

amount of trust assets administered from offices located in that state.¹³

Fiduciary Compensation (Proposed § 9.15)

The proposal retains the substance of current § 9.15, which addresses fiduciary compensation. Under the proposal, a national bank may charge a reasonable fee for its fiduciary services if the amount is not set or governed by applicable law. Moreover, the proposal prohibits an officer or an employee of a national bank from retaining any compensation for acting as a co-fiduciary with the bank in the administration of a fiduciary account, except with the specific approval of its board of directors.

Receivership or Voluntary Liquidation of Bank (Proposed § 9.16)

The proposal retains the substance of current § 9.16, which addresses receivership and voluntary liquidation. The proposal directs a receiver or liquidating agent to close promptly all fiduciary accounts to the extent practicable (in accordance with OCC instructions and the orders of the court having jurisdiction) and to transfer all remaining fiduciary accounts to substitute fiduciaries.

Surrender or Revocation of Fiduciary Powers (Proposed § 9.17)

The proposal retains the substance of current § 9.17, which addresses surrender and revocation of fiduciary powers. The proposal sets forth the standards and procedures that apply when a national bank seeks to surrender its fiduciary powers. The proposal also describes the standards that apply when the OCC seeks to revoke a bank's fiduciary powers.

Collective Investment Funds (Proposed § 9.18)

The proposal revises current § 9.18, which governs the establishment and operation of common trust funds and other collective investment funds by national banks.¹⁴ The central purpose of

this proposed revision is to lift certain unnecessary regulatory burdens currently imposed on institutions that administer collective investment funds, while preserving appropriate protections to beneficiaries (and other interested parties) of fiduciary accounts participating in those funds.

The OCC has not rewritten § 9.18 since 1972. In 1982, the OCC published an advance notice of proposed rulemaking requesting public comment on § 9.18 (47 FR 27833, June 25, 1982). The OCC specifically solicited comments on several issues.¹⁵ Moreover, the OCC indicated its intention to undertake a comprehensive review of its collective investment fund regulation.

The OCC received over 70 comments, most of which indicated that technological advances and new customer needs rendered portions of § 9.18 obsolete or even counter-productive. In November 1984, however, the OCC suspended its consideration of amendments to § 9.18, due to pending litigation stemming from the OCC's approval of collective investment funds consisting of Individual Retirement Accounts, Keogh Accounts, or other employee benefit accounts that are exempt from taxation (collective IRA funds).¹⁶ The OCC determined that it would be premature to pursue significant changes to § 9.18 under the circumstances.

In view of the disposition of the collective IRA fund litigation,¹⁷ the OCC

Internal Revenue Code of 1986, as amended (26 U.S.C. 584), this revision affects state-chartered banks, trust companies, and other financial institution fiduciaries that administer collective investment funds.

¹⁵ These issues included: (1) operations of guaranteed insurance contract funds; (2) establishment of commingled agency accounts; (3) commingling of Keogh trusts with corporate employee benefit funds; (4) establishment of common trust funds for individual retirement accounts; (5) advertising of common trust funds; and (6) commingling of charitable trusts with employee benefit trusts.

¹⁶ See, e.g., "Decision of the Comptroller of the Currency on the Application by Citibank, N.A., pursuant to 12 CFR 9.18(c)(5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts Exempt from Taxation under Section 408 of the Internal Revenue Code of 1954" (Oct 31, 1982), reprinted in 1 Comptroller of the Currency Q.J. No. 4 (1982), at 45; and "Decision of the Office of the Comptroller of the Currency on the Application by Wells Fargo Bank, N.A. to Establish a Common Trust Fund for the Collective Investment of Individual Retirement Account Trust Assets Exempt From Taxation Under section 408(a) of the Internal Revenue Code of 1954, as amended" (Jan. 28, 1984) (Wells Fargo Decision).

¹⁷ See *Investment Company Institute v. Clarke*, 789 F.2d 175 (2d Cir. 1986), cert. denied, 479 U.S. 940 (1986); *Investment Company Institute v. Conover*, 790 F.2d 925 (D.C. Cir. 1986), cert. denied, 479 U.S. 939 (1986); *Investment Company Institute v. Clarke*, No. 86-3725 (W.D.N.C. August 25, 1986, appeal withdrawn by stipulation, Jan. 6, 1987).

decided in 1990 to resume the rulemaking process by publishing a proposal to amend § 9.18 (55 FR 4184, February 7, 1990) (1990 Proposal) based largely on the public comments received in 1982.¹⁸ The OCC received 150 comment letters on the 1990 Proposal. In 1994, the OCC decided to revise § 9.18 as part of the comprehensive review of part 9 under its Regulation Review Program, rather than proceed with § 9.18 alone. This proposal incorporates many of the elements of the 1990 Proposal. Readers seeking additional background on these elements may refer to the 1990 Proposal.

This current proposal retains the general structure of § 9.18. Paragraph (a) authorizes national banks to invest fiduciary assets in two types of collective investment funds. Paragraph (b) sets forth the requirements applicable to funds authorized under paragraph (a). Paragraph (c) describes other types of collective investments available to national bank fiduciaries. Significant changes to current § 9.18 are noted below.

(a)(1) and (a)(2) Funds (Proposed § 9.18(a)).

The proposal retains the substance of current § 9.18(a), which authorizes national banks to invest fiduciary assets in common trust funds ((a)(1) funds) and funds consisting of employee benefit and other tax-exempt trusts ((a)(2) funds). The proposal, however, relocates to § 9.18(a) the substance of current § 9.18(b)(2), which provides

¹⁸ The 1990 proposal included revisions that would: (1) Eliminate the requirement for specific approval by an institution's board of directors prior to establishing a collective investment fund, and eliminate the requirement for national banks to file fund plans of operation with the OCC; (2) clarify the participation in collective investment funds by certain tax-exempt employee benefit funds; (3) broaden the authority to establish "closed-end" collective investment funds, the assets of which are illiquid; (4) eliminate the specific regulatory prohibition in § 9.18(b)(5)(v) on advertising the availability and performance of common trust funds; (5) eliminate the fixed percentage limitation in §§ 9.18(b)(9)(i) and 9.18(c)(3) on the interest a single participating account may have in a particular common trust fund; (6) eliminate the fixed percentage limitation in § 9.18(b)(9)(ii) on the concentration of investment by a common trust fund in the obligations of any one entity; (7) eliminate the liquidity requirement in § 9.18(b)(9)(iii) applicable to the assets of common trust funds; (8) eliminate the limitations in § 9.18(b)(12) on fees and expenses incurred by an institution in the administration of a collective investment fund, but require appropriate disclosure; (9) eliminate the requirement in § 9.18(c)(2)(ii) that investments in variable-amount notes be made on a short-term basis; (10) provide an expeditious procedure for the review of new types of funds; and (11) codify the authority to establish registered collective investment funds whose assets consist solely of Individual Retirement Accounts, Keogh Accounts, or other eligible employee benefit accounts.

¹³ See also Op. Chief Counsel, Office of Thrift Supervision (December 24, 1992) (interpreting 12 U.S.C. 1464(n)(5) (the Federal savings association equivalent of 12 U.S.C. 92a(f) with virtually identical language) and concluding that a Federal savings association should compute the amount of a required state deposit based on the amount of trust assets administered from offices located in that particular state, rather than on the basis of the bank's total trust assets nationwide).

¹⁴ Because the regulations of the Office of Thrift Supervision incorporate § 9.18, this revision also affects collective investment funds administered by Federally-chartered savings and loan associations. 12 CFR 550.13(b). Moreover, because common trust funds must comply with § 9.18 in order to qualify for tax-exempt status under section 584 of the