Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #920
December 2001
12 CFR 9.18

December 6, 2001

Subject: **[ ]** Trust Company -- **[ ]**Fund

Dear **[ ]**:

This is in response to your request for an exemption under 12 C.F.R. § 9.18(c)(5) to permit annual admissions to and withdrawals from a collective investment fund established by **[ ]**Trust Company. For the reasons discussed below, we have concluded that annual admissions and withdrawals are permitted under 12 C.F.R. § 9.18 and, therefore an exemption from 12 C.F.R. § 9.18 is not required.

Proposal

[ ] ("Trust Company"), a **[ ]** trust company, seeks to establish a collective investment fund, **[ ]** ("CIF"), exclusively for the collective investment and reinvestment of money contributed to the fund by the Trust Company in its capacity as trustee of certain trusts. The Trust Company is forming the CIF in order to enable several small trusts for which it serves as trustee to invest in **[ ]** ("Limited Partnership"), a limited partnership formed by the Trust Company. Those trusts are not qualified to invest directly in the Limited Partnership because of their size.

The Limited Partnership invests in third party investment partnerships engaged in hedge fund investing. The Limited Partnership will receive cash flow from its partnership investments once a year. As a result, the Limited Partnership will only allow annual admissions and withdrawals. Because the Limited Partnership only permits annual admissions and withdrawals, the Trust Company has proposed that the CIF only allow annual admissions and withdrawals.

The CIF will be valued quarterly. The Trust Company will use the valuation reports provided to it from the third-party investment partnerships that constitute the underlying investments of the Limited Partnership to determine the fund's fair value. To comply with 12 C.F.R. § 9.18(b)(4)(ii), the Trust Company must determine that the valuation provided by the limited partnerships represents the fair value of the fund's assets as of the date of the valuation.

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 CIF include appropriate provisions related to the terms and conditions governing the admission and withdrawal of participating accounts.[1]

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 CIF shall determine the value of the fund's assets at least once <u>every three months</u>. 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 <u>at least once a year</u>.[2]

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.[3] 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, you have represented that the CIF will not have sufficient liquidity to permit admissions and withdrawals more than once a year because the CIF is invested in a Limited Partnership that only permits annual admissions and withdrawals. You also have represented

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[1] 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).

[2] 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).

[3] 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.

that the amount of the investment that each participating trust will make in the CIF will not impair the liquidity of the participating trusts. The CIF is designed as, and will be used as, only one part of an overall investment strategy for the participating trusts.

Based on these representations and consistent with applicable law, the Trust Company may permit annual admissions and withdrawals from the CIF. The proposed schedule of admissions and withdrawals must be disclosed to fund participants in the CIF's written plan.

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

Sincerely,

-signed-

Beth Kirby
Special Counsel
Securities and Corporate Practices