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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

September 18, 2008

**Interpretive Letter #1103**  
**December 2008**  
**12 USC 92a**  
**12 CFR 9**

Subject: Fiduciary Powers of [ *Bank* ], [ *City, State* ]

Dear [ ]:

This letter responds to your request dated August 28, 2008, concerning proposed fiduciary activities of [ ] (the “Bank”) in the state of North Carolina. You have asked the Office of the Comptroller of the Currency (“OCC”) to confirm that the Bank is authorized under federal law to be appointed, and accept any appointment, to act in a fiduciary capacity permitted to state fiduciaries in North Carolina without obtaining any express qualification or otherwise qualifying under North Carolina law. For the reasons set forth in this letter, we confirm that the Bank need not qualify under North Carolina law in order to act as a fiduciary in that state.

### **Background**

The Bank is a national banking association authorized by the OCC to exercise fiduciary powers. The Bank intends to offer and deliver trust and fiduciary services in the state of North Carolina through trust offices that it has established in other states.<sup>1</sup> The Bank does not intend to establish a physical presence in North Carolina in order to conduct these activities. The Bank’s home state is [ *State* ].

North Carolina law provides that “out-of-state trust institutions,”<sup>2</sup> including national banks, may conduct trust business in North Carolina, subject to certain requirements.<sup>3</sup> In particular, out-of-state trust institutions may engage in trust business in North Carolina only if they maintain a

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<sup>1</sup> 12 C.F.R. § 9.7(c) expressly authorizes a national bank with fiduciary powers to establish trust offices or trust representative offices in any state.

<sup>2</sup> See N.C. Gen. Stat. § 53-301(a)(35).

<sup>3</sup> N.C. Gen. Stat. §§ 53-303(6), 53-303(b).

“trust office” in the state.<sup>4</sup> With respect to out-of-state trust institutions without a physical office in the state, such as the Bank, a “trust office” is defined as the “registered office.”<sup>5</sup>

North Carolina law also imposes certain conditions on out-of-state trust institutions seeking to establish a trust office in the state. Before an out-of-state trust institution may establish and maintain the required trust office (and hence before it can engage in fiduciary activities under North Carolina law), it must provide notice to the North Carolina Commissioner of Banks (the “Commissioner”).<sup>6</sup> Among other information, the notice must include proof that the institution has obtained from the North Carolina Secretary of State a certificate of authority for a foreign corporation to transact business in North Carolina.<sup>7</sup> The certificate of authority carries an annual report requirement.<sup>8</sup> Once the required notice is provided, the Commissioner may withhold approval of the out-of-state institution’s proposed trust office if the Commissioner determines that the institution’s home state imposes on “state trust institutions”<sup>9</sup> desiring to maintain trust offices in that home state restrictions “materially greater” than those imposed by North Carolina law.<sup>10</sup>

In addition to the requirements for out-of-state trust institutions described above, North Carolina law requires all banks, including national banks, to obtain a license from the Commissioner before exercising fiduciary powers in the state.<sup>11</sup>

As set out below, pursuant to 12 U.S.C. § 92a and the OCC’s regulations at 12 C.F.R. Part 9, the Bank is legally authorized to be appointed, and accept any appointment, to act in a fiduciary capacity permitted for state fiduciaries in North Carolina without obtaining a license or approval of any sort from the state of North Carolina.

### **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

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<sup>4</sup> N.C. Gen. Stat. § 53-314. This section contains both a grandfathering exception and an exception for depository institutions that maintain a branch in North Carolina. The Bank would not qualify for either exception, if the state law were applicable.

<sup>5</sup> N.C. Gen. Stat. § 53-301(a)(54). Under North Carolina law, maintaining a registered office entails having a registered agent in North Carolina whose duty it is to receive and forward any notice, process, or demand that is served on the institution. N.C. Gen. Stat. §§ 53-301(a)(39a); 55D-30.

<sup>6</sup> N.C. Gen. Stat. § 53-317.

<sup>7</sup> N.C. Gen. Stat. §§ 53-317(1), 55-15-01(a).

<sup>8</sup> N.C. Gen. Stat. § 55-16-22(a).

<sup>9</sup> This term is defined to include trust institutions organized under North Carolina law or having their principal offices in North Carolina. *See* N.C. Gen. Stat. § 53-301(47).

<sup>10</sup> N.C. Gen. Stat. §§ 53-315. The Commissioner may also disapprove an out-of-state trust institution’s proposed trust office for other reasons. For example, the Commissioner may disapprove if he or she finds that the institution lacks the resources to undertake the proposed expansion without adversely affecting its safety and soundness. N.C. Gen. Stat. § 53-318(b).

<sup>11</sup> N.C. Gen. Stat. § 53-160; N.C. Admin. Code tit. 4, r. 3D.0101. However, the North Carolina statute provides that, unlike other out-of-state trust institutions, national banks are not examined by the Commissioner for licensing purposes. *Id.*

with OCC approval,<sup>12</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 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>13</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>14</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 other states.<sup>15</sup> In addition, a national bank may act as fiduciary for relationships that include property located in other states.<sup>16</sup> Our regulations further provide that with the exception of those state laws specifically referenced in Section 92a, any other state laws limiting or establishing preconditions on the exercise of fiduciary powers by a national bank are not applicable to national banks.<sup>17</sup>

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<sup>12</sup> The OCC's regulations prescribe the requirements and procedures for a bank to obtain approval to exercise fiduciary powers. *See* 12 C.F.R. § 5.26 (licensing requirements for fiduciary powers).

<sup>13</sup> 12 C.F.R. § 9.7(a) and (c). For a detailed discussion of the analysis on which § 9.7 is based, *see* 66 Fed. Reg. 34792, 34794-96 (July 2, 2001) (preamble to final rule adopting § 9.7). *See also* OCC Interpretive Letter No. 695 (December 8, 1995) (IL 695) (analyzing national banks' authority to engage in fiduciary activities in multiple states); OCC Interpretive Letter No. 872 (October 28, 1999) (IL 872) (concluding that a national bank in Ohio may solicit and conduct a trust business in California and that state laws that purport to prohibit the bank from engaging in these activities are preempted).

<sup>14</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).

<sup>15</sup> 12 C.F.R. § 9.7(b).

<sup>16</sup> *Id.*

<sup>17</sup> 12 C.F.R. § 9.7(e)(2).

North Carolina law purports to require an out-of-state national bank to obtain a certificate of authority from the North Carolina Secretary of State; submit annual reports to keep the certificate current; notify and receive approval from the Commissioner of Banks before engaging in fiduciary activities in North Carolina; and obtain a state license. These requirements would clearly limit or precondition the exercise of the Bank's federally authorized fiduciary powers. The North Carolina law imposing these requirements is preempted for national banks<sup>18</sup> with fiduciary powers because the requirements directly conflict with the powers of national banks to act in a fiduciary capacity granted under federal law by section 92a and the OCC's regulations.<sup>19</sup>

I trust that the foregoing is responsive to your request. Please feel free to contact Jon Mitchell, Attorney, at (202) 874-3828 should you have further questions.

Sincerely,

*Signed*

Julie L. Williams  
First Senior Deputy Comptroller and Chief Counsel

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<sup>18</sup> However, a requirement to register with the state solely for purposes of service of process would not be preempted. *See, e.g.*, 12 C.F.R. §§ 7.4007(b)(2)(vi), 7.4008(d)(2)(i).

<sup>19</sup> *See 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). Moreover, the issues discussed herein 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).