



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

March 8, 2010

Interpretive Letter #1126
April 2010

Donna M. Harris
Managing Counsel
Wells Fargo & Co.
301 South College Street
MAC D1053-300
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 Silver Asset Management Group (“Silver”), a wholly-owned subsidiary of Wells Fargo Bank, N.A. (“Bank”), to purchase and hold for its own account auction rate preferred securities (“ARPS”).¹ For the following reasons, and subject to the representations and conditions set forth herein, the OCC hereby confirms that Silver may purchase the ARPS.

Wells Fargo Investments, LLC (“WFI”) is a broker-dealer affiliate of Silver. Wells Fargo Investment Group, Inc. (“WFIG”) is a subsidiary of the Holding Company and the parent of WFI. WFIG is purchasing the ARPS from WFI customers at par value. To date, Valley Asset Management Company (“Valley”), a Holding Company subsidiary and an affiliate of Silver has acquired ARPS that have been purchased from WFI customers. Silver proposes to purchase ARPS from Valley and WFIG at fair value,² as applicable, in order to better manage funding and to more fully benefit from the tax-exempt nature of the ARPS.³ The ARPS are highly rated,

¹ Wells Fargo Corporation (“Holding Company”) is the Bank’s holding company.

² The par value of the ARPS currently exceeds their fair value.

³ The Bank represents that Silver’s proposed purchases of the ARPS are covered transactions that will comply with sections 23A and 23B of the Federal Reserve Act, 12 U.S.C. §§ 371c and c-1, as implemented by Regulation W, 12 C.F.R. Part 223. The aggregate amount of these covered transactions will be the fair value purchase price of the ARPS. The Bank also states that the Bank’s covered transactions with affiliates, singularly or in the aggregate, will not exceed the limits section 23A imposes on such transactions. The Bank further represents that the purchase price satisfies the market terms requirements of section 23B. Finally, the Bank states that Silver will not purchase any low quality assets.

current on payments, not low quality assets, and the Holding Company will enter into an indemnification/repurchase agreement with the Bank, in which it agrees to purchase the ARPS from Silver and to cover certain losses and expenses that the Bank or any of its subsidiaries may incur as a result of its acquisition of the ARPS.

Discussion

Silver proposes to acquire the ARPS as Type III investment securities. 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.”⁴ OCC regulations define the term “investment security” as “a marketable debt obligation that is not predominantly speculative in nature.”⁵

The Bank represents that the ARPS possess many of the same debt-like characteristics of the ARPS that its affiliate national bank’s operating subsidiary was permitted to acquire under Interpretive Letter No. 1115 (April 3, 2009)⁶ (*i.e.*, the ARPS pay a fixed yield based on a rate or index not under the control of the issuer or purchaser, rank senior to common stock in the event of liquidation, and are cumulative). In addition, the Bank represents that the ARPS meet the quality and marketability requirements of Type III investment securities under 12 C.F.R. Part 1.⁷

Unlike debt obligations, the ARPS at issue here are perpetual. Even so, they are subject to optional and mandatory redemption provisions that may potentially limit the terms of the ARPS. The ARPS may be redeemed at the option of the issuer so long as the issuer has adequate funds and the redemption would not violate the Investment Company Act of 1940⁸ or other applicable laws. In addition to the optional redemption provisions, the ARPS must be redeemed at par plus accumulated dividends if the ARPS fail to meet asset coverage requirements imposed under the ’40 Act or by rating agencies.

Dissimilar to debt, the ARPS also carry voting rights. These rights, however, are limited but include the right to vote, as a separate class, for directors.

In IL No. 1115, the OCC permitted the Bank affiliate’s operating subsidiary to acquire perpetual ARPS having broad voting rights, based on certain representations and subject to certain “conditions imposed in writing” under 12 U.S.C. § 1818 (“Section 1818”). The Section 1818 conditions limited the operating subsidiary’s voting rights and required the bank and the holding

⁴ 12 U.S.C. § 24(Seventh).

⁵ See 12 C.F.R. § 1.2(e).

⁶ (“IL No. 1115”).

⁷ The ARPS are rated investment grade, with the majority rated AAA. The ARPS are marketable because they are registered under the Securities Act of 1933.

⁸ 15 U.S.C. § 80a-1, *et seq.* (“’40 Act”).

company to enter into an indemnification/repurchase agreement, which required the holding company to purchase the ARPS within a two-year period, effectively limiting the term of the ARPS.⁹

The Bank represents and agrees that Silver, in order to limit its voting rights to those commonly associated with the holder of debt instruments, will exercise voting rights under the ARPS only in situations where the rights or seniority of the ARPS holders could be adversely affected.¹⁰ The Bank further represents and agrees that it will enter into an operating agreement with the OCC, which requires the Bank to enter into an indemnification/repurchase agreement with the Holding Company under which the Holding Company agrees to cover certain losses and expenses that the Bank and any of its subsidiaries may incur as a result of Silver's acquisition of the ARPS and to purchase the ARPS within a two-year period.

Accordingly, the OCC concludes that it is permissible for Silver to acquire the ARPS here, based on facts and representations provided by the Bank and subject to certain Section 1818 conditions set forth below. Silver may acquire concentrations of ARPS within the investment limits for Type III securities.

Conclusion

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

The Bank's acquisition of the ARPS is subject to the following enforceable Section 1818 conditions:

- 1) Silver will not exercise its voting rights under the ARPS, except in those instances where the rights or seniority of the ARPS' holders could be adversely affected as discussed above. Silver will not exercise voting rights in order to meet quorum requirements;
- 2) Prior to the acquisition of the ARPS, the Bank shall enter into an operating agreement with the OCC, which shall require the Bank to enter into an indemnification/repurchase agreement, satisfactory to the OCC, with the Holding Company within 30 days of Silver's ARPS acquisitions;

⁹ In OCC Interpretive Letter No. 1124 (November 3, 2009), the OCC permitted PNC Bank, N.A., to acquire ARPS from an affiliate under similar terms and conditions.

¹⁰ Those rights may be characterized as follows: any breach by the issuer with respect to the terms of the ARPS; any modification of the terms or seniority of the ARPS; 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 ARPS; and any change in law, regulation or accounting treatment with respect to the Silver's investment in the ARPS.

- 3) Under the indemnification/repurchase agreement, the Holding Company shall agree to cover certain losses and expenses that the Bank and any of its subsidiaries may incur as a result of Silver's acquisition of the ARPS and shall also agree to repurchase all of the ARPS, no later than March 15, 2012;¹¹ and
- 4) The Bank's Board of Directors shall assure that the operating agreement is fully adopted, timely implemented, and adhered to thereafter.

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, and enforceable under, Section 1818. The Bank must seek prior OCC supervisory no-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 OCC may modify, suspend, or rescind this approval 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.

If you have any questions concerning this letter, please contact Tena M. Alexander, Senior Counsel, at (202) 874-5210.

Sincerely,

Signed

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

¹¹ Pursuant to the indemnification/repurchase agreement, the Holding Company will immediately repurchase from Silver, at the original purchase price plus any accrued but unpaid interest, any ARPS that become low-quality assets for the purposes of the Federal Reserve Board's Regulation W, 12 C.F.R. § 223.3(v).