Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

October 28, 1999

Interpretive Letter #872
December 1999
12 USC 92A

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Re: Authority of Bank One to Engage in Fiduciary Activities in California

Dear Mr. Rigelman:

This replies to your letter of August 25, 1999, in which you request, on behalf of Bank One Trust Company, NA (the "Bank"), confirmation from this office that (a) the Bank may solicit and conduct trust business and operate non-branch trust offices in California and (b) state laws that prohibit the Bank from engaging in these activities are preempted by federal law. As discussed more fully below, the Bank initially intends to have an office in California whose activities would be limited to marketing the Bank's trust services. The Bank anticipates, however, that it eventually will expand the operations of that office, and perhaps open additional offices in California, to provide a full range of trust services to customers located in California and elsewhere. You state in your letter that various California laws, as construed by the Acting Commissioner of the Department of Financial Institutions for the State of California, prohibit or restrict the Bank from engaging in these activities, and you have concluded, accordingly, that federal law preempts these state laws. For the reasons expressed herein, we concur.

I. BACKGROUND

The Bank, which has its main office in Columbus, Ohio, has opened an office in California that currently is engaged solely in marketing the Bank's trust services, providing liaison with people who open fiduciary accounts with the Bank, and providing similar incidental services. In this phase of the office's operations (referred to as Phase 1 in your letter), the office will act as a trust

representative office.[1] The core functions that are essential to the creation and administration of the fiduciary relationship -- which include accepting a fiduciary appointment, executing the documents that create the fiduciary relationship, and making decisions regarding the investment or distribution of fiduciary assets -- will be performed by Bank personnel in other states during Phase 1. However, as the Bank's base of customers in and around California grows, the Bank may decide, in Phase 2 of its operations in California, to open additional trust representative offices in California or open full-service trust offices in California that offer a full range of trust services. You state that none of the trust offices or trust representative offices contemplated will receive deposits, pay checks, or make loans.

The Bank has requested the OCC's views on whether state laws that would impair or impede the Bank's ability to establish trust offices and trust representative offices and 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 authority under section 92a for the Bank's proposed activities. In section II.D, we apply the preemption standards to the laws addressed in your letter and conclude that they are preempted.

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]

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[1] A "trust representative office" is an office of a national bank, other than a main office, a branch, or a trust office, at which the bank performs activities related to its fiduciary business, but does not act in a fiduciary capacity. This term is used to contrast the limited activities of a trust representative office from those of a trust office, at which a bank may act in a fiduciary capacity.

[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.

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 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

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[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 U.S. 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, 31 (1996) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

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] Preemption may arise notwithstanding the absence of directly conflicting duties imposed by federal and state laws. In *Barnett*, *supra*, the Supreme Court found that federal law preempts state law when the federal law merely authorizes national banks to engage in activities that a state law expressly forbids.[11]

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 types of fiduciary activities

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

[11] *Barnett*, 517 U.S. at 31.

specifically enumerated in section 92a(a),[12] in general a national bank may act in those fiduciary activities provided that the law of the state in which the bank is located does not prohibit competitors of national banks from conducting those fiduciary activities. A national bank also may act in any other fiduciary capacity in which national banks' competitors may act 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.[13] 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 national bank is "located" in a state where it acts in a fiduciary capacity.[14] 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.

Conversely, the determination of where the bank acts in a fiduciary capacity should <u>not</u> 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

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[12] 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.

[13] *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.

[14] 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).

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 of customer contacts that may occur in the loan transaction. Finally, a national bank's authority to sell insurance pursuant to 12 U.S.C. § 92 is statutorily tied to its location in a "place of 5,000," although the bank may market to customers residing elsewhere.[16]

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

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[15] *See Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 311-13 (1978). *See also* OCC Letter No. 822; 12 C.F.R. §§ 7.1003, 7.1004, and 7.1005.

[16] *See* 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").

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 advertise its fiduciary services to customers.[17] This incidental power extends to all customers, regardless of their location.

To infer a geographic limit 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. For example, national banks are authorized to make loans and receive deposits only at "branches." While establishment of a branch in a particular location requires OCC approval, once established, the branch may make loans to,[18] or accept deposits from, customers anywhere, including customers who live or work in states other than where the branch is located. Similarly, a national bank is authorized to sell insurance under 12 U.S.C. § 92 if it is located in a place with a population of less than 5,000, but the bank's insurance agency based in such a place may sell insurance to customers in other places, including other states.[19]

A national bank also may use a trust office or trust representative office (*i.e.*, an office that does not act in a fiduciary capacity) to facilitate its marketing efforts. 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),[20] and, therefore, will not be subject to the requirements and limitations imposed by section 36 or to the state laws referenced in section 36.[21]

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[17] 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).

[18] *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).

[19] *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).

[20] *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).

[21] *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

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 offices and trust representative offices nationwide to facilitate performance of its fiduciary business.

C. Section 92a permits the Bank both to solicit trust business and to act in a fiduciary capacity in California. The Bank may do so through one or more offices in California.

As proposed, the Bank intends only to solicit trust business and engage in related customer liaison and incidental services in Phase 1 of its trust operations in California. The Bank's core fiduciary functions will be performed during Phase 1 at offices located outside of California. The Bank anticipates expanding its operations in California during Phase 2 to include performing the core fiduciary functions. Applying the section 92a statutory framework to the Bank's proposal, the Bank may solicit trust business in California in Phase 1, notwithstanding that the Bank's main office is in Ohio and that the core fiduciary functions for California trust customers are performed outside of California. This is consistent with the conclusions stated above that the authority to offer a service necessarily includes the power to advertise that service and that nothing in section 92a limits where a national bank may advertise its trust services.

The Bank's contemplated activities in Phase 2 also are permissible under federal law. During this phase, the Bank will be engaging in the core fiduciary functions in California.[22] Therefore, the Bank will be authorized to engage in the fiduciary capacities listed in section 92a(a) to the extent that these capacities are not in contravention of California law. The Bank also may act in any other fiduciary capacity in which State banks, trust companies, or other corporations that compete with national banks are permitted to act under California laws.[23]

The Bank may engage in both the Phase 1 and Phase 2 activities either through the office that has been established or through any additional office, whether opened in California or elsewhere. Assuming that these offices will not receive deposits, pay checks, or lend money, they

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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….").

[22] It appears from your letter that all of the Bank's core fiduciary functions performed during Phase 2 will be performed at one or more offices located in California. Thus, we need not determine here whether all or only some of them are the key functions in order to determine whether the Bank will be acting in a fiduciary capacity in California.

[23] See IL 695.

will not be considered "branches" for purposes of section 36(j), and thus are not subject to the provisions of state law made applicable to national bank branches pursuant to section 36.[24]

D. The state laws described by the Bank are preempted to the extent that they conflict with the Bank's authorization to exercise fiduciary powers granted pursuant to section 92a.

You have asked whether federal law preempts California laws that, as interpreted by the Acting Commissioner of the California Department of Financial Institutions (the "Acting Commissioner") in a letter to you dated February 10, 1999 (the "February 10 letter"), effectively prohibit the Bank from engaging in the fiduciary activities described here.[25] The Acting Commissioner's interpretations of the laws in question, which appear at Cal. Fin. Code §§ 1500, 1502, 1503, and 3824, may be summarized as follows:

Section 1500: No corporation (which includes national banks) may engage in trust business unless, *inter alia*, it has received a certificate of authority to engage in trust business from the Commissioner;[26]

Section 1502: National banks may conduct trust business in California, but only if the bank maintains its main office or a branch office in California, is authorized to transact trust business,

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[24] 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"). 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).

[25] The Acting Commissioner also has submitted a letter to the OCC, dated October 4, 1999, noting the continued disagreement of the California Department of Financial Institutions with the views expressed by the OCC in IL 695. In that letter, the OCC stated that section 92a authorizes a national bank that has been granted fiduciary powers to exercise those powers in any state (subject to whatever state law limits are made applicable to national banks by section 92a), including having trust offices in any state. The OCC solicited comments, in conjunction with proposed amendments to the OCC's regulation governing fiduciary activities (12 C.F.R. Part 9), on the legal framework under section 92a for interstate fiduciary powers of national banks as set out in IL 695. See 60 FR 66171-72. The Acting Commissioner submitted a comment in response to that solicitation, and refers in the October 4 letter to objections raised in that comment. We have carefully considered all the points made by the California Department of Financial Institutions in reaching the conclusions stated in this letter.

[26] This section also requires a corporation seeking to engage in trust business in California to deposit money or securities with the State Treasurer as a pledge for the faithful performance of court and private trusts in accordance with section 1540 of the California Code. In a letter to Comerica Incorporated dated October 8, 1999, the OCC concluded that federal law preempts pledging requirements as they apply to trust representative offices. However, this issue is mooted in the instant situation by the Bank's voluntarily entering into a Safekeeping Agreement with the California State Treasurer that satisfies the pledging requirement.

and has complied with other requirements set out in Article 3 of Chapter 12 of the California Banking Law. A trust office is not a branch office for purposes of section 1502.

Section 1503: No foreign corporation, other than "a national banking association or a foreign (other state) state bank that is authorized to conduct a trust business" in California, may transact trust business in California. Approval by the OCC for the Bank to conduct trust business in California is not "authorization" for purposes of this statute.

Section 3824: No foreign bank that does not already have a branch office in California may establish a *de novo* branch in California. A trust office is a branch for purposes of section 3824.

Taken together, these provisions, as interpreted by the Acting Commissioner, would prohibit the Bank from exercising its authority under federal law to establish trust offices and trust representative offices in any state once it receives the approval of the OCC to exercise fiduciary powers.

As noted, section 92a does not impose any geographic limit on the places where a national bank may market its fiduciary services, where it may act in a fiduciary capacity, or where the bank's fiduciary customers are located. Nor does section 92a condition the exercise of fiduciary powers on compliance with state laws that purport to impose licensing or operating requirements on national banks. The California laws in question, as interpreted by the Acting Commissioner, conflict with section 92a, both because they effectively prohibit the Bank from engaging in activities permissible under federal law and because they purport to impose licensing requirements on the Bank.

Section 1500, as interpreted by the Acting Commissioner, prohibits a national bank from conducting trust business in California unless it first obtains a certificate of authority to engage in trust business from the Acting Commissioner. Section 1502 creates a limited exception to this prohibition for national banks, but only if they have a "licensed presence" (*i.e.*, their main office or a bank branch) in California. Section 1503 precludes a foreign corporation that is not authorized to conduct a trust business in California from exercising the trust powers enumerated in that section. Finally, section 3824 forbids a national bank that does not have a bank branch in California from operating a non-branch trust office. Because the Bank's only presence in California is the office that engages in marketing the Bank's trust services, and because the Acting Commissioner has concluded that this office is not a "licensed presence" for purposes of section 1502, these laws prohibit the Bank from engaging in the fiduciary activities permitted by federal law. As a result, these state laws are preempted to the extent that they prohibit the Bank from having trust offices or trust representative offices in California.

Even if the Bank were able to satisfy the requirements of sections 1502, 1503, and 3824, the Bank would be required by section 1500 to obtain a certificate of authority from the State of California before establishing a trust office. If a national bank is authorized under federal law to exercise a 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 of the federal government

over national banks,[27] including the OCC's exclusive visitorial power over national banks.[28] 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 other types of entities. 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 reflects Congress's recognition that national banks were not subject to state approval or licensing.

III. CONCLUSION

In summary, the Bank, which has received the OCC's approval to exercise fiduciary powers, is authorized under section 92a to market its services as trustee to, and act as trustee for, customers residing in California and other states. The Bank may also maintain trust offices and trust representative offices in California. In our opinion, state laws that prohibit or restrict the Bank from exercising its federal powers to act as trustee, to solicit trust business, and to maintain offices, or that require state approval or license to do so, conflict with federal law and are preempted by section 92a.[29]

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[27] *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).

[28] 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).

[29] 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.

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