



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

January 27, 1999

Interpretive Letter #850
February 1999
12 USC 92(A)
12 USC 24(7)

Re: Proposed Investment Advisory Program

Dear []:

This is in response to your letter requesting confirmation that national banks may enter into arrangements with a registered investment adviser for the provision of investment advice to bank customers. Based on the representations in your letter and for the reasons discussed below, we believe that a national bank may, in the manner described, enter into contracts with an investment adviser to provide services to bank customers.

I. PROPOSAL

[] () is an investment adviser registered with the Securities and Exchange Commission (SEC) under the Investment Advisers Act of 1940. [] intends to enter into contracts with national banks by which banks would, for a fee, refer bank customers to []. [] also proposes to enter into contracts with banks to act as a subadviser in providing investment management services to fiduciary accounts at those banks. For the reasons described below, based on the facts and representations provided, we conclude that national banks have the authority to enter into the proposed arrangements with [].¹

[] proposes to offer to banks (including national banks) two arrangements (“referral” and “private-label”) to generate fee income and to provide investment advisory services to bank customers.

¹ The OCC does not endorse particular investment products or investment advisers, and this letter is neither an endorsement nor a criticism of [] or any other investment adviser entering into arrangements with national banks.

A. “Referral” Arrangement

Under the referral arrangement, in exchange for a finder’s fee, a bank would agree to refer bank customers to [] for investment advisory services. [] personnel would not be present on bank premises and [] marketing materials would disclose clearly that customer accounts at [] are investments made by [] and are not deposits, or obligations of, or guaranteed by, the referring bank; are not insured by the FDIC; and may involve investment risks, including possible loss of principal.²

[] would provide investment management services in its own name, directly to and under contract with bank customers. While the relationship between the referring bank and [] would be disclosed, the bank’s role would merely be facilitative, it would not act as an investment advisor or retain investment discretion over customer assets. National banks entering into this “referral” arrangement would not act in a fiduciary capacity and, accordingly, would not generally have fiduciary powers. Referring banks would not negotiate with customers, act as co-advisors, enter into partnerships or joint ventures with [] or otherwise have any control over [] or the services [] provides.

[] expects some banks will want to serve merely as finders and will refer customers to [] with little or no further involvement in the future relationship between the bank customer and []. These banks will receive fee income from [] for the referral without devoting significant resources to support their customers’ relationships with []. [] anticipates other banks may want to maintain more active involvement in supporting and monitoring their customers’ investment advisory arrangements with []. Not only would these banks refer customers to [] for a fee, they would also provide ongoing customer-related administrative, recordkeeping, and other non-advisory services on behalf of [] for those bank customers who enter into investment management arrangements with []. These banks would receive additional fees based upon the nature and extent of the bank’s services.³

Depending on how a bank structures its program, [] anticipates it may: (1) assist in educating bank personnel about the [] program; (2) conduct sales seminars that would be held by the bank; and (3) provide brochures, other marketing materials and forms, including account applications, profiling questionnaires, clearing/custodial/agency applications, and disclosure forms. In addition, although [] anticipates it may provide some banks with sample Investor Quarterly Performance Reports, Client Strategy Reports, sample portfolios, investment commentaries, fund analyses, investment policies and other program

² [] and/or the bank would provide these disclosures during sales presentations and prior to or at the time an account is opened. [] and/or the bank would obtain a signed customer acknowledgment that the customer has received and understands these disclosures.

³ [] represents these fees would never exceed reasonable and customary fees for such services.

related documents for the bank's use in introducing customers to [], these banks will merely be a conduit for distributing these materials and will not act as a co-advisor with [] or provide investment advice.⁴

B. "Private Label" Arrangement

The "private-label" arrangement is designed for banks with fiduciary powers that intend to use [] as a sub-advisor. Bank customers would enter into traditional investment management agreements with their bank and [] would then manage these accounts under a separate sub-advisor agreement with the bank.

II. ANALYSIS

A. "Referral" Arrangement

1. Authority of a National Bank to Act as a "Finder"

The OCC has long recognized the finder function as a permissible banking activity that includes, "without limitation, identifying potential parties, making inquiries as to interest, introducing or arranging meetings of interested parties, and otherwise bringing parties together for a transaction that the parties themselves negotiate and consummate." 12 C.F.R. § 7.1002(b). Such activities are part of the business of banking.⁵ The OCC has also long recognized that the payment of a reasonable finder's or referral fee in connection with the marketing of trust services, that is disclosed to bank customers, is appropriate.⁶ "Unless otherwise prohibited, a national bank may advertise the availability of, and accept a fee for, the [finder] services provided. . ." 12 C.F.R. § 7.1002(c).

The proposed "referral" activity for national banks that you describe involves customer referrals, the distribution of materials pertaining to the [] program, and related administrative services performed by some banks. National banks may receive finder fees for providing these referrals and services.

⁴ A national bank that exercises fiduciary powers must first obtain approval from the OCC under 12 C.F.R. §§ 5.26 and 9.3.

⁵ See e.g., Interpretive Letter No. 824 (February 27, 1998), *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-273; OCC Corporate Decision No. 97-60 (July 1, 1997).

⁶ See, OCC Interpretive Letter No. 607 (August 24, 1992), [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,445 (IL 607); Trust Interpretive Letter No. 249 (May 23, 1990) [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,210; Interpretive Letter No. 504 (May 18, 1990) [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,202; Trust Interpretive Letter No. 78 (March 4, 1987).

2. Authority of a National Bank Without Fiduciary Powers to Enter into a Referral Arrangement with a Third Party for the Provision of Investment Advice to Bank Customers

You have specifically requested that the OCC confirm your view that a national bank without fiduciary powers could permissibly enter into the referral arrangement. Under the proposed “referral” arrangement, a national bank need not obtain fiduciary powers from the OCC in order to refer customers, for a fee, to []. Fiduciary activities that require a national bank to obtain fiduciary powers from the OCC include acting as an “. . . investment advisor, if the bank receives a fee for its investment advice; any capacity in which the bank possesses investment discretion on behalf of another; or any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. § 92a.” 12 C.F.R. § 9.2(e).⁷ Although [] intends that those banks with which it enters into contracts will retain involvement with their customers, those banks will not provide investment advice or retain investment discretion over those customer assets referred to [].⁸

Referring banks may engage in a broad range of activities in support of []’s investment advisory activities. For example, a bank may elect only to facilitate account openings before forwarding them to [] by reviewing customer account applications and related documents to be sure they have been completed properly. Other referring banks, however, consistent with IL 607, may elect to perform additional customer-related administrative functions such as transmitting documents and acquiring customers’ signatures, coordinating sales calls by [] personnel, including arranging appointments for [] officials who will meet with prospective customers referred by the bank, marketing [] products by distributing brochures and holding seminars to be conducted by [] personnel, performing market research such as determining the number of prospects in the bank’s market area that meet []’s criteria, and identifying prospective customers through other means. As noted in IL 607, finders referring potential trust business are authorized to perform essentially clerical and routine tasks, provided that the finder merely handles and does not generate or produce trust documents or give advice on the meaning or impact of these documents.

While the nature and extent of a bank’s continuing involvement would ultimately depend on the bank’s business objectives, in all cases where a bank does not possess fiduciary powers, the

⁷ See also, Interpretive Letter No. 769 (January 28, 1997), *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-133 (clarification of the term “investment advisor” as used in 12 C.F.R. Part 9).

⁸ Investment discretion is defined to mean, with respect to an account, “the sole or shared authority (whether or not that authority is exercised) to determine what securities or other assets to purchase or sell on behalf of the account. A bank that delegates its authority over investments and a bank that receives delegated authority over investments are both deemed to have investment discretion.” 12 C.F.R. § 9.2(i).

bank would be unable to provide investment advice or maintain investment discretion for its customers.

B. “Private Label” Arrangement

The “private-label” arrangement proposed by [] is lawful for banks with fiduciary powers. Bank customers would enter into traditional investment management agreements with their bank and [] would then manage these accounts under a separate sub-advisor agreement with the bank. Customers would have no direct or contractual relationship with [] and all written materials would identify the investment management program as offered by the bank. [] may be described in the written materials distributed by the bank as the sub-advisor of the account.

This arrangement is consistent with 12 C.F.R. § 9.4(c) which authorizes a national bank to “purchase services related to the exercise of fiduciary powers from another bank or other entity.” OCC precedent adopted prior to the addition of § 9.4(c) in 1996 expressly recognized that a national bank may find it desirable or expedient to contract for fiduciary support services. Among the services the OCC has recognized in the area of fiduciary support is responsibility for providing investment advice. Fiduciary Precedent 9.1390 (Comptroller’s Handbook for Fiduciary Activities).⁹

C. Compliance with the Interagency Statement

The Interagency Statement on Retail Sales of Nondeposit Investment Products (February 15, 1994), 7 Fed. Banking L. Rep. (CCH) ¶ 70-101, (Interagency Statement) provides guidance to the industry for avoiding customer confusion where nondeposit investment products are recommended or sold to retail customers of a financial institution. The Interagency Statement applies when retail recommendations or sales of nondeposit investment products are made by: bank employees; third party employees on bank premises; or sales resulting from a referral of retail customers by a bank to a third party, when the bank receives a benefit for the referral. The Interagency Statement would apply to the “referral” arrangement because the bank receives compensation for the referral.

Because the Interagency Statement generally does not apply to sales to fiduciary accounts, the “private-label” arrangement you described in which the bank acts as a fiduciary does not appear to be covered by the Interagency Statement.

⁹ See also, Fiduciary Precedent 9.1300 (Comptroller’s Handbook for Fiduciary Activities) (national bank with trust powers may either perform or purchase trust services for or from a bank or service corporation through a trust services agency agreement); and Trust Interpretive Letter No. 168 [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,935 (August 3, 1988) (use of an affiliate to perform trust administrative and investment services).

National banks participating in referral programs such as []'s must comply with all applicable OCC guidance, and operate the program in a safe and sound manner.

If you have any questions regarding this matter, please contact me at (202) 874-4447, or Joel Miller, Senior Attorney, Securities and Corporate Practices Division at (202) 874-5210.

Sincerely,

/s/

Lisa Lintecum, Director
Asset Management