

( 717) 787-1471

December 28, 2000

Dear :

This letter responds to your request for a letter from the Pennsylvania Department of Banking (the ADepartment@) confirming that \*\*\*\*\*, a national bank authorized to exercise fiduciary powers under the laws of the United States, may serve as a trustee of a special needs trust for the benefit of \*\*\*\*\* County, Pennsylvania.

As stated in your letter, a petition was filed and a hearing held before the Honorable \*\*\*\*\* in the \*\*\*\*\* County Orphans= Court to approve a settlement for the minor and to approve the creation of a trust and the appointment of trustees of special needs trust for the benefit of \*\*\*\*\* County, Pennsylvania. You indicated that \*\*\*\*\* is ready to sign an Order approving the settlement, the trust and the appointment of \*\*\*\*\* as a trustee of the trust, subject to your submission of a letter from the Commonwealth of Pennsylvania, Department of Banking confirming that \*\*\*\*\* Bank has legal authority to serve as a trustee in this matter in Pennsylvania.<sup>1</sup>

As you correctly stated in your letter dated December 7, 2000, prior to November 22, 2000, a Pennsylvania statute (7 P.S. ' 106(b)) generally prohibited corporations existing under the laws of a state other than Pennsylvania or national banks that are headquartered in other states from serving as a fiduciary in Pennsylvania. However, on November 22, 2000, H.B. 2533 was signed into law as Pennsylvania Act 89 of 2000 which amended section 106(b) of the Pennsylvania Banking Code to allow out-of-state banking institutions and national banks, that possess fiduciary powers respectively, to engage in fiduciary activity in Pennsylvania either with or without a physical presence in Pennsylvania.

Amended section 106 provides in relevant part that:

No corporation existing under the laws of a state other than this Commonwealth may act in this Commonwealth as fiduciary, except that an incorporated institution possessing fiduciary powers pursuant to the

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<sup>1</sup>The Department appreciates \*\*\*\*\* assistance in enforcing the provisions of the Banking Code of 1965 and section 106, 7 P.S. ' 106, in particular.

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laws of another state shall have the same power to engage in fiduciary activities within this Commonwealth as a national banking association acting pursuant to 12 U.S.C. 92a...

\* \* \*

7 P.S. ' 106(b). Pursuant to amended section 106(b), an out-of-state state-chartered banking or trust institution may file a one time notice with the Department providing the information set forth in section 106(b) as part of seeking to qualify to engage in fiduciary activity in Pennsylvania with or without a physical presence. *See* 7 P.S. ' 106(b).

With respect to national banks, the Pennsylvania General Assembly has chosen to recognize that national banks may engage in fiduciary activity in Pennsylvania consistent with section 92a of the National Bank Act, 12 U.S.C. ' 92a, and with reasonable interpretations issued by the Office of the Comptroller of the Currency (OCC) under section 92a. As you stated in your letter, the OCC has previously determined that a national bank is authorized under 12 U.S.C. ' 92a to market its trust services to, solicit trust business from, and act as trustee for customers in all states. *See* OCC Interpretive Letter No. 866 (October 8, 1999).<sup>2</sup> In addition, the OCC, recently through a Notice of Proposed Rulemaking (NPRM), proposes to amend its regulations at 12 C.F.R. Parts 5 and 9 to codify OCC interpretations on national bank multi-state trust operations.<sup>3</sup> 65 *Fed. Reg.* 75872. The

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<sup>2</sup> This letter does not opine on whether the OCC has legal authority to preempt any state law purporting to place greater restrictions on national banks than state banks as asserted by the OCC in OCC Interpretive Letter No. 866 (October 8, 1999). However, the issue of whether the OCC's letter preempts Pennsylvania state law with respect to a national bank headquartered in a state other than Pennsylvania seeking to engage in fiduciary activity in Pennsylvania became moot with the enactment of Pennsylvania Act 89 of 2000.

<sup>3</sup> In OCC Interpretive Letter No. 695, the OCC 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 OCC Interpretive Letter No. 866 and OCC Interpretive Letter No. 872, the OCC further held 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. *See* OCC Interpretive Letter No. 872 (Oct. 28, 1999); OCC Interpretive Letter No. 866 (Oct. 8, 1999); and OCC Interpretive Letter No. 695 (Dec. 8, 1995), reprinted in [1995-1996 Transfer Binder] *Fed. Banking L. Rep.* (CCH) para. 81.010.

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OCC indicated that the proposed changes to its regulations would provide enhanced guidance to national banks engaging in fiduciary activities. Comments to the OCC NPRM are due by February 5, 2001.

Based on the foregoing discussion, it is the Department's position that section 106(b) of the Banking Code, as amended by Act 89 of 2000, permits a national bank, regardless of the state in which the national bank is headquartered, to engage in fiduciary activity in Pennsylvania, either with or without a physical presence in Pennsylvania, provided the national bank is authorized to conduct fiduciary activity under section 92a of the National Bank Act.

The Department's analysis is based upon the facts as stated in this letter. Any change in the facts could result in an amendment or reversal of the Department's position. This letter has been authorized by the appropriate Department personnel and constitutes a duly authorized statement of the Department's position regarding the issues discussed herein. This letter may not be relied upon or construed as constituting legal advice.

I trust this letter is responsive to your request. Please feel free to contact me if you have any questions regarding the contents of this letter.

Sincerely,

Reginald S. Evans  
Chief Counsel

cc: James Acri, Trust Administrator