

ALABAMA DEPARTMENT OF REVENUE
REVENUE RULING 02-018

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TO:

FROM: Cynthia Underwood
Commissioner, Alabama Department of Revenue

DATE: November 25, 2002

RE: Common-Law Trusts

FACTS

The facts as stated in your ruling request are as follows:

"Bank" is a direct, wholly-owned subsidiary of "Holding Company". "Depositor" is a Delaware limited liability company that is a wholly-owned, special-purpose, bankruptcy-remote subsidiary of Bank. Depositor proposes to form one or more Delaware, New York or other state common-law trusts (each a "Trust", and collectively, the "Trusts"), in order to effect one or more securitizations of Consumer Receivables (as defined below) pursuant to one or more Registration Statements and the related base prospectus (the "Prospectus") and form of prospectus supplement (the "Supplement") included therein, filed with the U.S. Securities and Exchange Commission (the "SEC"). The actual Supplement relating to a particular securitization transaction will be filed with the SEC as a supplement to a Prospectus when such securitization transaction occurs.

A typical transaction is as described below. A Trust will be formed as a Delaware, New York or other state common-law trust pursuant to a Trust Agreement between the Depositor and a trustee (the "Trust Agreement"). A Trust will purchase a pool of consumer receivables which may include without limitation retail installment sales contracts, retail installment loans, purchase money notes or other notes ("Consumer Receivables") secured by the underlying assets which may include without limitation new and used automobiles, light-duty trucks, motorcycles, recreational vehicles, vans, mini-vans and/or sport utility vehicles (the "Financed Assets") from Depositor for cash and one or more classes of asset backed certificates (the "Certificates") pursuant to a Sale and Servicing Agreement between the trustee of a Trust,

Bank as servicer, Depositor and an indenture trustee (the "Sale and Servicing Agreement"). A Trust will acquire the funds necessary to purchase the Consumer Receivables by issuing one or more classes of asset backed notes ("Notes") and/or certificates to public and/or private investors. Depositor may or may not hold the Certificates for the duration of a Trust. After the initial acquisition of Consumer Receivables and throughout the term of a Trust, the assets of such Trust will consist primarily of the Consumer Receivables, all monies (including payments and interest) received with respect to such Consumer Receivables, certain deposit accounts in which collections are held, security interests in the Financed Assets, any rights to proceeds and proceeds from claims on insurance policies covering the Financed Assets, and any proceeds of the foregoing (collectively, the "Trust Assets"). After the initial acquisition period (which may extend beyond the dates the Notes and certificates are issued), no additional Consumer Receivables will be acquired by a Trust. A Trust will terminate when the pool of Consumer Receivables in such Trust matures or is otherwise redeemed by Depositor, the Notes and Certificates are paid in full, and the remaining Trust Assets are distributed to the holders of Certificates.

The Notes issued by a Trust will bear interest on the principal amount of the Notes at specified interest rates. The Certificates issued by a Trust will receive distributions after payment of the Note obligations. The Certificates may or may not bear interest at specified interest rates. Payments on the Certificates and Notes will be made solely out of the monies received on the Consumer Receivables, other assets of the Trust or any related credit enhancements on the Certificates and Notes. Neither the Notes nor the Certificates is guaranteed by Depositor, Bank or any other Holding Company affiliate.

After formation, the only activities of a Trust will generally be related to (i) acquiring, holding, and managing the Consumer Receivables and related assets, and the proceeds therefrom, (ii) issuing the Certificates and Notes, (iii) making payments on the Certificates and Notes, and (iv) engaging in other activities related thereto. However, all of the managing and servicing activities related to the Consumer Receivables will be performed by Bank pursuant to a contractual relationship established pursuant to the Sale and Servicing Agreement, and Bank will be compensated therefor. The Bank, as servicer, may appoint subservicers to service the Consumer Receivables on its behalf. The managing and servicing activities will include customer service, document file keeping, record keeping, credit underwriting, vehicle title processing, collecting payments on the receivables and other support services. The payments on the Certificates will be made by the trustee of the Trust. Payments on the Notes will be made by the indenture trustee to the holders of Notes in accordance with an Indenture between the Trust and the indenture trustee (the "Indenture"). Once the Notes and Certificates are paid in full and any remaining monies distributed, the Trust will terminate.

The Consumer Receivables held by a Trust will have been originated in the regular course of business by affiliates of Holding Company, including Bank, or will have been acquired by affiliates of Holding Company, including Bank, from dealers or other third parties that regularly originate such contracts or pursuant to portfolio acquisitions. The Consumer Receivables to be acquired by a particular Trust from Depositor will consist of Consumer Receivables originated in various states, including the State of Alabama. Such Consumer Receivables will bear interest within a specified percentage range, mature within a specified

period of time and satisfy other criteria established in the Sale and Servicing Agreement or Purchase Agreement. The Depositor will have acquired the Consumer Receivables from Bank in exchange for cash pursuant to a Purchase Agreement between Bank and Depositor.

For Federal income tax purposes under the Internal Revenue Code of 1986, as amended (the "IRC"), (i) Depositor will be treated as a disregarded entity, and (ii) the Depositor and the trustees of each Trust will agree to treat each Trust as a disregarded entity or a grantor trust. Thus, Depositor and each Trust will be treated as divisions of Bank for federal income tax purposes (or the beneficial owner of the underlying assets of a Trust if the Trust is treated as a grantor trust). The Notes will be treated as debt of Bank for federal income tax purposes.

... [A] Trust may qualify to do business in Alabama if permitted to do so by the Secretary of State."

ISSUES

I. Whether or not a Trust will be a corporation, limited liability entity, or disregarded entity for purposes of Alabama's business privilege tax in §40-14A-21, et seq., Code of Alabama 1975?

II. Whether or not a Trust will be subject to, or otherwise liable for, the business privilege tax levied in §40-14A-22?

ANALYSIS

Alabama's business privilege tax is levied upon "every corporation, limited liability entity, and disregarded entity doing business in Alabama, or organized, incorporated, qualified, or registered under the laws of Alabama." §40-14A-22(a), Code of Alabama 1975. The three entities subject to the tax are defined in §40-14A-1.

"Corporation" is defined as follows:

An entity, including a limited liability company electing to be taxed as a corporation for federal income tax purposes, through which business can be conducted while offering limited liability to the owners of the entity with respect to some or all of the obligations of the entity, other than a limited liability entity or a disregarded entity. The term "corporation" shall include but not be limited to the following: Corporations, professional corporations, joint stock companies, unincorporated professional associations, real estate investment trusts, limited liability companies electing to be taxed as corporations for federal income tax purposes, and all associations classified as corporations for federal income tax purposes. The term "corporation" shall not include any county, municipal corporation, political subdivision of the state, governmental corporation, instrumentality or agency thereof.

Section 40-14A-1(d)

"Disregarded entity" is defined in subparagraph (g) as "[a] limited liability company that is disregarded for purposes of federal income tax, or a qualified subchapter S subsidiary, as defined in 26 U.S.C. §1361." The phrase "limited liability entity" is defined as follows:

Any entity, other than a corporation, organized under the laws of this or any other jurisdiction through which business may be conducted while offering limited liability to the owners of the entity with respect to some or all of the obligations of the entity and which is taxable under subchapter K of the Code, including, without limitation, limited liability companies, registered limited liability partnerships, and limited partnerships.

Section 40-14A-1(k)

It is obvious that the Trust in question will not be a "disregarded entity". See §40-14A-1(g). The Trust will not be a limited liability company, nor will it be a subchapter S subsidiary.

It also is obvious that the Trust will not be a "limited liability entity". See §40-14A-1(k). The Trust will not be an entity taxable pursuant to subchapter K of the Internal Revenue Code. See 26 U.S.C. §761(a), excluding trusts from provisions of subchapter K.

Therefore, the question is whether or not the Trust will fit within the statutory definition of "corporation". Specifically, the question is whether or not the Trust will be "[a]n entity ... through which business can be conducted while offering limited liability to the owners of the entity with respect to some or all of the obligations of the entity...." §40-14A-1(d).

The Trust in question will be a common-law trust. That type of trust is the same as a "business trust". See 76 Am Jur 2d Trusts §11. See also 12A C.J.S. Business Trusts §2. These statements of statutory and case law define "business trust", as follows:

One of the distinctive devices by means of which individuals may combine their resources to operate a business for profit is the so-called business trust, or "Massachusetts trust," which may be comprehensively defined as an unincorporated business organization created by an instrument by which property is to be held and managed by trustees for the benefit and profit of such persons as may be or may become the holders of transferable certificates evidencing the beneficial interests in the trust estate. Such an organization has also been frequently termed a "common-law trust." Under the Uniform Commercial Code, the term "organization," unless the context otherwise requires, includes a business trust.

13 Am Jur 2d Business Trusts §1

A business or common-law trust, commonly known as a "Massachusetts trust," is a form of business organization consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an

instrument of trust, to be held and managed for the benefit of such persons as may from time to time be holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest is divided, which certificates entitle the holders to share ratably in the income of the property, and, on termination of the trust, in the proceeds thereof, as discussed infra § 21.

12A C.J.S. Business Trusts §2

Alabama's legislature provided a definition of business trust that is extremely similar to the definitions quoted previously. "A business trust is an express trust created by a written declaration of trust whereby property is conveyed to one or more trustees, who hold and manage the same for the benefit and profit of such persons as may be or become the holders of transferable certificates evidencing the beneficial interest in the trust estate." §19-3-60

The facts described in the ruling request show clearly that business will be conducted through the Trust; i.e., the issuance of Notes, the purchase of receivables, and the holding, managing, and distributing of the Trust Estate. As stated in your request, "[t]he Consumer Receivables held by a Trust will have been originated in the regular course of business by affiliates of Holding Company, including Bank, or will have been acquired by affiliates of Holding Company, including Bank, from dealers or other third parties that regularly originate such contracts or pursuant to portfolio acquisitions."

Further, the Trust documents supplied with your request show that the Trust is an entity through which business will be conducted. Specifically, the Form of Trust Agreement, Article II, §2.01, provides for the name of this particular Trust, "in which name the Owner Trustee may conduct the business of the Trust, make and execute contracts and other instruments on behalf of the Trust and sue and be sued." Also, §2.03 of the Form of Trust Agreement states that the purpose of the Trust is to engage in certain specified activities. These activities encompass the acquiring of the Consumer Receivables and the administration of the Trust Estate. Therefore, the Trust will be "[a]n entity ... through which business can be conducted...." §40-14A-1(d)

The remaining question concerns whether or not the Trust will offer limited liability. Alabama's statutory provisions grant such limited liability.

For example, §19-3-62 provides the following:

The trustees shall hold the legal title to all property at any time belonging to the business trust. They shall have control over such property as well as the control and management of the business and affairs of the business trust. Liability to third persons for any act, omission or obligation of a trustee of a business trust, when acting in such capacity, shall extend to the whole of the trust estate, or so much thereof as may be necessary to discharge such

obligation, but no trustee shall be personally liable for any such act, omission or obligation.

Further, Alabama's legislature provided the following concerning the liability of beneficial owners:

The beneficial ownership in a business trust shall be evidenced by certificates issued by the trustees. These certificates shall be transferable in the same manner as stock certificates of a corporation are transferable. No assessment shall be made against the interest of any beneficial owner, and no beneficial owner shall be personally liable for any debts or liabilities incurred by the trustees or by the business trust.

Section 19-3-63

Language in the Trust documents gives further evidence of the Trust offering limited liability. Section 11.19 of the Form of Indenture states as follows:

It is expressly understood and agreed by the parties hereto that (a) this Indenture is executed and delivered by [OWNER TRUSTEE], not individually or personally but solely as Owner Trustee of the Trust, in the exercise of the powers and authority conferred and vested in it, (b) each of the representations, undertakings and agreements herein made on the part of the Issuer is made and intended not as personal representations, undertakings and agreements by [OWNER TRUSTEE] but is made and intended for the purpose for binding only the Issuer, (c) nothing herein contained shall be construed as creating any liability on [OWNER TRUSTEE], individually or personally, to perform any covenant either expressed or implied contained herein, all such liability, if any, being expressly waived by the parties hereto and by any Person claiming by, through or under the parties hereto and (d) under no circumstances shall [OWNER TRUSTEE] be personally liable for the payment of any indebtedness or expenses of the Issuer or be liable for the breach or failure of any obligation, representation, warranty or covenant made or undertaken by the Issuer under this Indenture or any other related documents.

In the Form of Trust Agreement, Article VII concerns the Owner Trustee. Specifically, §7.01(d) states that "[u]nder no circumstances shall the Owner Trustee be liable for indebtedness evidenced by or arising under any of the Basic Documents, including the principal of and interest on the Notes". Further, §7.05 states that all persons having a claim against the Owner Trustee because of the transactions concerning the Trust "shall look only to the Trust Estate for payment or satisfaction thereof."

Section 11.10 of the Form of Trust Agreement also will provide for a limitation of liability, as follows:

No Recourse. Each Certificateholder by accepting a Trust Certificate acknowledges that such Trust Certificate represents a beneficial interest in the Trust only and does not represent an interest in or an obligation of the Depositor, the Servicer, the Administrator, the Owner Trustee, the Indenture Trustee or any Affiliate thereof and no recourse may be had against such parties or their assets, except as may be expressly set forth or contemplated in this Agreement, the Trust Certificates or the Basic Documents.

The proposed form of the Trust Certificate also expresses the limitation of liability, with the following statement: THIS TRUST CERTIFICATE DOES NOT REPRESENT AN INTEREST IN OR AN OBLIGATION OF DEPOSITOR, [INDENTURE TRUSTEE] OR ANY OF THEIR RESPECTIVE AFFILIATES. The reverse side of the proposed Trust Certificate contains the following: "The Trust Certificates do not represent an obligation of, or an interest in, the Depositor, the Servicer, the Owner Trustee or any affiliates of any of them and no recourse may be had against such parties or their assets, except as expressly set forth or contemplated herein or in the Trust Agreement or the Basic Documents."

The foregoing shows that the Trust will offer limited liability to its owners with respect to the obligations of the Trust. §40-14A-1(d) This limited liability will exist legally, by statute, and factually, by the language of the Trust documents.

CONCLUSION

As discussed, the Trust will meet the statutory definition of "corporation" in §40-14A-1(d), Code of Alabama 1975. Based on the law and the facts concerning your request, the Trust will be subject to Alabama's business privilege tax contained in that chapter.

Cynthia Underwood
Commissioner, Alabama Department of Revenue