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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

November 3, 2009

**Interpretive Letter #1124**  
**December 2009**

James S. Keller  
Chief Regulatory Counsel  
The PNC Financial Services Group, Inc.  
One PNC Plaza  
249 Fifth Avenue, 21st Floor  
Pittsburgh, PA 15222-2707

Subject: Purchase of Auction Rate Securities

Dear Mr. Keller:

This is in response to your request to confirm the authority of PNC Bank, N.A. (“Bank”) to purchase and hold for its own account shares of auction rate securities (“ARS”). The Bank’s proposed acquisitions include: (1) municipal ARS, (2) student loan ARS, and (3) auction rate preferred securities (“ARPS”), as described below. For the following reasons, and subject to the representations and conditions set forth herein, the OCC hereby confirms that the Bank may purchase the ARS.<sup>1</sup>

The PNC Financial Services Group, Inc., (the “Holding Company”) has acquired National City Bank (“NCB”). NCB is now merging into the Bank. The ARS are currently held by a broker-dealer subsidiary of the Holding Company, NatCity Investments, Inc. (“NCI”). As part of the corporate restructuring, NCI will merge into the Bank’s broker-dealer subsidiary. In order to better manage the ARS portfolio and associated liquidity, funding, and capital requirements, the ARS would be transferred to the Bank prior to the merger of NCI and the Bank’s broker-dealer subsidiary.<sup>2</sup> The ARS are highly rated, current on payments, not low quality assets, and the

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<sup>1</sup> These facts are based upon the Bank’s representations.

<sup>2</sup> The Bank represents that its proposed purchases of the ARS 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 securities, *i.e.*, approximately \$[ ]. 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 it will not purchase any low quality assets.

Holding Company will enter into an indemnification/repurchase agreement with the Bank, in which it agrees to purchase the ARS from the Bank and to cover certain losses and expenses that the Bank, including any of its subsidiaries, may incur as a result of its acquisition of the ARS.

## **Discussion**

### Municipal ARS

The Bank seeks to purchase the municipal ARS at issue as Type I securities. A Type I security includes municipal bonds if the national bank is well capitalized.<sup>3</sup> The Bank may purchase and hold these securities as Type I securities without investment limitation if the Bank is well capitalized and the municipal ARS qualify as “municipal bonds” under 12 C.F.R. § 1.2(g). The Bank is well-capitalized. Moreover, the Bank represents that the municipal ARS are for healthcare, airport, educational, pollution control and energy facilities, and qualify as municipal bonds. Thus, the Bank may purchase the municipal ARS as Type I securities in concentrations that are consistent with safe and sound banking practices.<sup>4</sup>

### Student Loan ARS

The Bank represents that the student loan ARS qualify as Type III securities. Type III securities are investment securities that do not qualify as Type I, II, IV, or V securities. Type III securities must meet the quality and marketability standards set forth in 12 C.F.R. § 1.2(e). The Bank represents that the securities are rated investment grade and thus meet the quality requirements for a Type III security. The Bank also represents the securities were either sold under SEC Rule 144 or registered under the Securities Act of 1933 and thus are marketable. Accordingly, the Bank may acquire concentrations of student loan ARS that fall within the 10 percent investment limit for Type III securities.<sup>5</sup>

### ARPS

The Bank proposes to acquire 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.”<sup>6</sup> OCC regulations define the term “investment security” as “a marketable debt obligation that is not predominantly speculative in nature.”<sup>7</sup>

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<sup>3</sup> See 12 C.F.R. § 1.2(j)(4).

<sup>4</sup> See 12 C.F.R. §§ 1.2(g), 1.2(j)(4), 1.3(a) and 1.5. Type I securities are not subject to an investment limit under Part 1.

<sup>5</sup> See 12 C.F.R. §§ 12(l), 1.3(c) and 1.5.

<sup>6</sup> 12 U.S.C. § 24(Seventh).

<sup>7</sup> See 12 C.F.R. § 1.1(e).

The Bank represents that the ARPS possess many characteristics commonly associated with debt obligations that qualify as Type III investment securities (*i.e.*, the ARPS pay a fixed yield based on a rate or index not under the control of the issuer or purchaser, have limited voting rights, and rank senior to common stock in the event of liquidation, and are cumulative). In addition, the Bank represents that the ARPS are rated investment grade and meet the quality standards for Type III investment securities. The Bank also states that the securities are registered under the Securities Act of 1933, and therefore marketable under Part 1.

Unlike debt obligations, however, the ARPS are perpetual, rather than limited in life. Recently, however, in OCC Interpretive Letter No. 1115 (April 3, 2009), the OCC permitted a national bank operating subsidiary to acquire ARPS from an affiliate that possessed many characteristics of debt, but like common stock, had broad voting rights and were perpetual.<sup>8</sup> The OCC permitted the holdings based on certain representations and “conditions imposed in writing” under 12 U.S.C. § 1818 that limited the operating subsidiary’s voting rights and required the bank and the holding company to enter into an indemnification/repurchase agreement, which required the holding company to purchase the ARPS by a set date, effectively limiting the term of the ARPS.

Similarly, as a condition for the OCC finding that the ARS are permissible holdings for the Bank here, the Bank shall 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 purchase the ARS from the Bank, no later than November 1, 2011, as enforceable § 1818 conditions. Under these circumstances, the Bank 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 the Bank may acquire the ARS as investment securities in accordance with 12 C.F.R. Part 1.

The Bank’s acquisition of the ARS is subject to the following enforceable conditions:

- 1) Prior to the acquisition of the ARS, 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 the Bank’s ARS acquisition.

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<sup>8</sup> 12 U.S.C. § 24 (Seventh). An operating subsidiary may engage in activities to the same extent as a national bank may engage in these activities. *See* 12 C.F.R. § 5.34(e)(3) (“An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank.”)

- 2) Under the indemnification/repurchase agreement, the Holding Company shall agree to cover certain losses and expenses that the Bank, including any of its subsidiaries, may incur as a result of its acquisition of the ARS and shall also agree to repurchase all of the ARS, no later than November 1, 2011.<sup>9</sup>
- 3) 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, 12 U.S.C. § 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, Acting Assistant Director, or Yuna Peng, Senior Attorney, at (202) 874-5210.

Sincerely,

*signed*

Julie L. Williams  
First Senior Deputy Comptroller and Chief Counsel

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<sup>9</sup> Pursuant to the indemnification/repurchase agreement, the Holding Company will immediately repurchase from the Bank, at the original purchase price plus any accrued but unpaid interest, any ARS that become low-quality assets for the purposes of the Federal Reserve Board's Regulation W, 12 C.F.R. § 223.3(v).