series of booklets in a comprehensive ''Comptroller's Handbook,'' which will replace the ''Comptroller's Handbook for Fiduciary Activities'' and other OCC guidance currently found in separate publications.

Definitions (Proposed § 9.2)

The proposal moves the definitions currently found at § 9.1 to proposed § 9.2. Some definitions are removed, and others are added. Significant changes are noted below.

Affiliate (Proposed § 9.2(a))

The proposal adds a definition of ''affiliate'' to part 9. This definition cross-references the definition in the Federal Reserve Act at 12 U.S.C. 221a(b), which is consistent with the way the OCC defines the term ''affiliate'' in a number of its other regulations.

Applicable Law (Proposed § 9.2(b))

The current regulation uses the term ''local law,'' as defined at § 9.1(g), to refer to the laws of the state or other jurisdiction governing a fiduciary relationship. The proposal replaces ''local law'' with ''applicable law'' in order to streamline some of the operative provisions of part 9 and to make clear that the bodies of authority that govern a national bank's fiduciary relationships include Federal law (including regulations), state law governing a national bank's fiduciary relationships (that is, fiduciary duties and responsibilities) the terms of the instrument governing a fiduciary relationship, and any court order pertaining to the relationship. The Federal law relevant to a national bank's fiduciary activities includes, for example, provisions of the Federal banking laws (12 U.S.C. 1 *et seq.*), the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq.*), the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*), the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*), and the rules issued pursuant to those acts. The OCC does not intend the term ''applicable law'' to incorporate any state law or other body of authority that would not otherwise apply to a national bank's fiduciary relationships. The OCC invites comment on the adequacy of this definition.

Fiduciary Capacity (Proposed § 9.2(e))

Under the current regulation, the term ''fiduciary,'' defined at § 9.1(b), includes ''a bank undertaking to act alone or jointly with others primarily for the benefit of another in all matters connected with its undertaking'' and goes on to list the ''traditional'' fiduciary capacities enumerated by 12 U.S.C. 92a: Trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of lunatics. The proposed definition of ''fiduciary capacity'' retains the current regulation's list of traditional fiduciary capacities with minor modification. For example, the phrase ''committee of estates of lunatics'' is removed because it is outdated and because the definition of the term ''guardian'' is broad enough to encompass that capacity. The proposed definition also clarifies that acting as registrar of stocks and bonds includes acting as transfer agent.

The current regulation's definition of ''fiduciary'' also includes fiduciary capacities that are not listed in the fiduciary powers statute. These capacities include ''managing agent'' and, as a catch-all category, ''any other similar capacity.''

The proposal attempts to establish a clearer and more objective boundary for the coverage of part 9 while retaining the traditional concept that acting on another's behalf is at the heart of serving in a fiduciary capacity. Under the proposal, the term ''fiduciary capacity'' includes, in addition to the statutory fiduciary capacities, ''any capacity involving investment discretion on behalf of another'' and ''any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a.'' [2] The proposal uses investment discretion as the factor that distinguishes fiduciary from non-fiduciary investment advisory activities. Thus, under the proposal, part 9 applies to (and, accordingly, requires a national bank to obtain fiduciary powers for) any investment advisory activity in which the bank manages the assets of another. Conversely, a national bank is not subject to part 9 with respect to an activity in which the bank does not have investment discretion, unless, of course, the bank acts in one of the ''traditional'' fiduciary capacities. For example, part 9 does not govern a directed custodian account (absent a ''traditional'' fiduciary capacity) because the customer, and not the bank, has investment discretion, although the bank may provide advice about investments appropriate to the customer's objectives. The proposed investment discretion test affects only those activities in which the bank does not act in one of the enumerated ''traditional'' fiduciary capacities. Part 9 continues to apply to activities in which the bank acts in a ''traditional'' fiduciary capacity regardless of whether the bank has investment discretion, *e.g.*, self-directed IRA accounts for which the bank is a named trustee.

As an alternative to using investment discretion as the dividing line between fiduciary and non-fiduciary investment advisory activities, the OCC could adopt an approach that relies on state law. Under a state law approach, for example, part 9 would apply to a national bank's investment advisory activity if that activity, when engaged in by competing state fiduciaries, requires state authorization and is regulated as a fiduciary activity under state law. Thus, the applicability of part 9 to a national bank's investment advisory activities could differ among states. The OCC invites comment on this and other alternative approaches to defining which investment advisory activities to regulate under part 9.

Adopting an approach that excludes some types of investment advisory activities from part 9's coverage raises the question of how to oversee these ''non-fiduciary'' investment advisory activities. Some of these activities already are subject to the Interagency Statement on Retail Sales of Nondeposit Investment Products (February 14, 1994),[3] the anti-fraud provisions of the Securities Exchange Act of 1934, and the recordkeeping and confirmation requirements for brokerage customers under the OCC's rules at 12 CFR part 12. In addition, a national bank must conduct its investment advisory activities (as with all its activities) in a manner consistent with safe and sound banking practices. Furthermore, the national bank must adhere to any conditions imposed by the OCC in writing in connection with approval of an application or request. The OCC invites comment on whether these existing regulatory safeguards are adequate to regulate non-fiduciary investment advisory activities. If the existing safeguards are not adequate, the OCC invites comment on what additional safeguards are appropriate.

For example, even if the OCC adopts the investment discretion approach, the OCC could continue to subject non-discretionary investment advice to pertinent provisions of part 9 (*e.g.*, those

[2] The term ''fiduciary capacity'' under the proposal also includes acting as a custodian under a uniform gifts to minors act, because a custodian under a uniform gifts to minors act is a fiduciary under current part 9.

[3] The four Federal banking agencies have recently issued a clarification of the Interagency Statement. See ''Joint Interpretation of the Interagency Statement on Retail Sales of Nondeposit Investment Products (September 12, 1995).