



# RESCINDED

OCC 2001-33

**Subject: Fiduciary Activities of National Banks**  
**Date: July 6, 2001**

**To: Chief Executive Officers of All National  
Banks, Federal Branches and Agencies,  
Department and Division Heads, and All  
Examining Personnel**

**Description: Final Rule**

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The purpose of the rulemaking is to provide clarity and certainty for national banks' multi-state fiduciary activities.; As provided for in the final rule, a national bank authorized to engage in fiduciary activities may act in a fiduciary capacity in any state that permits its own in-state fiduciaries to act in that capacity, including at trust offices. In addition, a national bank that acts in a fiduciary capacity in one state may market its fiduciary services to, solicit business from, and act as fiduciary for customers located in other states. This rulemaking codifies conclusions reached by the OCC in three previously issued Interpretive Letters.

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**Related Links**

- [Fiduciary Activities](#)

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**SUPPLEMENTARY INFORMATION:** On December 5, 2000, the OCC published a notice of proposed rulemaking (NPRM) in the **Federal Register** (65 FR 75872) to amend 12 CFR part 9 to add provisions addressing the application of 12 U.S.C. 92a in the context of a national bank engaging in fiduciary activities in more than one state. The purpose of the rulemaking was to provide clarity and certainty for national banks' multi-state fiduciary activities. The standards contained in the NPRM reflected positions taken in three earlier OCC Interpretive Letters.<sup>1</sup> Interpretive Letter No. 695 found that a national bank authorized to engage in fiduciary activities may act in a fiduciary capacity in any state that permits its own in-state fiduciaries to act in that capacity, including at trust offices. Interpretive Letters Nos. 866 and 872 clarified that a national bank that acts in a fiduciary capacity in one state may market its fiduciary services to customers in other states, solicit business from them, and act as fiduciary for customers located in other states. The NPRM and the final rule are based upon the detailed analysis contained in these Interpretive Letters.

Along with the NPRM, we also published an advance notice of proposed rulemaking (ANPR) inviting comments on whether the OCC should establish uniform national standards for the conduct of fiduciary activities by national banks. The ANPR invited comments on whether uniform standards of care generally applicable to national bank trustees' administration of private trusts and investment of private trust property should be established.

We received comments on both the NPRM and the ANPR. As discussed further below, comments on the NPRM predominantly were favorable. Comments on the ANPR were more mixed, raising a significant number of issues that will require additional analysis before any determination is made concerning how to proceed. Rather than delay addressing the issues covered by the OCC interpretations, we are issuing this final rule, which covers only the matters included in the NPRM, and are reserving a decision whether to proceed with a proposal to establish

uniform fiduciary standards pending completion of our analysis of the issues raised by the commenters.

The OCC received 25 comments on the NPRM. These comments included 4 from state bank supervisors' offices, 1 from a state bank supervisors' organization, 6 from banking trade associations, 13 from banks and bank holding companies, and 1 from a law firm. Most of the commenters supported the proposed changes, although several offered additional suggestions for changes. The state bank supervisors disagreed with the proposal and expressed concern about the effect the rule would have on the application of state laws to national banks engaged in fiduciary activities.

For the reasons discussed below, we have adopted the provisions of the NPRM substantially as proposed, but have made a number of changes in response to the comments received to clarify certain provisions.

### Description of Proposal, Comments Received, and Final Rule

#### Definitions (Revised § 9.2)

Proposed § 9.2 defined "trust office" and "trust representative office" in §§ 9.2(j) and (k), respectively. A "trust office" was defined as an office of a national bank, other than a main office or a branch, at which the bank acts in a fiduciary capacity. A "trust representative office" was defined as an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not act in a fiduciary capacity.

The final rule modifies the definition of trust office to clarify that it includes all offices where the bank engages in one or more of the key fiduciary activities specified in § 9.7(d)—*i.e.*, accepting the fiduciary appointment, executing the documents that create the fiduciary relationship, or making discretionary decisions regarding the investment or distribution of fiduciary assets. The definition in the proposal focused on where the bank acted in a fiduciary capacity (where the key fiduciary activities were performed) and implicitly assumed that all of the key fiduciary activities would be performed in one state for each fiduciary relationship (so that "acting in a fiduciary capacity" and performing the key activities were the same). However, as discussed in detail below in connection with § 9.7(d), in some instances, the key activities may be performed at offices in different states for some fiduciary relationships. In those instances, as provided in § 9.7(d)

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Parts 5 and 9

[Docket No. 01-14]

RIN 1557-AB79

### Fiduciary Activities of National Banks

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is publishing its final rule regarding the authority and standards for national banks to conduct multi-state trust operations. The purpose of these changes is to provide enhanced guidance to national banks engaging in fiduciary activities.

**EFFECTIVE DATE:** August 1, 2001.

**FOR FURTHER INFORMATION CONTACT:** Lisa Lintecum, Director, or Joel Miller, Senior Advisor, Asset Management, (202) 874-4447; Richard Cleva, Senior Counsel, Bank Activities and Structure Division, (202) 874-5300; Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090; or William Dehnke, Assistant

<sup>1</sup> OCC Interpretive Letter No. 872 (Oct. 28, 1999) reprinted in [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶181-366 (IL 872); OCC Interpretive Letter No. 866 (Oct. 8, 1999) reprinted in [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶181-360 (IL 866); and OCC Interpretive Letter No. 695 (Dec. 8, 1995), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-010 (IL 695).

a bank must determine one state in which it acts in a fiduciary capacity for purposes of 12 U.S.C. 92a. That means that there will remain other offices in other states in which the bank performs key fiduciary activities that, under the definition in the proposal, would not have been considered to be trust offices. However, our intention was that because each of these key activities is significant standing alone, all offices in which a bank engages in *any* of the key fiduciary activities should be considered to be trust offices. Therefore, the final rule clarifies the definition of "trust office" to be an office of a national bank, other than a main office or a branch, at which the national bank engages in one or more of the activities specified in § 9.7(d). A corresponding change has been made to § 9.2(k). A "trust representative office" is defined as an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not engage in any of the activities specified in § 9.7(d).

Section 9.2(k) of the proposal listed the following examples of ancillary activities: advertising, marketing, and soliciting for fiduciary business; contacting existing or potential customers, answering questions, and providing information about matters related to their accounts; acting as a liaison between the trust office and the customer (*e.g.*, forwarding requests for distribution or changes in investment objectives, or forwarding forms and funds received from the customer); or simply inspecting or maintaining custody of fiduciary assets.

A number of commenters suggested that various activities be added to the list of examples of ancillary activities. The list of ancillary activities set forth in § 9.2(k) is illustrative only, however, and not all-inclusive. While the OCC considers many of the suggested activities to be ancillary activities, we have not included most of them in the text of the final rule because the list set out in the definition is not intended to be comprehensive. A national bank may therefore identify additional activities as ancillary without seeking the express concurrence of the OCC. To make this clear, we have added to the text of the final rule an express statement that the items on the list are illustrative and that other activities may also be "ancillary" for the purposes of the definition.<sup>2</sup>

<sup>2</sup>Classifying activities as "ancillary" in §§ 9.2(j) and (k) is meant only to assist in the determination of the state in which the bank is acting in a fiduciary capacity for section 92a purposes. Only the key fiduciary activities in § 9.7(d) are relevant for determining that state: *all* other activities are

Two commenters urged that holding title to real property in any state be added to the list of ancillary activities in § 9.2(k), because some state laws attempt to prohibit out-of-state entities from taking title to real property without a state license or other authorization. Because this appears to be a specific issue warranting clarification, we have added holding title to real estate to the list of ancillary activities in § 9.2(k). The statutory authority for national banks to exercise fiduciary powers, 12 U.S.C. 92a, does not subject the exercise of a national bank's fiduciary powers to restrictions or preconditions, such as licensing requirements, under state law. State laws prohibiting out-of-state national banks from taking title to real property have such an effect. For these reasons, and because we believe that this activity is consistent with national banks' exercise of their fiduciary powers, we have added holding title to real property to the list of ancillary activities in the final rule.<sup>3</sup> Consistent with this change, we also have added language to § 9.7(b) to clarify that while acting in a fiduciary capacity in one state, a bank may act as fiduciary for relationships that include property located in other states.

As we stated in the NPRM, neither a trust office nor a trust representative office is a branch for purposes of the McFadden Act, 12 U.S.C. 36, which governs the location of national bank branches. In order to be considered a branch under the McFadden Act, a bank facility must perform at least one of the core branching functions of receiving deposits, paying checks, or lending money. 12 U.S.C. 36(j). The locational limitations of 12 U.S.C. 36 are not intended to reach all activities in which national banks are authorized to engage, but only core branching functions. *See Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) (considering securities brokerage powers) (*Clarke*). Proposed §§ 9.2(j) and (k) therefore stated that a trust office or a trust representative office is not a branch unless it is also an office at

"ancillary" for this purpose. This classification does not affect the importance of such activities or change in any way a bank's fiduciary duty with respect to such activities.

<sup>3</sup>This is consistent with the Office of Thrift Supervision's (OTS) position under its parallel statute. *See* OTS Chief Counsel Opinion (August 8, 1996), *reprinted in* [1996–1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶83–102 (OTS August 1996 Opinion) (holding title to real property as trustee in a state would not cause a federal savings association to be located in that state because the activity is incidental and not discretionary).

which deposits are received, or checks paid, or money lent.<sup>4</sup>

Several state bank supervisors disagreed with the OCC's conclusion that fiduciary activities are not core branching functions and stated their belief that trust offices should be considered to be branches. They assert that the *Clarke* case held only that discount brokerage activities are not core branching functions and should not be read to conclude that any other activities are not core branching functions.

The OCC has carefully considered these comments, but remains of the view that fiduciary activities under section 92a do not constitute core branching functions and that a national bank office that provides only fiduciary services would not be subject to the McFadden Act. In *Clarke*, the Supreme Court held that the McFadden Act's locational limits do not reach all activities in which national banks engage. This conclusion in the *Clarke* case is reinforced by the recent decision in *First National Bank of McCook, Nebraska v. Fulkerson, et al.*, Civil Action No. 98–D–1024, slip op. (D.C. Co. March 7, 2000), where the court held that the combination of a deposit production office, a loan production office, and an ATM do not constitute a branch because no core branching functions are performed.<sup>5</sup>

Finally, the second sentence in current § 9.2(g) provides that the extent of fiduciary powers is the same for out-of-state national banks as in-state national banks. We proposed to remove this sentence as unnecessary in light of new § 9.7, which sets forth the rules concerning multi-state fiduciary operations. We received no comments on this proposed change, and have adopted it as proposed.

<sup>4</sup>This final rule is consistent with the limitation, found in 12 U.S.C. 93a, which states that the general rulemaking authority vested in the OCC by that section "does not apply to section 36 of [Title 12 of the United States Code]." This limitation simply makes clear that section 93a does not expand whatever authority the OCC has pursuant to other statutes to adopt regulations affecting national bank branching. Congress clearly contemplated that the OCC would implement section 36, as is evidenced by the repeated references to obtaining the OCC's approval throughout that section (*see, e.g.*, paragraphs (b)(1), (b)(2), (c), (g), and (i) of section 36). It would be illogical to conclude that the OCC, in implementing the provisions requiring national banks to obtain the OCC's prior approval under the sections cited, cannot interpret what the terms of the statute mean or that the interpretation must be made on a case-by-case basis. This rulemaking simply clarifies a situation that falls outside the branching restrictions imposed by section 36.

<sup>5</sup>*See also Bank One, Utah v. Guttau*, 190 F. 3d 844 (8th Cir. 1999) (ATMs are excluded from the definition of "branch").

*Approval Requirements (revised § 9.3)*

Current § 9.3(a) provides that “[a] national bank may not exercise fiduciary powers unless it obtains prior approval from the OCC to the extent required under 12 CFR 5.26.” Section 5.26(e)(5) currently provides that a national bank that has obtained the OCC’s approval to exercise fiduciary powers does not need to obtain further approval to “commence fiduciary activities” in a state in addition to the state(s) described in the application for which it received OCC approval to exercise fiduciary powers. Instead, the bank is required only to provide written notice to the OCC within ten days after commencing fiduciary activities in a new state.

Under the proposal, a bank that has received OCC approval to exercise fiduciary powers does not need prior OCC approval each time it seeks to act in a fiduciary capacity in a new state or to conduct activities in a new state that are ancillary to its fiduciary business. Proposed paragraph (b) also directs the bank to follow the notice procedures in § 5.26(e)(5) (discussed below) in order to emphasize that revised § 9.3(b) is consistent with § 5.26(e)(5) and is not intended to impose any additional or different procedures on national banks. Current paragraph (b), which addresses the procedures for organizing a limited purpose trust bank, would be redesignated as paragraph (c).

We received one comment on this proposed change, suggesting that we clarify in § 9.3(b) that marketing and soliciting fiduciary business are included in ancillary activities. Because this is made clear in § 9.2(k), it is unnecessary to repeat it in this provision. The final rule has, however, been changed to reflect the modified definition of “trust office” in § 9.2(j). Consistent with § 5.26(e)(5) of the final rule, this provision now states that a national bank granted fiduciary powers by the OCC is not required to obtain the OCC’s prior approval to engage in any of the activities specified in § 9.7(d) in a new state or to conduct ancillary fiduciary activities in a new state.

*Multi-State Fiduciary Operations (New § 9.7)*

The statutory authority for national banks to exercise fiduciary powers is contained in 12 U.S.C. 92a(a) and (b). In IL 872, IL 866, and IL 695, the OCC considered how the language of section 92a would be applied in an interstate context.

Under section 92a, national banks may exercise fiduciary powers with OCC approval. Section 92a(a) states:

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, committee of estates of lunatics, or in 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.* (Emphasis added).

Section 92a(b) clarifies that, whenever state law permits state banks, trust companies, or other corporations that compete with national banks (State Fiduciaries) to exercise any of the fiduciary powers in section 92a(a), a national bank’s exercise of those powers is deemed not to be in contravention of State or local law under section 92a.

Thus, “when not in contravention of State or local law” (the Contravention Clause), a national bank may act in any of the fiduciary capacities specified in section 92a(a). This statutory grant of authority does not limit where a national bank may act in a fiduciary capacity. Nor does it require that the customers for whom the bank may act or the property involved in the fiduciary relationship be located in the same state as the bank. A bank is free to act in a fiduciary capacity in more than one state.

The Contravention Clause in section 92a(a) requires that a national bank look to the laws of the state in which it acts, or proposes to act, in a fiduciary capacity to determine what fiduciary capacities are permissible.<sup>6</sup> The state in which the bank acts in a fiduciary capacity for each existing or proposed fiduciary relationship is the state in which the bank performs the key fiduciary activities of accepting fiduciary appointments, executing documents that create the fiduciary relationship, or making decisions regarding the investment or distribution of fiduciary assets. This state is also the state referred to in other provisions in section 92a that refer to state law

<sup>6</sup> The last phrase in paragraph (a) of section 92a refers to the state in which the national bank is “located.” The primary reference to a state is in the Contravention Clause regarding the right to act in fiduciary capacities (the language emphasized above). That language was in the statute originally, before the phrase using the term “located” was added. Thus, we believe that the reference to the state in which a bank is located refers to the state in which the bank is acting in a fiduciary capacity. We note that the OTS construes its parallel statute in a similar way. The OTS concludes that a federal savings association may exercise fiduciary powers permitted for state fiduciaries in the states in which it is located, but it is “located” for this purpose in the state in which it performs key fiduciary functions. See, e.g., OTS August 1996 Opinion.

(subsections 92a(b), (c), (f), (g) and (i)) (the Section 92a State).

Section 9.7 of the proposed rule reflected this interpretation of section 92a. In paragraph (a) of proposed § 9.7, we stated that a national bank may act in a fiduciary capacity in any state. Proposed § 9.7(a) went on to state that if a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in any of the eight fiduciary capacities expressly listed in section 92a(a) unless the state affirmatively prohibits that capacity for its own State Fiduciaries as well as any other capacity a state permits for its own State Fiduciaries. This authority exists even if the state purports to restrict it for national banks. If state law is silent with respect to one (or more) of the eight capacities listed in section 92a(a), then that capacity is not in contravention of state law and a national bank may act in that capacity.

These conclusions, along with a more complete explanation of their underlying reasons, were stated in IL 695 and IL 872. As previously noted, the proposal intended to reflect the conclusions reached in those letters and is based on the reasoning stated therein.

Most of the comments on proposed § 9.7(a) supported its adoption. Of these, several requested that we clarify that the question of where a national bank is located for purposes of section 92a is a question of federal law. Comments from several state bank supervisors objected to proposed § 9.7(a), on the grounds that it would permit national banks a competitive advantage by being able to expand their fiduciary activities into states notwithstanding state limits on who may act as fiduciary. These commenters maintained that section 92a preserves for each state the right to establish such limits. They also suggested that the determination of which state’s laws govern the permissible capacities should be resolved by whether a national bank has its main office or a branch located in that state.

As set out above, we believe that section 92a imposes no limitations on where a bank may act in a fiduciary capacity. Under the Contravention Clause, a state may not prohibit or restrict national banks (including out-of-state national banks) from acting in a fiduciary capacity in the state in any manner, unless it also limits its own State Fiduciaries.

Moreover, we disagree that “location” for purposes of section 92a is appropriately determined by the presence of a main office or bank branch. As previously discussed, the Contravention Clause of section 92a

requires that a bank look to the laws of the state in which it acts in one or more fiduciary capacities in order to determine the limits on those capacities.

For the reasons discussed above, we have adopted proposed § 9.7(a) as proposed, making only stylistic changes to improve the readability of this provision.

Once the state in which a national bank is acting in a fiduciary capacity is identified, the fiduciary services may be offered regardless of where the fiduciary customers reside or where property that is being administered is located. This point was incorporated in proposed § 9.7(b), which provided that a national bank may market its services to customers in other states and solicit business from them. It also may establish and use a trust representative office for these purposes. Accordingly, a state may not prohibit or restrict out-of-state national banks from marketing to, or performing fiduciary functions for, customers in that state. Such state laws are not within the powers reserved to the states by section 92a, and so they cannot prohibit or restrict a national bank's exercise of its federally granted powers.<sup>7</sup> These conclusions are consistent with the conclusions set out in IL 866 and IL 872.<sup>8</sup>

A few commenters asked that we clarify that § 9.7(b) does not require a national bank to establish a trust representative office in order to market its fiduciary services to, or act as a fiduciary for, customers in any state. We agree that a bank need not establish a trust representative office; the reference to trust representative offices was intended solely to illustrate one option available to national banks who seek to market their fiduciary services. The final rule, like the proposal, states that a national bank "may" use a trust representative office to market its fiduciary services to and act as a fiduciary for customers in any state, indicating that use of a trust

representative office is discretionary. As noted earlier, we also have added language to § 9.7(b) to clarify that while acting in a fiduciary capacity in one state, a bank may act as fiduciary for relationships that include property located in other states.

As previously discussed, section 92a imposes no geographic limit on where a bank may act in a fiduciary capacity. Similarly, there is no geographic limit on where a bank may offer services that are incidental to acting in a fiduciary capacity. Accordingly, proposed § 9.7(c) reflected the conclusions stated in the Interpretive Letters that a national bank with fiduciary powers may establish a trust office or trust representative office in any state. We received no comments on proposed § 9.7(c) as such, and we have adopted it as proposed.

Proposed § 9.7(d) clarified how national banks may determine the state in which they are acting in a fiduciary capacity. In IL 866 and IL 872, we concluded that a national bank is deemed to be "acting in a fiduciary capacity" for purposes of section 92a in the state in which the bank performs the key fiduciary functions of executing the documents that create the fiduciary relationship, accepting the fiduciary appointment, and making decisions regarding the investment or distribution of fiduciary assets. As proposed, § 9.7(d) incorporated this position and further provided that, if with respect to a particular fiduciary relationship these key fiduciary activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity will be the state that the bank and customer designate from among those states. We specifically invited comment on ways to simplify the determination of where a bank with multi-state operations is acting in a fiduciary capacity.

We received several comments relating to the determination of where a bank acts in a fiduciary capacity when the key fiduciary activities take place in more than one state. One commenter asked us to clarify whether it was our intent to have the choice of law clause in the trust's governing instrument be used to designate where the bank acted in a fiduciary capacity. Similarly, two commenters suggested that we look to the governing instrument to make the determination. A few commenters suggested that, where the designation could not be made by the governing instrument or the customer has not or cannot otherwise make the designation, the bank be permitted to do so alone. A few commenters also noted the importance of the meaning of the term "customer," noting that if defined too

broadly, it could be quite burdensome for a bank to consult with customers to make the designation.

We agree with those commenters who pointed out the potential problems, in situations where a bank performs the key fiduciary activities in more than one state, of requiring a bank to obtain customer agreement concerning the state in which the bank will be deemed to be acting in a fiduciary capacity. For instance, a bank could be forced to obtain the agreement of many different people residing in several different locations. To avoid these problems, we have revised § 9.7(d) to provide that a bank performing the key fiduciary activities in more than one state for any particular fiduciary relationship may designate from among these states which state's laws are made applicable by operation of section 92a for that relationship. We have also made some minor changes intended to improve the readability of § 9.7(d), including a change in its heading.

Many of the commenters indicated some confusion over the significance of the determination of the Section 92a State. Section 92a directs the application of state law for purposes of determining a national bank's permissible fiduciary capacities (referred to in sections 92a(a) and (b)); for purposes of setting certain operational requirements for national banks as corporate fiduciaries (referred to in sections 92a(f), (g) & (i)); and for purposes of granting state banking authorities limited access to OCC examination reports relating to national bank trust departments (referred to in section 92a(c)). Proposed § 9.7(d) provided a means to identify which state's laws apply for purposes of section 92a when a bank is conducting multi-state fiduciary activities. As discussed more fully below, this determination is separate from the selection of the substantive law that governs matters affecting the exercise of the fiduciary appointment, such as standards of care.

Proposed § 9.7(e) provided a direct statement of how state law applies to a national bank engaging in fiduciary activities. As set out in the proposal, the state laws that apply to a national bank's fiduciary activities by operation of section 92a are the laws of the state in which the bank acts in a fiduciary capacity.

Two commenters suggested that we clarify that state laws may not impose operational requirements on national banks that engage only in limited trust operations. In both IL 866 and IL 872 we stated that section 92a does not "condition the exercise of fiduciary

<sup>7</sup> See, e.g., *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996).

<sup>8</sup> The OTS has reached the same conclusions under its parallel statute. See, e.g., OTS August 1996 Opinion (federal savings association will not be deemed located in a state where its only trust-related activities are marketing its trust services and performing incidental duties pursuant to its appointment as testamentary trustee or trustee holding real estate; and federal law would preempt state laws that prohibit or restrict an out-of-state federal thrift from engaging in these activities in the state); OTS Chief Counsel Opinion No. 94/CC-13 (June 13, 1994), reprinted in [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,814 (trust marketing and referral activities at affiliate's offices does not make federal savings association located at those offices; state laws that prohibit or restrict an out-of-state federal thrift from engaging in these activities in the state are preempted).

powers on compliance with state laws that purport to impose licensing or operating requirements on national banks.”<sup>9</sup> This point is incorporated in § 9.7(e)(2) of the final rule, which provides that, with the exception of those state laws specifically referenced in section 92a, national banks’ exercise of fiduciary powers is not subject to restrictions or preconditions under state law. Such restrictions and preconditions include, but are not limited to, state licensing requirements. This principle applies to the fiduciary activities of full service national banks as well as national banks that engage only in limited trust operations.

Section 9.7(e) does not affect the applicability of state substantive laws that govern the fiduciary relationship, such as the standard of care to be exercised by the fiduciary, or ability of a grantor to designate which state’s laws govern the trust itself. A grantor is free to designate which state laws apply for all other purposes or to have the applicable law determined by choice-of-law rules. For example, if the bank acting in a fiduciary capacity in State A is trustee for a trust whose grantor and beneficiaries are located in State B and the trust, by its terms, is governed by the laws of State C, then the laws of State C will govern the administration of the trust. The choice of law clause in a trust instrument does not, however, determine where a bank is acting in a fiduciary capacity or the laws that apply by operation of section 92a. That determination is a matter of federal law pursuant to section 92a. It cannot be altered by agreement of the parties.

Several state bank supervisors objected to the conclusion that a national bank is not subject to state laws that restrict the activities of out-of-state fiduciaries. However, as discussed above, the Contravention Clause in section 92a only serves to limit national banks from engaging in fiduciary capacities that are not permitted for State Fiduciaries but does not otherwise limit a national bank’s ability to exercise its federal authority in any state. State laws that are outside the ambit of the Contravention Clause, and so not authorized by Congress to apply to national banks, may not restrict or interfere with the exercise of permissible federal power. *See, e.g., Barnett Bank, supra.*

The state supervisors also pointed to discussion in earlier OCC interpretive letters, in particular IL 525, that suggested that all aspects of state law governing state fiduciary institutions applied to national banks. However, IL

525 was concerned primarily with the substantive fiduciary standards that would apply to national banks in certain trust contexts. As noted above, the substantive law governing a trust is a different matter than the law made applicable to national banks by operation of section 92a. Moreover, the discussion of state law in IL 525 did not involve an interstate situation and was focused on the issue of the substantive fiduciary law governing the fiduciary appointment. The OCC’s analysis of the application of section 92a in the interstate context, including the manner in which it incorporates state law, is clearly set forth in ILs 872, 866, and 695, the NPRM, and this final rule. Any contrary implications in IL 525 do not represent the position of the agency.

#### *Deposit of Securities with State Authorities (Revised § 9.14)*

Under section 92a(f) and current § 9.14 of our regulations, a national bank must comply with state laws that require corporations that act in a fiduciary capacity to deposit securities with state authorities for the protection of private or court trusts. The proposal made a technical amendment to § 9.14 to conform to the terminology used in proposed § 9.7. The proposal replaced the phrase “administers trust assets” in paragraph (b) of that section with the phrase “acts in a fiduciary capacity.” No substantive change was intended by this amendment.

The proposal also added a second sentence to § 9.14(b) to clarify how a bank that conducts fiduciary operations on a multi-state basis pursuant to proposed § 9.7 should compute the amount of deposit required by a state law that requires a deposit of securities on a basis other than assets (such as an amount equal to a percentage of capital). Pursuant to the proposal, in such a state, the bank may compute the amount of deposit required on a pro-rated basis, according to the proportion of fiduciary assets for which the bank is acting in a fiduciary capacity at offices located in that state.

A few commenters requested clarification of how the rule would apply to them, suggesting that sample calculations be included in the regulation. We believe that specific questions are better addressed by consultation with agency staff or in interpretive letters. Accordingly, we are adopting the proposal for this section without change.

#### *Fiduciary Powers (Revised § 5.26)*

Consistent with the proposed changes discussed above, we also proposed an amendment to 12 CFR 5.26(e) to clarify

that a national bank that plans to act in a fiduciary capacity in a state in addition to the state described in the application for fiduciary powers that the OCC has approved need only give notice of commencing to act in a fiduciary capacity in a new state. The proposal would revise current § 5.26(e)(5) so that it reflects the distinction between acting in a fiduciary capacity and conducting activities ancillary to the bank’s fiduciary business. The ten-day, after-the-fact notice requirement would apply only to acting in a fiduciary capacity.

The final rule has been changed to reflect the modified definition of “trust office” in § 9.2(j). This provision now states that no application is required when a national bank with fiduciary powers plans to engage in any of the fiduciary activities specified in § 9.7(d) or conduct ancillary activities in a new state. The final rule provides that, instead, the ten-day, after-the-fact notice to the OCC is required when a bank begins to engage in any of the key fiduciary activities specified in § 9.7(d) in a new state.

We received six comments requesting that we clarify that there is no need for prior approval or subsequent notice for establishing trust representative offices. As discussed above, a national bank that has received OCC approval to exercise fiduciary powers does not need to make any further application to the OCC when it plans to engage in any of the fiduciary activities specified in § 9.7(d) or conduct ancillary activities in a new state, but does need to provide notice to OCC within 10 days after it begins to engage in any of the fiduciary activities specified in § 9.7(d) in a new state. Since engaging in ancillary activities does not constitute engaging in any of the key fiduciary activities specified in § 9.7(d), and since only ancillary activities are undertaken at a trust representative office, a national bank is not required to get prior approval or give subsequent notice in order to establish a trust representative office. We have added a new sentence to clarify this point in the final rule.

#### **Regulatory Flexibility Act**

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this

<sup>9</sup> See IL 866 p. 9; IL 872 p. 10.

rulemaking will not have a significant economic impact on a substantial number of small entities. The final rule codifies case law and OCC interpretations, but adds no new requirements. Accordingly, a regulatory flexibility analysis is not needed.

#### Executive Order 12866

The OCC has determined that this final rulemaking is not a significant regulatory action under Executive Order 12866.

#### Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. For the reasons outlined above, the OCC has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed any regulatory alternatives.

#### Executive Order 13132

Executive Order 13132 requires Federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has Federalism implications. Under the Order, a regulation has Federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." In the case of a regulation that has Federalism implications and that preempts State law, the Order imposes certain consultation requirements with State and local officials; requires publication in the preamble of a Federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted to us by State and local officials. By the terms of the Order, these requirements apply to

the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation.

In our proposal relating to this final rule, we noted that certain provisions in the proposal may have Federalism implications, as that term is used in the Order, or may be found by a Federal court to preempt State law. The concern regarding Federalism was primarily directed to the advance notice, according to which the OCC proposed to establish uniform federal standards governing fiduciary activities that would be generally applicable to national bank trustees' administration of private trusts and investment of private trust property. A discussion of the Federalism issues arising from any uniform federal standard of fiduciary activities will be provided in any subsequent rulemaking document on that issue.

This final rule contains provisions that determine which States' laws apply to a national bank for purposes of 12 U.S.C. 92a, a Federal law. The determination of which State's rules apply for purposes of section 92a is governed, for the reasons set out above, by a determination of the State in which a national bank is acting in a fiduciary capacity. Once that determination is made, then, by operation of section 92a, other States' laws governing the operation of a national bank's fiduciary activities do not apply.

We note that there has been consultation with State officials on the issues addressed herein, both through this rulemaking and through other documents published in the **Federal Register** on which comment was invited. See 60 FR 66163 (December 21, 1995), 61 FR 68543 (December 30, 1996), 62 FR 19172 (April 18, 1997), and 62 FR 19173 (April 18, 1997). As discussed in this preamble, we received and considered a number of comments from states, and will make them available to the Director of the OMB.

#### List of Subjects

##### 12 CFR Part 5

Administrative practice and procedure, National banks, Reporting and recordkeeping requirements, Securities.

##### 12 CFR Part 9

Estates, Investments, National banks, Reporting and recordkeeping requirements, Trusts and trustees.

#### Authority and Issuance

For the reasons set forth in the preamble, parts 5 and 9 of chapter I of

title 12 of the Code of Federal Regulations are amended as follows:

### PART 5—RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES

1. The authority citation for part 5 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 93a; and section 5136A of the Revised Statutes (12 U.S.C. 24a).

#### Subpart B—Initial Activities

2. Paragraph (e)(5) of § 5.26 is revised to read as follows:

#### § 5.26 Fiduciary powers.

\* \* \* \* \*

(e) \* \* \*

(5) *Notice of fiduciary activities in additional states.* No further application under this section is required when a national bank with existing OCC approval to exercise fiduciary powers plans to engage in any of the activities specified in § 9.7(d) of this chapter or to conduct activities ancillary to its fiduciary business, in a state in addition to the state described in the application for fiduciary powers that the OCC has approved. Instead, unless the bank provides notice through other means (such as a merger application), the bank shall provide written notice to the OCC no later than ten days after it begins to engage in any of the activities specified in § 9.7(d) of this chapter in the new state. The written notice must identify the new state or states involved, identify the fiduciary activities to be conducted, and describe the extent to which the activities differ materially from the fiduciary activities that the bank was previously authorized to conduct. No notice is required if the bank is conducting only activities ancillary to its fiduciary business through a trust representative office or otherwise.

\* \* \* \* \*

### PART 9—FIDUCIARY ACTIVITIES OF NATIONAL BANKS

1. The authority citation for part 9 continues to read as follows:

**Authority:** 12 U.S.C. 24 (Seventh), 92a, and 93a; 15 U.S.C. 78q, 78q-1, and 78w.

2. § 9.2 is amended by removing the second sentence in paragraph (g) and adding new paragraphs (j) and (k) as follows:

#### § 9.2 Definitions.

\* \* \* \* \*

(j) *Trust office* means an office of a national bank, other than a main office or a branch, at which the bank engages in one or more of the activities specified

in § 9.7(d). Pursuant to 12 U.S.C. 36(j), a trust office is not a "branch" for purposes of 12 U.S.C. 36, unless it is also an office at which deposits are received, or checks paid, or money lent.

(k) *Trust representative office* means an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not engage in any of the activities specified in § 9.7(d). Examples of ancillary activities include advertising, marketing, and soliciting for fiduciary business; contacting existing or potential customers, answering questions, and providing information about matters related to their accounts; acting as a liaison between the trust office and the customer (e.g., forwarding requests for distribution or changes in investment objectives, or forwarding forms and funds received from the customer); inspecting or maintaining custody of fiduciary assets or holding title to real property. This list is illustrative and not comprehensive. Other activities may also be "ancillary activities" for the purposes of this definition. Pursuant to 12 U.S.C. 36(j), a trust representative office is not a "branch" for purposes of 12 U.S.C. 36, unless it is also an office at which deposits are received, or checks paid, or money lent.

3. § 9.3 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

**§ 9.3 Approval requirements.**

\* \* \* \* \*

(b) A national bank that has obtained the OCC's approval to exercise fiduciary powers is not required to obtain the OCC's prior approval to engage in any of the activities specified in § 9.7(d) in a new state or to conduct, in a new state, activities that are ancillary to its fiduciary business. Instead, the national bank must follow the notice procedures prescribed by 12 CFR 5.26(e).

(c) A person seeking approval to organize a special-purpose national bank limited to fiduciary powers shall file an application with the OCC pursuant to 12 CFR 5.20.

4. A new § 9.7 is added to read as follows:

**§ 9.7 Multi-state fiduciary operations.**

(a) *Acting in a fiduciary capacity in more than one state.* Pursuant to 12 U.S.C. 92a and this section, a national bank may act in a fiduciary capacity in any state. If a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in the following specific capacities:

(1) Any of the eight fiduciary capacities expressly listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and

(2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.

(b) *Serving customers in other states.* While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state, and it may act as fiduciary for relationships that include property located in other states. The bank may use a trust representative office for this purpose.

(c) *Offices in more than one state.* A national bank with fiduciary powers may establish trust offices or trust representative offices in any state.

(d) *Determination of the state referred to in 12 U.S.C. 92a.* For each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship. A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.

(e) *Application of state law.* (1) *State laws used in section 92a.* The state laws that apply to a national bank's fiduciary activities by virtue of 12 U.S.C. 92a are the laws of the state in which the bank acts in a fiduciary capacity.

(2) *Other state laws.* Except for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks.

5. Section 9.14(b) is revised to read as follows:

**§ 9.14 Deposit of securities with state authorities**

\* \* \* \* \*

(b) *Acting in a fiduciary capacity in more than one state.* If a national bank acts in a fiduciary capacity in more than one state, the bank may compute the amount of securities that are required to be deposited for each state on the basis

of the amount of assets for which the bank is acting in a fiduciary capacity at offices located in that state. If state law requires a deposit of securities on a basis other than assets (e.g., a requirement to deposit a fixed amount or an amount equal to a percentage of capital), the bank may compute the amount of deposit required in that state on a pro-rated basis, according to the proportion of fiduciary assets for which the bank is acting in a fiduciary capacity at offices located in that state.

Dated: June 21, 2001.

**John D. Hawke, Jr.,**

*Comptroller of the Currency.*

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