

# BANKING ISSUANCE

Comptroller of the Currency  
Administrator of National Banks

Type: Banking Circular

Subject: Application of Securities Laws to  
Common Trust Funds

TO: Chief Executive Officers of National Banks, Deputy Comptrollers (District), Department and Division Heads and All Examining Personnel

## PURPOSE

This issuance reminds national banks that under Securities and Exchange Commission Staff ("SEC" or "SEC staff") interpretations of the Securities Act of 1933, 15 U.S.C. § 77a ("Securities Act") and the Investment Company Act of 1940, 15 U.S.C. § 80a-1 ("Investment Company Act"), national banks must register all common trust funds or similar funds where the underlying trust accounts are established solely or primarily for the purpose of investment in the common fund or lack a "bona fide fiduciary purpose."

## REGISTRATION OBLIGATIONS UNDER THE FEDERAL SECURITIES LAWS

National banks that operate common trust funds must comply with the applicable provisions of the federal securities laws. Both the Securities Act and the Investment Company Act provide exemptions for common trust funds national banks maintain exclusively for the collective investment and reinvestment of assets they contribute as "trustee, executor, administrator or guardian." See Section 3(a) (2) of the Securities Act and Section 3(c) (3) of the Investment Company Act. However, the SEC has consistently interpreted the common trust fund exemptions in both of these statutes narrowly to apply only when the underlying trust relationships are created for "bona fide fiduciary purposes" rather than as "vehicles for general investment by the public." (See, e.g., SEC Release 33-6188 (February 1, 1980), reprinted in 1 Fed. Sec. L. Rep. (CCH) ¶ 1051; Commercial Bank, SEC No-Action Letter (February 24, 1988), reprinted in [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,684, reconsideration denied (July 13, 1988), Commission review declined (Jan. 11, 1989); Howard Savings Bank, SEC No-Action Letter (Aug. 13, 1979), reprinted in [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,320).

In the above Commercial Bank No-Action Letter, for example, the SEC staff stated that the common trust fund exemption is available only where the common trust fund is operated for the administrative convenience of the bank in a manner incidental to a bank's traditional trust department activities and not primarily for investment in the common trust fund.



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Even when the national bank has established funds that purport to provide certain traditional fiduciary services to individual beneficiaries in addition to the collective investment function, SEC staff may consider such services to be merely incidental to the money management purpose of the trusts and decline to issue a no-action position with respect to the bank's reliance on the common trust fund exemptions. (See Howard Savings Bank, *supra*; First Jersey National Bank, SEC No- Action Letter (November 13, 1987)). The SEC Staff views advertisement of a common trust fund outside the promotion of the bank's general fiduciary services as an indication that the fund is established primarily as a vehicle for money management and, therefore, is not exempt from registration. (See Northern Trust Company, SEC No-Action Letter (March 1, 1989), on reconsideration (July 21, 1989)).

Whenever national banks are found to not be in compliance with the Investment Company Act or the Securities Act, the OCC will require corrective or remedial actions. In addition, the SEC may bring an action in federal district court to enjoin the activities of any bank which has violated those statutes. Such enforcement actions are public. The SEC also has authority to recommend that the Attorney General commence criminal proceedings in appropriate cases.

## REMEDIAL ACTION

National banks that currently operate common trust funds that are not eligible for exemption under Section 3(a)(2) of the Securities Act and Section 3(c)(3) of the Investment Company Act and are not otherwise exempt from the registration requirements of either Act, must register those funds and the offerings of the participation in those funds and must comply with applicable provisions of these statutes. If a bank is uncertain as to whether a particular fund qualifies for the exemption from registration, the bank may request a no-action position from the SEC or take other steps to insure its compliance with the Investment Company Act and the Securities Act.



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## ORIGINATING OFFICE

Questions concerning this Banking Circular may be addressed to the Office of the Comptroller of the Currency, Securities & Corporate Practices Division, Washington, D.C. 20219, or by telephone at (202) 447-1954.

Ronald Lindhart  
Deputy Comptroller  
for Compliance Management