

**Appendix C to Subpart B of part 532—
Appropriated Fund Wage and Survey
Areas**

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Florida

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Jacksonville

Survey Area

Florida:

Alachua
Baker
Clay
Duval
Nassau
St. Johns

Area of Application. Survey Area Plus

Florida:

Bradford
Citrus
Columbia
Dixie
Flagler
Gilchrist
Hamilton
Lafayette
Lake
Levy
Madison
Marion
Orange
Osceola
Putnam
Seminole
Sumter
Suwanee
Taylor
Union
Volusia
Georgia:
Brantley
Camden
Charlton
Glynn
Pierce

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DEPARTMENT OF THE TREASURY

**Office of the Comptroller of the
Currency**

12 CFR Part 9

[Docket No. 98-02]

RIN 1557-AB63

Fiduciary Activities of National Banks

AGENCY: Office of the Comptroller of the
Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller
of the Currency (OCC) is amending its

rules governing national banks' fiduciary activities by issuing an interpretive ruling to clarify the types of investment advisory activities that come within the scope of these rules. This action will assist banks in determining the extent to which their investment advisory activities are subject to the OCC's fiduciary rules.

EFFECTIVE DATE: March 11, 1998.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Background

1996 Revision of 12 CFR Part 9

On December 30, 1996, the OCC issued a final rule revising 12 CFR part 9, effective January 29, 1997 (61 FR 68543). Among other changes, the final rule revised the terms that specify the types of activities governed by part 9. In particular, the final rule replaced the former regulation's terms "fiduciary" and "managing agent" with the term "fiduciary capacity," found at § 9.2(e). Under the revised part 9, if a national bank acts in a fiduciary capacity while engaging in an activity, then part 9 governs that activity.

One of the fiduciary capacities set forth in § 9.2(e) is "investment adviser, if the bank receives a fee for its investment advice." The concept of investment adviser for a fee is new to part 9, and the OCC's addition of this term to the list of fiduciary capacities raised questions from the banking industry about what activities entail providing investment advice for a fee.

Interpretive Letter #769

In response to these inquiries, the OCC issued Interpretive Letter #769 (January 28, 1997). In that interpretive letter, the OCC clarified that "investment adviser" generally means a national bank that is providing advice or recommendations concerning the purchase or sale of specific securities, such as a national bank engaged in portfolio advisory and management activities (including acting as investment adviser to a mutual fund). Moreover, the OCC explained that the

qualifying phrase "if the bank receives a fee for its investment advice" excludes from part 9's coverage those activities in which investment advice is merely incidental to other services. Generally, if a national bank receives a fee for providing 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 part 9 governs that activity. In effect, the OCC explained, the new term "fiduciary capacity" generally includes those activities that the former regulation covered and does not capture additional lines of business.

In the interpretive letter, the OCC indicated that it generally will consider full-service brokerage services to involve investment advice for a fee only if a non-bank broker engaged in that activity is considered an investment adviser under the Investment Advisers Act of 1940 (Advisers Act) (15 U.S.C. 80b-1 *et seq.*).¹ The Advisers Act, at section 202(a)(11)(C) (15 U.S.C. 80b-2(a)(11)(C)), excludes from its definition of investment adviser any broker or dealer whose performance of investment advisory services is solely incidental to the conduct of its business as a broker or dealer and who receives no special compensation for providing investment advice.

The OCC also addressed in the interpretive letter whether certain other activities came within the scope of part 9.

Proposed Rule

On July 9, 1997, the OCC proposed to add a new interpretation to part 9, at § 9.101, codifying the clarification contained in Interpretive Letter #769 (62 FR 36746). The OCC invited comments on any aspect of that proposal, including suggestions on whether any specific activities should be added to or removed from the list of activities that do not generally entail providing investment advice for a fee, found at proposed § 9.101(b)(2) (the "list of excluded activities").

Summary of Comments and Final Rule

The OCC received seven comment letters in response to the July 9, 1997, proposal. Six of the seven commenters explicitly supported the proposal, and no commenter opposed it. Several of the commenters suggested minor modifications to the list of excluded activities.

¹ Banks are excluded from the Advisers Act's definition of investment adviser. 15 U.S.C. 80b-2(a)(11)(A).

One commenter recommended that the OCC modify three of the items on the list of excluded activities, proposed § 9.101(b)(2) (ii), (iv), and (v), to mirror the more specific language in OCC Bulletin 97-22 (May 15, 1997) (the OCC's Q&As on revised 12 CFR part 9). The OCC agrees the additional detail in the OCC Bulletin is helpful, and thus is following that recommendation.

Another commenter recommended that the OCC add to the list of excluded activities, advice or information with respect to an employee benefit plan governed by the Employee Retirement Income Security Act of 1974 (ERISA) that is not deemed "investment advice" under ERISA. The OCC agrees that, with respect to employee benefit plans, ERISA should govern whether or not an activity involves "investment advice" and, more generally, whether or not an activity is fiduciary in nature. Thus, with respect to employee benefit plans, whether a national bank is considered a fiduciary under ERISA determines whether it is a fiduciary under part 9. The OCC believes that this principle is understood generally, and thus is not addressing the issue in this final rule.

A third commenter recommended that the OCC add estate planning and retirement counseling services to the list of excluded activities. The OCC believes that estate planning and retirement counseling can vary widely in the types of advice and services offered and, in some cases, may involve investment advice within the scope of part 9. Consequently, the OCC is not including the recommended exemption, but rather will address these activities on a case-by-case basis as questions arise.

A fourth commenter recommended that the OCC modify proposed § 9.101(b)(2)(ii)—the paragraph that excludes investment advice authorized under 12 U.S.C. 24(Seventh) as an incidental power necessary to carry on the business of banking—to limit that exclusion to situations that do not involve the exercise of substantial investment discretion. However, under part 9, if a bank exercises investment discretion, it is acting in a fiduciary capacity, as defined at § 9.2(e). Whether or not the bank is also providing investment advice for a fee does not affect the fact that it is acting in a fiduciary capacity. Consequently, the OCC believes that the recommended modification is not necessary.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the OCC certifies that this final rule will not have a significant economic impact on a

substantial number of small entities in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Accordingly, a regulatory flexibility analysis is not required. This final rule merely clarifies the scope of the 12 CFR part 9, and does not add any new requirements.

Executive Order 12866

The Office of Management and Budget has concurred with the OCC's determination that this final rule is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995

The OCC has determined that this final rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Reform Act of 1995. This final rule merely clarifies the scope of 12 CFR part 9 and does not add any new requirements.

List of Subjects in 12 CFR Part 9

Estates, Investments, National banks, Reporting and recordkeeping requirements, Trusts and trustees.

Authority and Issuance

For the reasons set out in the preamble, chapter I of title 12 of the Code of Federal Regulations is amended as follows:

PART 9—FIDUCIARY ACTIVITIES OF NATIONAL BANKS

1. The authority citation for part 9 continues to read as follows:

Authority: 12 U.S.C. 24(Seventh), 92a, and 93a; 15 U.S.C. 78q, 78q-1, and 78w.

2. A new § 9.101 is added under the undesignated centerheading "**Interpretations**" to read as follows:

§ 9.101 Providing investment advice for a fee.

(a) *In general.* The term "fiduciary capacity" at § 9.2(e) is defined to include "investment adviser, if the bank receives a fee for its investment advice." In other words, if a bank is providing investment advice for a fee, then it is acting in a fiduciary capacity. For purposes of that definition, "investment adviser" generally means a national bank that provides advice or recommendations concerning the purchase or sale of specific securities, such as a national bank engaged in portfolio advisory and management

activities (including acting as investment adviser to a mutual fund). Additionally, the qualifying phrase "if the bank receives a fee for its investment advice" excludes those activities in which the investment advice is merely incidental to other services.

(b) *Specific activities*—(1) *Full-service brokerage.* Engaging in full-service brokerage may entail providing investment advice for a fee, depending upon the commission structure and specific facts. Full-service brokerage involves investment advice for a fee if a non-bank broker engaged in that activity is considered an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 *et seq.*).

(2) *Activities not involving investment advice for a fee.* The following activities generally do not entail providing investment advice for a fee:

(i) Financial advisory and counseling activities, including strategic planning of a financial nature, merger and acquisition advisory services, advisory and structuring services related to project finance transactions, and providing market economic information to customers in general;

(ii) Client-directed investment activities (*i.e.*, the bank has no investment discretion) where investment advice and research may be made available to the client, but the fee does not depend on the provision of investment advice;

(iii) Investment advisory activities incidental to acting as a municipal securities dealer;

(iv) Real estate management services provided to other financial institutions;

(v) Real estate consulting services, including acting as a finder in locating, analyzing, and making recommendations regarding the purchase of property, and making recommendations concerning the sale of property;

(vi) Advisory activities concerning bridge loans;

(vii) Advisory activities for homeowners' associations;

(viii) Advisory activities concerning tax planning and structuring; and

(ix) Investment advisory activities authorized by the OCC under 12 U.S.C. 24(Seventh) as incidental to the business of banking.

Dated: February 3, 1998.

Eugene A. Ludwig,

Comptroller of the Currency.

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