



Mark Connolly
Director

State of New Hampshire

Department of State Bureau of Securities Regulation

107 North Main Street, State House Rm. 204
Concord, NH 03301-4989
Telephone: (603) 271-1463
Fax: (603) 271-7933

2/14/2008

William Mayer, Esq.
Goodwin Proctor, LLP
Exchange Place
Boston, MA 02109

Re: Optima Bank & Trust Company ("Optima")

Dear Mr. Mayer;

Reference is made to your letters dated 1/16/2008 and 1/22/2008 in which you make several legal arguments in response to the New Hampshire Bureau of Securities Regulation ("Bureau") securities inquiry into Optima's 2007 subscription offering and you request that no enforcement action be taken. Your letters were reviewed by our staff along with the various attachments consisting of documents related to Optima's 2007 offering of common stock and the various bank filings made with the New Hampshire Bank Commissioner ("NHBC"), New Hampshire Secretary of State ("NHSS"), New Hampshire Board of Trust Company Incorporation ("BTCI"), and the Federal Deposit Insurance Corporation ("FDIC"). Specifically, Optima claims that once Optima had filed with the NHSS it was an "organized" bank under New Hampshire bank law RSA 392 and securities law RSA 421-B:17, I(c) and thus subscriptions issued as part of the 2007 offering by Optima did not and do not require registration with the Bureau. Further, you argue that Optima once organized distributed subscriptions which were not "pre-organization subscriptions" and thus not securities under RSA 421-B:2, XX, and that "issuing" securities as stated in the definition of "issuer-dealer" in RSA 421-B:2, XIII-a did not take place.

In responding to your letters some history of the treatment of the legal issues by the Bureau raised in the exchange between the Bureau and Optima is warranted. Up until 2006, the Bureau required that securities issued by banks in organization be registered or exempt from registration. The Bureau's position was that the securities issued by banks in organization were not exempt under RSA 421-B:17, I(c) because they were not banks by definition. See RSA 384-B:1. The Bureau's position was that banks in organization that were not fully chartered and finally approved by the NHBC, BTCI and FDIC were not banks as defined by RSA 421-B:17, I(c) since they were not under the full supervision and audit functions of bank regulators. However, consistent with the position of the Securities and Exchange Commission ("SEC")¹, in 2006 the Bureau issued a no action letter in Bank of Cape Cod which changed the Bureau's position. In essence, the Bureau took the position that where a bank in organization had undergone conditional

¹ From the late 1970's to the late 1980's, the SEC issued a series of no action letters all basically indicating that securities issued by banks in organization can take the exemption under Section 3(a)(2) of the Securities Act of 1933 so long as certain conditions are met. After the late 1980's, the SEC simply stopped issuing no action letters since it was by that time an established SEC position. Many states have likewise followed suit. For example the State of Massachusetts allows banks in organization to take the bank exemption.

approvals of the NHBC, BTCI and FDIC, and where investor money was placed in escrow and not subject to the risk of loss, sufficient safeguards for investors were in place and no action was warranted, however, such offerings would still require issuer-dealer licensing. The Optima request would require that the Bureau expand its no action position to the issuer-dealer licensing requirement. Optima argues that the issuer-dealer requirements are not applicable to the Optima 2007 offering even though New Hampshire banks are specifically not exempt from issue-dealer licensure under RSA 421-B:6.

The purpose of the issuer-dealer licensing process is four fold. First, a back ground check process is put in place to ensure that agents of the bank in organization offering and selling the securities are of proper character. Second, the issuer-dealer process allows the Bureau to review securities offerings. Third, the issuer-dealer license allows the Bureau to audit the entity holding the license for compliance with securities laws and regulations. Fourth, issuer-dealers are required to file audited financial statements with the Bureau annually and to renew their licenses.

In reviewing Optima's no action request it has become apparent to the Bureau staff that the protections afforded by the issuer-dealer process are essentially covered by banking regulation. First and foremost, the issuer-dealer requirement only applies to New Hampshire banks and New Hampshire banks in formation. Most bank entities in New Hampshire are out-of-state banks. Second, when a New Hampshire bank in formation applies for a charter, New Hampshire banking law establishes a full array of requirements and protections. The BTCI is a charter review board made up of the bank commissioner, state treasurer, deputy treasurer, attorney general and the secretary of state. The bank commissioner is charged with examining among other things the back ground of the promoters, directors and mangers of the organizing entity. The secretary of state is a member of the BTCI oversight and review board. Further, the securities offering to capitalize the bank is reviewed and inspected and the bank will not receive its final approvals unless all conditions are complied with including that the bank raise the necessary capital to engage in banking business. Moreover, capital raised by banks in organization must be placed in escrow and said funds cannot be released unless final approval for the bank is granted. Further, the bank commissioner may review, "any other factor, as the commissioner may determine." RSA 392:5. Finally, once the bank has its approvals and charter, bank examiners regularly audit the bank for safety and soundness.

Therefore, the Bureau will not recommend enforcement action if the Bank offers and sells the securities identified by your request in New Hampshire without compliance with the registration and issuer-dealer licensing provisions of RSA 421-B. This position is based on the fact that Optima has undergone conditional approvals by the bank regulators, is under the review and regulation of the banking authorities, and that the investor funds have been placed in escrow and are not subjected to the risk of loss.² Different facts or conditions might require a different conclusion. This position, therefore, cannot be used as precedence for other, apparently similar, situations, and banks in formation must file their offerings with the Bureau for review prior to commencement of the offer in New Hampshire. Moreover, the position stated herein has no effect on the Bureau's ability to take action when there is fraud in the offer, purchase or sale of any security.

The Bureau cannot and does not give legal opinions, advice or conclusions, so this response merely expresses the Bureau's position on enforcement action and does not express a legal conclusion on the questions and issues presented by Optima. The staff's position is applicable only so long as the transaction proceeds exactly as set out in your letters. Further, this reply should not be interpreted as the Bureau's ruling on the accuracy or completeness of the information submitted.

² Optima received its final approvals by bank regulators on 1/29/2008, and therefore, the escrow funds have been released.

Optima may withdraw its Regulation D and issuer-dealer filings made on 1/23/2008.

Sincerely,



Jeffrey Spill
Deputy Director

cc:file

Abigail Shaine, Esq.