Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #1086
September 2007
12 USC 24(7)
12 CFR 1

August 23, 2007

Mr. Timothy J. Mayopoulos
General Counsel
Bank of America Corporation
101 South Tryon Street
Charlotte, NC 28255

Re: Acquisition of Preferred Securities by Bank of America, N.A. ("Bank")

Dear Mr. Mayopoulos:

This is in response to your request to confirm the authority of the Bank under the National Bank Act, 12 U.S.C. § 24(Seventh), and in accordance with 12 C.F.R. Part 1 of the regulations of the Office of the Comptroller of the Currency (OCC), to purchase and hold for its own account shares of fixed-rate cumulative preferred securities as described below. For the reasons described below, and subject to the representations and condition set forth herein, we have concluded and advised you, and hereby confirm, that the Bank may purchase these securities.

Proposal

The Bank proposes to purchase $2 billion in newly-issued preferred securities (the "Securities") from Countrywide Financial Corporation, ("Issuer") a savings and loan holding company registered with the Office of Thrift Supervision. The Securities represent preferred stock of the Issuer that pays quarterly cash dividends at a fixed percentage rate. The Issuer's obligation to pay these dividends is cumulative. In the event of the Issuer's liquidation or dissolution, the Bank as holder of the Securities would be entitled to a liquidation payment equaling the purchase price and any unpaid dividends. The Issuer's obligation to make dividend and liquidation payments on the Securities is senior to the rights of the Issuer's common stockholders. The Bank's voting rights as holder of the Securities are limited, arising only with respect to customary approval rights designed to protect the interests of holders of the Securities against certain corporate actions that would adversely affect the Securities or their relative seniority, or if the Issuer fails to pay dividends for six quarters. The Securities bear no fixed term, but they are callable at the option of the Issuer after ten years.[1] Holders of Securities may convert them into

[1] The Issuer's ability to call the Securities is subject to certain conditions, including the condition that the market price of the Issuer's common stock exceed the conversion price under the conversion feature by 150 percent for 30 consecutive trading days.

common stock of the Issuer, but the Issuer may not initiate conversion. The Bank represents it will not at any time exercise its right as holder of the Securities to convert them into the Issuer's common stock.

Discussion

A national bank "may purchase for its account investment securities under such limitations and representations as the Comptroller of the Currency may by regulation prescribe."[2] The statute further describes "investment securities" as "marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency."[3]

OCC regulations define an investment security as "a marketable debt obligation that is not predominantly speculative in nature." 12 C.F.R. § 1.2(e). This regulatory definition is general and non-exclusive, and relies on the substantive characteristics of an "investment security."[4]

Preferred stock is a hybrid instrument and can be structured to resemble either a debt instrument or a common stock.[5] The OCC has found it permissible for national banks to acquire preferred stock instruments in accordance with 12 C.F.R. Part 1 when the characteristics of the instruments were predominantly debt-like. For example, the OCC found money market preferred stock ("MMPS") possessed characteristics typically associated with debt obligations, and eligible for purchase under Part 1.[6] Similarly, the OCC found trust preferred stock ("TPS"), with distributions resembling periodic interest payments for a certain term and limited voting rights, to be debt-like securities eligible for purchase in accordance with Part 1.[7] In numerous other instances, the OCC has looked to the nature of an instrument instead of its label to assess whether it is a debt obligation or equity.[8]

---

[2] 12 U.S.C. 24(Seventh). *See also Comptroller's Handbook for Examiners* (March 2006) (investment securities may include a wide variety of instruments).

[3] *Id.*

[4] OCC Interpretive Letter No. 781 (April 9, 1997); OCC Interpretive Letter No. 777 (April 8, 1997).

[5] *Cf. Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985) and *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975) (discussing characteristics usually associated with common stock).

[6] OCC Interpretive Letter No. 781, *supra* note 4.

[7] OCC Interpretive Letter No. 777, *supra* note 4 . *See also* OCC Interpretive Letter No. 1047 (Dec. 20, 2005) (preferred stock of structured investment companies).

[8] *See*, *e.g.*, OCC Interpretive Letter No. 1021 (Feb. 17, 2005) (in determining national banks' authority to hold investments under their power to discount and negotiate evidences of debt, the OCC looks not to the label the instrument is given, but to the nature of the instrument to determine whether it is essentially a debt obligation); OCC Interpretive Letter No. 941 (June 11, 2002) (national bank authorized, under national banks' authority to discount and negotiate evidences of debt, to hold preferred stock acquired as consideration for disposition of a loan portfolio,

Consistent with the OCC precedent discussed above, the Securities at issue here possess characteristics typically associated with debt instruments, rather than common stock. Like a debt instrument, the Securities do not confer voting rights on holders so long as the yield is current and the issuer is not attempting to alter the holders' rights under the instrument. Furthermore, with respect to dividends, stockholders expect variable dividends declared by the issuer's directorate dependent on the corporation's earnings; this stands in contrast to holders of the Securities, who are entitled to quarterly cash payments at a stated rate, like bondholders. The Issuer's obligation to make these quarterly payments accrues regardless of earnings, and is cumulative, like an issuer's obligation under a typical debt instrument. Also, in the event of the Issuer's dissolution, holders of the Securities would hold a sum-certain claim for a share of the Issuer's liquidation proceeds, like a creditor, as opposed to the common stockholders' rights to any residue of such proceeds. The Securities are perpetual, which is a characteristic that, on its own, may be associated with common stock. However, in this instance, the Securities are callable by the Issuer, effectively limiting the holders' expectation of a perpetual income stream and allowing the Issuer to repay its principal obligations under the instrument. In addition, we note the growth of perpetual debt instruments in the markets in recent years.[9] The conversion feature of the Securities is also common in debt instruments, as is already recognized in section 1.6 of Part 1.[10] Section 1.6 addresses a national bank's power to acquire convertible securities, prohibiting such securities when they are convertible at the option of the issuer.[11] Consistent with section 1.6, conversion under the Securities is at the option of the holder.

You also have indicated the Bank seeks to hold the Securities under the "reliable estimates" provisions of section 1.3(i). Section 1.3(i) allows a national bank to acquire a security if the bank concludes, on the basis of estimates that the bank reasonably believes are reliable, that the obligor will be able to satisfy its obligations under the security.[12] The bank also must satisfy

---

because preferred stock was in substance a debt obligation); OCC Interpretive Letter No. 908 (April 23, 2001) (investment in trust preferred securities permissible under national banks' authority to discount and negotiate evidences of debt, because trust preferred securities are debt-like instruments); OCC Conditional Approval No. 331 (Nov. 3, 1999) (dealing in trust preferred securities is functionally equivalent or similar to arranging loan participations). *See also* OCC Interpretive Letter 1030 (May 26, 2005) (structured notes with equity-linked returns more closely resemble debt than equity and were accordingly a permissible investment in accordance with Part 1); OCC Interpretive Letter No. 1027 (preferred shares issued by structured finance vehicle equivalent to participation interests in pooled loans, and accordingly may be acquired by a national bank under its lending authority).

[9] *See, e.g., Capital Markets: European Issuers – Tapping the Asian Market – With Most Central Bank Reserves Globally Now Held in Asia, Demand for AAA Unsecured Bonds, Covered Bonds, and Even Residential MBS Will Likely Increase*, The Banker, May 1, 2006 (Financial Times Business, Ltd.) (describing recent perpetual debt issues by Porsche, Rabobank, and others); East *Meets West – Asia's Hunger for Latin American Perpetual Bonds*, Creditmag, Oct. 1, 2005 (Incisive Media Publications).

[10] 12 C.F.R. § 1.6.

[11] *See, e.g.,* OCC Interpretive Letter No. 930, (march 11, 2002) (fixed-rate bonds convertible to corporate stock); OCC Investment Securities Letter No. 55 (Aug. 5, 1991) (debenture convertible at the option of the issuer permissible up to the time that factual condition precedent to issuer's ability to covert transpires).

[12] 12 C.F.R. § 1.3(i)(1); OCC Interpretive Letter No. 911 (June 4, 2001).

itself that the security may be sold with reasonable promptness at a price that corresponds reasonably to their fair value.[13] You represent the Bank has reached these conclusions with respect to the Securities, and will make the information the Bank relied upon and its analysis available to its Examiner in Charge. The Bank's acquisition of the Securities in accordance with this authority is also subject to the limits in section 1.3(i), under which all securities in a bank's portfolio acquired on the basis of the "reliable estimates" provisions may total no more than 5 percent of the bank's capital and surplus.[14] You represent that even after the acquisition of the Securities, the aggregate par value of securities the Bank holds under section 1.3(i) will not exceed this limit.

Accordingly, in consideration of all the foregoing, and reliance upon the Bank's representations described herein, we conclude that the Bank may acquire the Preferred Securities as investment securities in accordance with section 1.3(i) of the OCC's regulations.

Our conclusion is subject to the condition that the Bank will not exercise the right granted to holders of the Securities to convert the Securities into common stock of the Issuer so long as the Securities are held by the Bank or any subsidiary of the Bank. This condition is a "condition 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. As such, the condition is enforceable under 12 U.S.C. § 1818. Our conclusions herein are also 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.

Sincerely,

signed

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

---

[13] 12 C.F.R. § 1.3(i)(1); OCC Interpretive Letter No. 779 (April 3, 1997).

[14] 12 C.F.R. § 1.3(i)(2).