



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

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

**Conditional Approval #1021
February 2012**

January 11, 2012

Pinchus D. Raice, Esq.
Pryor Cashman LLP
7 Times Square
New York, New York 10036-6569

Re: Preferred Stock Issuance and Capital Increase
The Upstate National Bank -- Charter Number 12018
OCC Control Number: 2011-WO-12-0114

Dear Mr. Raice:

This is in response to your letter dated October 14, 2011, submitted on behalf of The Upstate National Bank (“Bank”), and other communications with the Office of the Comptroller of the Currency (“OCC”). The Bank applied to increase its capital by issuing shares of Series D Preferred Stock to Modern Capital Holdings LLC (“Modern Capital”) for cash. The OCC hereby grants conditional approval for this issuance of preferred stock and the corresponding increase in capital. This approval is granted based on all information available, including commitments and representations made by the Bank and the Bank’s representatives. This approval is also subject to the conditions set out below.

Proposed Stock Issuance

The Series D Preferred Stock is non-voting and non-redeemable. The Bank is restricted from amending the rights and preferences of the Series D Preferred Stock without the consent of the holders of a majority of the outstanding shares of the Series D Preferred Stock.¹ The Series D Preferred Stock may vote on an as-if-converted basis with the common stock and other preferred

¹ Mr. George Karfunkel, one of the controlling shareholders of the Bank, currently holds all of the outstanding and issued Series D Preferred Stock. After the proposed issuance to Modern Capital, he will continue to hold a majority of the Series D Preferred Stock. There are no plans to issue Series D Preferred Stock to any other holder. The other controlling shareholders of the Bank are Howard Zuckerman and The K & Z Company LLC (collectively with Mr. Karfunkel, the “Principal Stockholders”).

classes and may be converted into common stock only after submission of applications and receipt of prior written approval from the OCC and all other necessary regulatory approvals.

After the investment by Modern Capital in the Series D Preferred Stock, Modern Capital will hold no more than 24.9% of the total equity of the Bank, and less than half of the total outstanding shares of Series D Preferred Stock. The investment in Series D Preferred Stock by Modern Capital replaces an earlier proposed investment in Series D Preferred Stock by FNB NY Bancorp, Inc. (“FNB NY”) that was conditionally approved by the OCC by letter dated December 2, 2010. *See* OCC Conditional Approval No. 984 (December 2, 2010). Modern Capital owns and controls FNB NY. Subsequent to the OCC’s December 2, 2010, approval, Modern Capital determined to make the investment in the Series D Preferred Stock directly, rather than through FNB NY.²

Modern Capital executed a Passivity Commitment delivered to the Federal Reserve Board dated April 29, 2011 (the “FRB Passivity Commitment”) pursuant to which Modern Capital agreed not to exercise a controlling influence over the management or policies of the Bank. The FRB Passivity Commitment permits Modern Capital to have not more than one (1) director representative on the Bank’s board of directors. In connection with the Bank’s October 14, 2011, application to the OCC, Modern Capital made a similar Passivity Commitment to the OCC.

The Bank’s Principal Stockholders and Modern Capital entered into a voting agreement, dated July 8, 2011, under which the Principal Stockholders agreed to maintain the size of the Bank’s

² The OCC’s December 2, 2010, approval of the investment by FNB NY is hereby rescinded. Some additional background information may be useful. In an earlier letter dated June 29, 2010, 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 and notified the OCC of the planned issuance of \$500,000 of the Series D Preferred Stock to one of the current controlling principal shareholders of the Bank, Mr. Karfunkel. The Bank also advised the OCC it was in negotiations to issue additional Series D Preferred Stock to Mr. Karfunkel and to FNB NY.

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 would require full OCC review and that the Bank was required to file an application for any increase in permanent capital. By letter dated September 8, 2010, the OCC approved the issuance of the \$500,000 in Series D Preferred Stock to Mr. Karfunkel. *See* OCC Conditional Approval No. 970 (September 8, 2010). The OCC also notified the Bank that an application was no longer required for future increases in permanent capital that arise through issuance of common or preferred stock to Mr. Karfunkel or any of the other current principal stockholders for cash consideration. For such increases, the Bank could use the notification procedure in 12 C.F.R. § 5.46(i)(3). Mr. Karfunkel subsequently purchased additional Series D Preferred Stock. An application continued to be required for any increase in capital arising from issuance of common or preferred stock to any other person, including Modern Capital or FNB NY. The OCC’s September 8, 2010, letter contains additional background.

board of directors at six (6) and to vote in favor of a director nominee designated by Modern Capital.

By your letter of October 14, 2011, the Bank applied for an increase in capital by issuing Series D Preferred Stock to Modern Capital. The OCC hereby approves such issuance of Series D Preferred Stock and increase in capital subject to the following conditions:³

1. The Bank shall immediately notify the OCC if Modern Capital engages in any action, or plans to engage in any action, that is inconsistent with Modern Capital's Passivity Commitment to the OCC.
2. The director nominee designated by Modern Capital may serve on the Bank's board of directors only after the Bank obtains prior supervisory non-objection from the OCC, and such director's background and expertise must be consistent with the Bank's strategy of becoming a profitable community bank that operates in a safe and sound manner in the Rochester, New York area.
3. The Bank shall not alter the provisions in its Articles of Association, or any other documents or terms, governing the Series D Preferred Stock without the prior approval of the OCC.
4. The Bank shall not issue any common or preferred stock, other than the specific issuance of Series D Preferred Stock approved in this letter, to any person (including, but not limited to, (a) Modern Capital, (b) FNBNY, (c) any manager or member of Modern Capital, and (d) any director, officer, or shareholder of FNBNY), other than one or more of the Principal Stockholders, without the prior approval of the OCC.
5. 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 (a) Modern Capital, (b) FNBNY, (c) any manager or member of Modern Capital, and (d) any director, officer, or shareholder of FNBNY, without the prior approval of the OCC.
6. If paragraph (4) of Article VI of the Amended Consent Order is terminated, the Bank thereafter shall not initiate any action that significantly deviates from the most recent Strategic and/or Business Plan that received a written determination of no supervisory objection from the OCC under the Amended Consent Order or make any material change to or a significant deviation in such Strategic and/or

³ The OCC also approves the amendments to the Bank's Articles of Association set forth in the Amended and Restated Articles of Association of The Upstate National Bank included with the October 14, 2011 letter.

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Business Plan unless the Bank has first given the OCC at least sixty (60) days prior written notice of its intent to do so, and obtained the OCC's prior written determination of no supervisory objection to such action.

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. Failure to comply with these conditions may also result in revocation of this approval.

Conclusion

When the Series D Preferred Stock discussed in this letter has been issued to Modern Capital and the capital increase completed, the Bank must notify to OCC under 12 C.F.R. § 5.46(i)(3).

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,

Stephen A. Lybarger

Stephen A. Lybarger
Deputy Comptroller for Licensing