

the value of legitimate services of tangible benefit to the participating fiduciary accounts that would not have been provided to the accounts were they not invested in the fund.

(10) *Expenses.* A bank administering a collective investment fund may charge reasonable expenses incurred in operating the collective investment fund, to the extent not prohibited by applicable law in the state in which the bank maintains the fund. However, a bank shall absorb the expenses of establishing or reorganizing a collective investment fund.

(11) *Prohibition against certificates.* A bank administering a collective investment fund may not issue any certificate or other document representing a direct or indirect interest in the fund, except to provide a withdrawing account with an interest in a segregated investment.

(12) *Good faith mistakes.* The OCC will not deem a bank's mistake made in good faith and in the exercise of due care in connection with the administration of a collective investment fund to be a violation of this part if, promptly after the discovery of the mistake, the bank takes whatever action is practicable under the circumstances to remedy the mistake.

(c) *Other collective investments.* In addition to the collective investment funds authorized under paragraph (a) of this section, a national bank may collectively invest assets that it holds as fiduciary, to the extent not prohibited by applicable law, as follows:

(1) *Single loans or obligations.* In the following loans or obligations, if the bank's only interest in the loans or obligations is its capacity as fiduciary:

(i) A single real estate loan, a direct obligation of the United States, or an obligation fully guaranteed by the United States, or a single fixed amount security, obligation, or other property, either real, personal, or mixed, of a single issuer; or

(ii) A variable amount note of a borrower of prime credit, if the bank uses the note solely for investment of funds held in its fiduciary accounts.

(2) *Mini-funds.* In a fund maintained by the bank for the collective investment of cash balances received or held by a bank in its capacity as trustee, ex-

ecutor, administrator, guardian, or custodian under a uniform gifts to minors act, that the bank considers too small to be invested separately to advantage. The total assets in the fund must not exceed \$1,000,000 and the number of participating accounts must not exceed 100.

(3) *Trust funds of corporations and closely-related settlors.* In any investment specifically authorized by the instrument creating the fiduciary account or a court order, in the case of trusts created by a corporation, including its affiliates and subsidiaries, or by several individual settlors who are closely related.

(4) *Other authorized funds.* In any collective investment authorized by applicable law, such as investments pursuant to a state pre-need funeral statute.

(5) *Special exemption funds.* In any other manner described by the bank in a written plan approved by the OCC.<sup>5</sup> In order to obtain a special exemption, a bank shall submit to the OCC a written plan that sets forth:

(i) The reason that the proposed fund requires a special exemption;

(ii) The provisions of the proposed fund that are inconsistent with paragraphs (a) and (b) of this section;

(iii) The provisions of paragraph (b) of this section for which the bank seeks an exemption; and

(iv) The manner in which the proposed fund addresses the rights and interests of participating accounts.

[61 FR 68554, Dec. 30, 1996, as amended at 68 FR 70131, Dec. 17, 2003]

#### §9.20 Transfer agents.

(a) The rules adopted by the Securities and Exchange Commission (SEC) pursuant to section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1) prescribing procedures for registration of transfer agents for which the SEC is the appropriate regulatory agency (17 CFR 240.17Ac2-1) apply to the domestic activities of national bank transfer agents. References to the

<sup>5</sup>Any institution that must comply with this section in order to receive favorable tax treatment under 26 U.S.C. 584 (namely, any corporate fiduciary) may seek OCC approval of special exemption funds in accordance with this paragraph (c)(5).

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“Commission” are deemed to refer to the “OCC.”

(b) The rules adopted by the SEC pursuant to section 17A of the Securities Exchange Act of 1934 prescribing operational and reporting requirements for transfer agents (17 CFR 240.17Ac2-2, and 240.17Ad-1 through 240.17Ad-17) apply to the domestic activities of national bank transfer agents.

[61 FR 68554, Dec. 30, 1996, as amended at 68 FR 70131, Dec. 17, 2003]

### INTERPRETATIONS

#### § 9.100 Acting as indenture trustee and creditor.

With respect to a debt securities issuance, a national bank may act both as indenture trustee and as creditor until 90 days after default, if the bank maintains adequate controls to manage the potential conflicts of interest.

#### § 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.

[63 FR 6473, Feb. 9, 1998]

## PART 10—MUNICIPAL SECURITIES DEALERS

Sec.

10.1 Scope.

10.2 Filing requirements.

AUTHORITY: 5 U.S.C. 93a, 481, and 1818; 15 U.S.C. 78o-4(c)(5) and 78q-78w.

SOURCE: 63 FR 29094, May 28, 1998, unless otherwise noted.

### § 10.1 Scope.

This part applies to:

(a) Any national bank, District bank, and separately identifiable department