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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

May 22, 2002

**Interpretive Letter #936  
June 2002  
12 CFR 9.18**

Re: Proposed Creation of the "[ ] Fund"

Dear [ ]:

This letter confirms our February 13, 2002 teleconference, and responds to your letter dated March 5, 2002, regarding the establishment by [ ] ("Bank"), as trustee, of the [ ] ("Fund"). You have inquired whether the OCC would object to an aspect of the Fund's operations under the OCC's rules governing collective investment funds at 12 C.F.R. § 9.18. Specifically, you have inquired whether the Bank, as trustee, may allow participant withdrawals from the Fund at the sole discretion of the Bank, or when a participant becomes ineligible to continue as a participant in the Fund. Based on your representations, and for the reasons described below, the OCC does not object to this aspect of the Fund's operations under the OCC's rules governing collective investment funds at 12 C.F.R. § 9.18.<sup>1</sup>

**I. Proposal**

The Bank seeks to establish the Fund for the collective investment of money contributed to the Fund by the Bank in its capacity as trustee of certain tax-exempt charitable trusts. The Bank is forming the Fund in order to enable several small trusts for which it serves as trustee to invest in private equity limited partnerships ("PELP"). However, the trusts cannot invest in the PELP directly because an appropriate private equity investment for these trusts would not

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<sup>1</sup> We limit our no-objection to the Bank's proposal to allow participant withdrawals from the Fund at the sole discretion of the Bank, or when a participant becomes ineligible to continue as a participant in the Fund. We offer no views on whether other aspects of the Fund's operations comply with the provisions of 12 C.F.R. § 9.18 or with applicable fiduciary law.

satisfy the minimum investment requirement of the limited partnership. The Fund will pool the investments of several tax-exempt trusts that are "qualified purchasers,"<sup>2</sup> allowing the Fund to satisfy the minimum requirement of the limited partnership.

Under the Bank's proposal, Fund participants will be unable to make discretionary withdrawals from the Fund.<sup>3</sup> Sections 6.2(a), (b), (c) and (e) of the Declaration of Trust provide:

- (a) Unless otherwise limited hereunder, the decision on when to allow, the form of, and the timing of all Fund withdrawals shall be within the sole discretion of the Trustee;
- (b) Participants will not have the right to withdraw from the Fund at any particular time or interval;
- (c) At the time of the creation of a Fund, the Trustee does not anticipate allowing any withdrawals from the Fund prior to the termination and liquidation of the [private equity investments] of the Fund; and
- (e) Upon the occurrence of an event that renders a participant ineligible to continue as a participant in the Fund,<sup>4</sup> within one year of such event the Trustee shall redeem such participant's units in the Fund, in kind, with a proportionate share of the [private equity investments] and the other assets of the Fund; subject, however, to any liens for incurred and unpaid capital contributions, debts, fees and expenses.

You represented during our February 13, 2002 teleconference that the Fund will be valued semi-annually on April 1 and October 1. The Bank will use the valuation reports provided by the PELP's general partner to determine the Fund's fair value. To comply with 12 C.F.R. § 9.18(b)(4)(ii), and as provided in § 5.3(f) of the Declaration of Trust, the Bank will determine whether the valuation provided by the PELP's general partner represents the fair value of the Fund's assets as of the date of the valuation.

## **II. Discussion**

The OCC's regulation governing collective investment funds does not mandate the frequency of admissions and withdrawals from collective investment funds. The regulation requires that the written plan governing the administration of the collective investment fund include

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<sup>2</sup> While the Investment Company Act of 1940 ("1940 Act") is not applicable to the Bank's proposal, the Bank represents that if the 1940 Act were applicable to the Bank's proposal, the tax-exempt trusts for which the Bank is trustee would meet the definition of "qualified purchasers" under § 2(a)(51) of the 1940 Act.

<sup>3</sup> The Bank represents that it will provide appropriate disclosures to the board of directors or the trustee(s) of the beneficiaries of each Fund participant with respect to the nature of the Fund's investments and capital calls, and that Fund participants will not have the right to withdraw from the Fund at any particular time or time interval.

<sup>4</sup> The Bank represents that the only way a participant would cease to be eligible to continue as a participant in the Fund would be if the Bank was removed, for cause, as trustee of the participating account.

appropriate provisions related to the terms and conditions governing the admission and withdrawal of participating accounts.<sup>5</sup>

In addition, the regulation provides that admissions and withdrawals may only be "on the basis of the valuation described in paragraph (b)(4)." Section 9.18(b)(4), in turn, provides in part that,

A bank administering a collective investment fund shall determine the value of the fund's assets at least once every three months. However, in the case of a fund described in paragraph (a)(2) of this section that is invested primarily in real estate or other assets that are not readily marketable, the bank shall determine the value of the fund's assets at least once a year.<sup>6</sup>

These provisions require that bank trustees use the valuation derived under section 9.18(b)(4) to determine the amount participants are entitled to when they are admitted to or withdraw from a fund. It does not mandate the frequency of admissions and withdrawals.<sup>7</sup> National banks and institutions that must comply with this regulation to receive favorable tax treatment should have valid reasons for limiting admissions and withdrawals, however. In addition, the admissions and withdrawal policies must be consistent with fiduciary duties.

In this case, the Bank does not anticipate allowing any withdrawals from the Fund prior to the termination and liquidation of the underlying trust investments because the Fund might fail to satisfy the minimum investment requirement of the PELP if the Fund permitted discretionary withdrawals from the Fund. In addition, you represent that the Bank will limit admissions to, and withdrawals from the Fund, because the Fund's private equity investments will be in limited partnerships that will be illiquid over their projected ten to fifteen year business cycles. Specifically, the limited partnership interests are not transferable without the permission of the General Partner. You have also represented that the amount of the investment that each participating trust will make in the Fund will not impair the liquidity of the participating trusts. The Fund is designed as, and will be used as, only one part of an overall investment strategy for the participating trusts.

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<sup>5</sup> The regulation also provides that certain funds may require a prior notice period of up to one year for withdrawals. 12 C.F.R. § 9.18(b)(5)(iii).

<sup>6</sup> 12 C.F.R. § 9.18(b)(4)(i). Section 9.18(b)(4) also establishes the method of valuation. In general, bank trustees are required to value fund assets at market value as of the date set for valuation, unless the bank cannot readily ascertain market value, in which case the bank shall use a fair value determined in good faith. See 12 C.F.R. § 9.18(b)(4)(ii)(A). Different valuation methods apply to short term investment funds. See 12 C.F.R. § 9.18(b)(4)(ii)(B).

<sup>7</sup> OCC Trust Interpretive Letters interpreting the prior version of 12 C.F.R. § 9.18 concluded that admissions and withdrawals must occur as frequently as valuations. See *e.g.*, Trust Interpretive Letter #13 (February 14, 1986). Upon closer examination of the regulation, however, we have concluded that the regulation does not mandate the frequency of admissions and withdrawals. See Interpretive Letter #920 (December 6, 2001).

Based on your representations and consistent with applicable law, the Bank may permit a participant to withdraw from the Fund solely at the Bank's discretion, or when a participant becomes ineligible to continue as a participant in the Fund.<sup>8</sup>

I trust this is responsive to your inquiry. Please do not hesitate to contact me if you have any questions.

Sincerely,

**-signed-**

Asa L. Chamberlayne  
Counsel  
Securities and Corporate  
Practices Division

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<sup>8</sup> See footnote 4, *supra*.