LETTER OPINION
94-L-128

April 29, 1994

Ms. Nancy J. Lewis
Deputy Securities Commissioner
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Ms. Lewis:

Thank you for your letter asking whether the North Dakota Securities Commissioner has the authority to regulate trust departments of national banks that sell securities in North Dakota.

According to a March 1994 Consumer Reports' article entitled "Should You Buy Mutual Funds From Your Bank?", "[s]ome 3,500 banks across the U.S. now sell mutual funds" and "the money invested in bank mutual funds was growing 40 percent a year - almost twice as fast as the fund industry in general." The significance of this issue is highlighted in an earlier article noting that "bank trust departments have larger securities portfolios than all other institutional investors combined." Lybecker, Regulation of Bank Trust Department Investment Activities, 82 Yale L.J. 977 (1973). Approximately 40 percent of national banks have trust departments. Central Nat'l Bank v. United States Dep't of Treasury, 912 F.2d 897 (7th Cir. 1990).

In light of the significance of this issue, I understand that the North Dakota Securities Commissioner has organized a bank securities task force and has issued Securities Commissioner Opinion 94-101 (January 21, 1994), directing trust departments that sell securities to register with the Securities Commissioner as broker-dealers. Accordingly, your concern centers on the authority of the North Dakota Securities Commissioner to regulate national bank trust departments that may operate as a "dealer" as that term is defined under N.D.C.C. ? 10-04-02(2)(a). N.D.C.C. 10-04-02(2)(a) defines dealer as every person who engages "[d]irectly or indirectly, as agent, broker, or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person." N.D.C.C. ? 10-04-10 prohibits any unregistered dealer from offering to sell or selling any securities in North Dakota. The North Dakota Supreme Court has held that a state chartered trust company, also defined by state law as a "banking institution" and subject to regulation by the Commissioner of Banking and Financial Institutions, is required to register with the Securities Commissioner when acting as a "dealer."[1] State ex rel. Holloway v. First American Bank & Trust Co., 186 N.W.2d 573, 576-580 (N.D. 1971).

The management and advisory services for trust accounts of bank trust departments was explained in one treatise as follows:

> The activities of bank trust department, i.e., management and advisory services for trust accounts and the execution of orders for an expanding number of investment services offered to bank customers, are an important segment of the securities business. Traditionally, trust department accounts were viewed as different from brokerage accounts with brokerage firms. Yet, with respect to the purchase and sale of securities for their accounts, bank trust departments are performing the same activities as brokerage firms in many respects. The trust department acts as an intermediary between its clients' accounts and third parties with

[1]The trust company apparently was engaging in the retail sale of securities; see 186 N.W.2d at 576-577. The Supreme Court did not discuss the exercise of normal fiduciary responsibilities of a trust company.

whom securities transactions are executed. In most cases, bank trust departments hire a broker to effect the transaction; however, this distinction from a traditional broker is merely a matter of degree. Moreover, a significant number of transactions are effected by bank trust departments without the use of a broker; these transactions include direct negotiations with dealers, transactions with other institutions, and the in-house crossing of orders between accounts.

5 DiLorenzo, Banking Law, ? 97.02 (1993). See also 12 C.F.R. ? 9.1(f) (defining investment authority as "the responsibility conferred by action of law or a provision of an appropriate governing instrument to make, select or change investments, review investment decisions by others, or to provide investment advice or counsel to others").

The question whether the North Dakota Securities Commissioner may regulate the investment authority of national bank trust departments raises the issue of federal preemption because national banks "are instrumentalities of the federal government, and are necessarily subject to the paramount authority of the United States." State v. Liberty Nat'l Bank and Trust Co., 427 N.W.2d 307, 309 (N.D. 1988). "When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to preempt state laws to the extent it is believed that such action is necessary to achieve its purposes." City of New York v. F.C.C., 486 U.S. 57, 63 (1988). "[N]ational banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 248 (1944).

The Comptroller of the Currency has both supervisory and examination authority over national banks; this authority extends to trust departments of national banks. 12 U.S.C. ?? 92a and 481. 12 U.S.C. ? 92a(a) provides that "[t]he 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, . . . 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." (Emphasis supplied.) Further, 12 U.S.C. ? 92a(b) expressly prohibits state regulation: "[w]henever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act." (Emphasis supplied.) The term "local law" as used in 12 U.S.C. ? 92a is defined as "the law of the State or other jurisdiction governing the fiduciary relationship."

12 CFR ? 9.1(g). See also American Trust Co. v. South Carolina State Bd. of Bank Control, 381 F.Supp. 313, 322 (D.S.C. 1974).

In an opinion by Justice Holmes, the Supreme Court interpreted 12 U.S.C. ? 92a(a) and (b) to exclude state regulation of national banks. Burnes Nat'l Bank v. Duncan, 265 U.S. 17 (1924). Missouri law forbade national and state banks from acting as executors of estates. Id. at 22, 28 (Sutherland, J., dissenting). Construing ? 92a(a) and (b) together, the Court held "[t]his says in a roundabout and polite but unmistakable way that whatever may be the state law, national banks having the permit of the Federal Reserve Board may act as executors if trust companies competing with them have that power." Id. at 23. First noting that Congress has exercised its powers to create a national bank with certain authority, Justice Holmes added that the states could not prevent that authority from being exercised by a national bank. Id. at 24.

There is nothing over which a State has more exclusive authority than the jurisdiction of its courts, but it cannot escape its constitutional obligations by the devise of denying jurisdiction to courts otherwise competent. . . . So here - the State cannot lay hold of its general control of administration to deprive national banks of their power to compete that Congress is authorized to sustain.

Id. The applicability of state regulation of state trust companies was also addressed:

The fact that Missouri has regulations to secure the safety of trust funds in the hands of its trust companies does not affect the case. The power given by the act of Congress purports to be general and independent of that circumstance and the act provides its own safeguards.

Id.

While national bank fiduciary powers may not be any broader than those of state banks, 12 U.S.C. ? 92a(a) does not give the state authority to regulate or require permits for national banks when exercising fiduciary powers granted by the Comptroller. OCC Interpretive Letter No. 628, July 19, 1993. Neither direct prohibition by a state nor a state license requirement may prohibit a national bank from exercising a power granted under the National Bank Act and approved by the Comptroller. First Nat'l Bank of E. Arkansas v. Taylor, 907 F.2d 775, 780 (8th Cir. 1990).

The authority for a national bank trust department to exercise the listed fiduciary powers therefore is a grant, under federal law, by the Comptroller. Fiduciary powers may be granted to state chartered banks by the State Banking Board pursuant to N.D.C.C. ? 6-05-01. Thus, although state law governs whether a fiduciary power may be

granted to a national bank by the Comptroller, the national bank remains under the exclusive regulatory authority of the Comptroller. OCC Interpretive Letter No. 628, July 19, 1993. Cf. National State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981, 987-989 (3d Cir. 1980) (holding that the national bank was subject to the substantive state law prohibiting "redlining," however, any enforcement could only be by the Comptroller).

State regulation of national banks is also limited by federal laws restricting state visitorial powers.

(A) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or of either House thereof or by any committee of Congress or of either House duly authorized.

(B) Notwithstanding subparagraph (A), lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

12 U.S.C.S. ? 484. No other provision of federal law which is relevant to the enforcement of state laws has been enacted. 12 C.F.R. ? 7.6025 (1993).

"The act of Congress granting trust powers to national banks is constitutional and such power cannot, therefore, be nullified, impeded, burdened or controlled by state law or authority, except as permitted by Congress." Burnes Nat'l Bank v. Duncan, 265 U.S. 17, 18 (1924). The Comptroller of the Currency is charged with the enforcement of banking laws. Investment Co. Inst. v. Camp, 401 U.S. 617, 627 (1971). Accordingly, one must give great weight to the Comptroller's reasonable construction of a regulatory statute that the Comptroller is charged to enforce. Id.

The Comptroller has taken the position that any state requirements of registration, registration fees, and visitorial or examination powers imposed upon a national bank exercising powers granted by federal law are invalid and that national banks need not follow such state laws.

See OCC Interpretive Letter No. 122, August 1, 1979; see also OCC Interpretive Letter No. 628, July 19, 1993.

Further, federal law expressly permits national banks to deal in securities.

The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities of stock: Provided, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.

12 U.S.C. ? 24 (Seventh). This provision has been held to permit national banks to offer discount brokerage services to the general public. Securities Indus. v. Comptroller of the Currency, 577 F.Supp. 252, 255 (D.D.C. 1983), aff'd 758 F.2d 739 (D.C. Cir. 1985) and aff'd 765 F.2d 1196 (D.C. Cir. 1985), rev'd in part on other grounds, sub nom, Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 393n.4 (1987). This grant of authority is separate and distinct from any state authority allowing state banks to offer discount brokerage services. Compare 12 U.S.C. ? 24 (Seventh) and 12 U.S.C. ? 92a(a).

The securities dealer registration requirement imposed under N.D.C.C. ? 10-04-10 does not constitute a state law governing fiduciary relationships. In light of the limitations on state authority contained in 12 U.S.C. ? 92a(b) and the interpretation of that statute by the Supreme Court and the Comptroller of the Currency, it is my opinion that a national bank trust department exercising investment authority pursuant to 12 U.S.C. ? 92a is not required to register as a dealer under N.D.C.C. ? 10-04-10.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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