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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 9, 1996

The Honorable Louie A. Jacobs
Commissioner of Banking
Board of Financial Institutions
1015 Sumter Street, Room 309
Columbia, South Carolina 29201

Re: Informal Opinion

Dear Commissioner Jacobs:

You have enclosed a letter with attachments from the Chairman of the Colonial Trust Company of Spartanburg requesting clarification concerning that company's status as a trust company. Such letter provides a background regarding activities of the company over the years and reads in pertinent part:

> [a]s you can see from the copy of our charter that I left with you, the company started operations in 1913. The charter is very broad, covering several types of business. Indeed, this may be part of the confusion, in that the charter is not a "standard" or "normal" one for a trust company.
>
> There has been continuous trust business conducted since the company's inception. At present, our oldest trust dates back to a lady who died in 1923. Probably our second oldest one is one for which we just completed our 60th accounting. After World War II, the company worked with the Veterans Administration in helping veterans who were receiving pensions or disability benefits but were judged incapable of handling them. A few (15-20) of these conserva-

> tors remain today, but most of the World War II veterans have died.
>
> During much of its history, the company operated a large general insurance agency. The insurance business was sold in 1970. From then until 1989, the company was fairly inactive, with just the conservatorships, some trusts, and a couple of estates for the Cleveland family, who owned the company. We bought the company in 1989 and began to build it up to the point we are today.
>
> Our focus has been on two types of business - fee based asset management; and trust and estate administration. By far the largest portion of our business comes from asset management, but our trust and estate activity is growing. Currently, we are serving as Trustee for assets amounting to around $15.5 million, and we manage an additional $190 million. We choose not to custody assets "in house"; but rather use major brokerage firms and banks for that service. This applies both to our trust assets and our managed assets.

You state that "[w]e have recently become aware of this company's trust activities and request your opinion as to whether Colonial is subject to regulation and direct supervision by the Board as other trust companies approved by the Board."

Law / Analysis

S. C. Code Ann. Sec. 34-21-10 provides:

> [n]o corporation, partnership or other person shall conduct a trust business in this State without first making a written application to the State Board of Bank Control and receiving written approval from the Board. Before any such application shall be approved, the Board shall make an investigation to determine whether or not the applicant has complied with all the provisions of law, whether in the judgment of the Board the applicant is qualified to conduct such a business and whether the conduct of such a business would serve the public interest, taking into consideration local circumstances and conditions at the place where such applicant proposes to do

> business; provided, however, that any person actively engaged in conducting a trust business in this State on January 1, 1972, shall not be required to make the application and receive the approval provided for herein. Provided, further, that nothing contained in this section shall prevent a natural person or a national banking association having its principal place of business in this State from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity.

Thus, the issue raised here is whether the company in question was "actively engaged in conducting a trust business in this State on January 1, 1972 ... ." If so, by the literal mandate of the statute, that company is not "required to make the application and receive the approval" of the State Board of Bank Control.

The phrase "actively engaged in conducting a trust business" is not defined by the statute or, specifically, by any other statute in the Code of which I am aware. Neither is the term "trust business" defined therein or elsewhere in the Code, to my knowledge.

However, courts have defined a "trust business" or a "trust company" according to the common and ordinary definition of those terms. In Carney v. Sam Houston Underwriters, 272 S.W.2d 942, 946 (Tex. Civ. App. 1954), the Court stated:

> [w]e believe that a corporation in the trust business and lawfully advertising itself as a trust company is a trust company just as much as a company in the lumber business is a lumber company. This accords with the ordinary conception of a trust company as being one authorized to take and administer trusts. (emphasis added).

In Goss and Hamlyn Howe v. State, 285 P.2d 428, 431 (Okl. 1955), the Court cited Websters New International Dictionary (2d ed. unabridged) defining a "trust company" as "any corporation found for the purpose of acting as trustee." An important indicia is also whether the business holds itself out to the public as a "trust company." Carney v. Sam Houston Underwriters, supra. It is also said that a "trust company" is

> a corporation formed for the purpose of taking, executing and administering all such trusts as may be lawfully committed to it and acting as testamentary trustee, executor, guardian, etc.

The foregoing definitions are consistent with those set forth in Title 34 of the Code. See, e.g. Sections 34-21-20 through -70; Section 34-21-210 (1) [definition of "trust institution"]; Section 34-21-220 et seq ["common trust funds"].

In addition, Section 34-21-10 requires that the entity have been "actively engaged" in the trust business on January 1, 1972 to be "grandfathered" pursuant to the statute. Courts have held that the word "actively" is used to mean "active" as opposed to "passive" or as opposed to "inactive" and denotes taking an active part and does not mean "brisk" or "lively". Carson Estate Co. v. McColgan, 130 P.2d 202, 208 (Cal. 1942). The phrase also signifies "transacting or carrying on" the business. Alabama Fuel and Iron Co. v. Ward, 194 Ala. 242, 69 So. 621, 623 (1915).

In the Carson case, the Court reasoned that the term "doing business" which was statutorily tied to "actively engaging" in any transaction for profit or gain, meant the following:

> taken to denote "brisk", "lively," "characterized by frequent activity," as in speaking of an "active market." If taken in that sense, the statutory definition is virtually rendered meaningless and impossible of any practical application, since the Legislature has therein employed the term "transaction" in the singular. Under the circumstances, "actively" must there be taken to mean "active" as opposed to "passive" or "active" as opposed to "inactive." Thus, "actively" as used in Section 5, supra denotes "taking a active part in any transaction," "actively engaging in any transaction."

Therefore, as I read Section 34-21-10, if a corporation or entity was transacting or carrying on trust business, i.e. taking, accepting, administering and executing trusts on January 1, 1972, the "grandfather" provision contained therein would be triggered. Section 34-21-10 does not require any particular level of transacting trust business in order to be entitled to be "grandfathered."

Of course, the final determination of whether a company qualifies for the "grandfather" exception is with the Board of Bank Control. Such a decision requires the determination of facts which is beyond the scope of an opinion of this Office. The Board should make such determination based upon the criteria set forth herein.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney

as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph