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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

**Interpretive Letter #769**  
**March 1997**  
**12 CFR Part 9**

January 28, 1997

Mr. John H. Huffstutler  
Senior Vice President and Chief Regulatory Counsel  
Bank of America National Trust and Savings Association  
Bank of America Center  
Box 37000  
San Francisco, CA 94137

Dear Mr. Huffstutler:

This is in response to your letter dated January 22, 1997, regarding the OCC's revision of its rules governing national banks' fiduciary activities, 12 CFR Part 9 (Part 9), as published in the Federal Register on December 30, 1996 (61 FR 68543). Specifically, you seek clarification of the scope of the reference to "investment adviser, if the bank receives a fee for its investment advice" in the definition of fiduciary capacity found at § 9.2(e). You ask for confirmation that certain advisory activities described in your letter, as well as activities described in a letter from the American Bankers Association (ABA) dated January 7, 1997, requesting similar clarification, do not involve a fiduciary capacity (as defined in the revision) and, thus, are not governed by Part 9.<sup>1</sup>

As a general matter, we intend the term "investment adviser" to include a national bank providing advice or recommendations concerning the purchase or sale of specific securities, such as a bank engaged in portfolio advisory and management activities. These activities were considered fiduciary under the old regulation. We do not intend the term to include lines of business that were not covered under the old regulation, such as many of the activities that you and the ABA describe in your letters.

Moreover, we intend the qualifying phrase "if the bank receives a fee for its investment advice" to exclude from Part 9's coverage those activities in which the investment advice is merely incidental to other services. Generally, if a national bank receives a fee for providing certain services, and a significant portion of that fee is attributable to the provision of investment advice (*i.e.*, advice or recommendations concerning the purchase or sale of specific securities), then that activity will be governed by Part 9. We recognize, however, that

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<sup>1</sup> We have attached your letter and the ABA's letter to this response.

it may not always be clear whether a bank receives a fee for its investment advice, and we will clarify our position further on a case-by case basis as questions arise.

With the foregoing in mind, we turn to the specific activities mentioned in your letter and the ABA's letter, incorporating by reference the letters' descriptions of those activities.

*Full-service brokerage services (ABA) and capital markets transactions (Bank of America).* With respect to brokerage activities, we note that the Investment Advisers Act of 1940 (Advisers Act) excludes from its definition of "investment adviser," "any broker or dealer whose performance of such [investment advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor."<sup>2</sup> Thus, under the Advisers Act, a full-service broker who charges the same fee, based on the size of the transaction or number of shares traded, regardless of whether investment advice is also provided to the customer, is not considered to be an investment adviser.<sup>3</sup> On the other hand, a broker who varies the commission charge based on the amount of advice and consultation given to the customer, is considered to be an investment adviser under the Advisers Act.<sup>4</sup> Further, the Securities and Exchange Commission has opined that merely because the commission charged at a full-service brokerage is higher than the commission charged by a discount brokerage firm does not necessarily indicate that special compensation is being charged by the full-service firm for investment advice.<sup>5</sup>

Thus, using the Advisers Act as a guide, the provision of full-service brokerage services may or may not be considered a fiduciary activity, depending upon the commission structure and specific facts. In making this determination, we generally will not consider a full-service brokerage activity to be a fiduciary activity if the broker, were it not a national bank, would not be considered an investment adviser under the Advisers Act.

*Investment advisory services (ABA).* To the extent that a national bank provides advice or recommendations concerning the purchase or sale of specific securities and the bank receives a fee for that advice, as discussed above, those services are governed by Part 9. Using the ABA's example, a national bank acting as investment adviser to a mutual fund complex is governed by Part 9. This does not reflect a change in OCC policy.

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<sup>2</sup> 15 U.S.C. § 80(b)-2(a)(11)(C).

<sup>3</sup> Investment Advisers Act Release No. 2 (October 28, 1940), 6 Fed. Sec. Law Rep. (CCH) ¶ 56,156.

<sup>4</sup> *Id.*

<sup>5</sup> Investment Advisers Act Release No. 626 (April 27, 1978), 6 Fed. Sec. Law Rep. (CCH) ¶ 56,156C; and Amer. Capital Financial Services, Inc., SEC No-Action Letter (April 29, 1985), [1984-85 Transfer Binder] Fed. Sec. Law Rep. (CCH) ¶ 77,916.

All other activities described in the ABA's letter (including bridge loans, financial advice and counseling, incidental powers, municipal finance consulting, real estate asset management services, real estate consulting, and services for homeowner's associations) and in your letter (including acting as a municipal securities dealer, tax planning and structuring advice, client-directed investment activities where the fee does not depend on the provision of investment advice, project finance, and merger and acquisition advisory services) -- based on the descriptions contained in those letters -- are not included in the definition of fiduciary capacity. Accordingly, those activities are not governed by Part 9.

If you have any questions or concerns, please do not hesitate to call me or Ray Natter at (202) 874-5200.

Sincerely,

/s/

Julie L. Williams  
Chief Counsel

cc: Sarah A. Miller  
Senior Government Relations Counsel  
American Bankers Association

\* Attachments are not available in electronic format