DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 5 and 9

[Docket No. 00-30]

RIN1557-AB79

Fiduciary Activities of National Banks

AGENCY: Office of the Comptroller of the Currency.

ACTION: Notice of proposed rulemaking; advance notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC), through a Notice of Proposed Rulemaking (NPRM), is proposing to amend its part 9 to codify OCC interpretations on national bank multi-state trust operations. The purpose of these changes is to provide enhanced guidance to national banks engaging in fiduciary activities. The OCC also is inviting comment, through an advance notice of proposed rulemaking (ANPR), on whether uniform standards of care generally applicable to national bank trustees' administration of private trusts and investment of private trust property should be established. The purpose of the ANPR is to determine the extent to which national banks that engage in fiduciary activities in more than one state experience problems in their administration as a result of complying with more than one state's laws and, if problems exist, to invite comment on ways in which the OCC could address these problems.

DATES: Comments must be received by [insert date 60 days after date of publication in the *Federal Register*].

ADDRESSES: Send your comments to: Communications Division, Office of the Comptroller

of the Currency, 250 E Street, SW, Third Floor, Washington, DC 20219, Attention: Docket No. 00-30. Comments will be available for public inspection and photocopying at the same location. In addition, you may send comments by fax to (202) 874-5274, or by electronic mail to regs.comments@occ.treas.gov.

FOR FURTHER INFORMATION CONTACT: For questions concerning the NPRM, contact Lisa Lintecum, Director, or Joel Miller, Senior Advisor, Asset Management, (202) 874-4447; Richard Cleva, Senior Counsel, Bank Activities and Structure, (202) 874 5300; Michele Meyer, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874-5090; or William Dehnke, Assistant Director, Securities and Corporate Practices Division, (202) 874-5210.

SUPPLEMENTARY INFORMATION:

This rulemaking consists of two parts. First, the OCC, through an NPRM, proposes to codify recent OCC interpretations in which we analyzed the extent to which a national bank may, in states other than its home state, (a) have trust offices or trust representative offices, (b) engage in fiduciary activities, and (c) market its fiduciary services to customers. Second, we invite comments, through an ANPR, on whether the OCC should propose to add a new section to part 9 that would establish national standards for the conduct of fiduciary activities by national banks. These ideas are explained more fully below.

NPRM: Codification of OCC interpretations

The OCC has issued three interpretive letters[1] addressing multi-state fiduciary activities.

[1] OCC Interpretive Letter No. 872 (Oct. 28, 1999) (IL 872); OCC Interpretive Letter No. 866 (Oct. 8, 1999) (IL 866); and OCC Interpretive Letter No. 695 (Dec. 8, 1995), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81.010 (IL 695).

In IL 695, we concluded that a national bank with its main office in one state may act in a fiduciary capacity in any other state that permits its own in-state fiduciaries to act in that capacity, including at trust offices in other states. In IL 866 and IL 872, we further clarified that a national bank that acts in a fiduciary capacity in one state may market its fiduciary services to customers in other states, solicit business from them, and act as fiduciary for customers located in other states. The proposal codifies these interpretations, which affect several sections in part 9, as explained in the following discussion.

Definitions (revised § 9.2)

The second sentence in current § 9.2(g) provides that the extent of fiduciary powers is the same for out-of-state national banks as in-state national banks. This sentence is unnecessary in light of proposed new § 9.7, which sets forth the rules concerning multi-state fiduciary operations, and the proposal removes it.

Proposed §§ 9.2(j) and (k) define "trust office" and "trust representative office," respectively. These terms are used in proposed new § 9.7. A "trust office" is defined as an office of a national bank, other than a main office or a branch, at which the bank acts in a fiduciary capacity. A trust representative office is an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not act in a fiduciary capacity. These ancillary activities might include, for instance, advertising, marketing, and 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.

Neither a trust office nor trust representative office is a branch for purposes of the McFadden Act, 12 U.S.C. 36, which governs the location of national bank branches. In order to be considered a branch under the McFadden Act, a bank facility must perform at least one of the core banking functions of receiving deposits, paying checks, or lending money. 12 U.S.C. 36(j). The locational limitations of 12 U.S.C. 36 are not intended to reach all activities in which national banks are authorized to engage, but only core banking functions. See Clarke v. Securities Industry Association, 479 U.S. 388 (1987) (considering securities brokerage powers). Proposed §§ 9.2(j) and (k) therefore state that a trust office or a trust representative office is not a branch unless it is also an office at which deposits are received, or checks paid, or money lent.

Approval requirements (revised § 9.3)

Current § 9.3(a) provides that "a national bank may not exercise fiduciary powers unless it obtains prior approval from the OCC to the extent required under 12 CFR 5.26." Section 5.26(e)(5) currently provides that a national bank that has obtained the OCC's approval to exercise fiduciary powers does not need to obtain further approval to "commence fiduciary activities" in a state in addition to the state(s) described in the application for which it received OCC approval to exercise fiduciary powers. Instead, the bank is required only to provide written notice to the OCC within ten days after commencing expanded fiduciary activities.

As discussed in greater detail in the next section, proposed new § 9.7 codifies recent OCC interpretations clarifying national banks' authority to engage in multi-state fiduciary operations. Among other things, those interpretations, and new § 9.7, distinguish between acting in a fiduciary capacity and conducting other activities ancillary to the bank's fiduciary business. The

proposal adds a new paragraph (b) to § 9.3 to clarify that a bank that has received OCC approval to exercise fiduciary powers does not need prior OCC approval each time it seeks to act in a fiduciary capacity in a new state or to conduct, in a new state, activities that are ancillary to its fiduciary business. Instead, paragraph (b) directs the bank to follow the notice procedures in § 5.26(e)(5). Current paragraph (b), which addresses the procedures for organizing a limited purpose trust bank, is redesignated as paragraph (c).

Multi-state fiduciary operations (new § 9.7)

The statutory authority for national banks to exercise fiduciary power is contained in 12 U.S.C. §§ 92a(a) and (b). Under section 92a(a), the Comptroller may permit national banks, when not in contravention of State or local law, to exercise eight expressly identified fiduciary powers and to act in any other fiduciary capacity in which State banks, trust companies, or other corporations that come into competition with national banks are permitted to act under the laws of the State in which the national bank is located. Under section 92a(b), whenever state law permits state institutions that compete with national banks to exercise any of the fiduciary powers listed in section 92a(a), a national bank's exercise of those powers is deemed not to be in contravention of State or local law under section 92a.

Sections 92a(a) and (b) do not expressly address the extent to which a national bank may conduct a multi-state fiduciary business. The OCC, however, has issued several interpretive letters that address multi-state fiduciary activities. In IL 695, we concluded that a national bank with its main office in one state may have trust offices in another state. We also concluded that the bank may engage in (a) any of the eight fiduciary capacities listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with

national banks in that state from acting in that capacity; and (b) any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state. This conclusion applies even in a state that has laws prohibiting or restricting out-of-state fiduciaries from providing fiduciary services or having trust offices within their state. As explained in the interpretive letter, section 92a(b) makes it clear that, if a state permits its own state institutions to exercise certain fiduciary powers, then national banks are authorized to exercise those fiduciary powers in that state.

Proposed § 9.7(a) codifies this interpretation. Pursuant to that section, a national bank may act in any of the eight fiduciary capacities listed in the statute in any state in which a national bank "is located," which we have interpreted for purposes of section 92a as the state in which a national bank acts in a fiduciary capacity. It may also act in any other fiduciary capacity that the state permits for its own state institutions, "when not in contravention of State or local law." Thus, a national bank may act in any of the eight capacities listed in the statute unless the state affirmatively prohibits that activity for national banks and for its own institutions. If state law is silent on any of these eight capacities, it is permitted for a national bank by virtue of the direct grant of authority in section 92a(a). Further, if a state permits its own state institutions to exercise additional fiduciary powers, then national banks are authorized to exercise those fiduciary powers in that state. The state may not limit them, because the terms of section 92a(b) expressly deem the fiduciary powers that a state permits to its own institutions not to be in contravention of state law. Thus, under proposed § 9.7(a)(2), a national bank acting in a fiduciary capacity in a particular state may act in each of the eight fiduciary capacities listed in section 92a(a) (unless the state expressly prohibits the capacity for its own state institutions) and

in any other fiduciary capacities permitted for state banks, trust companies, or other corporations that compete with national banks.

In IL 866 and IL 872, the OCC clarified that a national bank that acts in a fiduciary capacity in a given state under the authority of section 92a is authorized to market its services to customers in other states, to solicit business from them, and to act as fiduciary for customers located in other states.[2] A state may not prohibit or restrict out-of-state national banks from marketing to, or performing fiduciary functions for, customers in that state. Therefore, proposed § 9.7(b) provides that a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state and provides that the bank may use a trust representative office for these purposes. Proposed § 9.7(c) expressly authorizes a national bank with fiduciary powers to establish a trust office or trust representative office in any state.

IL 866 and IL 872 also addressed where a national bank is deemed to be "acting in a fiduciary capacity" for purposes of section 92a. As explained in those letters, in order to determine in which state a bank "acts in a fiduciary capacity" for section 92a purposes, one looks to the state in which the bank performs key fiduciary functions. These key activities include executing the documents that create the fiduciary relationship, accepting the fiduciary appointment, and making decisions regarding the investment or distribution of fiduciary assets.

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[2] This approach is consistent with that taken by the Office of Thrift Supervision, as summarized in its letter dated August 8, 1996, from Carolyn J. Buck, Chief Counsel, reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83-102 (in which the OTS concluded (1) that, for trust purposes, a savings association will not be deemed located in a state where its only trust-related activities are marketing its trust services and performing incidental duties pursuant to its appointment as testamentary trustee or trustee holding real estate; and (2) federal law would preempt state laws that prohibit or restrict an out-of-state federal thrift engaging in these activities in the state).

Proposed § 9.7(d) codifies this position and further provides that if these key fiduciary activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes will be the state that the bank and customer designate from among those states. We invite comment on ways to simplify the determination of where a bank with multi-state operations is acting in a fiduciary capacity.

The state in which the bank acts in a fiduciary capacity for an account, in turn, determines -- with respect to that account -- which state laws apply in the provisions of section 92a that refer to state law.[3] Thus, if a national bank acts in a fiduciary capacity in State A for a customer located in State B, the bank looks to the laws of State A in applying the provisions of section 92a that refer to state law. These include not only state laws affecting permissible fiduciary capacities (referred to in sections 92a(a) and (b)) but also state laws used in setting operational requirements for national banks as corporate fiduciaries (referred to in sections 92a(f), (g) & (i)) and those that grant state banking authorities limited access to OCC examination reports relating to national bank trust departments (referred to in section 92a(c)). Therefore, proposed § 9.7(e) clarifies that the references in section 92a to state law mean the law of the state in which the bank acts in a fiduciary capacity. The laws of other states where the bank is not acting in a fiduciary capacity, including states in which the bank's customers may reside or in which trust assets may be located, are not made applicable to national banks by section 92a.

Deposit of securities with state authorities (revised § 9.14)

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[3] This is to be contrasted with the laws governing the trust itself, which are determined by the trust instrument and, in some instances, by choice-of-law rules. For example, if a national bank is acting in a fiduciary capacity in State A and is a trustee for a trust for which the trust instrument says the laws of State B govern, then the laws governing the administration of the trust (for example, the standard of care to be applied) will be those of State B.

Under section 92a(f) of the statute and current § 9.14 of our regulations, a national bank must comply with state laws that require corporations that act in a fiduciary capacity to deposit securities with state authorities for the protection of private or court trusts. The proposal makes a technical amendment to § 9.14 to conform to the terminology used in proposed § 9.7. Instead of saying that a bank "administers trust assets" in paragraph (b) of that section, the proposed language states that a bank "acts in a fiduciary capacity." No substantive change is intended by this amendment.

The proposal also adds a second sentence to § 9.14(b) to clarify how a bank, which conducts fiduciary operations on a multi-state basis pursuant to proposed § 9.7, should compute the amount of deposit required by a state law that requires a deposit of securities on a basis other than assets (such as an amount equal to a percentage of capital). In such a state, the bank may compute the amount of deposit required 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.

Fiduciary powers (revised § 5.26)

Consistent with the proposed changes discussed above, the proposal also would amend 12 CFR 5.26(e) to clarify that a national bank that plans to act in a fiduciary capacity in a state in addition to the state described in the application for fiduciary powers that the OCC has approved need only give after-the-fact notice of having commenced acting in a fiduciary capacity in a new state. The proposal revises current § 5.26(e)(5) so that it reflects the distinction between acting in a fiduciary capacity and conducting activities ancillary to the bank's fiduciary business. The ten-day, after the fact notice requirement would apply only to acting in a fiduciary capacity.

ANPR: Uniform standards governing fiduciary activities

Twelve U.S.C. 92a, which authorizes national banks to act as fiduciaries, also governs the exercise of their fiduciary powers in certain respects. For example, the statute requires national banks to segregate the assets they hold in a fiduciary capacity from the "general assets" of the bank and to keep separate records of the transactions they engage in as fiduciary.[4] The statute does not set out general standards of care that apply to national banks acting in a fiduciary capacity; however, it expressly authorizes the OCC to issue regulations to enforce compliance with section 92a and "the proper exercise of the powers" that the statute grants.[5] Thus, the statutory scheme governing national bank fiduciary powers specifically permits the Comptroller to promulgate regulations necessary to the proper exercise of national bank fiduciary powers and to address any areas unique to national banks.[6]

Trustees are responsible for performing a core set of fundamental duties when exercising the powers permitted under section 92a. These include the duty to administer the trust according

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[4] 12 U.S.C. 92a(c).

[5] 12 U.S.C. 92a(j). See also id. at 93a.

Section 92a(j) states:

> The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein.

(Emphasis added.)

[6] The view that fiduciary rules applicable to a national bank fiduciary may be affected by Federal law is supported by the legislative history of section 92a. When Congress enacted the precursor to section 92a in 1913, it authorized the Federal Reserve Board (which regulated national bank fiduciary activities until 1962, when Congress transferred that authority to the OCC) to grant national banks the right to act in a fiduciary capacity "under such rules and regulations as the board may prescribe." Pub. L. 63-43 11(k), 30 Stat. 251 (1913).

to its terms; the duty of loyalty; the duty to be impartial where there is more than one beneficiary of a trust; the duty to be prudent with trust assets; and so on. These duties are embodied in most state trust codes, but the precise formulation and the elements of the applicable standards vary from state to state, causing a national bank that conducts an interstate fiduciary business to continually monitor the differing state laws and to develop different plans for compliance in each state where it operates.

One example of where state laws may differ is the investment management standard that applies to trustees. Trustees have always had the duty to manage trust assets prudently. In the first half of the twentieth century, most states enacted lists of specific types of investments that trustees were permitted to make, and trustees were required to assess the prudence of each individual investment in isolation. More recently, however, many states have applied a "prudent investor" rule, which focuses on the need to manage risk in the portfolio by balancing the role of a single asset or group of assets against that of the overall portfolio. Examples of other areas where the applicable standards might vary from one jurisdiction to another include the laws governing reasonableness of compensation of trustees; duties regarding trust accounting; the termination, modification, or reform of a trust; records retention; and purchases by a bank, in its capacity as trustee, of shares of proprietary mutual funds.

The lack of uniformity in applicable fiduciary standards may become more burdensome in light of the increase in national banks' interstate fiduciary operations following the enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and in light of new technologies that greatly facilitate the marketing and delivery of fiduciary services to customers nationwide. National banks not only have trust customers and conduct fiduciary activities in

many different states, but they also act as trustee for trusts governed by the laws of many different states.

For these reasons, in addition to inviting comments on the proposed amendments to part 9 as discussed in the previous portion of this notice, the OCC invites comments on whether we should adopt uniform standards of care governing fiduciary activities of national banks. The OCC is not proposing specific standards at this point; rather, we seek the views of interested persons on the need for such standards and, if there is a need, on what the standards should contain.

The OCC contemplates that any uniform standards would apply only to private trusts. As under current law, we envision that the uniform federal standard could be modified by the terms of the trust, but not by contrary or inconsistent state law.

The OCC invites comments on whether uniform, national standards in the areas noted (or other areas) would promote the efficient exercise of a national bank's fiduciary powers, consistent with the fulfillment of its fiduciary obligations. Specifically, the OCC seeks comments on the following:

- Does compliance with multiple state laws that establish separate fiduciary standards of care present a significant burden? If so, please identify the principal sources of that burden.
- How would a bank's administration of trusts or estates differ if there were a federal law creating a uniform standard of care?
- If the OCC were to adopt uniform standards, should those standards be modeled after the Uniform Trust Act prepared by the National Conference of Commissioners on Uniform

State Laws? If so, which sections should we adopt?

- What other sources should the OCC rely upon in developing uniform, nationwide standards of care?
- Do most states already have substantially similar laws governing trust administration and investment of trust assets? Is adoption of the model uniform laws by additional states likely?
- What effect have the OCC's recent opinions on the applicability of state law to interstate fiduciary activities had on national banks' interstate fiduciary business?
- How could a federal standard work when there are specific state statutes (such as those governing the investment by trustees in proprietary mutual funds) that make investment explicitly subject to state laws?
- How should the OCC resolve issues that arise about the meaning or applicability of any uniform standards it issues? What would be the effect of a uniform standard on the common law that has developed over time in connection with state fiduciary standards?
- If uniform standards are adopted, how should the OCC manage the transition from the existing regulatory structure? Should new standards be applied only to fiduciary relationships formed after a date certain?
- Could uniform standards impose unanticipated burdens on national banks? If so, what would those burdens be? What could the OCC do to reduce the burden?
- Even if a uniform national approach to fiduciary standards proves beneficial over time, a change in applicable fiduciary standards may create near-term uncertainty about what rules govern national banks' fiduciary activities. What could the OCC do to reduce

uncertainty, and any accompanying litigation risk, that may result from our adoption of uniform standards?

- Should the OCC adopt a uniform federal choice of law rule for determining what law governs the fiduciary relationship in the absence of a provision in the trust instrument specifying the governing law? This would address questions of applicable law that are not resolved by operation of section 92a.

This ANPR reflects our ongoing commitment to review and reevaluate our regulations periodically to ensure that they encourage national banks' efficiency and competitiveness, consistent with safety and soundness and fair treatment of bank customers. Based on the comments we receive, we may propose specific revisions to our rules for comment in a later rulemaking.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the Federal Register along with its rule.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities. The NPRM codifies caselaw and OCC interpretations, but adds no new requirements. Similarly, the ANPR merely invites comments on whether uniform federal standards would be appropriate. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

The OCC has determined that this rulemaking is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. For the reasons outlined above, the OCC has determined that this rulemaking will not result in expenditures by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed any regulatory alternatives.

Executive Order 13132

Executive Order 13132 requires Federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has Federalism implications. Under the Order, a regulation has Federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." In the case of a regulation that has

Federalism implications and that preempts State law, the Order imposes certain consultation requirements with State and local officials; requires publication in the preamble of a federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted to us by State and local officials. By the terms of the Order, these requirements apply to the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation.

Certain provisions of this proposal and advance notice, including uniform federal standards if they were to be adopted, may have Federalism implications, as that term is used in the Order, or may be found by a Federal court to preempt state law. Therefore, before promulgating a final regulation based on this proposal, the OCC will, to the extent practicable and permitted by law, seek consultation with State and local officials, include a Federalism summary impact statement in the preamble to the final rule, and make available to the Director of OMB any written communications we receive from State or local officials.

List of Subjects

Banks, banking, insurance, national banks, trust operations.

Authority and Issuance

For the reasons set forth in the preamble, part 5 and part 9 of chapter I of title 12 of the Code of Federal Regulations are proposed to be amended as follows:

PART 5--RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES

1. The authority citation for part 5 continues to read as follows:

Authority: 12 U.S.C. 1 et seq., 93a; and section 5136A of the Revised Statutes (12

U.S.C. 24a).

Subpart B--Initial Activities

2. Paragraph (e) of § 5.26 is revised to read as follows:

§ 5.26 Fiduciary powers.

* * * * *

(e) * * *

(5) Notice of fiduciary activities in additional states. No further application under this section is required when a national bank with existing OCC approval to exercise fiduciary powers plans to act in a fiduciary capacity, or to conduct activities ancillary to its fiduciary business, in a state in addition to the state described in the application for fiduciary powers that the OCC has approved. Instead, unless the bank provides notice through other means (such as a merger application), the bank shall provide written notice to the OCC no later than ten days after it begins to act in a fiduciary capacity in the new state. The written notice must identify the new state or states involved, identify the fiduciary activities to be conducted, and describe the extent to which the activities differ materially from the fiduciary activities that the bank was previously authorized to conduct.

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PART 9 -- FIDUCIARY ACTIVITIES OF NATIONAL BANKS

1. The authority citation for part 9 continues to read as follows:

Authority: 12 U.S.C. 24(Seventh), 92a, and 93a; 15 U.S.C. 78q, 78q-1, and 78w.

2. Section 9.2 is revised by removing the second sentence in paragraph (g) and adding new paragraphs (j) and (k) as follows:

§ 9.2 Definitions.

* * * * *

(j) Trust office means an office of a national bank, other than a main office or a branch, at which the bank acts in a fiduciary capacity. Pursuant to 12 U.S.C. 36(j), a trust office is not a "branch" for purposes of 12 U.S.C. 36, unless it is also an office at which deposits are received, or checks paid, or money lent.

(k) Trust representative office means an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not act in a fiduciary capacity. Examples of ancillary activities include advertising, marketing, and 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 inspecting or maintaining custody of fiduciary assets. Pursuant to 12 U.S.C. 36(j), a trust representative office is not a "branch" for purposes of 12 U.S.C. 36, unless it is also an office at which deposits are received, or checks paid, or money lent.

3. Section 9.3 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 9.3 Approval requirements.

* * *

(b) A national bank that has obtained the OCC's approval to exercise fiduciary powers is not required to obtain the OCC's prior approval to act in a fiduciary capacity in a new state or to conduct, in a new state, activities that are ancillary to its fiduciary business. Instead, the national bank must follow the notice procedures prescribed by 12 CFR 5.26(e).

(c) A person seeking approval to organize a special-purpose national bank limited to fiduciary powers shall file an application with the OCC pursuant to 12 CFR 5.20.

4. A new § 9.7 is added to read as follows:

§ 9.7 Multi-state fiduciary operations.

(a) Acting in a fiduciary capacity in more than one state. A national bank with fiduciary powers may act in a fiduciary capacity in different states. In each state in which a national bank acts in a fiduciary capacity, the bank may act in:

(1) Any of the eight fiduciary capacities listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and

(2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.

(b) Serving customers in more than one state. While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state. The bank may use a trust representative office for this purpose.

(c) Offices in more than one state. A national bank with fiduciary powers may establish

trust offices or trust representative offices in any state.

(d) Acting in a fiduciary capacity. For each fiduciary relationship, a national bank acts in a fiduciary capacity in a state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, or makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes will be the state that the bank and customer designate from among those states.

(e) Application of state law. (1) State laws used in section 92a. The state trust laws that apply to a national bank's fiduciary activities by operation of the provisions of 12 U.S.C. 92a that refer to state law are the laws of the state in which the bank acts in a fiduciary capacity.

(2) Other state laws. Section 92a specifically identifies which state laws regulating the operations of bank trust departments, trust companies, or other corporate fiduciaries are applicable to national banks. Other state laws regulating such operations are not applicable to national banks.

5. Section 9.14(b) is revised to read as follows:

§ 9.14 Deposit of securities with state authorities

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(b) Acting in a fiduciary capacity in more than one state. If a national bank acts in a fiduciary capacity in more than one state, 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.

Dated: October 31, 2000

John D. Hawke, Jr.,
Comptroller of the Currency