



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

April 28, 2003

Interpretive Letter #969
July 2003
12 C.F.R. 9.18
12 C.F.R. 9.12

RE: Collective Fund Limited to Funds Awaiting Investment or Distribution

Dear []:

This is in response to your February 5, 2003 letter, and subsequent discussions with Joel Miller, concerning []'s (the "Bank's") desire to pool the funds of individual fiduciary accounts and self-deposit¹ them collectively in a 12 C.F.R. § 9.18(a)(1) short-term investment fund ("STIF"). The STIF would consist exclusively of funds awaiting investment or distribution and would operate in accordance with all applicable provisions of 12 C.F.R. § 9.18. Based on your representations, and for the reasons set forth below, we conclude that the Bank may pool the individual fiduciary accounts and self-deposit them in the STIF.

Discussion

The Bank currently serves as trustee, executor, administrator, guardian, and in other fiduciary capacities for thousands of its trust customers. As fiduciary, the Bank receives and invests fiduciary cash and other assets and makes distributions to beneficiaries.

The Bank seeks to pool and self-deposit fiduciary funds awaiting investment or distribution and to manage them collectively through a STIF. The assets of the STIF will consist of short-term CDs of varying maturities, similar to assets of a money market fund, except that a portion (e.g., 10%) of the STIF assets may consist of checking or other "transaction" deposits that are needed to meet anticipated liquidity needs. The Bank believes collective investment will enable customers to receive higher yields on funds awaiting distribution or investment without materially increasing the administrative burden on the Bank. Each trust customer's account will

¹ Any deposits the Bank makes of fiduciary funds in the commercial, savings, or other department of the Bank are considered "self-deposits." 12 C.F.R. § 9.10(b).

reflect ownership of units in the STIF equivalent to the customer's proportionate share of the STIF net assets.

Analysis

National banks are generally authorized to pool fiduciary funds and invest them collectively, including investment through STIFs.² Investing these fiduciary funds in the bank's own deposits, however, raises conflict of interest issues for the STIF. Twelve C.F.R. § 9.18(b)(8) requires a national bank administering a STIF to comply with the conflict of interest requirements of 12 C.F.R. § 9.12, which provides as follows –

(a) Investments for fiduciary accounts.

(1) In general. Unless authorized by applicable law, a national bank may not invest funds of a fiduciary account for which a national bank has investment discretion in the stock or obligations of, or in assets acquired from: the bank or any of its directors, officers, or employees; affiliates of the bank or any of their directors, officers, or employees; or individuals or organizations with whom there exists an interest that might affect the exercise of the best judgment of the bank. (Emphasis by underlining added.)

Applicable law authorizes the Bank to invest the STIF in the Bank's own deposit obligations. Twelve C.F.R. § 9.2(b) defines applicable law to include, "any applicable Federal law governing [fiduciary] relationships." Federal law includes OCC regulations, 12 C.F.R. § 9.10(b), which read in part as follows –

(b) Self-deposits – (1) In general. A national bank may deposit funds of a fiduciary account that are awaiting investment or distribution in the commercial, savings, or another department of the bank, unless prohibited by applicable law. (Emphasis by underlining added.)

Part 9 was restructured and streamlined in 1995. The regulatory history of Part 9 clearly shows

² See 12 C.F.R. § 9.18(a)(1) and 9.18(b)(4)(ii)(b). Twelve C.F.R. § 9.18(a)(1) states –

Where consistent with applicable law, a national bank may invest assets that it holds as fiduciary in the following collective investment funds:
(1) A fund maintained by the bank, or by one or more affiliated banks, exclusively for the collective investment and reinvestment of money contributed to the fund by the bank, or by one or more affiliated banks, in its capacity as trustee, executor, administrator, guardian, or custodian under a uniform gifts to minors act. [Footnotes omitted, emphasis by underlining added.]

The Bank represents that it is consistent with applicable law for it to invest fiduciary assets in collective investment funds in those states in which it does business and plans to so invest fiduciary assets.

that national banks have been permitted to self-deposit funds awaiting investment or distribution both before and after Part 9 was revised.

Before its revision, Part 9 dealt with self-deposits of trust funds in three sections. Twelve C.F.R. § 9.18(b)(8)(i) (1993) expressly permitted STIFs to self-deposit funds awaiting investment or distribution; 12 C.F.R. § 9.12(a) (1993) prohibited conflicts of interest such as self-deposits of fiduciary funds unless “lawfully authorized by the instrument creating the relationship, or by court order or by local law”; and 12 C.F.R. § 9.10(b) (1993) permitted self-deposit of funds awaiting investment or distribution “unless *prohibited* by the instrument creating the trust or by local law.” OCC precedents (described below) made it clear that in addition to the specific authorization for STIFs to self-deposit under 12 C.F.R. § 9.18(b)(8)(i) (1993), STIFs were subject to the provisions of 12 C.F.R. § 9.12 and 12 C.F.R. § 9.10(b). *See* Trust Interpretation 218 (May 24, 1989) and Trust Interpretation 258 (April 10, 1991) *infra*.

In 1995 the OCC deleted the express authorization for self-deposits of STIF funds in 12 C.F.R. § 9.18(b)(8)(i), and instead inserted a cross reference to 12 C.F.R. § 9.12. *See* 61 *Fed. Reg.* 68543, at 68550 (Dec. 30, 1996). Adding the cross-reference to 12 C.F.R. § 9.12 effectively preserved the ability of STIFs to self-deposit subject to the same requirement under old Part 9 that they comply with 12 C.F.R. § 9.12 and 12 C.F.R. § 9.10(b).

The OCC issued two letters under old Part 9 confirming the ability of STIFs to self-deposit. In Trust Interpretation No. 218 (May 24, 1989), the OCC permitted a bank to self-deposit in a STIF provided that the STIF’s investment objective was to, “provide a temporary investment for funds awaiting investment or distribution.” The Interpretation also included the qualification that, “it must be permissible for all accounts participating in the STIF to maintain funds in deposits of the Bank, *see* 12 C.F.R. § 9.10(b) and 12 C.F.R. § 9.12,” demonstrating that the ability of the STIF to self-deposit was subject to those two regulations. Interpretation No. 218 was clarified by Trust Interpretation No. 258 (April 10, 1991) which noted that under 12 C.F.R. § 9.12, the exception for self-deposits of trust funds applied only when “lawfully authorized by the instrument creating the relationship, or by court order or by local law.” As described above, that standard contained in 12 C.F.R. § 9.12 was changed in 1995 to permit self-deposits “if authorized by applicable law.”

The Bank represents that applicable law in those states in which it does business and plans to self-deposit fiduciary funds does not prohibit such self-deposits. As a result, 12 C.F.R. § 9.10(b) provides the applicable authority required by 12 C.F.R. § 9.12 for the Bank to self-deposit fiduciary funds awaiting investment or distribution or to deposit such funds with affiliates, and this practice is not prohibited by applicable law.

Conclusion

Based on the foregoing, the Bank may self-deposit fiduciary assets awaiting investment or distribution collectively in a STIF administered by the Bank.

The Bank confirms that it will comply with the requirements as to collateral for self-deposits imposed by 12 C.F.R. § 9.10 and with all other applicable requirements under Part 9.

Sincerely,

/s/ Lisa Lintecum

Lisa Lintecum
Director
Asset Management Division