

Via Electronic Mail

September 2, 2014

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street, S.W.
Washington, D.C. 20219

Re: Comments on 12 CFR Part 9; Regulatory Publication and Review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, 79 FR 32172 (June 4, 2014).

Dear Sir or Madam:

The American Bankers Association (ABA)¹ appreciates this opportunity to comment on the Office of the Comptroller of the Currency's (OCC, Agency) fiduciary regulations in 12 C.F.R. Part 9 as a part of the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) review. A substantial number of our member institutions conduct fiduciary activities that are directly or indirectly affected by these rules. Hence, we are very interested in providing comments on Part 9 that will help the trust and wealth management industry as a whole.²

The purpose of this review, as required in section 2222 of that Act, is to identify regulations that are "outdated, unnecessary, or unduly burdensome" and make recommended changes that are compatible with the safety and soundness of the banking industry, as well as the U.S. financial system. The EGRPRA request highlights several considerations when making comments, including need and purpose of the regulations; their effect on competition; reporting,

¹ The American Bankers Association is the voice of the nation's \$15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$11 trillion in deposits and extend more than \$8 trillion in loans.

ABA believes that government policies should recognize the industry's diversity. Laws and regulations should be tailored to correspond to a bank's charter, business model, geography and risk profile. This policymaking approach avoids the negative economic consequences of burdensome, unsuitable and inefficient bank regulation.

² ABA is making general EGRPRA comments in another letter to the OCC, Federal Deposit Insurance Corporation and the Federal Reserve Board.

recordkeeping and disclosure requirements; clarity of the regulations; and scope of the rules. Our comments on Part 9 focus on these considerations, with particular emphasis on modernization and reasonable burden reduction.

General Comments on Part 9

OCC 12 Part 9 contains a very important set of rules for institutions that conduct fiduciary activities. For our national bank members, these rules directly govern services rendered to trusts, estates, employee benefit plans, investment management clients, and other fiduciary accounts.³ For our state chartered institutions, many state banking agencies look to these rules as a standard for their own requirements of their regulated institutions.

The last time the OCC made significant changes to Part 9 was in 1996, when the Agency undertook an effort to modernize and streamline rules that had not changed significantly since 1963.⁴ At the time, ABA supported the OCC effort and welcomed the improved final rules. We believe that now is another opportune time to make comprehensive changes that acknowledge an ever-evolving industry, with the introduction of new investment products and technology, as well as changing demands in the marketplace led by trust grantors, beneficiaries, employer plan sponsors, and other clients.

The following comments reflect several years of thoughtful consideration by the ABA Trust Counsel Committee and ABA Collective Funds Task Force. Both groups deliberated on Part 9 with the intent of recommending amendments that would modernize and clarify the rules, while balancing reasonable regulatory relief with the important protections owed to fiduciary clients. We note that the letter contains only some of the comments on more pressing issues identified by the groups. We may therefore raise others at a later date with the OCC.

³ We note that the OCC will eventually integrate the rules governing federal savings associations with the rules discussed here that govern national banks.

⁴ The OCC explained the purpose of the 1996 revision: “This rulemaking is the OCC’s first comprehensive revision of the rule since 1963. Much about national banks’ fiduciary business has changed since that time, including the nature and scope of the fiduciary services that banks offer and the structures and operational methods that banks use to deliver those services. The OCC’s particular goal in revising part 9 is to accommodate those changes by lifting unnecessary regulatory burden and facilitating the continued development of national banks’ fiduciary business consistent with safe and sound banking practices and national banks’ fiduciary obligations.” 60 FR 66163 (Dec. 21, 1995).

Specific Comments

Below are specific comments on various sections in Part 9. The order of the comments follows the sequence in Part 9 and does not indicate their relative importance.

§9.8, Recordkeeping

Since the mid-1990s, the use of the Internet and electronic communications has increased dramatically in ways that could not have been foreseen when Part 9 was last amended. ABA urges the OCC to amend section 9.8 to acknowledge and expressly permit the electronic retention of documents to satisfy regulatory requirements. In particular, we recommend the following language to be added to this section where appropriate:

Electronic documents, including electronic copies of original paper documents, satisfy fiduciary recordkeeping requirements. An electronic record shall have the same force and effect as the original, so long as the electronic record is: (i) retained in a form that accurately reflects the information in the record; (ii) accessible to all persons who are entitled to access the information for the period of time required by law; and (iii) in a form that allows it to be accurately reproduced for later reference by transmission, printing or otherwise.

Where state law is silent as to the medium of recordkeeping, this proposed section would give confirmation as to the permissible use of electronic documents. The proposed language also would be consistent with the treatment of electronic recordkeeping in 12 CFR Part 12, *Recordkeeping and Confirmation Requirements for Securities Transactions*, and Section 109 of the Uniform Trust Code, *Methods and Waiver of Notice*. We urge the OCC to modernize the fiduciary rules and provide some burden relief to the banking industry, while supporting the important fiduciary duty to keep adequate records and render accounts.

Retention of Documents

To protect beneficiaries and bank fiduciaries, we recommend that the period of document retention in 9.8(b) be changed from three years to a “necessary period” or simply to refer to applicable law on retention of documents. A retention period of 3 years from the termination of the account or related litigation may be inadequate in some situations. For example, a predecessor trustee may be sued by a beneficiary three years after the termination of the account,

but before the applicable law's statute of limitations period has run. As a best practice in this example, the trustee should look to applicable law.

§9.10, Fiduciary funds awaiting investment or distribution

ABA recommends that the OCC reexamine the concept of self-deposits and the resulting collateral requirements. In the last twenty years, the trust industry has seen an increase in the number of directed, non-managed fiduciary accounts. For example, a growing number of personal trusts and employee benefits accounts expressly state that the trustee has no investment discretion. In the corporate trust industry, contractual provisions have long dictated that the corporate trustee has no investment discretion over deposited funds. Investment discretion over these types of accounts is instead often specifically and expressly retained by independent external parties or spelled out in the governing document.

At the same time, bank fiduciaries have also found that many directing fiduciary clients have moved away from investments in mutual funds and other securities, preferring to place the assets in bank deposits. The reasons for this trend include reduced differences in yield between bank deposit rates and traditional investments, ease of administering cash, and changing rules governing money market mutual funds, among other things.

(b)(1), Self-Deposits

Addressing and mitigating conflicts of interest and self-dealing by the fiduciary is an important objective under both banking regulations and other fiduciary law. This objective is reflected in 9.10 and 9.12, which control or prohibit self-dealing activities by banks. Consistent with common law and traditional fiduciary principles, Regulation 9.10 protects trust beneficiaries and other fiduciary clients from self-dealing by a bank fiduciary and the associated risks that are beyond the control of the beneficiary or client. In Bulletin 2010-37, the OCC states that “[t]he primary supervisory concern with self-deposits of fiduciary funds is that a bank may fail to fulfill its duties of undivided loyalty and care to fiduciary account beneficiaries if the bank's interests conflict with those of its fiduciary clients. Self-depositing fiduciary funds can potentially benefit the bank by providing the bank increased liquidity, stable funding, and low-cost deposits. These potential financial benefits, however, should not influence a bank when it makes fund-placement decisions for its fiduciary clients.”

Controls and prohibitions are appropriately placed on banks to ensure that a bank's self-interest does not influence its fiduciary investment decisions to the detriment of trust beneficiaries. A bank's decision to invest fiduciary assets in its own deposit products is not permitted unless prudent, specifically authorized by applicable law, and properly collateralized. These controls protect beneficiaries and other fiduciary clients from decisions that could result in below market rates, lost investment opportunities, and, in worst case scenarios, loss of principal in the event of a bank's insolvency.

In the "Guidelines for Self-Deposits" section of Bulletin 2010-37, the OCC recognizes the applicability of Regulation 9.10 to discretionary deposits, describing "self-deposits" as activities that require initial due diligence, continuing evaluation, and periodic review by the bank fiduciary. In other words, the guidance applies to discretionary deposits placed by the fiduciary, but it does not require reviews of client-directed deposits.

In a directed fiduciary account situation, the client or other external party, not the bank, makes the decision to hold the account's funds in cash or other bank deposit products. In such case, the directed fiduciary is not self-dealing and there is no opportunity for overreaching by the directed fiduciary. Indeed, the directed fiduciary has no authority to invest the fiduciary assets otherwise and would be committing a breach of duty by investing funds in contravention of the directing party's instructions. We, therefore, suggest that 9.10 accommodate these situations by stating that the bank "may" collateralize deposits if such deposits are directed by a third-party or in the governing instrument. Indeed, some states that require collateral for fiduciary self-deposits have expressly codified this same concept.⁵

(b)(2)(iv), Acceptable Collateral

ABA also urges the OCC to consider expanding the acceptable collateral allowed in section 9.10(b)(2)(iv) to include not just surety bonds but other instruments that provide similar protection from loss.

⁵ See, Illinois Compiled Statutes, 205 ILCS 620/2-8(c)(3) ("No collateral shall be required or authorized if the deposit is made solely at the direction and determination of the settlor, beneficiary or other person, other than the corporate fiduciary, having the right to direct investment of funds."), and Florida Statute 660.37(2)(a) and (b).

§9.13, Custody of Fiduciary Assets

Given changing client preferences, bank fiduciaries do not always have primary custody of the fiduciary assets they manage. The client may select a separate custodian before the account with the fiduciary is ever established. To accommodate this scenario, ABA recommends that subsection (a) be rewritten as such:

A national bank with custody of fiduciary assets that are held on-premises shall place such assets in the joint custody or control of not fewer than two of the fiduciary officers or employees designated for that purpose by the bank's board of directors. A national bank with custody of fiduciary assets that are held off-premises (e.g., by a sub-custodian or custodial agent) shall maintain adequate safeguards and controls over the assets, provided that holding such assets off-premises is consistent with applicable law. A national bank that has not been granted custody fiduciary assets may still act as a fiduciary with respect to those assets, if consistent with applicable law.

These proposed changes would reconcile an inconsistency between the first and second sentences in the current 9.13(a). As currently written, the first sentence requires that fiduciary assets must be in the joint custody or control of two or more fiduciary officers or employees, but the second sentence states that the bank may maintain fiduciary assets off-premises, where it may no longer be under those individuals' control. The proposed language would also acknowledge that a fiduciary client, while seeking the bank's investment management expertise, may seek to maintain custody with another institution that is not related to the bank fiduciary.

§9.14, Deposit of securities with state authorities

In recent years, national banks have had occasional difficulty complying with requirements to deposit securities with state authorities pursuant to 9.14. In these instances, certain states or jurisdictions will not accept the required deposits and also fail to complete necessary paperwork to allow for the deposit of securities with the Federal Reserve Bank of the relevant district, as required in 9.14(a). Given these situations, we ask the OCC to add a provision in 9.14 stating that if the bank makes a best effort to comply with these provisions yet is unable to meet the deposit requirement because of a state's refusal or inaction, the national bank will nonetheless be deemed to have complied with the provision.

§9.18, Collective investment funds

(b)(1), Written Plan

ABA urges the OCC to clarify this provision expressly to allow a bank to provide an electronic copy of a written plan, as an alternative to sending a paper copy by postal mail, while requiring that the bank provide a paper copy upon request. It is frequently the case that fund participants request or expect that collective investment fund-related documents be provided by electronic mail or through an Internet website. In addition, in light of our above suggested clarifications, we ask that the OCC eliminate the somewhat antiquated requirement of keeping a copy of the plan available for public inspection at the bank's main office.

(b)(5)(iii), Prior notice period for withdrawals from funds with assets not readily marketable

This subsection provides that a bank managing certain (a)(2) funds, such as those “invested primarily in real estate or other assets that are not readily marketable,” may require investors to provide notice a year in advance when requesting a withdrawal. For the reasons outlined below, we believe that this language could be modernized by removing the reference to “real estate” as a separate category of assets and, instead, use the phrase “invested primarily in assets that are illiquid or otherwise not readily marketable.”

When this subsection was first introduced in 1982, investments in real estate were likely the most common type of illiquid assets held by (a)(2) funds, but with the advent of securitization since that time, investments in real estate may be represented in many forms and with varying degrees of liquidity and tradability. Furthermore, thirty years later, in 2014, (a)(2) funds more commonly hold other categories of illiquid assets. For example, stable value funds typically hold a mix of guaranteed investment contracts, synthetic investment contracts, or separate account contracts (collectively, SV Contracts) that have limits on transferability that make them illiquid or otherwise not readily marketable. Alternative investments that are illiquid or otherwise not readily marketable, such as private equity and venture capital investments, likewise can be held by (a)(2) funds.

In addition, in recent years the OCC has granted permission to individual banks seeking a longer advance notice period for funds when appropriate and disclosed to investors.⁶ To obviate

⁶ See, e.g., OCC Interpretive Letter 1121 (Jun. 18, 2009).

the need for banks to apply on a case-by-case basis to the OCC for permission to have an advance notice period of more than one year for (a)(2) funds, we believe adding appropriate criteria to this subsection that a bank may use in setting a longer period will improve efficiencies for the bank and the OCC, while still preserving the bank's duties to set such longer periods consistent with its overall fiduciary duties and to disclose such periods properly to participants. This possibility also is recognized in the recently revised Collective Investment Funds Handbook:⁷

In the absence of a specific notice period for withdrawals established in the fund's plan, a bank administering a CIF that is invested primarily in real estate or other assets that are not readily marketable may impose a prior notice period of up to one year.

The OCC recognizes that certain CIFs may 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 (e.g., fund liquidity), and these restrictions are consistent with the bank's fiduciary duties, a bank may establish a fund that severely restricts admissions to and withdrawals from the fund.

There can be many reasons why a longer period may be appropriate for such an (a)(2) fund. For example, ABA members have reported that a bank may be able to achieve better diversification among the issuers of SV Contracts held for an (a)(2) stable value fund or obtain better prices or other overall terms for SV Contracts if its (a)(2) fund has an advance notice period of more than one year for withdrawals initiated by the fiduciary of a participating retirement plan.⁸

Using the criteria noted in Interpretive Letter 1121 as a guide, the subsection could be amended to read as follows:

A bank administering a collective investment fund described in paragraph (a)(2) of this section that is invested primarily in assets that are illiquid or otherwise not readily marketable may require a prior notice period, not to exceed one year, for withdrawals, or subject to the following conditions, may require a prior notice period of more than one year for withdrawals if:

(A) the fund's Plan authorizes an extended (more than one year) redemption period;

⁷ Comptroller's Handbook, Collective Investment Funds, App. B (p. 46) (May 2014).

⁸ *E.g.*, an advance notice period of up to three years for withdrawals initiated by the fiduciary of the retirement plan while still permitting daily withdrawals for underlying plan participant activity.

(B) the fund’s redemption policy, including the extended redemption period, is disclosed in writing to the fund’s participants;

(C) the bank has valid reasons for an extended redemption period and the extended redemption period is appropriate given the nature or other attributes of the illiquid or otherwise unmarketable assets held by the fund; and

(D) the bank has determined that an extended redemption period is consistent with fiduciary principles and in the best interests of withdrawing and remaining participants of the fund.

(b)(6), Audits and Financial Reports

This subsection provides, “At least once during each 12-month period, a bank administering a collective investment fund shall prepare a financial report of the fund based on the audit required by paragraph (b)(6)(i) of this section.” The OCC Handbook on Collective Investment Funds further states that, “A bank cannot waive the annual audit requirement when it terminates a fund. Unless a fund’s termination occurs as of the audit date of the fund, a separate fund termination audit is required to verify all fund assets have been distributed or are otherwise accounted for.” Although the Handbook emphasizes the need for a final audit, we urge the OCC to provide some flexibility as to its timing when the fund is terminated shortly after the 12-month audit period ends.

Given significant fixed costs in audits, the cost of a “stub-period” audit can be substantial. This cost would typically be borne by the participants remaining in the fund, the number of which will necessarily decrease over time, thereby magnifying the effect of any accrual for the audit cost. Therefore, as a matter of burden reduction for both the fund participant and the bank, we urge the OCC to amend the requirement to allow a bank terminating a fund within 15 months after the last audit to wait until the fund has terminated to complete the final audit.

(c)(2), Mini-funds

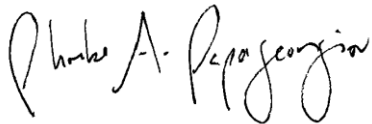
ABA believes that the OCC should periodically adjust the total asset limit for mini-funds in light of inflation and economic growth. These funds allow for the collective investment of cash balances received or held by a bank in its capacity as trustee, executor, administrator, and other fiduciary capacities that may be too small to invest separately. Over time, as was the case during the revision in 1996, the static threshold can become so relatively low that it may no longer provide a feasible investment option. We, therefore, recommend that the threshold be

raised to at least \$1.5 million, which is approximately the inflation-adjusted value of \$1 million in 1996 dollars.⁹

Conclusion

ABA appreciates the opportunity to comment on OCC Part 9. These rules are very important to our member institutions that conduct fiduciary activities. We believe our comments would modernize and clarify Part 9, while balancing reasonable regulatory relief with the important protections owed to fiduciary clients. We look forward to discussing these comments and recommendations with the OCC.

Sincerely,

A handwritten signature in black ink that reads "Phoebe A. Papageorgiou". The signature is written in a cursive, flowing style.

Phoebe A. Papageorgiou

Vice President & Senior Counsel

⁹ The calculation was made using the Bureau of Labor Statistics Consumer Price Index Inflation Calculator, available at http://www.bls.gov/data/inflation_calculator.htm.