February 9, 2001

Office of the Comptroller of the Currency
Public Information Room, Mail Stop 1-5
250 E Street, SW
Washington, DC 20219

Re: Fiduciary Activities of National Banks, 65 Federal Register 75872 (December 5, 2000)

Dear Sir or Madam:

The American Bankers Association ("ABA") appreciates the opportunity to comment on the proposal issued by the Office of the Comptroller of the Currency ("OCC") to amend its regulations to codify OCC interpretations regarding multi-state trust operations of national banks. In addition, this letter responds to the OCC's solicitation of comment on the need for uniform standards of care applicable to national bank trustees' administration of personal trusts and trust assets.

The ABA is the largest banking trade association in the country bringing together all elements of the banking community, including community, regional, money center banks and holding companies, as well as savings associations, trust companies and savings banks. For over 75 years, the ABA has advocated before the Congress and the federal banking agencies on behalf of trust and fiduciary bankers. ABA's Trust Counsel Committee has studied this proposal and considers it to be very important to ABA's members. Approximately 1,100 national banks and trust companies serve as fiduciary to over one million accounts holding assets in excess of $4 trillion would be impacted by the OCC's proposal.[1]

Multi-state Fiduciary Operations

The OCC proposes to codify in new Section 9.7 recent OCC interpretations that authorized: (1) a national bank with its main office in one state to act in a fiduciary capacity in any other state that permits its own in-state fiduciaries to act in that capacity;[2] and (2) a national bank that acts in a fiduciary capacity in one state to market its fiduciary services to customers in other states, to solicit business from these customers, and to act as fiduciary for customers located in other states.[3]

The ABA strongly supports the proposal to codify its interpretations regarding national bank multi-state fiduciary operations. It is important for our members to be able to offer fiduciary services on a nationwide basis and in a seamless and efficient fashion. Codification of this authority both clarifies and bolsters the authority of national banks to do just that.

We would, however, offer the following comments for consideration:

- New Section 9.7 should clarify what impact, if any, state licensing statutes have on national banks. Should state licensing statutes apply even when a national bank is not located in that particular state but, rather, is merely marketing its services in that state? We would submit that they should not.

- Amend Section 9.7(b) to make clear that a national bank need not maintain any type of office in a state in order to market its fiduciary services to, and act as a fiduciary for, customers in that state.
- Clarify that state laws that either do not come within the meaning of state laws affecting permissible fiduciary capacities, as specified in Sections 92a(a) and (b), or do not set operational requirements as specified in Sections 92a(f) (deposit of securities and/or execution of bonds), (g) (execution of oath or affidavit) or (i) (requisite capital and surplus) are not applicable to national banks. State laws prohibiting banks not located in a particular state from taking title to real estate or requiring trusteeships from customers located in that state to be served by an in-state trustee are two such examples.
- Clarify that activities ancillary to fiduciary activities in Section 9.3 includes marketing and soliciting fiduciary business so that it is clear that once a national bank has received authorization to exercise fiduciary powers it need not seek prior OCC approval each time it seeks to market those services or solicit fiduciary business in a new state. In addition, ABA would support the comments of others who suggest that a greater than 10-day after-the-fact notice should be required. The Gramm-Leach-Bliley Act embraces a 30-day after-the-fact notice requirement for financial holding companies exercising **new** nonbanking authorities.[4] A national bank exercising **previously approved** fiduciary powers in a new state should be subject to no more of a notice requirement.

Uniform Standards Governing Fiduciary Activities

To address the lack of uniformity in state laws applicable to bank fiduciary services, the OCC is soliciting comment on whether the OCC should adopt uniform standards of care governing fiduciary activities of national banks. The request for comment is silent on whether such a uniform national standard would preempt the various state fiduciary laws. We presume, for purposes of this request for comment that it would not.

The OCC is quite correct; banks that operate in several states are subject to a variety of state fiduciary laws that lack in uniformity. For example, the majority of states have adopted the Uniform Prudent Investor statute, which governs fiduciary investment standards. A minority of states, however, continues to require fiduciaries to operate under the older, more-outdated Uniform Prudent Person rule. Significant differences exist between the two statutes and, even among those states that have adopted the Uniform Prudent Investor statute, variations do exist.

The Uniform Principal and Income Act is another example where differences exist among those states that have elected to adopt the model statute. In addition, while almost all states permit fiduciary assets to be invested in proprietary and third party mutual funds, the prerequisites to investing fiduciary assets in mutual funds, i.e., notice and compensation, differ significantly among the fifty states.

Differences among the state laws increase regulatory burdens and inefficiencies for banks offering fiduciary services. Bank legal and compliance staff must stay on top of applicable legislative and regulatory changes in each state in which fiduciary services are offered. Manuals, operating procedures, account forms, and systems must constantly be revised to reflect these changes. Complying with differing state laws and regulations increases legal, compliance and operational risks for banks.

Clearly, the need for uniformity among the states is great. The efforts made by the National Conference of Commissioners on Uniform State Laws (“ NCCUSL”) to adopt uniform laws are a very good step in that direction. Those efforts call on various legal authorities, experts in their fields, to draft a particular uniform law. Once a law is drafted, it is then shared with others in the appropriate field who then provide appropriate comment and input to the drafters. Finally, after a uniform law is approved by NCCUSL, it is then sent to the various state legislative bodies for consideration. The ABA believes that in the absence of federal preemption of state laws, the Uniform Trust Act, adopted by NCCUSL in August 2000 is the best opportunity the industry has to achieve uniformity among the states.

Consequently, it is our conclusion that a national uniform standard of law, such as that suggested by the OCC, no matter how well intentioned, will not solve the problem of lack of uniformity among the states. Rather, we believe that overlaying yet another standard at the national level will add to the complexity and burden of complying with various state statutes. For those national banks operating in all 50 states and the District of Columbia, a national uniform standard of law would add a 52nd standard with which to comply.[5]

Even if the OCC were to preempt all state fiduciary laws in favor of a national uniform standard of law, questions and concerns would still exist. First, it is not all clear what impact a national uniform standard of law would have on state common law. Would the national standard preempt common law? Or would national banks also have to comply with those principles established under common law?

In addition, some banks have suggested that a national uniform standard of law could actually operate to the detriment of national banks, specifically that national banks could lose business to state banks. Consumers of fiduciary services are fairly savvy, according to this argument, and may very well elect a state bank over a national bank to serve as trustee for the trust *res* if the consumer believes that that particular state bank is operating under state laws that are more pro-consumer than the national bank. While the ABA recognizes that the OCC’s proposal would permit the consumer to elect to have the national bank operate under the particular state law, the perception, nevertheless, would be that the national bank is more predisposed to operate under the less pro-consumer national standard.

While we remain unconvinced of the benefits of drafting a national uniform standard of fiduciary care, we nevertheless believe that there is a role for the OCC to play in assisting national banks to comply with the “crazy patchwork quilt” of state laws. Specifically, the ABA would suggest that the OCC lend its good offices to efforts to adopt uniform choice of law rules. It is a nightmare for our member banks to determine which law applies when the trust instrument is silent. In an increasingly mobile world, where the bank trustee is operating in one state, the grantor lives in another, the beneficiaries in a third, and the property often times housed in a fourth, it is very difficult to determine which law governs. An OCC-developed solution to this problem would present huge benefits for trust banks and their customers. We strongly encourage the OCC to work toward such a solution.

In sum, the ABA appreciates the opportunity to comment on the multi-state trust proposal and to work with the OCC on the issue of a national fiduciary standard of care. The ABA stands ready, through its Trust Counsel Committee and Center for Securities, Trusts and Investments, to continue its work with the OCC on these and similar issues.

Sincerely yours,
Sarah A. Miller

cc: Lisa Lintecum
Millerard Cleva
Michelle Meyer
William Dehnke

[1] Federal Financial Institutions Examination Council, Trust Assets of Financial Institutions – 1998 at pp 7-8.

[2] OCC Interpretive Letter No. 695 (December 8, 1995).

[3] OCC Interpretive Letter Nos. 866 and 872 (October 8 and 28, 1999).

[4] Section 4(k)(6) of the Bank Holding Company Act, 12 U.S.C. 1843.

[5] We note that fiduciary standards set out in the Employee Retirement Income and Security Act, ERISA, and applicable to employee benefit plans, add yet another standard to the mix of fiduciary codes of conduct with which banks must comply.