Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

Interpretive Letter #866
October 1999
12 USC 92A

October 8, 1999

Julius L. Loeser
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Comerica Incorporated
500 Woodward Avenue, 33rd Floor
Detroit, Michigan 48226

Re: Authority of a National Bank to Market Fiduciary Services to, and Act as Fiduciary for, Customers in Various States

Dear Mr. Loeser:

This replies to your letter of August 20, 1999, in which you request, on behalf of Comerica Bank & Trust, National Association, Ann Arbor, Michigan (the "Bank"), the opinion of this office concerning the extent to which federal law preempts state restrictions on the ability of the Bank to engage in certain fiduciary activities. As described more fully below, the Bank, after receiving permission to exercise fiduciary powers through its Michigan offices, would like to solicit customers that are located in other states and serve those customers by acting as trustee for trusts and by maintaining trust representative offices in those states. You note that various state laws purport to prohibit or restrict the Bank from engaging in these activities. In some cases, the state law would require a state license or approval for the Bank to market its services and provide fiduciary services for customers in those states. In other cases, the state law would impose reciprocity or pledging requirements in addition to those provided for in 12 U.S.C. § 92a. You have concluded that federal law preempts these state laws. For the reasons expressed herein, we concur.

I. BACKGROUND

The Bank has entered into a contractual relationship with a brokerage firm (the "Broker") pursuant to which the Bank would solicit trust business through existing offices of the Broker throughout the United States and then act as trustee for trusts involving customers in various states. The Broker offers a program called the Personal Trust Account ("PTA"), which, in essence, is a retail brokerage account that holds cash, securities, and similar financial products and that provides a variety of trust services to assist in meeting a customer's estate,

investment, and tax planning goals. Under the program, representatives of the Broker will advise customers of the availability of the Bank's trust services in connection with a PTA, and will refer the customers to the Bank. A Bank trust representative will correspond with the prospect and, if successful in gaining the prospect's business, open a Bank trust account. Most communications between the Bank and the customer will be by telephone or through the mail. On occasion, Bank employees may meet with a customer at the customer's place of business or home or at an office of the Broker. Joint marketing programs may also be conducted at offices of the Broker or at other locations in various states.

The responsibilities of the Bank, as trustee, are set forth in a trust agreement that is separate from the Broker's account agreement with the customer. The Broker will not execute trust documents on behalf of the Bank. Rather, the Broker will forward trust agreements to the Bank for review and acceptance. The Bank will retain the right to decline any appointment with respect to a particular trust agreement.

The Bank will decide whether to accept the appointment and will execute the trust agreements only at its Michigan offices. Similarly, the Bank will make decisions about the investment or distribution of trust assets and will conduct the daily administration of trust accounts only at its Michigan offices. The Bank, as the named fiduciary, will collect and hold in custody all assets of the trust and will act as trustee in all respects with regard to discretionary actions.[1]

In certain situations, the Bank may open a trust representative office outside of Michigan. The trust representative offices will serve as a liaison between the Bank and trust customers; they will not perform core fiduciary functions. The Bank's representatives at the trust representative offices solicit new fiduciary accounts on behalf of the Bank, transfer documents to the Bank, provide information to clients regarding their accounts, and answer questions. Neither daily administration of trust accounts nor acts of discretion with respect to the trust accounts are conducted at the trust representative offices.

The Bank has requested the OCC's views on whether state laws that would impair or impede the Bank's ability to engage in the activities described above are preempted by federal law. In responding to this request, we review in section II.A of this letter the standards that govern the preemption of state laws with respect to national banks. We then discuss in sections II.B and II.C the scope of national bank powers under section 92a and the application of section 92a to the Bank's proposed activities. In section II.D, we apply the preemption standards to laws of the type described in your letter and conclude that they are preempted.

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[1] In some instances, the Bank may utilize an employee of the Broker or independent money managers to provide investment advisory or management services, subject to the Bank's oversight and review. The Bank may utilize the Broker as a custodian or subcustodian for holding some of the financial assets in the trusts, where permitted by the trust instrument or applicable law.

II. ANALYSIS

A. National banks are federal instrumentalities. State laws that frustrate the purposes for which these federal instrumentalities were created are preempted.

National banks are brought into existence under federal legislation, and are federal instrumentalities subject to the paramount authority of the United States.[2] Thus, it is well established that any state law limiting the operation of national banks is preempted by federal law and invalid under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2 (the Supremacy Clause)) if the state law "expressly conflicts with the laws of the United States, and either frustrates the purpose of national legislation or impairs the efficiency of [national banks] to discharge the duties for the performance of which they were created."[3]

Congress may confer power on the states to regulate national banks or may retain that power.[4] The question is whether Congress, in enacting the federal law, intended to exercise its constitutionally delegated authority to set aside the laws of the state.[5] Absent explicit preemption language, courts must consider whether the federal statute's "structure and purpose" reveal a clear preemptive intent.[6]

Federal law may preempt state law where it is in "irreconcilable conflict" with state law.[7] This may occur where compliance with both statutes is an impossibility.[8] Preemption is also appropriate where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[9]

When state and federal laws are inconsistent, the state law is preempted regardless of the motive or subject of the state law. As the Supreme Court noted in *Gade v. National Solid*

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[2] *Davis v. Elmira Sav. Bank*, 161 U.S. 275 (1896); *M. Nahas Co., Inc. v. First National Bank of Hot Springs*, 930 F.2d 608, 610 (8th Cir. 1991).

[3] *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 414 (1821) (Marshall, C.J.); *Davis*, 161 U.S. at 283.

[4] *Independent Comm. Bankers Ass'n of South Dakota, Inc., v. Board of Governors of the Federal Reserve System*, 820 F.2d 428, 436 (D.C.Cir. 1987).

[5] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-281 (1987).

[6] *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

[7] *Rice v. Norman Williams Co.*, 458 654, 659 (1982).

[8] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

[9] *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 134 L. Ed. 2d 237, 244 (1996) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Wastes Management Ass'n, 505 U.S. 88, 103 (1992) in holding that a state law designed to promote worker safety was preempted:

> In determining whether state law "stands as an obstacle" to the full implementation of a federal law, *Hine v. Davidowitz*, 312 U.S., at 67, "it is not enough to say that the ultimate goal of both federal and state law" is the same, *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). "A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal." *Ibid*,; see also *Michigan Canners & Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 477 (1984).

See also Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) (holding that a state statute allegedly designed to prevent market distortion caused by false advertising of airfares was precluded by federal law preempting state regulation of the rates, routes, or services of air carriers).

In the context of preemption of state laws affecting national banks, the Supreme Court's analysis is informed by the unique purposes for which the national banking system was created. Through the national charter, Congress has established a banking system intended to be both nationwide in scope and uniform in character. As stated by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903), Federal legislation affecting national banks "has in view the erection of a system extending throughout the country, and independent, so far as the powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *See also Davis, supra*, at 283 ("This freedom from State control over a national bank's powers protects national banks from conflicting local laws unrelated to the purpose of providing the uniform, nationwide banking system that Congress intended."); *Farmers' & Merchants National Bank v. Dearing*, 91 U.S. 29, 33 (1875) ("National banks organized under [the National Bank A]ct are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end.").

The Supreme Court has consistently relied on the special Federal purpose of national banks as an important reason for concluding that national bank powers normally are not limited by State law. In *First National Bank of San Jose v. California*, 262 U.S. 366 (1923) ("*FNB San Jose"*), for instance, the Supreme Court stated "[A]ny attempt by a state to define [national banks'] duties or control the conduct of their affairs is void, whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation, or impairs the efficiency of the bank to discharge the duties for which it was created." *Id*. at 369. Applying this principle to the authority of national banks to accept deposits, the Court in *FNB San Jose* observed that "Plainly, no state may prohibit national banks from accepting deposits, or directly impair their efficiency in that regard." *See also Marquette National Bank v. First of Omaha Corp.*, 423 U.S. 299, 307 (1978) (finding that a national bank is an instrumentality of the Federal government, created for a public purpose, and as such necessarily is subject to the paramount authority of the United States).

Preemption of state laws affecting national banks may occur -- notwithstanding that compliance with both state and federal laws is possible -- if the state laws "infringe the national banking laws or impose an undue burden on the performance of the banks' functions."[10] In *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), the Supreme Court found that a state law that prohibited the use of due-on-sale clauses in loan instruments was preempted by a federal regulation that expressly granted to federal savings and loans the power to include such clauses in loan instruments, even though federal law merely permitted federal savings and loans to include due-on-sale clauses in their contracts.

B. Under 12 U.S.C. § 92a, the Bank is authorized to market its trust services to, solicit trust business from, and act as trustee for customers in all states.

Pursuant to section 92a, a national bank may act in certain fiduciary capacities, subject to the law of the state where the bank is located. In the case of the eight capacities specifically enumerated in section 92a(a),[11] a national bank may engage in these capacities provided that the law of the state in which the bank is located does not prohibit competitors of national banks from engaging in these capacities. A national bank also may engage in any other fiduciary capacity in which national banks' competitors may engage under the laws of the state where the national bank is located.

As noted above, section 92a(a) authorizes a national bank to act in fiduciary capacities, with the extent of permissible capacities being determined in part by the laws of the state where the bank is located. When a national bank is acting in a fiduciary capacity in a given state, section 92a also makes laws of that state governing the deposit of securities, execution of bonds, and taking of oaths applicable to the bank.[12] In each of these cases, the references to state laws occur in conjunction with references to, or descriptions of, the national bank's acting in a fiduciary capacity. In light of this context, we conclude that for purposes of section 92a a

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[10] *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944).

[11] 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.

[12] *See* 12 U.S.C. §§ 92a(f) (securities deposit and bond requirement) and 92a(g) (officers' oath or affidavit requirement). Section 92a(i) also requires a national bank to comply with minimum capital requirements that apply to state institutions.

national bank is "located" in a state where it acts in a fiduciary capacity.[13] Accordingly, in order to determine where a national bank is located under section 92a (and thereby know which state's laws apply), one must determine where the bank is acting in a fiduciary capacity.

Section 92a does not explicitly address what level of contact is necessary for the bank to be deemed to be acting in a fiduciary capacity within the meaning of the statute. In our view, the best construction of the statute is to determine that location by looking to the place at which the bank performs core functions of a fiduciary. These core functions include accepting the appointment, executing the documents that create the fiduciary relationship, and making decisions regarding the investment or distribution of fiduciary assets.[14]

Conversely, the determination of where the bank acts in a fiduciary capacity should not look to every location where customers reside or where trust assets are located, or be based on places at which the bank engages in other non-fiduciary activities primarily for the purpose of establishing or maintaining customer relationships. Thus, core fiduciary functions do not include advertising, marketing, or 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.

The conclusion that "acting in a fiduciary capacity" includes only a central range of activities is consistent with analysis employed by the courts and the OCC in other situations where a federal law borrows from, or refers to, state law. For example, in the context of identifying the state in which a national bank is located for purposes of determining the allowable interest rate it may charge on loans under 12 U.S.C. § 85, the Supreme Court rejected the view that various business contacts that were part of the lending relationship were sufficient to make the bank "located" in a state for purposes of section 85, because the rejected approach would make the meaning of term "located" too uncertain.[15] Similarly, under the well-established treatment of lending for branching purposes, where a national bank "makes a loan" for purposes of 12 U.S.C. § 36 depends on certain key bank activities, not on the many types

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[13] A fundamental principle of statutory construction is that the meaning of a word is informed by its context. Sutherland Stat. Const. § 46.05 (5th ed. 1992). As the Supreme Court has often explained, "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of statutory language, plain or not, depends on context." *Bailey v. U.S.*, 516 U.S. 137, 145 (1995). Thus, in interpreting the language of a statute, courts do not look at one provision in isolation, but rather look to the entire statutory scheme for clarification and contextual reference. *U.S. v. McLemore*, 28 F.3d 1160, 1162 (11th Cir. 1994).

[14] Because the Bank will engage in all the activities that are considered the key fiduciary functions only at its Michigan offices, we need not determine here whether all or only some of them are the key functions. Similarly, since all the activities are performed in one state, we need not address how to determine the state in which the bank acts in a fiduciary capacity in that context.

[15] *See Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 311-13 (1978). *See also* OCC Interpretive Letter No. 822 (Feb. 17, 1998), *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-265.

of customer contacts that may occur in the loan transaction. While establishment of a branch in a particular location requires OCC approval, once established, the branch may make loans to,[16] or accept deposits from, customers anywhere, including states other than where the branch is located. Similarly, national banks' authority to sell insurance pursuant to 12 U.S.C. § 92 is statutorily tied to its location in a "place of 5,000," although a bank may market to customers residing elsewhere.[17] Thus, to infer a geographic limit in the context of fiduciary activities on where a national bank may market a service it is authorized to perform, or on where customers of a particular bank product or service may live or work, would be fundamentally inconsistent with how national banks are permitted to exercise other authorized powers.

Importantly, our approach does not mean that national banks may engage in fiduciary activities free from state-imposed restrictions. Rather, this approach simply identifies *which* state's laws will apply. Absent this certainty, national banks would be unable to know whether their contacts with a state were sufficient to alter the outcome of which state's law applied. This would impose an enormous burden on the ability of national banks to exercise fiduciary powers, contrary to the purposes for which the national banking system was created and in the absence of any indication in section 92a that such a result is intended.

Once a national bank is authorized under section 92a to act in a fiduciary capacity, section 92a imposes no limitations on where the bank may market its services or where the bank's fiduciary customers may be located. There is no evidence of a congressional intent to limit a national bank's exercise of fiduciary powers only to customers based in states in which the bank is exercising its fiduciary capacities, nor is it reasonable to infer such a limitation. Moreover, a grant of fiduciary powers to a national bank necessarily includes the power to

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[16] *See, e.g., Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978) (national bank from one state lending to customers in another state may charge federally authorized interest rate without regard to law of customers' state); *Bank of America National Trust & Savings Ass'n v. Lima*, 103 F. Supp. 916, 917-18 (out-of-state national bank's ability to lend in a state does not depend on state's permission; state cannot require national banks to register as foreign corporations); *Indiana National Bank v. Roberts*, 326 So.2d 802, 803 (Miss. 1976) (same, citing other cases).

[17] *See Independent Insurance Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993), *aff'g* 736 F. Supp. 1162 (D.D.C. 1990), *on remand on other grounds from* 508 U.S. 439 (1993). *See also NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995); *Shawmut Bank Connecticut v. Googins*, 965 F. Supp. 304 (D. Conn. 1997); OCC Interpretive Letter No. 753 (Nov. 4, 1996), *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-107. This is consistent with the analysis suggested by the Conference of State Bank Supervisors for identifying the state in which an entity is acting in a fiduciary capacity. *See* Conference of State Bank Supervisors (CSBS), *Statutory Options for Multistate Trust Activities* (March 1997) at third page of unpaginated Introduction and §§ 1.002(a)(28) and (37), 1.102(m), 2.101 - 2.106 and 2.201 - 2.202 of the model Multistate Trust Institutions Act (distinguishing three different tiers for an out-of-state bank's fiduciary activities in a host state -- (1) marketing and soliciting without an office in the state, (2) a trust representative office, and (3) a full service trust office -- of which only the full service trust office "acts in a fiduciary capacity" in the host state). Several states have adopted similar provisions. *See, e.g.*, 6 Okla. Stat. §§ 1701 *et. seq.* (1998) (legislation based on CSBS Model); Wis. Stat. Ann. § 223.12(3) (authorizing out-of-state banks to have trust representative offices that "do not act in a fiduciary capacity"); Minn. Stat. §§ 48.475 and 48.476 (authorizing trust service offices and representative trust offices for state trust institutions; a representative trust office engages in a trust business other than specified activities that are "acting as a fiduciary").

advertise its fiduciary services to customers.[18] This incidental power extends to all customers, regardless of their location.

A national bank may use a trust office to facilitate its marketing efforts, provided the bank complies with applicable filing requirements set out in 12 C.F.R. § 5.26. A national bank also may use a trust representative office (*i.e.*, an office that does not act in a fiduciary capacity) to market its fiduciary activities. The establishment of trust representative offices requires no filing to the OCC. Assuming that a trust office or trust representative office does not receive deposits, pay checks, or lend money, it will not be considered a "branch" as that term is defined in 12 U.S.C. § 36(j),[19] and, therefore, will not be subject to the requirements and limitations imposed by section 36 or to the state laws referenced in section 36.[20]

In summary, the fiduciary capacities in which a national bank may act, and certain other provisions in section 92a governing its operations, are determined by reference to the law of the state in which the bank acts in a fiduciary capacity, but the bank may advertise and solicit customers for its fiduciary business from other states. The bank also may operate trust representative offices nationwide, in which it does not perform fiduciary activities, to facilitate performance of its fiduciary business.

C. The Bank acts in a fiduciary capacity only in Michigan.

Applying the section 92a statutory framework to the Bank's proposal, the Bank acts in a fiduciary capacity only in Michigan, because it conducts all the core fiduciary functions only at its Michigan offices. The Bank reviews proposed trust appointments and decides whether to accept them or not at its Michigan offices. It executes the trust agreements and other trust documents at its Michigan offices. The Bank makes discretionary decisions about investment or distribution of trust assets at its Michigan offices. It also conducts the daily administration of trust accounts only at its Michigan offices.

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[18] It is well established that a national bank's power to engage in an authorized activity includes the power to advertise its services. *See, e.g., Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954); *Bank One, Utah, N.A. v. Guttau*, No. 98-3166 (8th Cir. September 2, 1999). OCC Conditional Approval No. 221 (December 4, 1996); OCC Interpretive Letter No. 494 (December 20, 1989) (national bank incidental powers).

[19] *See, e.g., Clarke v. Securities Industry Association*, 479 U.S. 388, 392 n.2 (1987); *Cades v. H & R Block, Inc.*, 43 F.3d 869, 874 (4th Cir. 1994), *cert. denied*, 515 U.S. 1103 (1995); *Dep't of Banking & Consumer Finance of Missouri v. Clarke*, 809 F.2d 266, 270 (5th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

[20] *See* Interpretive Letter No. 695, reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-010 (December 8, 1995) (IL 695), at 4, in which the OCC concluded that a national bank office that provided only fiduciary services would not be subject to the McFadden Act (12 U.S.C. § 36). The reasoning of, and conclusions reached in, IL 695 are incorporated herein by reference. *See also Bank One, Utah v. Guttau*, No. 98-3166, slip. op. at 7, 9 (8th Cir. September. 2, 1999) (stating, after finding that automated teller machines (ATMs) are excluded from the definition of "branch" in section 36(j), "By excluding ATMs from the definition of 'branch,' Congress … signaled its intention to foreclose the states from imposing location and approval restrictions on a national bank's ATMs. * * * Congress has made clear in the [National Bank Act] its intent that ATMs are not to be subject to state regulation….").

In states other than Michigan, the Bank markets its services and solicits business through advertising, telephone, mail or electronic communications, referrals from Broker employees or others, and/or marketing presentations by Bank employees. It also interacts with potential or existing customers, answering questions or providing information about accounts through telephone, mail, or electronic communication or personal visits by Bank employees. In states in which it would have trust representative offices, it performs these incidental activities at the representative offices. However, none of the core fiduciary activities described above would be performed at the representative offices.

Michigan, therefore, is the only state in which the Bank acts in a fiduciary capacity (its "capacity" state). Thus, Michigan is the only state whose law is incorporated in the provisions of section 92a and 12 C.F.R. Part 9 that make state law applicable to national banks' conduct of fiduciary business. Michigan permits its state institutions that compete with national banks to act in the fiduciary capacity of trustee. *See, e.g.*, Mich. Comp. Laws § 487.181. Therefore, the Bank is authorized under section 92a(a) to act as trustee at its Michigan offices, including soliciting business from, and acting as trustee for trusts involving, customers residing in other states and to have trust representative offices in other states.[21]

D. The state laws described by the Bank, other than Michigan law, are preempted because they conflict with the Bank's authorization to exercise fiduciary powers granted pursuant to section 92a.

You have asked whether federal law preempts the laws of states other than Michigan that purport to prohibit the Bank from engaging in the fiduciary activities described here, require state license or approval, or impose operating requirements beyond those in section 92a. You have provided examples from five states of the types of laws that you believe are preempted by federal law, although you believe that similar laws in jurisdictions other than the ones you have cited also are preempted. We agree.

As noted, section 92a does not impose any geographic limit on the places where a national bank may market its fiduciary services or on the location of the bank's fiduciary customers, nor does it condition the exercise of fiduciary powers on compliance with state laws that purport to impose licensing or operating requirements on national banks. Thus, state laws

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[21] The OTS has reached the same conclusions under section 5(n) of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1464(n), which authorizes federal savings associations to engage in fiduciary powers. *See, e.g.*, OTS Chief Counsel Opinion (August 8, 1996), *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83-102 ("OTS August 1996 Opinion"); OTS Chief Counsel Opinion No. 94/CC-13 (June 13, 1994), *reprinted in* [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,814 ("OTS June 1994 Opinion"). *See also* OTS Chief Counsel Opinion (January 4, 1999); OTS Chief Counsel Opinion (July 1, 1998), *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83-272; OTS Chief Counsel Opinion (June 21, 1996); OTS Chief Counsel Opinion (March 28, 1996), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83-100 ("OTS March 1996 Opinion"). The OTS June 1994 Opinion involved trust activities by a federal thrift similar to those in the Bank's proposal. Section 5(n) of HOLA was originally modeled on section 92a, and was intended to give federal savings associations the same fiduciary powers as national banks. *See* Pub. L. No. 96-221, § 403, 44 Stat. 146, 156; S. Rep. No. 368, 96th Cong., 2d Sess. 12-13, 23 (1980).

are preempted to the extent they impermissibly conflict with the Bank's authority to solicit trust business or act as trustee in trust appointments for customers in those states or from having trust representative offices in those states.

Illustrative of the types of laws that you believe are preempted is a statute in Utah[22] that completely prohibits the Bank from engaging in fiduciary activities. A statute in Virginia[23] prohibits a common way of doing trust business (*i.e.*, soliciting business and acting as a trustee without having an office in the state). Statutes in Virginia, Wisconsin, New Jersey, and Minnesota[24] impose a reciprocity condition on an out-of-state bank's authority to conduct trust business in the state or to have trust offices in the state. Statutes in Wisconsin and Minnesota[25] could have the effect of prohibiting an out-of-state bank from using trust representative offices to conduct its trust business in those states. To the extent that these statutes conflict with the authority to engage in fiduciary activities under section 92a, they are, in our opinion, preempted.[26]

Similarly, state laws that would require the Bank to obtain a certificate of authority, approval, or other license requirement from the state before soliciting and engaging in the proposed trust arrangements with customers in those states[27] conflict with the Bank's federal authority under section 92a, and so are preempted. If a national bank is authorized under federal law to exercise a granted power, it does not require the additional permission of a state to exercise that power. To conclude otherwise would run counter to the paramount authority

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[22] Utah Code Ann. § 7-5-1(1)(d) and 7-5-1(2) (out-of-state banks, including national banks, may not engage in trust business in Utah, unless the bank is also authorized to engage in business as a depository institution in Utah).

[23] Va. Code Ann. §§ 6.1-5 and 6.1-32.35 (no out-of-state bank, except one with a branch or a trust office in Virginia, may engage in banking business or trust business in Virginia).

[24] Respectively, Va. Code Ann. § 6.1-32.39; Wis. Stat. Ann. § 223.12(1); N.J. Stat. Ann. § 17:9A-316(B) (*see also* 1999 N. J. Laws ch. 159, § 3 (adding new section) (approved July 8, 1999)); and Minn. Stat. § 303.25(Subdivision 1).

[25] Respectively, Wis. Stat. Ann. § 223.12(3) and Minn. Stat. § 303.25(Subdivision 5) (the Minnesota provision regarding trust representative offices imposes a reciprocity requirement).

[26] 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, and so preemption analysis in those situations is different. 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 does not include *all* state law governing fiduciary activities.

[27] Respectively, Va. Code Ann. §§ 6.1-32.38, 6.1-32.40, and 6.1-32.41; Wis. Stat. Ann. § 223.12(4); N.J. Stat. Ann. §§ 17:9A-316(B) and 17:9A-322;

of the federal government over national banks,[28] including the OCC's exclusive visitorial power over national banks.[29]

This conclusion is supported by the language of section 92a. Paragraph (a) of that section expressly delegates to the OCC the authority to determine whether a national bank may engage in fiduciary activities, while paragraph (i) lists considerations to be used by the OCC in acting on applications for fiduciary powers. The references to state law in section 92a are limited to ensuring that certain restrictions apply to national banks if they apply to others. These include, for instance, provisions governing the pledge of securities (section 92a(f)) and officials' oaths and affidavits (section 92a(g)). The fact that Congress incorporated state law requirements into section 92a suggests that Congress recognized that national banks were not subject to state approval or licensing, because otherwise states simply could impose their own capital, securities deposit, bond, oath, and affidavit requirements on national banks through the state licensing process.

Finally, state laws that would impose regulatory operating requirements (in particular, a requirement to pledge securities[30]) on the Bank conflict with the Bank's federal authority under section 92a and are preempted. Section 92a(f) requires national banks to follow the securities pledging requirement that the state in which the bank is acting in a fiduciary capacity imposes on corporations acting in that capacity. The OCC's regulation[31] implementing this section addresses the application of section 92a(f) in contexts in which a bank acts in a fiduciary capacity in more than one state, and provides that a bank may compute the amount of deposit required for each state on the basis of trust assets that the bank administers primarily from offices located in that state. Both section 92a(f) and its implementing regulation provide only for incorporation of securities pledging requirements of capacity states. In the Bank's proposal, Michigan is its only capacity state. Accordingly, only Michigan's securities pledging requirement is applicable, and other states' laws are preempted to the extent they require the

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[28] *See, e.g. Burnes National Bank v.Duncan*, 265 U.S. 17, 24 (1924) (the authority of Congress to grant national banks fiduciary powers in section 92a is independent of the states, "as otherwise the State could make it nugatory"). Courts also have held that routine state registration requirements, such as obtaining a certificate of authority as a foreign corporation, are not applicable to national banks. *See, e.g., Bank of America National Trust & Savings Ass'n v. Lima*, 103 F. Supp. 916, 918, 920 (D. Mass. 1952) (in case where out-of-state bank lent to customer in state, state statute requiring foreign corporations to qualify to do business held not applicable to national banks); *Indiana National Bank v. Roberts*, 326 So.2d 802, 803 (Miss. 1976) (same); *First National Bank of Tonasket v. Slagle*, 5 P.2d 1013, 1914 (Wash. 1931) (same); *State National Bank of Connecticut v. Laura*, 256 N.Y.S. 2d 1004, 1006 (Cty. Ct. 1965) (same).

[29] A state requirement that a national bank obtain state approval or license to exercise a power authorized under federal law is an assertion by the state that it has supervisory or regulatory authority over national banks. This is in direct conflict with federal law providing that the OCC has exclusive visitorial powers over national banks except as otherwise provided by federal law. 12 U.S.C. § 484; 12 C.F.R. § 7.4000(b). *See generally Guthrie v. Harkness*, 199 U.S. 148, 159 (1905) (states may not exercise right of visitation over national banks).

[30] Minn. Stat. §§ 303.25(Subdivision 3) and 48A.03(Subdivision 2).

[31] 12 C.F.R. § 9.14(b).

Bank to pledge securities in a manner inconsistent with section 92a(f) and 12 C.F.R. § 9.14(b).[32]

III. CONCLUSION

In summary, the Bank, which is authorized to exercise fiduciary powers through its offices in Michigan, is authorized under section 92a to market its services as trustee to, and act as trustee for, customers residing in other states. The Bank may also maintain trust representative offices in those other states. State laws that prohibit or restrict the Bank from exercising its federal powers to act as trustee, to solicit trust business, and to maintain trust representative offices, or that require state approval or license to do so, or that impose securities pledging requirements in addition to those imposed by section 92a conflict with federal law and are preempted by section 92a.[33]

Our conclusions are based on the facts and representations made in the materials submitted by the Bank and discussions with representatives of the Bank. Any material change in facts or circumstances could affect the conclusions stated in this letter.

Sincerely,

/s/

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

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[32] Language in some earlier OCC letters and other material may suggest that national banks are subject to state laws prohibiting nonresident fiduciaries or that all aspects of state law governing state fiduciary institutions apply to national banks. *See*, *e.g.*, OCC Interpretive Letter No. 525 (August 8, 1990) (state laws); 7 Fed. Res. Bull. 816 (1921) (nonresident fiduciaries). In general, we do not believe they were directly addressing the issues discussed in this letter or offering analysis (*e.g.*, the discussions of state law often appear as general background before the letter reaches its particular topic). *See* Letter No. 695 at pages 18-19 nn. 11 and 12. To the extent the previous letters are inconsistent with this letter, they are superseded.

[33] Our review of the preemption issues involved in the Bank's inquiry is not subject to the notice and comment procedures for preemption determinations involving state laws in the areas of community reinvestment, consumer protection, fair lending, and establishment of intrastate branches. *See* 12 U.S.C. § 43. First, the state laws involved here are not within the four covered subject areas, and so section 43 does not apply. Second, the preemption issue whether section 92a preempts state laws that prohibit a national bank from acting as trustee was previously addressed in *Burnes National Bank*, *supra*, and *Fidelity National Bank & Trust Company v. Enright*, 264 F. 236, 239 (W.D.Mo. 1920). Similarly, the issue of whether a state may require state approval or license or state examination was also previously resolved by the courts. While the prior cases do not deal with fiduciary powers, the licensing and visitorial powers preemption issues are the same. Third, the preemption issues regarding state laws prohibiting the trust activity, prohibiting trust offices, and requiring state licensing are substantially similar to those previously published for comment by the OCC several times, *see*, *e.g.*, 62 Fed. Reg. 19172-73 (1997) (two applications); 61 Fed. Reg. 68543, 68545 (1996) (Part 9 rulemaking, final rule); 60 Fed. Reg. 66163, 66171 (1995) (Part 9, proposed rule). Moreover, we note that the OTS has interpreted the parallel provision in HOLA as preempting state law in the same way.