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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

October 10, 2008

**Interpretive Letter #1106**  
**December 2008**  
**12 USC 92a**  
**12 CFR 9**

Subject: Fiduciary Powers of [ *Bank* ]

Dear [ ]:

Thank you for your letter dated August 5, 2008, on behalf of [ ] (the “Bank”). You have requested confirmation from the Office of the Comptroller of the Currency (“OCC”) principally concerning the Bank’s authority under federal law to conduct fiduciary activities in the states of Georgia, South Carolina and Florida. This letter discusses and confirms that authority.

### **Background**

As set forth in your letter, the Bank is a limited-purpose national trust bank, with its main office in [ *State* ], and additional trust offices in [ *State2* ], [ *State3* ], [ *State4* ], Florida and [ *State5* ]. The Bank is authorized by the OCC to exercise fiduciary powers. The Bank acts as a fiduciary for customers in Georgia, South Carolina and Florida as well as a number of other states. The Bank does not accept deposits and, therefore, is not FDIC-insured. Your letter asks that the OCC confirm that the Bank: (i) may exercise its federally-authorized fiduciary powers and act as a fiduciary for customers in Georgia and South Carolina, notwithstanding state laws that purport to limit the Bank’s ability to do so; and (ii) may deposit the amount of securities required pursuant to federal law and the OCC’s regulations rather than the larger amount required under Florida law.

As set out below, the Bank is authorized by 12 U.S.C. § 92a and Part 9 of the OCC’s regulations to act as a fiduciary for customers in the states of Georgia and South Carolina, notwithstanding state laws that purport to limit its ability to do so. In connection with the Bank’s fiduciary activities in Florida, we also confirm that under Section 92a and Part 9, the Bank may deposit the amount of securities required pursuant to federal law and the OCC’s regulations rather than the conflicting amount required under Florida law.

## Analysis

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,<sup>1</sup> and directs that the types of fiduciary powers available to a national bank are to be 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."

The grant of statutory authority in Section 92a does not limit where a national bank with fiduciary powers may act in a fiduciary capacity. Accordingly, our regulations at 12 C.F.R. § 9.7 expressly provide that a national bank may act in a fiduciary capacity in any state, and may establish trust offices or trust representative offices in any state.<sup>2</sup> 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,<sup>3</sup> 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 authority, stating that while acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to customers in

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

<sup>2</sup> 12 C.F.R. § 9.7(a) and (c). 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) (analyzing national banks' authority to engage in fiduciary activities in multiple states); OCC Interpretive Letter No. 872 (October 28, 1999) (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 are preempted).

<sup>3</sup> 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, and making decisions regarding the investment or distribution of fiduciary assets. If these key fiduciary activities take place in more than one state for any given relationship, a bank must designate the state in which it acts in a fiduciary capacity from among those states. 12 C.F.R. § 9.7(d).

other states.<sup>4</sup> In addition, a national bank may act as fiduciary for relationships that include property located in other states.<sup>5</sup>

Our regulations further provide that with the exception of those state laws specifically referenced in Section 92a, any state laws limiting or establishing preconditions on the exercise of fiduciary powers by a national bank are not applicable to national banks.<sup>6</sup>

### *Georgia and South Carolina*

You have indicated that the Bank provides fiduciary services for customers and property located in Georgia and South Carolina. You represent that the Bank does not have an office in either state and does not “act in a fiduciary capacity,” as that term is defined in 12 C.F.R. § 9.7(d), in these states.<sup>7</sup>

Georgia law generally permits “foreign corporations” to act as a fiduciary in the state,<sup>8</sup> however, the definition of “foreign corporation” is limited to federally-insured state-chartered banks or their subsidiaries, corporations organized under the laws of states that border Georgia, and “[a]ny federally chartered financial institution whose deposits are federally insured having its principal place of business in any state of the United States, other than Georgia, or any subsidiary of such financial institution.”<sup>9</sup> Although the Bank is federally-chartered, because it does not take federally-insured deposits, it would be prohibited under Georgia law from acting as a fiduciary for customers and property in the state. Your letter further describes a Georgia reciprocity statute that provides that a foreign corporation may only conduct fiduciary activities in the state if Georgia-chartered fiduciaries and national banks with their principal places of business in Georgia may do so in the state in which the foreign corporation is organized or, in the case of a national bank, the state in which it has its principal place of business.<sup>10</sup>

Your letter also describes two South Carolina statutes. The first provides that a corporation “created under the laws of the United States and not having a business in [the] State . . .” is not qualified to be a personal representative for the estate of a person domiciled in the state.<sup>11</sup> The second requires national banks that do not have their principal place of business in South Carolina to obtain written approval from the State Board of Bank Control prior to engaging in a trust business in the state.<sup>12</sup>

As noted above, Section 92a and Part 9 of the OCC’s regulations make it clear that a national bank with fiduciary powers may act in a fiduciary capacity in any state and may market fiduciary

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<sup>4</sup> 12 C.F.R. § 9.7(b).

<sup>5</sup> *Id.*

<sup>6</sup> 12 C.F.R. § 9.7(e)(2). *See also Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559 (2007) (holding that, under the National Bank Act, a national bank may conduct federally-authorized mortgage lending activities through an operating subsidiary without regard to state licensing regimes).

<sup>7</sup> Your letter states that the Bank acts in a fiduciary capacity in those states in which it has offices.

<sup>8</sup> O.C.G.A. § 53-12-391.

<sup>9</sup> O.C.G.A. § 53-12-390.

<sup>10</sup> O.C.G.A. § 53-12-391(a)(2).

<sup>11</sup> S.C. Code Ann. § 62-3-203(e)(3).

<sup>12</sup> S.C. Code Ann. § 34-21-10.

services to, and perform such services for, customers in other states. Section 9.7(e)(2) of our regulations further provides that, with the exception of those state laws specifically referenced in Section 92a, any state laws limiting or establishing preconditions on the exercise of fiduciary powers by a national bank are not applicable to national banks. Because the state statutes you have cited would have the effect of limiting or preconditioning national banks' exercise of their federally-authorized fiduciary powers, these statutes are not applicable to national banks.<sup>13</sup> Therefore, we confirm that the Bank may exercise its federally-authorized fiduciary powers and act as a fiduciary for customers and property located in Georgia and South Carolina, notwithstanding the states' laws conditioning the exercise of those powers.<sup>14</sup>

### *Florida*

According to your letter, the Bank has a trust office in the state of Florida and acts in a fiduciary capacity in that state. Your letter also notes that the Bank has been advised by the Florida Department of Financial Services that it must comply with the state law that requires all national banks to deposit or pledge securities with a market value of 25% of the bank's issued and outstanding capital stock.<sup>15</sup>

Section 92a(f) provides that “[w]henver the laws of a State require corporations acting in a fiduciary capacity to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law.” The OCC's regulations govern the application of this statutory provision in the context of national banks that act in a fiduciary capacity in more than one state. In that circumstance, “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.”<sup>16</sup>

Your letter explains that the amount of securities to be deposited required under Florida law is higher than the amount calculated under the OCC's regulations. We confirm that the Bank need

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<sup>13</sup> We note specifically that there is no requirement under federal law or OCC regulations that a national bank accept deposits or have federal deposit insurance in order to be authorized to engage in fiduciary activities.

<sup>14</sup> Although your letter states that Georgia state officials have indicated that these statutes would be applicable to the Bank, a provision in the same Georgia law also provides that “[n]othing in this part shall be construed to prohibit or make unlawful any activity in this state . . . by a national bank which does not have its principal place of business in this state, which activity would be lawful in the absence of this part.” O.C.G.A. § 53-12-391(c). This provision could be read to mean that the restrictions discussed in the text would not apply to the Bank even under Georgia state law.

<sup>15</sup> Fla. Stat. § 660.27(1). The statute further provides that the amount shall not exceed \$500,000.

<sup>16</sup> 12 C.F.R. § 9.14(b).

not deposit securities in the amount required under the Florida law, but instead may deposit securities in the amount calculated under the OCC's regulations at 12 C.F.R. § 9.14(b).<sup>17</sup>

### *Other Statutes*

In addition to the matters discussed above, your letter also contained specific requests regarding a number of statutes in other states. The types of statutes in your letter generally contained reciprocity requirements, physical presence requirements, and requirements to obtain certificates of authority from the state, all of which must be satisfied prior to conducting trust activities or establishing a trust office. As noted earlier, our regulations clearly provide that with the exception of those laws specifically referenced in Section 92a, any state laws limiting or establishing preconditions on the exercise of fiduciary powers by a national bank are not applicable to national banks.<sup>18</sup> The types of statutes you referenced have been largely addressed in the OCC regulations and in our prior opinions.<sup>19</sup>

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

Sincerely,

*Signed*

Julie L. Williams  
First Senior Deputy Comptroller and Chief Counsel

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<sup>17</sup> Your letter also requests that we confirm that the Bank need not comply with state securities deposit laws with respect to states in which the Bank does not act in a fiduciary capacity. It is clear from 12 C.F.R. § 9.14(b) and Section 92a(f) that a national bank need only make a deposit of securities in states where it "acts in a fiduciary capacity," as that term is defined in 12 C.F.R. § 9.7(d).

<sup>18</sup> 12 C.F.R. § 9.7(e).

<sup>19</sup> *See, e.g.*, OCC Interpretive Letter 866 (October 8, 1999)(state statutes requiring reciprocity, a physical presence, certificates of authority, deposits of securities); OCC Interpretive Letter No. 872 (October 28, 1999)(state statutes requiring certificates of authority, a physical presence); OCC Interpretive Letter 995 (June 22, 2004)(state statutes requiring a physical presence); and OCC Interpretive Letter 1080 (April 4, 2007)(state statute requiring reciprocity certificate).

Moreover, the issues under Georgia, South Carolina and Florida law discussed earlier in this letter also are essentially identical to issues already resolved by the OCC's Part 9 regulations and prior opinion letters cited herein. Accordingly, the publication requirements of 12 U.S.C. §§ 43(a) and (b) are not applicable. *See* 12 U.S.C. § 43(c)(1)(A).