

cc TTB



Thacher Proffitt & Wood LLP
Two World Financial Center
New York, NY 10281
(212) 912-7400

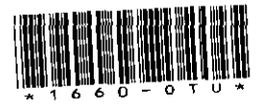
Fax: (212) 912-7751
www.tpw.com

Direct Dial: (212) 912-7436
dmcclintock@tpw.com
Admitted in NY

October 10, 2008

VIA FEDEX AND E-MAIL

Mr. Robert H. Herz
Chairman
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, Connecticut 06856-5116



LETTER OF COMMENT NO. 9

Re: Treatment of ARPS

Dear Mr. Herz:

I am writing on behalf of one of our bank clients ("Bank") regarding a matter we believe is of general concern and one that is within the jurisdiction of the Financial Accounting Standards Board ("FASB"). In light of the current market environment, we believe that applicable accounting standards are being misapplied, or applied in such a conservative fashion, with respect to the treatment of adjustable rate preferred stock ("ARPS") and certain other-than-temporary impairment ("OTTI") write downs and mark-to-market accounting, which is resulting in unintended consequences. In short, in this letter, we are respectfully requesting that, for the reasons set forth below, the FASB consider treating ARPS as debt securities for financial accounting purposes, rather than equity. In a separate letter, we will address our concerns about the severe consequences of requiring other-than-temporary impairment ("OTTI") write downs and mark-to-market accounting for high quality securities that currently have low market prices merely because of the significant turmoil in the market. We are sending courtesy copies of both letters to the Chairman of the Public Company Accounting Oversight Board ("PCAOB"), the Chairman and Chief Accountant of the Securities and Exchange Commission ("SEC") and representatives of the American Bankers Association ("ABA") and the New York Bankers Association ("NYBA"), because of the great concern of the issues described in such letters to the financial industry.

The Bank holds significant investments in investment grade ARPS that are listed on major stock exchanges, and their issuers are very high quality institutions, such as MetLife, Inc., The Goldman Sachs Group, Inc. and Bank of America Corporation, the latter two of which have been deemed sound by the Board of Governors of the Federal Reserve System. The ARPS have not been downgraded below investment grade since their purchase by the Bank. As a policy matter, treating ARPS as equity effectively reduces many banks' capital and capital ratios, including the Bank's, and hence their ability to lend, until the fixed income markets become more normalized, following which the banks' capital would likely readjust back upward.

Earlier this year, we requested that the Federal Deposit Insurance Corporation (“FDIC”) confirm what we believe is a reasonable interpretation of Part 325 of the FDIC’s Rules and Regulations and the Consolidated Reports of Condition and Income for a Bank With Domestic Offices Only – FFIEC 041 (“Call Report”). Such interpretation involved the appropriate treatment of the Bank’s holdings of ARPS, which meet certain investment quality and marketability requirements, as debt rather than equity for purposes of Part 325 and the Call Report. In response, the FDIC noted that it has tied the capital treatment of ARPS to the definitions in the applicable accounting standards, but that the FDIC’s staff would discuss the capital treatment of ARPS with the other bank regulatory agencies and consider whether clarifications or revisions to the treatment of ARPS as equity securities for capital purposes may be warranted in future capital rulemakings.

(a) **Equity-Like Features of ARPS as Compared to TRUPS.**

In contrast to the current treatment of ARPS as equity, trust preferred securities (“TRUPS”) would normally be considered debt securities for financial accounting purposes, even though both TRUPS and ARPS are hybrid instruments possessing characteristics typically associated with debt obligations.

No Stated Maturity or Mandatory Redemption. TRUPS have a stated maturity date and may also be redeemed under other circumstances. In addition, most TRUPS are subject to mandatory redemption upon the repayment of the debentures. In contrast, ARPS generally do not have any explicit stated maturity date or mandatory redemption provisions.

GAAP Treatment. Although TRUPS would normally be considered debt securities for financial accounting purposes, ARPS would normally be considered equity securities for such purposes, even though both TRUPS and ARPS are hybrid instruments possessing characteristics typically associated with debt obligations.

The current definitions of debt and equity included in Statement of Financial Accounting Standards (SFAS) No. 115 indicate that preferred stock which does not have to be redeemed by the issuer and which is not redeemable at the option of the investor does meet the definition of equity. However SFAS No. 115 was issued in May 1993, before ARPS became a common form of instrument, and as such the existing definitions under generally accepted accounting principles (“GAAP”) do not specifically address ARPS. Further, the distinguishing of equity versus liabilities for GAAP purposes is an evolving matter and is the subject of the FASB ongoing project on liabilities and equity.

In November 2007, the FASB stated its preliminary view that the “basic ownership approach” provides more decision-useful information to investors than the current practice while significantly simplifying accounting requirements. Under the basic ownership approach, an instrument would be classified as equity if it (i) is the most subordinate interest in an entity and (ii) entitles the holder to a share of the entity’s net assets after all higher priority claims have been satisfied. Under current practice, perpetual instruments are classified as equity. Under the basic ownership approach certain perpetual instruments, such as preferred shares, would be classified as liabilities.

(b) Debt-Like Features of ARPS as Compared to TRUPS.

Limited Voting Rights. The Office of the Comptroller of the Currency (“OCC”), in OCC Letter No. 781, described certain substantive characteristics that distinguish common stock and debt securities. For example, as the OCC noted, common stock owners typically have broad voting rights, while debt holders ordinarily have very limited voting rights. Debt holders typically have voting rights only in extraordinary circumstances, such as reorganization or default by the issuer. ARPS, similar to debt, generally have no voting rights with respect to matters that generally require the approval of voting stockholders.

Adjustable Interest Rate on Dividends. In OCC Letter No. 781, the OCC also noted that common stock owners typically have an ownership interest in the issuer that offers an opportunity to benefit from appreciation in the market value of the issuer and to earn dividends declared by the directorate based on an issuer’s profits. In contrast, as set forth in OCC Letter No. 781, debt holders typically are entitled to receive periodic payments, which may be fixed or fluctuate as provided in the debt instrument, and principal at maturity. ARPS holders, similar to the money market preferred stock (“MMPS”) holders described in OCC Letter No. 781, generally do not have an opportunity to benefit from appreciation in the market value of the issuer and do not earn dividends declared by the directorate based on the issuer’s profits. Instead, ARPS holders, similar to MMPS holders, are typically entitled to a return determined by a formula established in the governing prospectus. The dividend payments on ARPS, similar to floating rate TRUPS, usually reset quarterly, generally based on three-month LIBOR, and thus are reflective of short term market interest rates as measured by LIBOR. Therefore, investors in ARPS have virtually no interest rate risk, unlike traditional preferred stocks, such as fixed rate perpetual preferred stocks, which have considerable interest rate risk.

Issuer’s Optional Redemption. Generally ARPS are redeemable only at the issuer’s option. The issuer may only exercise such option to redeem after a certain date, which is typically five years from the date of issuance. Similarly, TRUPS generally may not be redeemed during the first five years after the date of issuance, except if certain tax or regulatory capital treatment events occur or if there is a change in the Investment Company Act of 1940, as amended, requiring certain registration under such Act.

Although ARPS do not have a stated maturity date or mandatory redemption, the issuer’s right to redeem the ARPS, coupled with the adjustable rate feature described above, give the issuer substantial control over the ARPS such that the issuer has the option to redeem the ARPS if LIBOR rates increase above a desired level or not to do so if LIBOR rates decrease. In fact, ARPS are callable at the issuer’s option after the no call period. The issuer is very likely to call ARPS whenever current funding rates are lower than the adjustable rate plus the cost and expenses of calling and re-issuing, and thus there is a high probability that the ARPS will have a limited life. For example, based on a study performed by the Bank as of a certain time approximately eight months ago of ARPS with 3-month adjustable rate features (both LIBOR and U.S Treasury index based), issued from 1983 to 2005, the Bank determined that the overwhelming majority, specifically 88%, of such ARPS had been called at the first permissible call date, or relatively soon after the first “par priced” open call opportunity. Although results of any such study might vary over different periods, out of the 43 ARPS in the Bank’s study, which totaled \$9.1 billion, 38 had been called as of the date of the study. Of the five issuances that remained outstanding, one of the issuers, namely Niagara Mohawk, had tendered for 63% of the issuance, and the other four issuers may not have tendered

because their respective issuances have structurally non-standard and obsolete repricing mechanisms. Furthermore, all of the six issuances of fixed/adjustable rate preferred stocks (i.e., typically fixed rate for the first five years, then adjustable rate in perpetuity) that were held by the Bank in 2001, all of which were included in the study, were called after five or six years, once the rate became adjustable. Accordingly, from the issuer's standpoint, once the non-call period expires, the ARPS are like short-term debt. If the ARPS are short term debt from the issuer's standpoint and are likely to be called by the issuer when market conditions are favorable, then from the investor's perspective, they arguably should be considered debt as well.

Thus, as described above, while preferred stocks, such as ARPS, clearly do not have a stated maturity date or mandatory redemption, in fact, as market conditions change, it is very likely that preferred stocks will be redeemed within three to five years after the no call period expires. We believe, therefore, that preferred stocks functionally have a maturity date, and coupled with the ability to sell such stocks on an exchange, ARPS should be considered debt rather than equity.

The dividend rates on traditional preferred stock do not adjust based upon an outside market index, such as LIBOR, and generally cannot be called on notice after five years. Such control is typically associated with debt instruments, such as short term commercial paper, and make ARPS more similar to debt rather than equity. Furthermore, in OCC Letter No. 781, the OCC in describing debt-like characteristics of MMPS stated that although MMPS do not have a maturity date, they may be viewed as similar to a series of fixed maturity instruments because of the process for resetting the dividend rates every 49 days. The FDIC treats MMPS and ARPS similarly, other than that in the case of MMPS the dividend rate generally resets every 49 days, as described in OCC Letter No. 781, while in the case of ARPS the dividend rate generally resets quarterly. Therefore, ARPS, like MMPS, may be viewed as a series of fixed maturity instruments. In addition, the FDIC has characterized ARPS as "essentially a substitute for money market investments such as commercial paper." Commercial paper is, of course, debt.

Furthermore, ARPS that are actively traded on national security exchanges, permit the investor to readily sell ARPS providing liquidity and effectively making them debt-like – not because there is an explicit maturity date, but because the investor can sell the securities on short notice. ARPS should be distinguished from auction rate preferred securities which have to be auctioned periodically and auctions can fail. Generally, ARPS simply adjust interest rates based upon an accepted market index, such as LIBOR, and there is no auction requirement and the adjustment cannot fail as in the case of auction certificates.

Structure. Some ARPS, similar to TRUPS, have a two-tiered structure. For example, in some cases, ARPS represent fractional interests in shares of the preferred stock in the form of depositary shares. The shares of the preferred stock represented by depositary shares are deposited under a deposit agreement among the depositary and the holders from time to time of the depositary receipts evidencing the depositary shares. Subject to the terms of the deposit agreement, each holder of a depositary shares is entitled, through the depositary, in proportion to the applicable fraction of a share of the preferred stock represented by such depositary share, to all the rights and preferences of the applicable preferred stock (including dividend, voting, redemption and liquidation rights).

Tax Treatment. TRUPS and ARPS are generally treated differently for income tax purposes in that interest on TRUPS is generally deductible by the issuer and fully taxable to the investor, while dividends on ARPS are not deductible by the issuer and such amounts are eligible for dividends received deductions to the corporate investor.

Accordingly, we respectfully request that, in light of current market conditions, the FASB expedite its review of whether ARPS may be treated as debt securities for financial accounting purposes, rather than equity, and make its determination of such review effective as soon as possible, preferably prior to the end of 2008, if not earlier.

Please call me at (212) 912-7436 or Sabrina Minchella at (212) 912-7652 if you have any questions or there is additional information that you would require in connection with your review of the foregoing. We are also available to discuss the foregoing in further detail at your convenience. Thank you.

Sincerely,

Douglas J. McClintock
by sm

Douglas J. McClintock

cc: Mr. Mark W. Olson, Chairman, PCAOB
Mr. Christopher Cox, Chairman, SEC
Mr. Conrad Hewitt, Chief Accountant, SEC
Mr. Edward L. Yingling, President, ABA
Ms. Diane Casey-Landry, Chief Operating Officer, ABA
Mr. Michael P. Smith, President and Chief Executive Officer, NYBA
Ms. Roberta Kotkin, General Counsel and Chief Operating Officer, NYBA
Ms. Doreen R. Eberley, Regional Director, FDIC