Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #1121
August 2009

June 18, 2009

Subject: **[ ]** Investment Trust

Dear **[ ]**:

This is in response to your request on behalf of **[ ]** ("Bank"), **[*City, State*]** to extend the time period allowable for acting upon withdrawal requests submitted pursuant to 12 C.F.R. § 9.18(b)(5)(iii). Section 9.18(b)(5)(iii) provides that a collective investment fund invested primarily in real estate or other assets that are not readily marketable, may require a prior notice period, not to exceed one year, for withdrawals. The OCC has previously determined that this provision requires payment of such withdrawal requests within the one-year notice period. The Bank believes that a longer redemption period is in the best interest of fund participants due to current economic and market conditions. Based on the Bank's representations and for the reasons discussed below, the OCC will allow an extended time period for acting upon withdrawal requests.[1]

The Fund

The Bank is the trustee of the **[ ]**Investment Trust ("Fund"), a collective investment fund whose beneficial owners are limited to qualified pension and employee benefit plans. The Fund primarily invests directly and indirectly in commercial real estate, either by providing financing secured by mortgages or interests in real estate or through equity investments in real estate through joint ventures, limited liability companies, limited partnerships or other vehicles. It also invests in multi-family apartment and condominium buildings. It does not invest in single-family residential real estate.

The net asset value of the Fund as of March 31, 2009 is approximately $2.552 billion. The Fund has a total of approximately $480 million in pending redemption requests from the third and fourth quarters 2008 and the first quarter 2009 representing over 20% of the total interests in the Fund. Due to the size of the pending redemption requests and the current unusual illiquidity in

[1] The OCC expresses no opinion as to whether the proposed extended redemption period is consistent with the requirements of the Employee Retirement Income Security Act ("ERISA").

the commercial real estate market, the Bank has determined that there will not be sufficient cash available to meet all pending redemption requests within the one-year notice period. As a result, the Bank requests a waiver pursuant to 12 C.F.R. § 9.18(c) to permit a longer redemption period for the Fund.

The Bank contends that requiring it to meet the one-year redemption period will force either a fire sale of the Fund's real estate assets or an in kind distribution of those assets to withdrawing participants. The Bank believes that neither of these options is in the best interests of the Fund's participants.

Selling Fund Assets

The Bank contends that forcing it to sell real estate within a one-year period is harmful, rather than helpful, in preserving the value of the assets, and undermines the ability of the Bank to realize an appropriate value for the assets. The Bank represents that currently there is not a ready market into which a large volume of commercial real estate can be sold, driven in large part by the shortage of available financing. As a result, the price at which Fund assets can be sold would not reflect the cash flows on the properties, but simply the current lack of buyers. Moreover, the Bank notes that these unusual market conditions would make it difficult to determine the market value of the Fund's assets. The Bank argues that accepting any available transaction over the next few months would inevitably trigger large losses to the portfolio, which would harm both continuing and withdrawing participants in the Fund.

The Bank contends that delaying payment of redemption requests would allow for an orderly liquidation of sufficient assets to raise cash through sales as financing and more normal market conditions permit. Moreover, the Bank contends that general fiduciary principles do not require the immediate disposition of an asset into an illiquid market without regard to available prices and current conditions. Instead, a prudent fiduciary normally is expected to sell real estate using appropriate judgment as to market conditions, and take an appropriate amount of time to sell real estate in order to obtain the best available price for the trust account. The Bank also contends that the standards of prudence established by section 404(a)(l)(B) of ERISA that are applicable to the Fund and the Bank weigh against selling assets at fire sale prices.

In Kind Distribution

The Bank contends that an in kind distribution of assets, whether made ratably or non-ratably, also would not benefit withdrawing participants, because it would not provide the cash redemption requested. In an in kind distribution, the withdrawing participants would receive an illiquid asset that they have no ready means to convert to cash. In addition, that Bank contends that an in kind distribution could create significant ERISA, tax and valuation issues that would tend to increase transaction costs associated with transferring the Fund's real estate assets.

Authority for Extended Redemption Period

The Bank represents that granting a waiver of the one-year redemption period would be consistent with the Fund's Declaration of Trust and is permissible under applicable state law. The Fund's Declaration of Trust imposes a one-year notice requirement on participants withdrawing from the fund, but it does not require that the trustee make redemption payments within that notice period. Instead, the Declaration of Trust provides that the trustee will make redemption payments "as soon as reasonably practicable" following the one-year notice period. It further provides that the trustee is permitted to defer redemption payments until sufficient cash is available. The Bank also states that Maryland law, where the fund is located, does not impose a one-year maximum period on the payment of withdrawal requests to withdrawing investors.[2]

Discussion

Section 9.18(b)(5)(iii) provides that a collective fund invested primarily in real estate may require a prior notice period of up to one year for withdrawals. The OCC has previously interpreted this one-year notice provision as requiring payment of a withdrawal request within the one-year notice period.[3] In recent years, however, the OCC has concluded that national banks and institutions that must comply with Section 9.18 to receive favorable tax treatment may restrict admissions and withdrawals for certain illiquid funds if they have valid reasons for doing so and the admissions and withdrawal policies are consistent with fiduciary duties.[4]

The OCC's *Handbook on Collective Investment Funds* states:

> The OCC recognizes that some CIFs contain illiquid assets, such as interests in private equity limited partnerships and hedge funds. To the extent that a bank has *valid reasons* for limiting admissions and withdrawals for one of these funds, and these restrictions are *consistent with the bank's fiduciary duties*, a bank may establish an A2 fund that severely restricts admissions to and withdrawals from, the fund.

In consideration of all the foregoing, the OCC will permit an extended redemption period in this case, provided that the Bank meets the following criteria.

1. The Fund's Declaration of Trust must include clear language authorizing an extended (more than one year) redemption period.

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[2] The Maryland Commissioner of Financial Regulation recently issued a letter stating that Maryland law's omission of a time period was "purposeful and that the legislature intended that there be no statutory timing requirements as to fund entries and withdrawals---other than that they be on valuation dates and according to the terms and conditions set out in the fund plan." Letter from Sarah Bloom Raskin, Commissioner of Financial Regulation, State of Maryland, (February 26, 2009).

[3] *See e.g.*, OCC Interpretive Letter No. 523 (July 17, 1990); OCC Investment Securities Letter No. 58, 1991 (Nov. 22, 1991).

[4] *See* OCC Interpretive Letter No. 920 (Dec. 6, 2001) and OCC Interpretive Letter No. 936 (May 22, 2002).

2. The Fund’s redemption policy, including the extended redemption period, must be fully disclosed to Fund participants.

3. The Bank must have valid reasons for an extended redemption period, and the extended redemption period must be necessary given the nature of the assets.

4. The Bank must determine that an extended redemption period is consistent with fiduciary principles and in the best interests of all participants – both withdrawing and remaining.

5. Participation in the Fund must be limited to participants that meet the definition of “institutional investors” and that are tax exempt retirement, profit sharing or stock bonus plans. In addition, each participant must be administered by a trustee or board of trustees that is required to act solely in the interest of plan participants and their beneficiaries.

The Bank represents it has met these criteria as follows:

1. The Fund’s Declaration of Trust expressly authorizes a longer period for payment of withdrawals. The Declaration of Trust states that the trustee will make payments to withdrawing participants “as soon as reasonable practicable following the one-year notice period.” It further provides that the trustee is permitted to defer redemption payments until sufficient cash is available.

2. The policy regarding redemptions, including the authority to make redemptions beyond the one-year notice period, has been fully disclosed to Fund participants. Each participant was sent a copy of the current Declaration of Trust and Information Memorandum of the Fund and each participant has executed a participation agreement that agrees to the terms of the Fund’s Declaration of Trust.

3. The Bank represents that it does not have sufficient cash available to meet pending redemptions within the one-year notice of withdrawal period. The Bank states that in order generate sufficient cash to satisfy redemption requests within the one year notice period, the Bank would either have to sell assets of the Fund at whatever prices might be available over the next few months or make ratable or non-ratable in kind distributions to withdrawing participants. Due to the current economic situation and unusual illiquidity in the real estate market, the Bank has stated that selling Fund assets at such fire sale prices would inevitably trigger large losses to the Fund’s portfolio. In addition, the Bank has stated that making in kind distributions, whether ratably or non-ratably, would not give withdrawing participants a short term means to convert the assets into cash and would present significant obstacles and risks.

4. As noted above, the Bank has stated that requiring it to meet the one-year redemption period will force either a fire sale of the Fund’s real estate assets or an in-kind distribution of those assets to withdrawing participants. The Bank believes that neither of these options is in the best interests of the Fund’s participants. Moreover, the Bank has stated that general fiduciary principles do not require the immediate disposition of assets into an illiquid market without

regard to available prices and current conditions. Instead, the Bank states that a prudent fiduciary is expected to sell real estate using appropriate judgment as to market conditions, and take an appropriate amount of time to sell real estate in order to obtain the best available price for the trust account. The Bank believes a prudent fiduciary would not sell a large portion of the Fund's real estate assets at the prices currently available in the commercial real estate market.

5. The Bank represents that each of the Fund's participants is a tax-qualified pension or employee benefit plan, has a trustee, and is an institutional investor.

Conclusion

We conclude that the Bank may extend the time period for acting upon requests to withdraw from the Fund, consistent with applicable law.[5] It is the Bank's responsibility to make full disclosure to Fund participants of all material facts concerning the extended redemption period. In addition, the Bank must provide quarterly status reports to the Examiner-in-Charge detailing efforts to satisfy pending redemption requests. Our conclusions are specifically based on the Bank's representations, and any change in facts and circumstances could result in a different conclusion. If you have any questions concerning this letter, please contact Beth Kirby, Special Counsel, Securities and Corporate Practices Division, at (202) 874-5210.

Sincerely,

/*Signed*/

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

[5] This letter is limited to approval of an extended time period to act upon withdrawal requests. We take no position on any other issue in connection with the Fund's redemption policy, including whether the extended redemption period complies with applicable fiduciary law.