



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

June 22, 2004

Interpretive Letter #995
July 2004
12 USC 92a

Subject: Fiduciary Powers of [*NB*]

Dear []:

By letter dated January 30, 2004, you have requested, on behalf of [*NB*] (the "Bank"), confirmation of certain aspects of the Bank's fiduciary powers. This letter responds to the Bank's request.

Background

Your letter represents that the Bank wishes to implement a national fiduciary program to market, advertise, solicit, and deliver its trust and fiduciary services throughout the U.S., including in those states where it does not have a branch. The Bank may establish a full-service trust office or trust representative office in one or more of these states. In states where the Bank believes it can develop a market for its fiduciary services, it intends to engage in the following activities, with respect to individuals and institutions (corporate as well as public): review and execute documents creating the fiduciary relationship; administer, manage, and distribute fiduciary assets in accordance with the law of the situs or law designated in the trust agreements; provide investment advice; make decisions regarding the investment and distribution of fiduciary assets; and reflect situs of trust assets state-by-state on its trust systems while holding such assets at one or more central locations. In addition, pursuant to the program, the Bank will conduct other marketing and solicitation activities in all states.

As set out below, we confirm that the Bank has the authority to implement the national fiduciary program described herein. We also confirm that any state law, other than a law made applicable by 12 U.S.C. § 92a, that limits or establishes preconditions on the exercise of the fiduciary powers that are to be exercised as part of that program is not applicable to the Bank.

Analysis

1. *As a national bank that has been granted fiduciary powers by the OCC, the Bank is authorized under the federal banking laws to (i) act in any and all fiduciary capacities and (ii) exercise any and all fiduciary powers in any state in which it acts, or proposes to act, in a fiduciary capacity, to the same extent granted under applicable state laws to state fiduciaries that come into competition with national banks in such state.*

The Bank's fiduciary powers are governed by federal law and derive from 12 U.S.C. § 92a and Part 9 of the OCC's regulations. Section 92a permits national banks to exercise fiduciary powers with OCC approval,¹ and directs that the types of fiduciary powers available to a national bank are determined by reference to state law. Section 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, 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.

Section 92a(b) provides that whenever state law permits state fiduciaries to exercise any of the eight fiduciary powers set forth in Section 92a(a), a national bank's exercise of those powers is deemed not to be "in contravention of State or local law."

Thus, a national bank looks to state law to determine which fiduciary capacities are permissible. For this purpose, the relevant law is the law of the state in which the national bank is located, which the OCC has interpreted to mean the state in which the national bank acts in a fiduciary capacity.²

Part 9 of the OCC's regulations clarifies that the state in which a bank acts in a fiduciary capacity for any given 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.³ For each fiduciary relationship, a national bank will refer to only one state's laws for purposes of defining the extent of its fiduciary powers pursuant to Section 92a. The Bank would

¹ See 12 C.F.R. § 5.26 (licensing requirements for fiduciary powers).

² 12 C.F.R. § 9.7(d).

³ *Id.* 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 designates from among those states.

look to the laws of that state to determine which fiduciary capacities it may engage in, and may then engage in any of these capacities for customers both in that state and in other states. The fiduciary capacities permitted under the laws of other states where the Bank's *customers* are located do not affect the fiduciary capacities in which the Bank may act.

We note that certain other provisions in Section 92a also expressly require the application of state law in certain areas affecting a national bank's exercise of fiduciary powers.⁴ For instance, a state's laws governing certain operational requirements are made applicable to national banks by Sections 92a(f), (g), and (i). Section 92a(c) grants state banking authorities limited access to OCC examination reports relating to national bank trust departments. However, as provided in our regulations,⁵ in each case where Section 92a applies state law to national banks, it is for each fiduciary relationship, the law of the state where the national bank is acting in a fiduciary capacity for that relationship.

The grant of statutory authority in Section 92a does not limit where a national bank may act in a fiduciary capacity. Accordingly, our regulations expressly provide that a national bank may act in a fiduciary capacity in any state.⁶ Further, a national bank may establish trust offices or trust representative offices in any state.⁷

In addition, Section 92a imposes no limitations on where the bank may market its services, where the bank's fiduciary customers may be located, or where property being administered is located. 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. Our regulation codifies this conclusion, stating that while acting in a fiduciary capacity in one state, a national bank may

⁴ It should be noted that some national banking laws, including Section 92a, incorporate elements of state law and make them part of the federal law applicable to national banks. However, the determination of what elements of state law are incorporated is a question of federal law. Once it is determined, other parts of state law -- even on the same subject matter -- are not incorporated and so are subject to the usual national bank preemption analysis. *Cf. Independent Bankers Ass'n of America v. Clarke*, 917 F.2d 1126 (8th Cir. 1990); *Department of Banking & Consumer Finance v. Clarke*, 809 F.2d 266 (5th Cir.), *cert. denied*, 483 U.S. 1010 (1987). In these decisions, state laws that applied the state's commercial bank branching laws to national banks were found to conflict with the federal branching authority of the McFadden Act, even though the McFadden Act refers to state law. Similarly, Section 92a refers to state law but incorporates only those state laws governing fiduciary activities to which it refers.

⁵ 12 C.F.R. § 9.7(e)(1).

⁶ 12 C.F.R. § 9.7(a). For a discussion of the analysis on which § 9.7 is based, *see* 66 Fed. Reg. 34792, 34794-96 (July 2, 2001) (preamble to final rule adopting § 9.7). *See also* OCC Interpretive Letter No. 695 (December 8, 1995) (IL 695) (analyzing national banks' authority to engage in fiduciary activities in multiple states); OCC Interpretive Letter No. 872 (October 28, 1999) (IL 872) (concluding that a national bank in Ohio may solicit and conduct a trust business in California and that state laws that purport to prohibit the bank from engaging in these activities were preempted).

⁷ 12 C.F.R. § 9.7(c).

market its fiduciary services to customers in other states.⁸ In addition, a national bank may act as fiduciary for relationships that include property located in other states.⁹

2. *The Bank is legally authorized under the federal banking laws to receive any appointment to act in a fiduciary capacity permitted for state fiduciaries in the state in which the Bank acts in a fiduciary capacity. State statutes that provide that only state-chartered fiduciaries, national banks principally located in the state, or national banks with branches in the state may exercise fiduciary powers in certain contexts are preempted.*

As discussed above, to determine which fiduciary capacities it may exercise, a national bank looks to the laws of the state in which it acts in a fiduciary capacity. The Bank has the authority under federal law to receive any appointment to act in any fiduciary capacity permitted for state fiduciaries in the state in which the Bank acts in a fiduciary capacity, that is, the state in which it performs one or more of the key fiduciary functions. Also as previously noted, national banks may act in a fiduciary capacity on a multi-state basis. Thus, under federal law, the Bank may act in a fiduciary capacity in State A for customers residing in State B and may receive any appointment (even from customers in other states) to act in a fiduciary capacity that state fiduciaries in State A may receive.

As you noted, some state statutes limit the type of entity that may perform fiduciary functions in certain circumstances to state-chartered fiduciaries, national banks principally located in the state, or national banks with branches in the state. Our regulations provide that with the exception of those state laws specifically referenced in Section 92a, any other state laws limiting or establishing preconditions on the exercise of fiduciary powers by a national bank are not applicable to national banks.¹⁰ Because the types of state statutes you referenced would generally have the effect of limiting or establishing preconditions on a national bank's exercise of its fiduciary powers, they would be preempted.

We note, however, that while a national bank may have the federal authority to act as a trustee and in various other fiduciary capacities (as determined by reference to the laws of the state in which it is acting in a fiduciary capacity), that authority *does not* determine whether a state instrumentality has authority under its governing state statutes to contract with the national bank for fiduciary services.

⁸ 12 C.F.R. § 9.7(b).

⁹ *Id.*

¹⁰ 12 C.F.R. § 9.7(e)(2).

I trust that the foregoing is responsive to your request. Please feel free to contact Andra Shuster, Counsel, at (202) 874-4694 should you have further questions.

Sincerely,

signed

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel