of its Articles to create the Series D Preferred Stock was not subject to the 15 day approval process, but would require full OCC review. The reasons for the delay and full review included the need for additional information regarding the planned or proposed uses and

¹ The other controlling shareholders are Howard Zuckerman and The K & Z Company LLC (collectively with Mr. Karfunkel, the “Principal Stockholders”).

² In addition, the Bank, the Principal Stockholders, and FNBNY have been in negotiations for some time to enter an Agreement and Plan of Merger under which FNBNY would acquire the Bank and become its sole owner.

holders of the Series C and Series D Preferred Stock.³ In view of the planned future issuance to FNB NY and rights that FNB NY might have under the Stock Purchase Agreement and Agreement and Plan of Merger, issuance of the preferred stock could give rise to questions regarding the acquisition of control of the Bank. Thus, it was appropriate to review the proposed terms and features.

After review of information Bank counsel supplied, the OCC has determined that the terms of the Series D Preferred Stock may be approved, provided that issuance of the stock is limited to Principal Stockholders as discussed below. Accordingly, the OCC hereby approves the proposed amended Articles of Association creating the Series D Preferred Stock.

Issuance of Series D Preferred Stock and Other Stock

In its July 9th letter, the OCC also required the Bank to obtain prior OCC approval for any increase in permanent capital, including the issuance of any already authorized but unissued common or preferred stock, as well as any future issuance of Series D Preferred Stock.

National banks are required to obtain OCC approval for increases in permanent capital. In its regulations, the OCC has established a notice process for certain approvals of increases in capital that involve only common or preferred stock and cash consideration. Under that process, the bank submits a notice of the increase in capital, and the proposed increase is deemed approved by the OCC and certified seven days after the date on which OCC received the notice. 12 C.F.R. § 5.46(i)(3). However, the regulation also provides that a national bank may not use this process but must follow the full application process and obtain prior OCC approval to increase its permanent capital if the bank is “[r]equired to receive OCC approval pursuant to letter, order, directive, written agreement or otherwise.” 12 C.F.R. § 5.46(g)(1)(i)(A).⁴

As stated above, investment by FNB NY in the Bank together with its future plans for acquiring the Bank give rise to issues regarding possible control prior to regulatory approval. Those concerns are not present if stock is issued only to the existing controlling owners. Accordingly, the OCC hereby approves the increase in capital that arises from the \$500,000 Issuance of Series D Preferred Stock, subject to the conditions below.⁵ This approval is based on the OCC’s

³ According to the June 29th letter, all of the authorized shares of Series A and Series B Preferred Stock are issued and outstanding.

⁴ The full application process must also be used for selling stock for consideration other than cash or for receiving a material noncash contribution to capital surplus. 12 C.F.R. § 5.46(g)(1)(i)(B)&(C).

⁵ Since the \$500,000 has been paid in and the Bank submitted its notification under 12 C.F.R. § 5.46(i)(3), this letter serves as OCC acknowledgement that such capital increase is deemed certified under 12 C.F.R. § 5.46(i)(3), effective as of June 30, 2010.

understanding that the purchase of this Series D Preferred Stock is for investment by Mr. Karfunkel and is not intended to be sold or otherwise transferred to another person.

In addition, the OCC also modifies the requirement in its July 9th letter for a full application for any increase in capital. An application is not required for future increases in permanent capital that arise through issuance of common or preferred stock to the Principal Stockholders for cash consideration. The Bank must continue to file notices for such increases, as required by 12 C.F.R. § 5.46(g)(2)(last sentence) & 5.46(i)(3). An application continues to be required for any increase in capital arising from issuance of common or preferred stock to any other person, including FNBNY.

Conditions

The OCC's approval for the increase in capital arising from the \$500,000 Issuance is subject to the following conditions:

1. The Bank shall not issue any common or preferred stock to any person, including FNBNY, other than one or more of the Principal Stockholders, without the prior approval of the OCC.
2. The Bank shall not transfer on the books and records of the Bank the ownership of any outstanding common or preferred stock from a prior owner to FNBNY, without the prior approval of the OCC.

These conditions of approval are conditions "imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request" within the meaning of 12 U.S.C. § 1818. As such, the conditions are enforceable under 12 U.S.C. § 1818.

Conclusion

The OCC's approval of the amendment of the Articles to create the Series D Preferred Stock and approval of the \$500,000 Issuance of Series D Preferred Stock to Mr. Karfunkel are limited to those matters. They do not reflect any position regarding the OCC's review of the proposed later issuance of Series D Preferred Stock to FNBNY, the proposed later acquisition of the Bank by FNBNY, and the terms of the draft Stock Purchase Agreement and draft Agreement and Plan of Merger. The current approval is no indication that FNBNY's and the Bank's future plans would also be approved.

Pinchus D. Raice, Esq.
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This conditional approval, and the activities and communications by OCC employees in connection with the filings, does 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. Our approvals are based on the representations made in the applications, other submissions, and other information available to the OCC as of this date. The OCC may modify, suspend, or rescind these conditional approvals if a material change in the information on which the OCC relied occurs prior to the date of the transaction to which this decision pertains. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.

Please include the OCC control number on any correspondence related to this filing.
If you have any questions, contact National Bank Examiner Crystal Maddox at (202) 874-5060 or by email at crystal.maddox@occ.treas.gov.

Sincerely,

/s/

Crystal Maddox
National Bank Examiner