Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #884
April 2000
12 USC 9

January 13, 2000

Re: Collective Investment Funds under 12 C.F.R. § 9.18(a)(2)(ii)

Dear **[ ]**:

This replies to your request on behalf of **[ ]** (the "Bank") concerning investing assets of certain employee benefit plan accounts held by a national bank as directed agent or non-discretionary custodian in collective investment funds established and maintained pursuant to 12 C.F.R. § 9.18. As part of the 1996 revisions to part 9, the OCC added section 9.18(a)(2)(ii) which provides a national bank may invest in part 9 collective investment funds the assets of specified employee benefit accounts that the "bank holds in any capacity (including agent)." For the reasons discussed more fully below, we concur with your position that section 9.18(a)(2)(ii) permits the investment of assets in part 9 collective investment funds of tax-exempt employee benefit plan accounts held by the bank in any capacity, provided the fund itself qualifies for an exemption from federal tax.

Background

The Bank's Proposal

The Bank represents that it acts as a directed agent or a non-discretionary custodian to certain tax-exempt, employee benefit plan accounts ("EB accounts"). Another entity acts as the named fiduciary to the EB accounts and makes the investment decisions. The EB accounts may include corporate pension and profit-sharing plans, which are tax-exempt by reason of being

described in section 401(a) of the Internal Revenue Code, as well as government plans.[1] The Bank has no investment discretion over the assets. Prior to investment in a collective investment fund, the Bank would not consider the assets part 9 "fiduciary" assets, and would not be considered holding the assets in a "fiduciary capacity" for purposes of part 9. The Bank proposes to offer several investment options for the EB accounts, including investment in collective investment funds established by the Bank under section 9.18(a)(2).

The Bank represents that once the investment is made, the Bank, as trustee of the collective investment fund is a "fiduciary" with respect to those assets held in the collective investment fund. The Bank also represents that the collective investment fund would operate in accordance with any applicable requirements of part 9 generally, and section 9.18 in particular. The Bank believes that section 9.18(a)(2)(ii) by its terms permits the investment of certain tax-exempt employee benefit plan account assets, such as the EB accounts, the bank "holds in any capacity (including agent)."[2]

Discussion

Part 9 governs the fiduciary activities of national banks. In 1995-96, the OCC undertook a comprehensive revision of part 9 and issued a final rule effective January 29, 1997. The primary goal in revising part 9, as stated in the preamble to the final rule, was to modernize and update part 9 by removing unnecessary regulatory burden and facilitating the continued development of national banks' fiduciary business consistent with safe and sound banking practices and national banks' fiduciary obligations.[3] Likewise, the preamble to the proposed rule indicated that the specific revisions to section 9.18 were intended for the same purpose.[4] The OCC had not rewritten section 9.18 since 1972.

While retaining the general structure of former section 9.18 with respect to (a)(1) and (a)(2) funds, the 1995-96 revisions relocated the substance of former section 9.18(b)(2) to section 9.18(a).[5] The revisions eliminated the former rule's specific references to tax provisions to

---

[1] All determinations concerning the federal taxation status of the EB accounts are the responsibility of the Bank. The Bank represents that section 401(a) plans generally are subject to the fiduciary responsibilities of ERISA. The government plans are not subject to ERISA, although by contract the Bank states that ERISA standards may be imposed.

[2] Bank counsel has noted that, while not expressly authorized, Massachusetts law permits banks with trust powers to collectively invest funds held as custodian as part of "business customarily engaged in by trust departments of banks in this commonwealth." Mass. Ann. Laws ch. 167G, § 3.12.

[3] 61 Fed. Reg. 68544 (Dec. 30, 1996).

[4] 60 Fed. Reg. 66168 (Dec. 21, 1995).

[5] The most explicit reference to the change in language is in the proposed rule preamble which states that the revision to section 9.18(a) "provides guidance on the circumstances under which a bank may place employee

clarify that the OCC promulgated the regulation solely on the authority of federal banking law and not in conjunction with federal tax laws.[6] National banks, not the OCC, are responsible for ensuring appropriate exemptions from applicable federal tax laws in order to satisfy the requirements of section 9.18.[7] The former rule did not contain the specific language "holds in any capacity (including agent)" as in current section 9.18(a)(2)(ii). The OCC has not addressed the meaning of this particular language since the issuance of the revised part 9.
The relevant portions of section 9.18(a) provide as follows:

> (a) *In general*. Where consistent with applicable law, a national bank may invest assets that it holds as fiduciary in the following collective investment funds: [footnote omitted]
>
> (1) A fund maintained by the bank, or by one or more affiliated banks, [footnote omitted] exclusively for the collective investment and reinvestment of money contributed to the fund by the bank, or by one or more affiliated banks, in its capacity as trustee, executor, administrator, guardian, or custodian under a uniform gifts to minors act.
>
> (2) A fund consisting solely of assets of retirement, pension, profit sharing, stock bonus, or other trusts that are exempt from Federal income tax.
>
> > (i) A national bank may invest assets of retirement, pension, profit sharing, stock bonus, or other trusts exempt from Federal income tax and that the bank holds in its capacity as trustee in a collective investment fund established under paragraph (a)(1) or (a)(2) of this section.
> >
> > (ii) A national bank may invest assets of retirement, pension, profit sharing, stock bonus, or other employee benefit trusts exempt from Federal income tax and that the bank holds in any capacity (including agent), in a collective investment fund established under this paragraph (a)(2) if the fund itself qualifies for exemption from Federal income tax (emphasis added).

---

benefit and other tax-exempt trust assets in either an (a)(1) or an (a)(2) fund, and on the circumstances under which a bank may place trusts for which the bank is not the trustee in an (a)(2) fund." 60 Fed. Reg. at 66169.

[6] *See* 60 Fed. Reg. at 66169 (preamble to proposed rule). Former section 9.18(a) stated: "Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively…" Former section 9.18(a)(2) stated: In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or other trusts which are exempt from Federal income taxation under the Internal Revenue Code." In part, former section 9.18(b)(2) stated: "Assets of retirement, pension, profit sharing, stock bonus, or other trusts which are exempt from Federal income taxation by reason of being described in section 401 of the Code may be invested in collective investment funds established under the provisions of paragraph (a)(2) of this section if the fund qualifies for tax exemption under Revenue Ruling 56-267, and following rulings."

[7] Similarly, the OCC does not provide any opinion on the status of the described collective investment funds under the federal securities laws.

A plain reading of section 9.18(a)(2) permits the Bank's suggested interpretation. The language of section 9.18(a) generally authorizes national banks to invest assets it holds as fiduciary in two types of collective investment funds, so-called (a)(1) and (a)(2) funds. As represented by the Bank, the assets invested in the (a)(2) collective investment fund are "fiduciary" assets for purposes of part 9.[8] Under section 9.18(a)(2), the national bank must meet certain requirements with respect to the type of assets and their tax-exempt status. If the requirements are met, then section 9.18(a)(2)(ii) provides that a bank may invest in the fund tax-exempt retirement, pension, or other assets as specified, including employee benefit plan assets, that the bank "holds in any capacity (including agent)," as long as the fund itself also qualifies for an exemption from federal income tax.

Conclusion

Accordingly, we concur with the Bank's view that under an existing or newly-established (a)(2) fund consisting of retirement and other assets exempt from federal income tax, section 9.18(a)(2) permits a national bank to invest in the (a)(2) fund assets of employee benefit plan accounts exempt from federal income tax that the bank holds in the capacity of directed agent or non-discretionary custodian, such as the EB accounts, if the fund itself is exempt from federal income taxation. This result is particularly appropriate because the Bank, as trustee of the fund acts as a fiduciary to the assets once they are invested in a collective investment fund. Likewise, this meaning is consistent with the purpose and language of the revised part 9.

These conclusions are based on the facts and representations made in the materials submitted by the Bank and the discussions with representatives of the Bank. Any material change in facts or circumstances could affect the conclusions stated in this letter.

Sincerely,

/s/

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

---

[8] As proposed by the Bank, the assets invested in the section 9.18(a)(2)(ii) funds are tax-exempt, employee benefit plan assets generally subject to ERISA and held "in trust" by another entity prior to their investment by the Bank. As employee benefit plan assets subject to ERISA and exempt from federal taxation as qualified retirement plans, federal law mandates and circumscribes precise requirements. These facts are materially different from those in *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971). In *Camp*, the assets were not subject to ERISA or held in trust at all prior to investment by the bank, were not exempt from taxation, and were tendered directly by retail customers authorizing the bank to act as managing agent for the individual customer. Thus, *Camp's* principal concern, the offering to the public of a mutual fund for purely investment opportunities, is absent here.