OPINION NO. 86-101

Syllabus:

A corporation organized under R.C. Chapter 1701 for the purpose of serving, pursuant to 11 U.S.C. §321(a)(2), as a trustee in bankruptcy proceedings commenced under 11 U.S.C. §§701-766 is not required to qualify as a trust company under R.C. Chapter 1109.

To: Sherrod Brown, Secretary of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 10, 1986

You have requested my opinion regarding certain requirements that may be imposed by Ohio law upon a corporation that serves as a trustee in bankruptcy proceedings commenced in United States Bankruptcy Court pursuant to Chapter 7 of Title 11 of the United States Code, 11 U.S.C. §§701-766 (liquidation proceedings). Specifically, you have asked whether a corporation that is incorporated as a for profit corporation under R.C. Chapter 1701 for the purpose of serving as a trustee in bankruptcy proceedings must also qualify as a trust company under R.C. Chapter 1109. The articles of incorporation of the corporation in question, a copy of which accompanies your letter, expressly state that the corporation shall not have or exercise any of the powers or responsibilities that are conferred upon a trust company by R.C. Chapter 1109.

Before addressing your specific question, I find it helpful to review briefly those provisions of federal statutory law addressing the appointment and qualifications of corporations as trustees in federal bankruptcy proceedings, and the duties imposed upon bankruptcy trustees generally. In this regard, 11 U.S.C. §321(a)(2) provides, in part, that, "[a] person may serve as trustee in a case under this title...if such person is a corporation authorized by such corporation's charter or bylaws to act as a trustee, and, in a case under chapter 7 or 13 of this title, having an office" in the judicial district within which the case is pending, or in any judicial district adjacent to such district. 11 U.S.C. §322(a) further provides that a person qualifies to serve as a trustee if such person files with the court "a bond in favor of the United States conditioned on the faithful performance of such [trustee's] official duties." The amount of such a bond and the sufficiency of the surety thereon shall be determined by the court. 11 U.S.C. §322(b). See also 11 U.S.C. Bankr. Rule 2010 (qualification by trustee; proceeding on bond). Thus, a corporation authorized by its charter or bylaws to serve as a trustee in bankruptcy, and that further qualifies as such, is eligible for appointment to the United States Bankruptcy Court panel of trustees by the Director of the Administrative Office of the United States Courts. See 28 U.S.C. §604(f)("[f]or each bankruptcy court, the Director shall name qualified persons to membership on the panel of trustees...A corporation named to membership on the panel of trustees shall be authorized by its charter or by law to act as trustee and shall have an office in the State served by the court").

11 U.S.C. §704 delineates the duties and responsibilities conferred upon a trustee in bankruptcy. In this regard, the trustee's principal duty is to collect and reduce to money the property of the debtor's estate for which he serves, and to close up the estate as expeditiously as is compatible with the best interests of parties in interest. 11 U.S.C. §704(1). The

trustee is accountable for all property received, 11 U.S.C. §704(2), must ensure that the debtor shall perform his intention with respect to the retention or surrender of property which serves as security for consumer debts, as specified in 11 U.S.C. §521(2)(B), 11 U.S.C. §704(3), and must investigate the financial affairs of the debtor, 11 U.S.C. §704(4). If a purpose would be served thereby, the trustee is required to examine proofs of claims and object to the allowance of any claim that is improper, 11 U.S.C. §704(5), and if advisable, oppose the discharge of the debtor, 11 U.S.C. §704(6). Unless the bankruptcy court orders otherwise, the trustee must furnish such information concerning the debtor's estate and the estate's administration as is requested by a party in interest. 11 U.S.C. §704(7). If the business of the debtor is authorized to be operated, the trustee must file with the bankruptcy court, and with any governmental unit charged with the responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court requires. 11 U.S.C. §704(8). The trustee must also make a final report and file a final account of the administration of the debtor's estate with the bankruptcy court. 11 U.S.C. §704(9). See also 11 U.S.C. Bankr. Rule 2015 (duty of bankruptcy trustee or debtor in possession to keep records, make reports, and give notice of case); 11 U.S.C. Bankr. Rule 3004 (filing of proof of creditor claims by debtor or bankruptcy trustee); 11 U.S.C. Bankr. Rule 6009 (prosecution and defense of proceedings by trustee or debtor in possession). See generally In Re 2001 Cincinnati, Inc. VIP Clubs of America, 43 Bankr. 6, 7 (Bankr. S.D. Ohio 1984)("[a] trustee is a fiduciary, but in bankruptcy he is a fiduciary only for creditors").

I now direct my attention to your specific question, whether a corporation organized under R.C. Chapter 1701 for the purpose of serving as a trustee in bankruptcy proceedings commenced pursuant to 11 U.S.C. §§701-766 must also qualify as a trust company under R.C. Chapter 1109. I note initially that R.C. 1701.03 provides, in pertinent part, that a for profit corporation "may be formed for any purpose or purposes...for which natural persons lawfully may associate themselves." Insofar as a natural person lawfully may be designated to serve as a trustee in bankruptcy proceedings, see 11 U.S.C. §321(a)(1), it follows that a for profit corporation may also be formed for such a purpose under R.C. Chapter 1701.

R.C. Chapter 1109 addresses the requirements imposed upon trust companies, both foreign and domestic, that operate within Ohio, and the activities such companies may perform. In particular, R.C. 1109.02 provides, in part, that no domestic or foreign trust company that is authorized to accept and exercise trusts "shall certify to any evidence of indebtedness secured by any trust deed or mortgage upon, or accept any trust concerning, property located wholly or in part in this state, without complying with [R.C. 1109.03]." R.C. 1109.03 provides, in part, as follows:

> No trust company or corporation, either foreign or domestic, doing a trust business, shall accept trusts of property within this state which may be vested in, or transferred, or committed to it, by a person, firm, association, corporation, court, or other authority, until its paid-in capital is at least

one hundred thousand dollars and it has deposited with the treasurer of state one hundred thousand dollars in cash.

R.C. 1109.03 further provides that a trust company, in lieu of one hundred thousand dollars in cash, may deposit with the Treasurer of State certain securities equal at their par value to one hundred thousand dollars and approved by the Superintendent of Banks. See also R.C. 1109.04 (permitting the deposit of such securities with a qualified trustee instead of with the Treasurer of State); R.C. 1109.17; R.C. 1109.18 (both sections describing additional license fee and filing requirements imposed upon foreign trust companies). R.C. 1101.01(BB) defines a "trust company," as used in R.C. Chapter 1109, see R.C. 1109.01, as "any corporation having trust powers."

A corporation that qualifies to do business as a trust company may receive and hold moneys or property, in trust or on deposit, from executors, administrators, assignees, guardians, trustees, corporations, or individuals, R.C. 1109.05; act as agent, and accept and execute any trusts, duties, and powers which may be granted to it, in regard to the holding, management, and disposition of any property which may be committed or transferred to, or vested in the trust estate, R.C. 1109.07; accept and execute all trusts committed to it by order of any court of record or probate court of any state or of the United States, to act as executor, administrator, assignee, guardian, receiver, or trustee, or in any other trust capacity, and take title to any real estate which is the subject of any such trust, R.C. 1109.08; act as agent or trustee for the purpose of registering, countersigning, or transferring the certificates of stock, bonds, or other evidences of indebtedness of a corporation, association, municipal corporation, state, or public authority, and accept and execute any corporate or municipal trusts, R.C. 1109.09; while acting as a fiduciary under any declaration of trust and having funds of the trust which are to be invested, invest such funds in securities, stocks, bonds, certificates of deposit, and other forms of investment enumerated or described in R.C. 2109.37 and R.C. 2109.371,[1] R.C. 1109.10; and invest money and property held by it as trustee in a general trust fund of the trust company, R.C. 1109.11. See also R.C. 1109.06 (court may direct that moneys or property which are under its control or paid into court by parties to legal proceedings shall be deposited with a trust company designated by the court); R.C. 1109.15 (the Superintendent of Banks may examine the books or affairs of any trust company as to any matters relating to any trust, estate, or property within the state concerning which such trust company is acting in a trust or representative capacity); R.C. 1109.20 (a trust company may establish and maintain one or more common trust funds for the collective investment of funds held by it in its capacity as a fiduciary).

My review of R.C. Chapter 1109 leads me to conclude that a corporation organized under R.C. Chapter 1701 for the purpose of serving as a trustee in bankruptcy proceedings commenced pursuant to 11 U.S.C. §§701-766 is not required to qualify as a trust company under R.C. Chapter 1109. I believe the

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[1] R.C. 2109.37 and R.C. 2109.371 describe in detail the scope of investment authority conferred upon a fiduciary having funds belonging to a trust.

dispositive inquiry in this regard should focus upon the nature and functions of trust companies as understood by R.C. Chapter 1109. On this point I find persuasive the reasoning and conclusions set forth in 1938 Op. Att'y Gen. No. 3516, Vol. III, p. 2466, in which one of my predecessors addressed the question whether a corporation organized for the purpose of servicing second mortgage loans on homes constructed by a private contractor, whereby the corporation holds in its own name the second mortgages and remits to the contractor the amounts collected thereon, should also be required to qualify as a trust company under G.C. 710-150, the statutory predecessor of R.C. 1109.03. In resolving this question, 1938 Op. No. 3516 examined those General Code provisions governing the organization and management of trust companies in order to determine the precise nature of such entities and the functions they are intended to carry out. Noting the unique character of trust companies in this regard, 1938 Op. No. 3516 states as follows at 2469-70:

> It is recognized at the outset that the sections of the General Code relating to trust companies "doing a trust business" in this state are in pari materia and must be construed together to ascertain the legislative intent. It is apparent that the legislature intended that the sections relating to trust companies, as above referred to, should apply to trust companies possessed of the above mentioned powers, whether or not such trust company performs all of the above powers or not. Essentially the law relates to corporations doing the type of business referred to in these sections. Certainly such a trust company would be doing a trust business in this state, and certainly the statutes herein referred to relate only to such corporations doing such a trust business in this state.
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> The mere fact that a corporation exercises some of the powers of a trust company does not make it ipso facto a trust company. See Zollman, Banks and Banking, Vol. 2, p. 393, citing People vs. National Security Company, 177 N.Y. Supp., 838, affirmed in 232 N.Y., 586, 134 N.E., 582.
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> A trust company is defined in Corpus Juris, Vol. 65, p. 183, as one incorporated by statute and authorized by its special act to undertake the duties of executors, administrators and trustees for pecuniary reward.
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> As I have above stated, trust companies have, as contemplated by Sections 710-150 et seq., General Code of Ohio, a public nature due to the extent and magnitude of the trust properties which they control in their own name, and through usage and custom such companies have become more and more associated with the banking business and the terms are quite largely used interchangeably.[2] Nearly all of the works

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[2] The latter concept, for example, now finds expression in R.C. 1101.01(B), which defines the term, "[b]ank", in part, as including trust companies. Further, authorities on this subject recognize that trust companies as such are traditionally associated with the business of banking and related enterprises. Thus, in Bogert, The Law of Trusts & Trustees §136 (2nd ed. rev. 1984) it is stated at 474 that,

> relating to trust companies are treated with the banking corporations. Quite largely, the powers of a trust company, except the elementary and primary power of taking and administering trusts, depend upon the enumeration of its powers by the charter granted to it by the state by which such trust companies are organized. (Emphasis and footnote added.)

See also 1956 Op. Att'y Gen. No. 6200, p. 52, at 56 (citing with approval 1938 Op. No. 3516, and reiterating that, "[t]he primary and ordinary conception of a trust company is a corporation to take and administer trusts").

I concur in the reasoning of 1938 Op. No. 3516, and, insofar as the current provisions of R.C. Chapter 1109 pertaining to trust companies differ in no material respect from the General Code provisions discussed therein, find it applicable to the particular situation described in your letter. In this regard, the corporation in question has been organized exclusively for the purpose of serving as a trustee in bankruptcy proceedings commenced pursuant to 11 U.S.C. §§701-766. The corporation's articles state that the corporation shall provide and perform only those services expressly authorized a bankruptcy trustee by 11 U.S.C. §704. Further, it is apparent that the corporation in question does not intend to carry on a trust business within Ohio, R.C. 1109.03, and shall neither assume nor exercise any of the duties, powers, or responsibilities otherwise conferred upon trust companies by R.C. Chapter 1109. In this regard, the corporation is not empowered to receive and hold moneys in trust or on deposit, R.C. 1109.05; act as agent and accept any trusts, duties, or powers which may be granted to it with respect to the holding, management, and disposition of property, R.C. 1109.07; or accept and execute trusts committed to it by order of any court and act as trustee with respect thereto, R.C. 1109.08. The corporation also is not empowered to act as an agent or trustee for the purpose of registering, countersigning, or transferring certificates of stock, bonds, or other evidences of indebtedness, R.C. 1109.09, or invest any money or property it holds in its capacity as trustee, R.C. 1109.10; R.C. 1109.11.

Based upon the foregoing it is my opinion, and you are advised that a corporation organized under R.C. Chapter 1701 for the purpose of serving, pursuant to 11 U.S.C. §321(a)(2), as a trustee in bankruptcy proceedings commenced under 11 U.S.C. §§701-766 is not required to qualify as a trust company under R.C. Chapter 1109.

"[i]n the last fifty years trust companies have increased enormously in number and influence in the banking and fiduciary field," and that, "[t]rust companies are corporations organized under state law for the purpose of administering trusteeships and other fiduciary relationships, as well as conducting a banking business." See also Scott, The Law of Trusts §96.5, at 784 (3rd ed. 1967)("[i]n the United States, however, it came about that banking institutions were to be clothed with trust powers, and that trust companies should be organized to do both banking and fiduciary business," and citing pertinent state law provisions to that effect, including, in Ohio, R.C. 1109.08).