



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

August 12, 2003

John D. Lowery
Riddell Williams P.S.
1001 Fourth Avenue Plaza
Suite 4500
Seattle, Washington 98154-1065

Interpretive Letter #973
September 2003
12 USC 92a
12 CFR 9

Subject: Fiduciary Powers of U.S. Trust Company, N.A.

Dear Mr. Lowery:

By letter dated July 16, 2003, you have requested, on behalf of U.S. Trust Company, N.A. (the "Bank"), a letter from the OCC confirming the authority of the Bank to serve, in California, as indenture trustee for municipal bonds issued in the State of Washington. This letter replies to the three specific questions you have posed and confirms that the Bank has that authority.

Background

The Bank is a national bank that has been authorized by the OCC to exercise trust powers. You have informed us that the bank served as indenture trustee for bonds issued in October of 2000 by the Holmes Harbor Sewer District, a municipal water and sewer district organized and existing under the laws of the State of Washington ("HHSD"). Sometime in late 1999 or early 2000, HHSD decided to issue municipal bonds to finance the acquisition of land and construction of utility infrastructure in a utility local improvement district ("ULID") formed by HHSD and located in Everett, Washington, outside HHSD's geographic boundaries.

In connection with the issuance of the bonds, HHSD retained two law firms, one located in California and one in Washington, to act as bond counsel; both bond counsel also acted as special disclosure counsel to HHSD. HHSD also contracted with an underwriter, IBIS Securities ("IBIS"), for a negotiated underwriting; IBIS retained its own underwriter's counsel. These parties also drafted all disclosure documents for investors.

In mid-September 2000 (approximately one month before the HHSD bonds were issued), U.S. Trust was approached by IBIS in California and asked to serve as indenture trustee for the HHSD bonds. U.S. Trust was provided with the opinion letters of two bond counsel stating that the ULID was validly formed, that the bonds were revenue bonds (it is undisputed that the issuer

had authority under Washington law to appoint a private trustee if the bonds were revenue bonds), that HHSD had authority to issue the bonds, and that HHSD had authority to execute the indenture. U.S. Trust received these opinions prior to executing the indenture and relied on them in executing the indenture, as is the custom and practice of the industry. HHSD made similar representations in the Certificate of the Issuer executed at closing.

On October 26, 2000 (the date the bonds closed), the Bank executed an indenture with HHSD (a customer located in the State of Washington). The indenture authorized the Bank to conclusively rely on any certificate, opinion (including bond counsel opinions) or other document believed by it to be genuine and to have been signed or presented by the proper party, and provided that the Bank undertook no responsibility with respect to any information, statement or recital in any official statement, offering memorandum or any other disclosure material prepared or distributed with respect to the Bonds. The indenture also provided that all representations in the indenture were the statements of HHSD.

At all times prior to the bond issuance and while the Bank was servicing the HHSD trust account, the Bank's trust office was located in San Francisco. The Bank did not at that time (and does not currently) maintain a trust office in Washington. The Bank responded from its office in San Francisco to a request that the Bank serve the customer located in Washington.

The Bank asks the OCC to answer three specific questions, which are set forth, together with their answers, in the remainder of this letter.

Analysis

1. *Are the Bank's fiduciary trust powers and authority to act as trustee governed by Federal law or by state law?*

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. The statutory authority for national banks to exercise fiduciary powers is contained in 12 U.S.C. § 92a. Section 92a permits national banks to exercise fiduciary powers with OCC approval,¹ and directs that the fiduciary powers available to a national bank are 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.

¹ See 12 C.F.R. § 5.26, as amended by 66 Fed. Reg. 34792, 34797 (July 2, 2001) (licensing requirements for fiduciary powers).

The grant of statutory authority in Section 92a does not limit where a national bank may act in a fiduciary capacity. Accordingly, our regulations expressly provide that a national bank may act in a fiduciary capacity in any state.²

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, 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 conclusion, stating that while acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to customers in other states.³ In addition, a national bank may act as fiduciary for relationships that include property located in other states.⁴

2. *Would California law or Washington law be the applicable state law incorporated into Federal law for purposes of determining the fiduciary capacity in which the Bank may act under 12 U.S.C. § 92a for customers located in the state of Washington?*

As we have described, a national bank looks to state law to determine which fiduciary capacities are permissible. For this purpose, the relevant law is the law of the state in which the national bank acts, or proposes to act, in a fiduciary capacity.⁵

Part 9 of the OCC's regulations also 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 core fiduciary activities of accepting fiduciary appointments, executing documents that create the fiduciary relationship, or making decisions regarding the investment or distribution of fiduciary assets.⁶ For each fiduciary relationship, a national bank will refer to only one state's laws for purposes of defining the extent of its fiduciary powers pursuant to Section 92a.

With respect to its fiduciary relationship with HHSD, the Bank acted in a fiduciary capacity in the state of California, since the core fiduciary activities of accepting the fiduciary appointment, executing the documents that created the fiduciary relationship, and making the

² 12 C.F.R. § 9.7(a). *Id.* 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) (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 were preempted).

³ *Id.* at § 9.7(b).

⁴ *Id.*

⁵ *Id.* at § 9.7(d).

⁶ *Id.* If, with respect to a particular fiduciary relationship, these core fiduciary activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity will be the state that the bank designates from among those states.

decisions regarding the investment or distribution of fiduciary assets were all performed there. Based on the foregoing analysis, whenever the Bank acts in a fiduciary capacity in California, the Bank would look to the laws of that state to determine which fiduciary capacities it may engage in, and may then engage in any of these capacities for customers in other states. The fiduciary capacities permitted under the laws of other states where the Bank's customers are located, including Washington state law in this instance, do not affect the fiduciary capacities in which the Bank may act when it is acting in a fiduciary capacity in California.

3. *Given that a state can regulate its own municipal instrumentalities and political subdivisions, did the Bank nonetheless have full fiduciary trust powers and authority to act as trustee for customers located in any state (including, without limitation, Washington) if the Bank was authorized by Federal law to engage in fiduciary trust activities and assuming that the Bank complied with the applicable state law of California as incorporated into federal law granting the Bank such fiduciary trust powers and authority?*

If the Bank may act as an indenture trustee under Section 92a, the Bank is authorized to act as an indenture trustee on a multistate basis. As expressly provided in our regulation, the laws of any state other than California – including Washington – that purport to limit or establish preconditions on the exercise of that fiduciary power are not applicable to the Bank.⁷ A state's authority to regulate the instrumentalities of its own government (for example, by state laws restricting the types of trustees, or other fiduciaries, those state government instrumentalities may appoint), is a separate matter, wholly independent of, and not affecting, the fiduciary authorities granted to national banks as a matter of Federal law. Thus, the Federal authority of a national bank to act as a trustee (or to act in any other permissible fiduciary capacities) is not affected by such statutes.

We note that certain other provisions in Section 92a expressly require the application of state law in certain areas affecting a national bank's exercise of fiduciary powers.⁸ For instance, a state's laws governing certain operational requirements are made applicable to national banks by Sections 92a(f), (g), and (i). Section 92a(c) grants state banking authorities limited access to OCC examination reports relating to national bank trust departments. However, as provided in our regulations,⁹ in each case where Section 92a applies state law to national banks, it is the law of the state where the national bank is acting in a fiduciary capacity – here, California law.

⁷ Id. at § 9.7(e). See also IL 872.

⁸ It should be noted that some national banking laws, including Section 92a, incorporate elements of state law and make them part of the Federal law applicable to national banks. However, the determination of what elements of state law are incorporated is a question of Federal law. Once it is determined, other parts of state law -- even on the same subject matter -- are not incorporated and so are subject to the usual national bank preemption analysis. Cf. *Independent Bankers Ass'n of America v. Clarke*, 917 F.2d 1126 (8th Cir. 1990); *Department of Banking & Consumer Finance v. Clarke*, 809 F.2d 266 (5th Cir.), cert. denied, 483 U.S. 1010 (1987). In these decisions, state laws that applied the state's commercial bank branching laws to national banks were found to conflict with the Federal branching authority of the McFadden Act, even though the McFadden Act refers to state law. Similarly, Section 92a refers to state law but does not include *all* state law governing fiduciary activities.

⁹ 12 C.F.R. § 9.7(e)(1).

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

Sincerely,

/s/ Julie L. Williams

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel