INTERPRETIVE LETTER 99-04 (December 15, 1999)

Not-for-profit corporation acting as trustee of its own deferred compensation plan is not "engaging in the trust business."

Please accept this correspondence as a response to your recent inquiry. You had asked whether a not-for-profit corporation may act as trustee for its own deferred compensation plan without first obtaining a certificate of authority under the Corporate Fiduciary Act [205 ILCS 620/1 et. seq.] (the "Act"). The Act generally requires a person to obtain a certificate of authority prior to engaging in trust business. (205 ILCS 620/2-4.) However, it is the position of the Office of Banks and Real Estate (the "Agency") that the described activity to be conducted by the corporation would not constitute engaging in trust business and would not require licensing as a corporate fiduciary in Illinois.

Section 2-4 of the Act states:

> Certificate of Authority. (a) It shall not be lawful for any person to engage in the trust business, after the effective date of this amendatory Act of 1995, without first filing an application for and procuring from the Commissioner a certificate of authority stating that such person has complied with the requirements of this Act and is qualified to engage in the trust business.
> (b) No natural person or natural persons, firm or partnership, or corporation not having been authorized under this Act shall transact a trust business. A person who violates this Section is guilty of a Class A misdemeanor, and the Attorney General or State's Attorney of the county in which the violation occurs may restrain the violation by a compliant for injunctive relief. 205 ILCS 620/2-4 (1996).

Section 1-5.13 Trust Business.

> "Trust Business" means the holding out by a person to the public by advertising, solicitation, or by other means that a person is available to act as a fiduciary in this State, or the accepting or undertaking to perform the duties of a fiduciary as a significant part of its regular business. 205 ILCS 620/1-5.13 (1996).

A person is considered to be conducting trust business provided they meet the definition contained in section 1-5.13 of the Act.

In order to avoid the licensing requirements of Section 2-4(a) of the Act, a person must not hold themselves out to the public as available to act as a fiduciary. Most significant, the person seeking to avoid the licensing requirement must not engage in advertising, soliciting, or otherwise marketing fiduciary services to the public. The Agency has taken the position that it will analyze the particular facts of a circumstance in order to determine if a person is holding themselves out to the public as being available to act as a fiduciary in the State of Illinois. You have indicated that the corporation will not hold out its availability to act as a fiduciary and will not advertise, solicit or otherwise market fiduciary services to the public.

The second condition that must be satisfied in order to avoid the licensing requirements of Section 2-4(a) of the Act requires that a person not accept or undertake to perform fiduciary services as a "significant part" of the person's regular business. The Agency has previously adopted a two prong test to determine what activity would constitute a "significant part" of regular business for Section 1-5.13 purposes. The first prong of the test focuses on the total number of trust relationships in relation to the person's business activities. The second prong of the test focuses on whether the trust business is casual or isolated and not a regular business

activity. This two prong test is analogous to that set out in *In re Tri-County Materials, Inc.*, 14 B. R. 160, 12 UCC Rep. Serv. 2d 869 (C.D. Ill. 1990).

The Tri-County court used a "percentage test" to determine whether a portion of accounts constituted a "significant part" of aggregate accounts. (*Id.* at 164.) The court held that no bright line marks the division between significant and insignificant, but that 12% was an insignificant amount. (*Id*. at 165.) The Tri-County court also addressed the term "regular business" by distinguishing it from "casual or isolated" activity. (Tri-County at 164.) Specifically, the court said it made sense to exempt a creditor from a filing requirement in order to perfect its security interest under the Uniform Commercial Code if the creditor's ordinary business was not financing and the creditor's securitization was isolated. (*See Id.)*

A similar analysis and approach is appropriate with respect to the activity described by your inquiry. It is the Agency's position that trustee asset administration which constitutes 15% or less of the total assets held by the corporation, or time spent performing deferred compensation plan trustee duties which constitutes 15% or less of the corporation's time, should not be considered significant.

You have indicated that the assets administered by the corporation as trustee would constitute significantly less than 15% of the total assets of the corporation and the corporation would spend a de minimis amount of time performing fiduciary duties. Lastly, the corporation would act as employee benefits trustee only for its own employees. Under these facts, the corporation would not "engage in the trust business" under the Act by serving as trustee of its own deferred compensation plan.

I trust this responds to your inquiry. Please do not hesitate to contact the Office of Banks and Real Estate if you have additional questions.