



Interpretive Letter #1176 January 2021

OCC Chief Counsel's Interpretation on National Trust Banks

January 11, 2021

This letter addresses the authority of the Office of the Comptroller of the Currency (OCC) to charter national banks within the scope of 12 U.S.C. § 27(a). As discussed in detail below, 12 U.S.C. § 27(a) recognizes the authority of the OCC to charter a bank that limits its operations to *those of a trust company and activities related thereto*. Activities of a trust company include activities permissible for a state trust bank or company¹ even if those state authorized activities are not necessarily considered fiduciary in nature under 12 U.S.C. § 92a and 12 C.F.R. Part 9. This letter also discusses the standards the OCC considers when assessing whether an activity is conducted in a fiduciary capacity, and the implications for chartering de novo institutions and approving the conversion of state institutions, along with the permissibility of certain activities for existing national banks that do not have fiduciary powers.

I. General Discussion: Chartering, Fiduciary Capacity, and the Business of Banking

As noted below, the ability of national banks to engage in activities in a fiduciary capacity is governed by 12 U.S.C. § 92a and 12 C.F.R. Part 9. Under these provisions, fiduciary capacity includes the enumerated activities or roles listed in the statute and regulations as well as any other capacity that the OCC authorizes pursuant to 12 U.S.C. § 92a, including those fiduciary capacities specifically recognized under state law. The provisions regarding trust banks in 12 U.S.C. § 27(a) and the fiduciary capacity authority in 12 U.S.C. § 92a are related in the sense that a national bank that limits its activities to those of a trust company typically performs at least some of its activities in a fiduciary capacity, which may include a fiduciary capacity permitted under 12 U.S.C. § 92a. Accordingly, as discussed in detail below, a national bank chartered under 12 U.S.C. § 27(a) is not limited to fiduciary activities as defined for purposes of 12 C.F.R. Part 9 and may engage in any permissible activities of a trust company.

¹ In this letter, the terms “state trust bank” and “state trust company” are used interchangeably.

A. Chartering Authority

The OCC's authority to charter national banks is found in the National Bank Act, 12 U.S.C. §§ 21-27. The last sentence of 12 U.S.C. § 27(a) specifically addresses the chartering of trust banks by providing that:

A National Bank Association, to which the Comptroller of the Currency has heretofore issued or hereafter issues such certificate, is not illegally constituted solely because its operations are or have been required by the Comptroller of the Currency to be limited to *those of a trust company and activities related thereto*.

Congress added this provision to clarify and confirm that the OCC, under its general chartering authority, has the power to charter a national bank that limits its activities to those of a trust company and activities related to the same.² The statute does not define what constitutes a "trust company" under 12 U.S.C. § 27(a) and there is no "trust company" specifically authorized under federal law outside of 12 U.S.C. § 27(a). At the time of the enactment of 12 U.S.C. § 27(a), however, many banks had trust departments to provide customers with dedicated trust and other related services. Likewise, state law permitted the operation of state trust companies and trust banks to provide similar dedicated trust and related services.³ In the absence of other textual and statutory guidance, the phrase "trust company" contained in 12 U.S.C. § 27(a) has been construed to refer to and include the activities of trust departments of banks as well as the activities of trust companies and trust banks authorized under the laws of the various states.

The activities of a trust company, trust bank, or trust department of a bank typically include performing fiduciary activities as defined by federal or state law, as well as other activities that are non-fiduciary in nature, such as non-fiduciary custody. Therefore, under 12 U.S.C. § 27(a), a national bank is not illegally constituted because it limits its operations to such activities.

B. Fiduciary Capacity Authority

Twelve U.S.C. 92a provides the authority for the OCC to permit national banks to engage in activities in which the bank will be acting in a fiduciary capacity. Specifically, 12 U.S.C. § 92a(a) provides:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or in any other fiduciary capacity in

² See *Nat'l State Bank of Elizabeth, N. J. v. Smith*, 591 F.2d 223, 231 (3d Cir. 1979) (noting that the last sentence in 12 U.S.C. § 27(a) "validates retroactively as well as prospectively the action of the Comptroller in limiting to the business of a trust company the operation of a national banking association to which he has granted a certificate of authority to commence business").

³ *Id.*

which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

The OCC has implemented 12 U.S.C. § 92a in 12 C.F.R. Part 9. Twelve C.F.R. Part 9 applies to national banks that act in a “fiduciary capacity.” Twelve C.F.R. § 9.2(e) defines “fiduciary capacity” to include the activities listed in 12 U.S.C. § 92a(a) along with the following additional activities:

- transfer agent (which is akin to a registrar of stock and bonds);
- custodian under a uniform gifts to minors act (which is a type of guardian of estate);
- investment adviser, if the bank receives a fee for its investment advice;
- any capacity in which the bank possesses investment discretion on behalf of another; and
- any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. § 92a.

1. Enumerated Fiduciary Capacities

As noted above, 12 U.S.C. § 92a and 12 C.F.R. Part 9 enumerate specific roles or functions of banks that are regarded as being performed in a fiduciary capacity. A bank that engages in any of the enumerated roles or functions is doing so in a fiduciary capacity and is subject to the requirements of 12 C.F.R. Part 9.

There is no *de minimis* rule regarding national banks’ use of trust powers. A national bank that only performs one fiduciary capacity under 12 U.S.C § 92a would need trust powers. Conversely, there is also no requirement that a national trust bank chartered under 12 U.S.C. § 27(a) perform primarily in a fiduciary capacity.

2. Fiduciary Capacity Under State Law

As noted above, under 12 U.S.C. § 92a, fiduciary capacity may also include “any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.” This is the so-called “bootstrap” provision of 12 U.S.C. § 92a.

For the OCC to use the bootstrap provision and determine that a state fiduciary capacity—i.e., an activity, role, or function that a state’s law regards as being performed in a fiduciary capacity—is a fiduciary capacity for purposes of 12 U.S.C § 92a, the OCC must determine that a national bank is engaging in the relevant activity, role, or function consistent with the parameters provided for in the relevant state law to the same extent as a state bank to qualify as a fiduciary capacity. Thus, under the bootstrap provision, a bank performing in a fiduciary capacity for purposes of state law and operating consistent with the parameters provided for in relevant state laws and regulations may be deemed to be performing in a

fiduciary capacity for purposes of 12 U.S.C. § 92a and subject to 12 C.F.R. Part 9.⁴ Conversely, a bank is not engaging in a fiduciary capacity for purposes of the bootstrap provision of 12 U.S.C. § 92a or 12 C.F.R. Part 9 when the bank is engaging in an activity, role, or function inconsistent with the parameters provided for in the relevant state law for a fiduciary capacity.⁵

This is consistent both with the plain language of 12 U.S.C. § 92a, as well as the principles upon which the National Bank Act is based, which frequently turns on permissibility under the law of the state in which the national bank is located.⁶

3. *Any Other Similar Capacity the OCC authorizes pursuant to 12 U.S.C. § 92a.*

As noted above, 12 C.F.R. § 9.2(e) defines “fiduciary capacity” to include “any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. § 92a.”⁷

In determining whether an activity is performed in “any other similar capacity,” the OCC considers the substantive conduct of the bank in performing the activity, and whether it is analogous to the enumerated capacities in 12 U.S.C. § 92a and 12 C.F.R. Part 9.⁸ Specifically, the OCC looks to the exemplar fiduciary roles of trustee and investment advisor and considers (1) whether the activity involves the exercise of discretion on behalf of a client

⁴ If the OCC recognizes a capacity that is a fiduciary capacity under applicable state law as a “fiduciary capacity” under 12 U.S.C. § 92a, then the recognized capacity will be a fiduciary capacity subject to the implementing regulations of 12 C.F.R. Part 9. The particular provisions of 12 C.F.R. Part 9 that are relevant to the activity will depend on the nature of the activity.

⁵ This reasoning can be contrasted with OCC Interpretive Letter No. 265, reprinted in [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCP) ¶ 85,429 (July 14, 1983), which concluded that the OCC will only look to state law to determine whether a fiduciary capacity of national bank is permissible after the activity is determined to be “fiduciary” within the meaning of 12 U.S.C. § 92a. To the extent that Interpretive Letter No. 265 conflicts with this decision, it is superseded.

⁶ There are numerous examples of this. Under 12 U.S.C. § 85, a national bank generally may charge the interest rate permitted by the state in which it is located, and under 12 U.S.C. § 36, a national bank may establish new branches to the extent that a state bank could establish a new branch under the law of that state. As a result, national banks based in different states may be subject to different interest rate caps or branching laws. The fact that a capacity may be considered fiduciary under one state’s laws is not a grant of authority for banks located in a different state that does not define such a capacity as fiduciary to act in a fiduciary capacity.

⁷ The language “any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a” in 12 C.F.R. § 9.2(e) is a catch-all term that covers the broad grant of statutory authority given to the OCC to recognize other fiduciary capacities not specifically enumerated (e.g., only generally referred to) in the statute. See *Fiduciary Activities of National Banks; Rules of Practice and Procedure*, 60 Fed. Reg. 66163, 66164 (Dec. 21, 1995) (describing the language “any other similar capacity” as “a catch-all category”).

⁸ See “Asset Management” booklet of the *Comptroller’s Handbook* 8-9 (Dec. 2000) (defining “fiduciary capacity” and noting that national banks acting in a fiduciary capacity are subject to specific standards of care and prudence); see also *Black’s Law Dictionary* 235 (9th ed. 2009) (defining “capacity” as “[t]he role in which one performs an act”).

or third party in a manner that would have an economic impact on the client or third party, and (2) whether, in carrying out the discretionary activities, the bank is subject to the duties or standards of behavior that are customarily associated with being a fiduciary. These fiduciary standards and duties are high standards of conduct that generally require the fiduciary to act with utmost care and in the best interest of the client.⁹ A fiduciary satisfies these obligations by, for example, acting with utmost loyalty with respect to the client and the client's assets and making sure that decisions are prudently undertaken after consideration of pros and cons of the particular action.

Under 12 C.F.R. Part 9, national banks acting in a fiduciary capacity are subject to specific standards, including adopting and following appropriate policies and procedures, conducting appropriate reviews, maintaining appropriate records, and arranging for suitable audits.

C. *Business of Banking*

Under 12 U.S.C. § 24(Seventh), national banks may engage in the business of banking and activities incidental to the business of banking.¹⁰ When determining whether an activity is part of the business of banking, the OCC considers the following factors under 12 C.F.R. § 7.5001(c)(1):

- Whether the activity is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;
- Whether the activity strengthens the bank by benefiting its customers or its business;
- Whether the activity involves risks similar in nature to those already assumed by banks; and

⁹ Among the common duties of a fiduciary are: duty of loyalty (acting in good faith, protecting the interest of the client, and taking no action in favor of the fiduciary that would impair the interest of the client); duty of care or prudence (exercising reasonable care, skill, and caution in performing activities); duty to segregate funds (keeping client assets distinct from other assets, including those of the fiduciary); duty to safeguard (protecting client assets from damage, loss, or destruction); duty to invest (acting as a prudent investor bearing the purpose and interest of the client mind); and duty of accounting (providing full and fair disclosure and keeping records of receipts, expenses, sales, purchases, exchanges and/or distributions to account for the fiduciary's activities on behalf of the client). *See* Restatement (Third) of Trusts §§ 76-83 (2007). *See also Bogert's The Law of Trusts and Trustees* § 543. *See also* the U.S. Securities and Exchange Commission regulation regarding the fiduciary duties of investment advisors, requiring, inter alia, the fiduciary to at "all times, serve the best interest of its client and not subordinate its client's interest to its own," and to "eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested." 17 C.F.R. Part 276, IA-5248, "Comm'n Interpretation Regarding Standard of Conduct for Inv. Advisers" (June 5, 2019) pp. 8, 23.

¹⁰ Twelve C.F.R. § 7.5001(d) provides the OCC may find an activity is permissible because it is incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for national banks or to an activity that is otherwise part of the business of banking. *See also* OCC Interpretive Letter No. 940 (May 24, 2002).

- Whether the activity is authorized for state-chartered banks.¹¹

Given this fourth factor, “Whether the activity is authorized for state-chartered banks,” an activity permitted for state trust banks may be part of the business of banking under the authority of 12 U.S.C. § 24(Seventh) for national banks if the activity is authorized for state-chartered banks, and the OCC is satisfied that the remaining three factors are also sufficiently met.

II. De Novo Chartering of National Banks that Limit Their Activities to Those of a Trust Company and Activities Related Thereto

As noted above, under 12 U.S.C. §§ 21-27, the OCC may charter a national bank that limits its activities to those of a trust company and activities related thereto. A national trust bank may be permitted to engage in any and all activities permitted under state law for a state trust company located in the same state under the plain terms of 12 U.S.C. § 27(a).

Moreover, a national trust bank may also engage in activities beyond those authorized under state law for a state trust company provided such activities are permitted for a national bank under other sources of authority such as 12 U.S.C. §§ 24(Seventh) or 92a, as discussed above.¹²

In addition to being legally permissible, the activities of a national trust bank must be conducted in a safe and sound manner and in compliance with applicable law and regulations, including those relating to the Bank Secrecy Act, anti-money laundering, Office of Foreign Assets Control requirements, and consumer protection.

III. Charter Conversions

As discussed above, the chartering provisions in 12 U.S.C. §§ 21-27 provide the authority for all national bank charters. In the case of conversions, 12 U.S.C. § 35 provides additional provisions regarding conversions of state banks into national banks with respect to legacy activities. Typically, the legacy activities of a converting state trust bank will be permissible for a national trust bank under 12 U.S.C. § 24(Seventh), which includes activities permitted within the business of banking, 12 U.S.C. § 27(a), which includes all legacy activities that are allowed to the converting state trust company under state law, or 12 U.S.C. § 92a, which includes activities the OCC determines are conducted in a fiduciary capacity.

In the event a legacy activity of a converting state trust bank is not permissible under the foregoing statutes, however, 12 U.S.C. § 35 also recognizes that in some cases a

¹¹ When considering the four business of banking factors described in section 7.5001(c)(1), the OCC has the discretion to vary the weight given to each factor. *See* 12 C.F.R. § 7.5001(c)(2) (“The weight accorded each factor set out in paragraph (c)(1) of this section depends on the facts and circumstances of each case.”).

¹² An activity may be permissible for a national trust bank under multiple sources of authority, and a bank need not rely on all sources of authority to engage in any one activity.

converting bank may have assets that are not permissible for national banks generally under applicable federal law and provides that in connection with such a conversion:

The Comptroller of the Currency may, in his discretion and subject to such conditions as he may prescribe, permit such converting bank to retain and carry at a value determined by the Comptroller such of the assets of such converting bank as do not conform to the legal requirements relative to assets acquired and held by national banking associations.

The text of the statute itself does not place any temporal limits on the retention of nonconforming assets, and the OCC may exercise discretion in permitting the retention of certain nonconforming assets.¹³ The OCC has typically required divestiture or conformity of non-conforming assets within a reasonable time period, typically two years.¹⁴

IV. New Activities in an Existing Bank Without Fiduciary Powers

National banks without fiduciary powers may also engage in certain activities of state trust banks that are not considered fiduciary in nature under 12 U.S.C. § 92a. If the state trust bank powers are permissible for national banks under 12 U.S.C. § 24(Seventh), based on the test outlined above, and are not fiduciary for purposes of 12 U.S.C. § 92a and 12 C.F.R. Part 9, any national bank can engage in those state trust bank activities without fiduciary powers and without being subject to 12 C.F.R. Part 9.

National banks seeking guidance on whether a new activity would be subject to 12 C.F.R. Part 9 should speak with examination staff who may seek further guidance from Asset Management Policy and the Law Department.¹⁵

¹³ See Corporate Decision No. 95-55 (Nov. 15, 1995). The OCC relied on 12 U.S.C. § 35 to allow a state bank converting to a national bank to permanently retain its ownership interest in two nonconforming insurance subsidiaries. The legal basis for the decision was fully explained in OCC Interpretive Letter 757 (Apr. 1, 1996). When the OCC's decision regarding the insurance subsidiaries was challenged in *American Council of Life Insurance v. Ludwig*, 1 F. Supp. 2d 24, 29 (D.D.C. 1998) *vacated and remanded*, 194 F.3d 173 (D.C. Cir. 1999), the U.S. District Court for the District of Columbia held that the OCC correctly interpreted 12 U.S.C. § 35 when it allowed the converting bank to permanently retain the nonconforming insurance subsidiaries. While that portion of the District Court's decision was ultimately vacated and remanded on appeal by the D.C. Circuit, it was only done so on mootness grounds because the OCC ordered the divestiture of the two insurance subsidiaries when it approved a subsequent merger of the bank with and into another national bank. See OCC Conditional Approval No. 288 (Sept. 30, 1998).

¹⁴ See "Conversions to Federal Charter" booklet of the *Comptroller's Licensing Manual* 14 (Oct. 2019) ("The OCC may give a converting depository institution a reasonable period of time, generally not to exceed two years after conversion, to divest or conform any nonconforming assets or activities, including nonconforming subsidiaries, not being permanently retained. A reasonable period is given so that the converting depository institution may take the necessary action without undue hardship.").

¹⁵ Similarly, current national charters with fiduciary powers should continue to apply 12 C.F.R. Part 9 to their current activities as they have done in the past.

/s/

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