



May 20, 2020

**Interpretive Letter #1167**  
**June 2020**

Jeffrey L. Hare  
DLA Piper LLP (US)  
500 Eighth Street, NW  
Washington, DC 20004

Subject: Fiduciary Powers of ADP Trust Company, National Association, and State Money Transmitter Licensing Requirements

Dear Mr. Hare:

I am writing in response to your letter dated April 15, 2020 (Request Letter), on behalf of ADP Trust Company, National Association (Bank). Your Request Letter asked for confirmation that (1) the Bank may conduct federally authorized fiduciary activities in any state under authority of the National Bank Act (NBA), notwithstanding the fact that certain aspects of these activities may constitute regulated money transmission under state money transmitter laws and the Bank is not licensed as a money transmitter; (2) state money transmitter licensing requirements are preempted in their application to the Bank; and (3) the Bank is not required to satisfy any specific exemptions included within a state's money transmitter law.

As discussed below, the Bank's fiduciary powers derive from and are governed by the NBA and the Office of the Comptroller of the Currency's (OCC) regulations. Accordingly, the OCC concludes that (1) the Bank may conduct federally authorized fiduciary activities in any state, even if aspects of its activities fall within the state's definition of money transmission and the Bank is not licensed by the state as a money transmitter; (2) any state law purporting to impose licensing requirements on the Bank's exercise of its fiduciary powers is preempted; and (3) the Bank does not need to satisfy a state licensing exemption to conduct its activities. Therefore, subject to the limits established by 12 U.S.C. § 92a and 12 C.F.R. part 9, the Bank may exercise fiduciary powers in any state without obtaining a state money transmitter license.

**I. Background**

Automatic Data Processing, Inc. (Company) provides a variety of human capital management services to client companies, including impounding client funds and subsequently transferring the funds to satisfy clients' compensation, tax, and related payment obligations. Prior to the Company's restructuring of certain operations, ADP Payroll Services, Inc. (Subsidiary), a wholly owned Company subsidiary licensed to engage in money transmission in several states, undertook activities associated with impoundment and distribution of the Company's clients' funds.

In 2017, the Company decided to use a structure involving a trust to conduct the impoundment and distribution of the Company's clients' funds. According to the Request Letter, this new trust structure was designed to allow the Company to offer clients the protection associated with maintaining their funds in a trust with a federally regulated trustee, to carry out the impoundment and distribution of client funds under a more rational and efficient regulatory framework, and to strengthen protection of impounded client funds from creditors of the Company and its clients. To implement this restructuring, the Company formed ADP Client Trust (Client Trust) under Delaware law and appointed a third-party federal savings association as trustee. The Company transferred ownership of its Subsidiary's accounts holding client funds to the Client Trust in February 2018, at which time the Subsidiary ceased money transmission activities.

Subsequently, the Company decided to form a national bank as a wholly owned subsidiary to serve as trustee for the Client Trust and, on September 25, 2018, applied to the OCC to charter the Bank as an uninsured national trust bank. Pursuant to 12 U.S.C. §§ 21-27 and 92a, the OCC approved the application.<sup>1</sup> After the Bank began operations in September 2019, it replaced the third-party federal savings association as the trustee for the Client Trust. As described in your Request Letter, in this capacity, the Bank

- receives and holds title to client funds as trust property of the Client Trust;
- manages the Client Trust, including by directing the distribution of trust property to satisfy obligations of the Company's clients;
- invests certain trust property according to the investment guidelines and terms of the trust agreement;
- commits to exercise good faith in the performance of its duties and to act in the best interest of the Client Trust; and
- commits to satisfy the primary objectives of safety of principal, liquidity, and diversification in its performance on behalf of the Client Trust.

The Subsidiary has surrendered or is in the process of surrendering its money transmitter licenses. However, you have informed us that certain states are asserting the Bank must obtain a money transmitter license to carry out the activities the Subsidiary previously carried out. The states argue that the Bank may only avoid the licensing requirements if it satisfies a state law exemption to the licensing requirement. According to the Request Letter, while some state money transmitter laws exempt banks and financial institutions generally,<sup>2</sup> other state law exemptions are narrower and would not apply to the Bank.<sup>3</sup>

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<sup>1</sup> OCC Conditional Approval 1210 (Feb. 8, 2019) (preliminary conditional approval); OCC Conditional Approval 1227 (Aug. 19, 2019) (final conditional approval).

<sup>2</sup> See, e.g., Md. Code, Financial Institutions § 12-402(a) (exempting state- and federally chartered banks, credit unions, and savings and loan associations).

<sup>3</sup> See, e.g., Conn. Gen. Stat. § 36a-609 (generally exempting "[a]ny federally insured federal bank, out-of-state bank, Connecticut bank, Connecticut credit union, federal credit union or out-of-state credit union"); Tex. Fin. Code §

## II. Legal Analysis

### A. Fiduciary Powers of National Banks

National banks' fiduciary powers derive from and are governed by the NBA and OCC regulations, specifically 12 U.S.C. § 92a and 12 C.F.R. part 9.<sup>4</sup> Twelve 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 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.

Therefore, with prior OCC approval,<sup>5</sup> 12 U.S.C. § 92a authorizes national banks to act in the listed fiduciary capacities and any other fiduciary capacity permitted for state institutions when acting in the capacity is not in contravention of state law. It is not in contravention of state law for national banks to act in a fiduciary capacity if the state permits its own institutions to act in the capacity.<sup>6</sup> While the fiduciary capacities available to a national bank are determined by reference to state law,<sup>7</sup> 12 U.S.C. § 92a imposes no geographic limits on where a national bank with fiduciary powers may act in a fiduciary capacity. Accordingly, OCC regulations expressly permit a national bank authorized to act in a fiduciary capacity to do so in any state.<sup>8</sup>

In addition, 12 U.S.C. § 92a does not limit where a national bank may market its fiduciary activities, where its fiduciary customers may be located, or where the property being administered may be located. Consistent with this, the OCC's regulations provide that a national bank may (1) act as a fiduciary in one state and market its fiduciary services to, and serve customers in, another state; (2) act as a fiduciary for relationships

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151.003(3), (9-a) (exempting "federally insured financial institution[s] . . . organized under the laws of this state, another state, or the United States" and "trust compan[ies] . . . organized under the laws of this state").

<sup>4</sup> OCC Interpretive Letter 973 (Aug. 12, 2003) (confirming that federal law is the source of a national bank's fiduciary powers and authority); OCC Interpretive Letter 1106 (Oct. 10, 2008) (same).

<sup>5</sup> 12 C.F.R. § 5.26 (licensing requirements for the exercise of fiduciary powers by national banks).

<sup>6</sup> 12 U.S.C. § 92a(b).

<sup>7</sup> The state referred to in 12 U.S.C. § 92a is the state in which the bank acts in a fiduciary capacity for each fiduciary relationship, as determined by the test established in OCC regulations. 12 C.F.R. § 9.7(d).

<sup>8</sup> 12 C.F.R. § 9.7(a).

that include property located in other states; and (3) establish trust offices and trust representative offices in any state.<sup>9</sup>

When the OCC approved the application to charter the Bank, it also granted the Bank the authority to exercise fiduciary powers.<sup>10</sup> With respect to its relationship to the Client Trust, the Bank acts in the fiduciary capacity of trustee in the state of Delaware. Delaware permits state trust companies to act as trustees.<sup>11</sup> Therefore, 12 U.S.C. § 92a authorizes the Bank to act as a trustee of the Client Trust. Consistent with OCC regulations, the Bank may engage nationwide in activities related to its role as trustee of the Client Trust.

## **B. State Money Transmitter Licensing Requirements**

“[W]here Congress has not expressly conditioned the grant of ‘power’ upon a grant of state permission,” typically “no such condition applies,” unless the federal statute includes language indicating a congressional intent to include such a condition.<sup>12</sup> Consistent with this principle, OCC regulations clarify the applicability of state law to a national bank’s exercise of fiduciary powers.<sup>13</sup> Other than the state laws made applicable by 12 U.S.C. § 92a<sup>14</sup> and relevant substantive state laws that govern the fiduciary relationship,<sup>15</sup> state laws “limiting or establishing preconditions on the exercise of fiduciary powers are not applicable.”<sup>16</sup> This includes state licensing requirements.<sup>17</sup> Those laws conflict with federal law and are preempted.

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<sup>9</sup> 12 C.F.R. § 9.7(b)-(c).

<sup>10</sup> See OCC Conditional Approval 1210; OCC Conditional Approval 1227.

<sup>11</sup> Del. Code tit. 5, § 765.

<sup>12</sup> *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 34 (1996).

<sup>13</sup> 12 C.F.R. § 9.7.

<sup>14</sup> Twelve U.S.C. § 92a expressly makes certain state laws applicable. See, e.g., 12 U.S.C. § 92a(f). As noted above, these laws are the laws of the state where the national bank acts in a fiduciary capacity for the fiduciary relationship. With respect to the Bank’s relationship with the Client Trust, that state is Delaware.

<sup>15</sup> This includes, for example, the standard of care. The parties may select the state whose laws govern the trust instrument, or this may be determined by a choice-of-law analysis. Fiduciary Activities of National Banks, 66 Fed. Reg. 34,792, 34,796 (July 2, 2001) (“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 . . . . A grantor is free to designate which state laws apply . . . or to have the applicable law determined by choice-of-law rules.”). Here again, in the case of the Bank’s relationship with the Client Trust, that state is Delaware.

<sup>16</sup> 12 C.F.R. § 9.7(e)(2).

<sup>17</sup> Fiduciary Activities of National Banks, 66 Fed. Reg. at 34,795-96 (“Such restrictions and preconditions include, but are not limited to, state licensing requirements.”) (citing OCC Interpretive Letter 866 (Oct. 8, 1999) and OCC Interpretive Letter 872 (Oct. 28, 1999)).

As provided in the OCC's regulations, the Bank is not required to obtain a state money transmitter license to engage in the activities described in the Request Letter. A state's claim that the Bank's activities constitute money transmission does not alter the analysis. While the receipt and subsequent disbursement of client funds to satisfy client obligations may in some contexts be regulated as money transmission, the Bank clearly engages in these activities in fulfillment of its role as trustee of the Client Trust, which is consistent with the authority granted to trustees by Delaware law.<sup>18</sup> Thus, the Bank's activities are well within the scope of its federally authorized fiduciary powers. Other than the Delaware law governing the trust and other laws made applicable pursuant to 12 U.S.C. § 92a, any state precondition or limitation on the exercise of those powers is preempted. Because licensing requirements are preempted as impermissible limitations or preconditions on a national bank's exercise of fiduciary powers, the Bank is not required to obtain a money transmitter state license or to satisfy a state law exemption to the licensing requirement.

### **III. Conclusion**

Based on the foregoing analysis, we conclude that (1) a national bank may conduct federally authorized fiduciary activities in any state, even if aspects of its activities fall within the state's definition of money transmission and the bank is not licensed by the state as a money transmitter; (2) state laws purporting to impose licensing requirements on a national bank's exercise of fiduciary powers are preempted; and (3) satisfaction of an exemption from those requirements is not required. Therefore, subject to the limits established by 12 U.S.C. § 92a and 12 C.F.R. part 9, the Bank may exercise fiduciary powers in any state without obtaining a state money transmitter license. This conclusion is based on the facts and circumstances as represented in the Request Letter. Different facts and circumstances or consideration of different laws and regulations could result in a different conclusion.

I trust this is responsive to your inquiry.

Sincerely,

/s/

Jonathan V. Gould  
Senior Deputy Comptroller & Chief Counsel

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<sup>18</sup> In Delaware, a trustee may exercise the powers conferred by the terms of the trust and, except as limited by those terms, powers conferred by Delaware law. *See* Del. Code tit. 12, § 3324; *see also* Restatement (Third) of Trusts § 3 cmt. d (2003) ("A trustee holds the trust property for the benefit of a person or persons.").