Fiduciary Capacity; Non-Fiduciary Capacity Custody Activities

COMMENT LETTER

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Chief Counsel's Office
Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E-218
Washington, DC 20219

Re: Fiduciary Capacity; Non-Fiduciary Capacity Custody Activities [RIN 1557-AE46; Docket ID OCC- 2018-0018]

Dear Sir or Madam,

The Conference of State Bank Supervisors ("CSBS") appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking issued by the Office of the Comptroller of the Currency (the "OCC"), titled "Fiduciary Capacity; Non-Fiduciary Custody Activities" (the "ANPR"). The ANPR requests comment on potential amendments to the OCC's fiduciary activities rules. In this letter, CSBS raises concerns regarding the impetus for and permissibility of these contemplated proposals and reiterates concerns regarding the validity of the OCC's multistate fiduciary operations rules.

The ANPR indicates that the OCC is considering issuing two separate proposals: (1) a proposal to update the definition of fiduciary capacity to include certain "trust adviser activities" ("Trust Adviser Proposal") and (2) a proposal to establish certain requirements for non-fiduciary custody activities of national banks and Federal savings associations ("Custody Proposal"). The Trust Adviser Proposal prompts concerns regarding the relation of the potential amendment on state trust law and the permissibility of this amendment under the National Bank Act ("NBA"). Similarly, there are significant questions regarding the legal underpinnings of the Custody Proposal and the proposal's consistency with the prevailing interpretation of the scope of the OCC's fiduciary activities regulation.

CSBS believes the significant questions and concerns discussed in this letter should be addressed clearly and thoroughly if the OCC proceeds in issuing the proposals contemplated in the ANPR. In Part I, CSBS explains why the OCC cannot and should not redefine fiduciary capacity as contemplated in the Trust Adviser Proposal. In Part II, CSBS discusses how the Custody Proposal is seemingly inconsistent with the long-standing distinction drawn by the OCC between fiduciary and custodial activities and, in any event, is not clearly

necessary in light of other federal requirements. Lastly, this letter explains, in Part III, that the multi-state fiduciary operations rules must be reconsidered and revised to comply with federal limits of preemption and, in concluding, reminds the OCC about the procedural requirements that apply to proposals to amend the OCC's fiduciary activities regulation.

I. TRUST ADVISER PROPOSAL

In Section II of the ANPR, the OCC indicates that it is contemplating issuing a proposal to update the definition of fiduciary capacity to include certain "trust adviser activities" (the "Trust Adviser Proposal"). Specifically, the Trust Adviser Proposal contemplates updating the regulatory definition of "fiduciary capacity" in 12 CFR Part 9 to include "any activity based on the authority a national bank or Federal savings association has with respect to a trust, such as the power to make discretionary distributions, override the trustee, or select a new trustee."

The impetus for the Trust Adviser Proposal is said to be the directed trust laws enacted in some states in recent years. State directed trust laws allow for the division of the functions and duties of a traditional trustee into multiple, distinct roles and thereby limit or eliminate the traditional fiduciary liability of the trustee. However, because some of these roles do not involve investment discretion and because the terms employed by state directed trust laws to describe these roles are not otherwise explicitly included within the definition of fiduciary capacity, there is said to be uncertainty and risk for those national banks and Federal savings associations which presumably desire to act in these roles.1
In this Part, CSBS explains that:

- the NBA does not permit the OCC to amend the definition of fiduciary capacity to include "trust adviser activities" as broadly defined in the ANPR or, alternatively, a more narrowly defined set of "trust adviser capacities" if national banks are permitted to act in these capacities on a multi-state basis; and
- amending the definition of "fiduciary capacity" to include trust adviser capacities would impede the development and enhancement of state directed trust laws and create unanticipated risks for consumers of trust services.

A. The OCC is not permitted to include "trust adviser activities" within the definition of "fiduciary capacity".

Section 92a of the NBA delegates to the OCC the authority to permit national banks to act in a "fiduciary capacity".2 Section 92a defines "fiduciary capacity" to include certain "traditional" fiduciary capacities (e.g., trustee, executor, etc.) and "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."3

In implementing Section 92a through the promulgation of 12 CFR Part 9, the OCC has adopted a regulatory definition of "fiduciary capacity" and, in so doing, interpreted what constitutes "any other fiduciary capacity" under Section 92a. Accordingly, in addition to the "traditional" fiduciary capacities listed in Section 92a, Part 9 defines "fiduciary capacity" to include other capacities not expressly enumerated in the statute.4 The unenumerated capacities listed in 12 CFR Part 9 define fiduciary capacity based on certain named capacities (e.g., transfer agent, custodian under the Uniform Gifts to Minors Act, etc.) and a functional classification covering "any capacity in which the bank possesses investment discretion on behalf of another".5

The Trust Adviser Proposal contemplates updating the regulatory definition of "fiduciary capacity" to include "trust adviser activities" which the ANPR defines as "any activity based on the authority a national bank or

Federal savings association has with respect to a trust, such as the power to make discretionary distributions, override the trustee, or select a new trustee". It is unclear whether the language used in the ANPR to define "trust adviser activities" would be the precise language utilized in updating the definition of fiduciary capacity. But, for the avoidance of doubt, CSBS expresses its opposition to amending the definition of fiduciary capacity to include "any activity based on the authority a national bank has with respect to a trust" because such an amendment would significantly expand the definition of fiduciary capacity relative to its current scope.

While the ANPR primarily focuses on the purported confusion and ambiguity created by state directed trust laws, the contemplated amendment to the definition of fiduciary capacity is not so limited. Indeed, as used in the ANPR, the term "trust adviser activities" first refers to an incredibly broad category of activities (i.e. "any activity based on the authority a national bank [] has with respect to a trust") and only then refers, by way of example, to two roles recognized under some state directed trust law, namely, the role of distribution trust adviser and trust protector. However, national banks exercising fiduciary powers engage in a wide variety of activities that, when exercised in isolation from all other fiduciary powers, are by no means fiduciary activities.

Thus, to the extent the OCC intends to redefine "fiduciary capacity" to include what are clearly non- fiduciary activities, such an amendment would be unlawful and strongly opposed by CSBS. To that end, CSBS reiterates its opposition to defining fiduciary capacity to include trust adviser activities, that is, any activity based on the authority a national bank has with respect to a trust.

B. The OCC is not permitted to include trust adviser capacities within the definition of "fiduciary capacity".

Even if the Trust Adviser Proposal amended the definition of fiduciary capacity in a more targeted manner to specifically recognize certain narrowly defined trust adviser capacities, such an amendment would still be impermissible if the amended definition permitted national banks to engage in trust adviser capacities on a multi-state basis. The ANPR does not address the implications of amending the definition of fiduciary capacity with respect to the multi-state fiduciary operations of national banks. Nevertheless, we will assume for the purposes of this letter that the OCC intends to allow a national bank to engage in trust adviser capacities on a multi-state basis to the same extent as multi-state operations are permitted for the currently defined fiduciary capacities. Section 92a authorizes the OCC to permit national banks to act in a fiduciary capacity only when "not in contravention of State or local law."6 Section 92a further provides that the granting to and exercise of a fiduciary power by a national bank is deemed to be "not in contravention of State or local law" whenever the laws of such State authorize or permit the exercise of that fiduciary power by state-chartered entities that compete with national banks.7 Thus, under Section 92a, the OCC may only grant fiduciary powers if and to the extent that the laws of the State in which a national bank is located permits such powers to be exercised by state-chartered entities.

The OCC's fiduciary activity regulations provide that a national bank may act in a "fiduciary capacity" in multiple states and the determination as to whether a particular fiduciary capacity is permitted or prohibited under state law is determined based on the laws of the state in which the bank performs core fiduciary functions.8 Accordingly, if the OCC were to expand the definition of "fiduciary capacity" to include trust adviser roles, then we assume that the OCC would also assert that a national bank may act in trust adviser capacities in any state, including states that do not permit or allow state-chartered institutions to act in trust adviser capacities. As explained below, it is for this reason that expanding the definition of "fiduciary capacity" to include trust adviser capacities would exceed the OCC's authority under Section 92a.

Defining "fiduciary capacity" to include trust adviser capacities would not be permissible because doing so defines fiduciary based on a function that is not a fiduciary capacity permitted under the trust laws of all states.

Not all states have adopted directed trust laws. Indeed, some states do not provide for the establishment of directed trusts at all and, consequently do not permit or authorize state-chartered institutions to serve in trust adviser roles. Further, among the states that have enacted directed trust laws, a majority of the states do not allow for the complete bifurcation of fiduciary powers and duties because the directed trustee continues to possess the fiduciary liability for deciding whether to follow the direction of trust advisers or, at least, liability for willful misconduct. Moreover, a majority of the states with directed trust laws do not recognize all the trust adviser roles with some permitting state-chartered institutions to act only in the capacity of investment trust adviser.

Given that trust adviser capacities are not fiduciary capacities in which all state trust laws permit state- chartered institutions to act, defining "fiduciary capacity" to include trust adviser capacity would exceed the OCC's authority under Section 92a. Although the OCC has previously defined fiduciary capacity in a functional manner to include any capacity where the bank possesses investment discretion on behalf of another and applied this definition on a multi-state basis, at the time this definition was amended acting solely in the capacity of exercising investment discretion on behalf of another was, under all state trust laws, a fiduciary capacity in which state-chartered entities were authorized to act. The same cannot be said for trust adviser capacities given the current level of enactment of directed trust laws outlined above.

Furthermore, while the OCC applied the investment discretion definition of fiduciary capacity in promulgating the multi-state fiduciary operations rule, 12 CFR 9.7, the validity of this rule was naturally dependent on the validity of defining fiduciary capacity to include any capacity involving investment discretion. Indeed, as explained in Part III, the validity of the multi-state fiduciary operations rule is already highly questionable, but it would be further called into question if, as is contemplated, the OCC were to define fiduciary capacity to include capacities that are not, under all state trust laws, fiduciary capacities in which state-chartered institutions are permitted to act. While the OCC may be permitted to allow national banks to act in trust adviser capacities in those states in which trust adviser capacities are fiduciaries capacities in which state-chartered institutions are permitted to act, allowing national banks to engage in trust adviser capacities on a multi-state basis would violate Section 92a.
In sum, given that trust adviser capacities are not, under all state trust laws, fiduciary capacities in which state-chartered institutions are permitted to act, the

OCC is not permitted to redefine fiduciary capacity to allow national banks to engage in trust adviser capacities in states in which trust adviser capacities are not fiduciary capacities in which state-chartered institutions are permitted to act.

C. The Trust Adviser Proposal would impede the development and enhancement of state directed trust laws and create unanticipated risks for consumers.

Even if the OCC had the authority to permit national banks to act in trust adviser capacities on a nationwide basis, doing so would be unwarranted and inadvisable as a matter of policy. As explained in this section, CSBS believes that permitting national banks to act in trust adviser capacities on a nationwide basis would create significant risks that consumers may not reasonably expect to encounter and would impede the future development and enhancement of state directed trust laws.

As with any policy matter, the enactment of directed trust laws involves various trade-offs. While directed trust laws can afford more flexibility in allocating fiduciary liability and responsibility and thereby reduce the cost of trust services for consumers, these laws can also create heightened risks for beneficiaries in trust administration. State policymakers have considered these trade-offs in deciding whether to enact and how to craft directed trust laws with different states striking a different balance with respect to what trust adviser capacities to permit and what are the responsibilities of a directed trustee.

As in other areas of state law, the balance drawn by different state policymakers over time will shift as states and their citizens develop varying levels of comfort with directed trust arrangements. This process is inherent to our federalist system and will ultimately, by allowing for competition between states and accountability to state citizens, result in the balanced development and enhancement of directed trust laws for both consumers and providers of trust services. However, by adopting a federal definition of trust adviser capacities and applying that definition on a multi-state basis, the OCC will stymie the natural improvement of directed trust laws.

While the ANPR expresses concern about the litigation risk purportedly caused by differences in the terminology utilized in state directed trust laws, the litigation risk faced by national banks is no greater than the risk faced by every other fiduciary institution seeking to operate on a multi-state basis and is simply part of the natural maturation process of a relatively young area of state law. It is unclear why national banks should be afforded the unique privilege of being exempt from that process particularly given that the very basis upon which Congress afforded fiduciary powers to national banks was to ensure competitive equality with competing state-chartered institutions.

In conclusion, CSBS opposes the Trust Adviser Proposal because it would not only create significant risks that consumers may not reasonably expect to encounter but also would impede the future development and enhancement of state directed trust laws.

II. CUSTODY PROPOSAL

In Section III of the ANPR, the OCC indicates that it is contemplating issuing a proposal to establish certain requirements for non-fiduciary custody activities of national banks and Federal savings associations (the "Custody Proposal"). Specifically, the ANPR states that the Custody Proposal would, among other things, require national banks and Federal savings associations to segregate and safeguard client assets obtained in a custodial capacity.
As discussed below, the Custody Proposal raises significant questions which CSBS believes the OCC should address, including how the proposal comports with the OCC's position regarding the source of the authority of national banks to engage in custodial activities. Based on these questions, CSBS makes the following requests for clarification and explanation:

- whether Section 92a authorizes amending 12 CFR 9 to regulate the non-fiduciary custodial activities of national banks;
- how regulating custodial activities through 12 CFR 9 is consistent with the OCC's long-held position that custodial activities are not fiduciary activities under Section 92a; and
- why the Custody Proposal is necessary in light of regulatory requirements already applicable to the custody activities of national banks.

A. What is the statutory source of authority for national banks to engage in and the OCC to regulate non-fiduciary custodial activities?

While national banks have been authorized to carry on the business of banking since the passage of the NBA in 1863, national banks were not allowed to engage in fiduciary activities until the passage of the Federal Reserve Act ("FRA") in 1913.9 Importantly, in allowing national banks to engage in fiduciary activities, Congress did not include fiduciary powers within the banking powers granted upon formation of a national bank; rather Congress required national banks to separately apply for a special permit to acquire fiduciary powers.

The authority to permit and regulate the exercise of fiduciary activities of national banks—although originally delegated to the Board of Governors of the Federal Reserve System ("FRB")—has, since 1962, been delegated to and exercised by the OCC. Nevertheless, it remains as true today as it was in 1913 that the power of a national bank to engage in the business of banking does not include an inherent grant of authority to engage in fiduciary activities; rather, the banking powers and fiduciary powers of national banks stem from separate and distinct sources of statutory authority. The division of banking and fiduciary powers under the NBA is clearly recognized in Section 92a—the statute permitting and regulating the exercise of fiduciary activities.10

In considering where custodial activities fall in the division of banking and fiduciary powers, the OCC has consistently maintained that the authority of national banks to act in a custodial capacity derives from the banking powers granted under 12 U.S.C. 24(Seventh), not the fiduciary powers granted pursuant to Section 92a.11 Relatedly, in implementing and interpreting Section 92a, the OCC through 12 CFR Part 912 (and, prior to 1962, the FRB through Regulation F)13 have consistently maintained that this statute neither authorizes nor governs the exercise of nonfiduciary powers by national banks.

Thus, the position of the OCC has long been that the banking powers and fiduciary powers of national banks derive from separate and distinct sources of statutory authority and the authority to engage in custodial activities is a banking power, not a fiduciary power. But the Custody Proposal would seemingly conflict with this long-standing position because the OCC seems to be asserting that its statutory authority under Section 92a to regulate the fiduciary activities of national banks also empowers the OCC to regulate the non-fiduciary activities of national banks through 12 CFR Part 9.

Section 92a(j) provides that "[t]he [OCC] 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."14 Pursuant to this authority, the OCC has promulgated 12 CFR Part 9 which "applies to all national banks that act in a fiduciary capacity, as defined in §9.2(e)".15 But, as discussed above, acting in a custodial capacity has never been classified as a fiduciary capacity and presumably would not be so classified under the Custody Proposal. For this reason, CSBS requests that the OCC clarify and explain how Section 92a authorizes amending 12 CFR Part 9 to regulate the non- fiduciary custodial activities of national banks.

B. How is the Custody Proposal consistent with the OCC's long-held position that custodial activities are not fiduciary activities under Section 92a?

The Custody Proposal also raises the question as to how amending 12 CFR Part 9 to apply to the nonfiduciary custodial activities can be reconciled with the OCC's position that custodial activities are not fiduciary activities under 12 U.S.C. 92a. The ANPR states that "whether acting in a fiduciary or non- fiduciary custodial capacity, the principal roles of a national bank and Federal savings association custodian remain the same: To safeguard a client's assets and to operate in a safe and sound manner."

However, equating the principal roles served in acting in these distinct capacities overlooks fundamental legal differences between fiduciary and custodial arrangements. For instance, when acting in a fiduciary capacity, a bank, as the trustee, has legal title and possession of the funds held in fiduciary accounts and the client beneficiary holds neither; but, when acting in a custodial capacity, a bank, as the custodian, only has possession of assets held in custodial accounts and the client retains full title and ownership of custodial assets.

This concern regarding the conflation of custodial and fiduciary capacities and the requirements applicable thereto is not merely theoretical. For instance, the ANPR indicates that the Custody Proposal would potentially amend the rules requiring the safeguarding of fiduciary assets to apply a single consistent standard to both fiduciary and custodial assets. However, the rules governing the protection of fiduciary assets mandate certain

action that would actually be prohibited for client assets held in a custodial capacity. For instance, while national banks are required by Section 92a to collateralize fiduciary funds awaiting investment or distribution,16 national banks are prohibited from collateralizing client funds held in a custodial capacity.17 Thus, certain safeguarding requirements in 12 CFR Part 9 simply could not be made to apply to non-fiduciary custody assets.

Given the clear differences between the capacities of custodian and fiduciary, the contemplated extension of OCC's fiduciary activities regulations to cover non-fiduciary activities raises the question whether the OCC continues to interpret "fiduciary capacity" to exclude acting in a custodial capacity. If the OCC is reversing its long-held position that custodial activities are not fiduciary activities under 12 U.S.C. 92a, then CSBS requests that the OCC make this clear and thoroughly articulate its novel interpretation of the NBA. Additionally, CSBS requests that the OCC address how aligning the safeguarding requirements applicable to fiduciary assets and custodial assets is consistent with the limits of the fiduciary powers and banking powers of national banks.

C. Is the Custody Proposal necessary in light of regulatory requirements already applicable to the custody activities of national banks?

The concerns as to the permissibility and legal underpinnings of the Custody Proposal discussed above arise quite naturally because the reasons provided as to why the OCC is contemplating the Custody Proposal raise more questions than answers. For instance, the ANPR notes that the Custody Proposal would complement the applicable regulations of other regulators related to the custody of client assets and cites to, among other things, regulations implementing federal commodities laws and federal securities laws. But, some of these regulations—for instance, the Treasury regulations governing the holding of government securities in a custodial capacity—have been in place for decades without any relevant modification and yet the OCC only just now feels compelled to propose complementary regulations.

Additionally, other federal regulations cited in the ANPR would seemingly already require the segregation and safeguarding of client assets held by a national bank in a custodial capacity. For instance, the regulations governing custody of funds or securities of clients by investment advisers require investment advisers to maintain customers' assets with "qualified custodians" and, at least with respect to bank custodians, require that the custodian maintain the customer's assets in a separate account.

Lastly, although the ANPR does not address the pass-through deposit insurance regulations, the extent to which segregation of custodial assets is already required or at least encouraged by those regulations is, of course, quite relevant in considering whether the Custody Proposal is necessary or warranted. CSBS encourages the OCC to consider and address the interaction of the Custody Proposal with the pass- through regulations and any implications such a proposal would have for pass-through insurance.

Given that the regulations that the Custody Proposal would purportedly complement seemingly already require custodial banks to segregate and safeguard client assets, the impetus for the issuance of the Custody Proposal is far from clear. CSBS requests that the OCC explain, in a candid and transparent manner, the reasons that the OCC is issuing the proposal and whether the proposal would merely be duplicative in light of other federal requirements applicable to custody activities of national banks.

III. MULTI-STATE FIDUCIARY OPERATIONS RULES

The OCC fiduciary activities regulations address the application of Section 92a in the context of a national bank engaging in fiduciary operations in multiple states. Specifically, the multi-state fiduciary operations rule, 12 CFR 9.7, provides that a national bank may act in a "fiduciary capacity" in multiple states and the determination as to

whether a particular fiduciary capacity is permitted or prohibited under state law is based on the laws of the state in which the bank performs certain key fiduciary functions. The OCC's promulgation of Section 9.7 in 2001, and the interpretation of Section 92a therein, were premised on a preemption standard which Congress has since overturned with the enactment of 12 U.S.C. 25b through the Dodd-Frank Act (DFA).
In this Part, CSBS explains that (1) the multi-state fiduciary operations rules are subject to reconsideration in light of the requirements of Section 25b; and (2) when reconsidered under the preemption standard set forth under Section 25b, these rules should be found to be invalid and revised accordingly.

A. The multi-state fiduciary operations rules are subject to reconsideration under Section 25b.

With the passage of DFA in 2010, Congress enacted Section 25b to overturn the preemption interpretations and rules issued by the OCC in the lead up to the financial crisis. Congress intended Section 25b to reverse the OCC's aggressive preemption campaign by, among other things, expressly declaring that field preemption does not apply under the NBA and by codifying the Barnett Bank conflict preemption standard.18 Importantly, Congress also reduced the level of deference afforded preemption determinations in requiring that their validity be tested under a Skidmore standard of review and in requiring that they be supported by substantial evidence.19 Section 25b became effective on July 21, 2011 and the preemption standard laid out therein applies to all contracts entered into after that date.20

As required by Section 25b, the OCC set out to reconsider and revise its preemption rules in 2011.21 While we do not believe the OCC's revised preemption rules are themselves consistent with the letter or spirit of Section 25b, it is undeniable that the rulemaking implementing Section 25b did not consider or even mention the OCC's multi-state fiduciary operations rules. However, Congress clearly intended all of the OCC's preexisting rules preempting state consumer financial laws (with the exception of the OCC's usury preemption rule) to be reconsidered and amended to satisfy the requirements of the DFA.

Section 25b defines "state consumer financial law" quite broadly and in such a manner that it unquestionably encompasses state laws regulating trust services including the very type of laws preempted under 12 CFR Part 9.22 The reconsideration of the multi-state fiduciary rules, in particular, is mandated by Section 25b because these rules preempt state laws prohibiting certain trust activities.

Indeed, the multi-state fiduciary operations rules bear all the indicia of the type of rules Congress intended Section 25b to cover in that they are largely based on the field preemption principles previously applicable to federal savings associations but now prohibited by Section 25b. In sum, the OCC's failure to reconsider Part 9 is a blatant violation of the requirements of Section 25b and CSBS urges the OCC to reconsider and revise 12 CFR Part 9 through a future rulemaking.

B. The multi-state fiduciary operations rules are invalid and must be revised.

Section 25b not only mandates that the OCC's multi-state fiduciary operations rules be reconsidered, it also requires that those rules be revised because they are premised on a field preemption standard that is now prohibited. Specifically, the multi-state fiduciary operations rules, 12 CFR 9.7, must be revised because they interpret the phrase "the State in which the national bank is located" in Section 92a in a manner that applies field preemption to the fiduciary activities of national banks.

Under Section 92a(a), the OCC may only grant a national bank the right to act in certain fiduciary capacities if and to the extent that acting in such capacities would not be "in contravention of State or local law . . . under the laws of the State in which the national bank is located". In promulgating Section 9.7, the OCC interpreted the

phrase “the State in which the national bank is located” to refer only to the state in which a national bank “acts in a fiduciary capacity” which the OCC defined to include only certain “core” fiduciary functions, not all the fiduciary activities in which national banks engage.23 As a result, a national bank is said to be “located” only in the state(s) in which it conducts core fiduciary functions, not in any state in which it engages in fiduciary activities authorized by Section 92a.

The interpretation underlying Section 9.7 is invalid not only because its reasoning equivocates as to the meaning of fiduciary capacity,24 but also because it has a field preemptive effect. In particular, by concluding that a national bank is not “located” in every state in which it engages in fiduciary activities, Section 9.7 allows national banks to engage in fiduciary activities in any state even if those activities are in contravention of state law. The categorical determination in Section 9.7 that state law prohibitions on trust activities are preempted even in the absence of direct or indirect conflict cannot properly be called anything other than field preemption.

That Section 9.7 applies field preemption is further underscored by the manner in which the OCC, in defining “act in a fiduciary capacity”, drew on the field preemption analysis employed by the Office of Thrift Supervision (OTS).25 After concluding the term “located” to mean the state in which the national bank acts in a fiduciary capacity, the OCC defined “act in a fiduciary capacity” to include only three “core” fiduciary functions and cited as support the OTS opinions reaching the same conclusion. But the conclusions of the OTS opinions were premised on the field preemption then-afforded federal savings associations.26 Thus, the OCC’s definitions of “location” and “acts in a fiduciary capacity” are not valid in that they afford field preemption to national bank fiduciary activities and thus violate the restrictions of Section 25b.

Even apart from unlawfully establishing field preemption, the OCC’s multi-state fiduciary activities rules are invalid because they do not comport with the preemption standard laid out in Barnett Bank and codified in Section 25b. In defining “located”, the OCC drew heavily on Marquette, where the Supreme Court interpreted the term “located” in 12 U.S.C. 85 in a manner that allowed national bank from one state can conduct an authorized business in another state without regard to its being authorized by the other state.27 But the decision in Marquette was premised on the fact that, unlike other provisions of the NBA, Section 85 does not render the permissibility of national bank activity contingent on the law of the state in which the activity takes place.28 The Court recognized this distinction again in Barnett Bank in holding that NBA provisions which authorize national bank activities only under the grace of state law, such as Section 92a, are not to be interpreted in the same manner as provisions which do not condition the grant of powers on state permission, such as Section 85.29 Thus, the OCC’s interpretation of “located” not only is not authorized by Marquette but actually violates the reasoning of Barnett Bank and the preemption standard laid out therein, and as a consequence, violates the requirements of Section 25b.

CSBS believes the only interpretation of the phrase “State in which the national bank is located” that is valid under Section 92a and in compliance with the requirements of Section 25b is one which provides that a national bank is located in a state if it engages in any fiduciary activities in that state. This is the “state-by-state” approach that the OCC adhered to prior to the adoption of Section 9.7 in 2001.30 Under this approach, the exercise of fiduciary powers within each state is conditioned on a state-by-state basis under the same test: “is the exercise of fiduciary powers by national banks prohibited by state law, and even if it is, does that state permit its state institutions to exercise these powers or not.”31 This state-by- state approach is the only valid interpretation of Section 92a both in its own right and in light of the restrictions and requirements of Section 25b. Therefore, CSBS urges the OCC to revise Section 9.7 to return to this approach.

CONCLUSION

If the OCC proceeds with issuing a proposed rulemaking for the Trust Adviser Proposal or the Custody Proposal or any other significant amendment to its fiduciary activities rules, then CSBS reminds the OCC of the procedural requirements that apply to such rulemakings, including the requirements applicable to preemption determinations under 12 U.S.C. 25b & 43 and rules with federalism implications under Executive Order 13132. As explained above, amending the definition of fiduciary capacity as contemplated by these proposals would have significant implications for the protections afforded consumers of trust services under state law as well as significant federalism implications. Given these implications, the Trust Adviser Proposal and Custody Proposal would be subject to the above-mentioned procedural requirements and CSBS expects full compliance with these requirements.

In conclusion, with respect to the Trust Adviser Proposal, CSBS believes that the OCC cannot and should not redefine fiduciary capacity as is contemplated in the ANPR; and, with respect to the Custody Proposal, CSBS requests clarity regarding the legal underpinnings and implications of as well as the impetus for the proposal. Additionally, CSBS reiterates that the OCC is required to reconsider and revise its multi-state fiduciary operations rules to comply with the DFA limitations on NBA preemption. CSBS appreciates the opportunity to comment on the ANPR and the potential amendments contemplated therein.

Sincerely,

John Ryan

Footnotes

1 Although this letter primarily discusses the fiduciary activities of national banks and the statutory and regulatory framework applicable thereto, the questions and concerns expressed herein apply also to the fiduciary activities of Federal savings associations under 12 U.S.C. 1464(l) and (n) as implemented in 12 CFR Part 150.

2 12 U.S.C. 92a.

3 12 U.S.C. 92a(a).

4 12 CFR 9.2(e).

5 Id.

6 12 U.S.C. 92a(a).

7 12 U.S.C. 92a(b).

8 See 12 CFR 9.7.

9 See Pub. L. 63-43, Section 11(K) (formerly codified at 12 U.S.C. § 248(K)).

10 See e.g., 12 U.S.C. 92a(d) (prohibiting the trust department of a national bank from effecting transactions that are traditionally commercial bank activities). Relatedly, the OCC has stated that it would be ultra vires for a national bank to pledge its own securities to secure cash balances held in a nondiscretionary custodial capacity. See OCC No- Objection Letter No. 86-11 (April 2, 1986); see also 1 F.R.R.S. 3-428.

11 See e.g., OCC Interpretive Letter No. 1078 (May 2007) ("For banking law purposes, the authority of national banks to engage in custody activities derives from the general business of banking, and incidental powers language in 12 U.S.C. § 24(Seventh).").

12 See 61 Fed. Reg. 68542, 68545, n.4 (Dec. 30, 1996) ("The OCC does not treat non-discretionary custodial activities as fiduciary, and the final rule continues that approach. Those activities are authorized under 12 U.S.C. 24 (Seventh).").

13 See Fed. Res. Bulletin 6-949 (Sept. 1920) ("The Board does not believe that national banks can exercise nonfiduciary powers merely because competing trust companies are permitted to exercise those powers under the laws of a particular State.").

14 12 U.S.C. 92a(j).

15 12 CFR 9.1(c).

16 See 12 U.S.C. 92a(d).

17 See supra note 10; see also Texas & Pacific Railroad Co. v. Pottorff, 291 U.S. 245 (1934) (holding that a national bank lacks power to pledge its assets to secure a private deposit).
18 See 12 U.S.C. 25b(b)(1), (4).
19 See 12 U.S.C. 25b(b)(5)(A), (c).
20 CSBS notes that the decision in Bank of Am., N.A. v. Sundquist, 2018 UT 58 (2018) did not consider Section 25b in passing on the validity of the OCC's interpretation of Section 92a because the mortgage at issue in that case was originated in 2006 and thus prior to the effective date of Section 25b. With respect to financial transactions entered into after the effective date of Section 25b, CSBS is confident that, when considered under the standard of review mandated by Section 25b, the OCC's interpretation of Section 92a will be deemed invalid.
21 See 76 Fed. Reg. 30557 (May 26, 2011) (proposed rule); 76 Fed. Reg. 43549 (July 21, 2011) (final rule).
22 See 12 U.S.C. 25b(a)(2).
23 See 66 Fed. Reg. 34792, 34794-34796 (July 2, 2001).
24 In the 2001 rulemaking, the OCC explained its interpretation of "located" as follows: "The last phrase in paragraph (a) of section 92a refers to the state in which the national bank is ''located.'' The primary reference to a state is in the Contravention Clause regarding the right to act in fiduciary capacities (the language emphasized above). That language was in the statute originally, before the phrase using the term ''located'' was added. Thus, we believe that the reference to the state in which a bank is located refers to the state in which the bank is acting in a fiduciary capacity." See 66 Fed. Reg. 34792, 34794 n. 6 (emphasis added). Note that while the first emphasized reference uses "act in fiduciary capacities" to include all fiduciary activities in which national banks are authorized to engage, the second emphasized reference uses "acting in a fiduciary capacity" in the defined sense to include only the "core" fiduciary functions.
*25 See 66 Fed. Reg. 34792, 34794 n. 6 (citing OTS August 1996 Opinion). See also OCC Interpretive Letter 866, *9,*
n.21 (Oct. 1999) (citing numerous OTS Opinions).
26 See 12 CFR 550.136(a) (2010) ("OTS occupies the field of the regulation of the fiduciary activities of Federal savings associations.").
*27 See OCC Interpretive Letter 866, *6 (Oct. 1999) (citing Marquette National Bank of Minneapolis v. First of Omaha Service Corp., 439 U.S. 299, 311-13 (1978)).*
28 See Marquette National Bank of Minneapolis, at 313.
29 See Barnett Bank, N.A. v. Nelson, 517 U.S. 25, 34 (1996).
*30 See OCC Interpretive Letter 695, *11-12 (Dec. 1995).*

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