

tolerance, by count, in any one container, may not be more than 10 percent and except that for Size 45 kiwifruit, the tolerance, by count, in any one container, may not be more than 25 percent) may fail to meet the requirements of this paragraph.

Dated: July 2, 1997.

**Eric M. Forman,**

*Director, Fruit and Vegetable Division.*

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BILLING CODE 3410-02-P

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Part 9

[Docket No. 97-14]

RIN 1557-AB63

#### Fiduciary Activities of National Banks

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is proposing to amend the rules governing national banks' fiduciary activities by issuing an interpretive ruling to clarify the types of investment advisory activities that come within the scope of these rules.

**DATES:** Comments must be received by September 8, 1997.

**ADDRESSES:** Comments should be directed to: Communications Division, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219, Attention: Docket No. 97-14. Comments will be available for public inspection and photocopying at the same location. In addition, comments may be sent by fax to (202) 874-5274, or by electronic mail to [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).

**FOR FURTHER INFORMATION CONTACT:** Andrew Gutierrez, Attorney, Legislative and Regulatory Activities Division, (202) 874-5090; Lisa Lintecum, Director, Asset Management, (202) 874-5419; Dean Miller, Special Advisor, Fiduciary Activities, (202) 874-4852; Laurie Edlund, National Bank Examiner, Fiduciary Activities, (202) 874-3828; Donald Lamson, Assistant Director, Securities and Corporate Practices Division, (202) 874-5210.

#### SUPPLEMENTARY INFORMATION:

##### Background

On December 30, 1996, the OCC issued a final rule revising 12 CFR part 9, effective January 29, 1997 (61 FR

68543). Among other changes, the final rule revised the terms that specify the types of activities governed by part 9. In particular, the final rule replaced the former regulation's terms "fiduciary" and "managing agent" with the term "fiduciary capacity," found at § 9.2(e). Under the revised part 9, if a national bank acts in a fiduciary capacity while engaging in a certain activity, then part 9 governs that activity.

One of the fiduciary capacities set forth in § 9.2(e) is "investment adviser, if the bank receives a fee for its investment advice." The concept of investment adviser for a fee is new to part 9, and the OCC's addition of this term to the list of fiduciary capacities raised questions from the banking industry about what activities entail providing investment advice for a fee.

#### Interpretive Letter #769

In response to these inquiries, the OCC issued Interpretive Letter #769 (January 28, 1997). In that interpretive letter, the OCC clarified that "investment adviser" generally means a national bank that is providing advice or recommendations concerning the purchase or sale of specific securities, such as a national bank engaged in portfolio advisory and management activities (including acting as investment adviser to a mutual fund). Moreover, the OCC explained that the qualifying phrase "if the bank receives a fee for its investment advice" excludes from part 9's coverage those activities in which investment advice is merely incidental to other services. Generally, if a national bank receives a fee for providing certain services, and a significant portion of that fee is attributable to the provision of investment advice (*i.e.*, advice or recommendations concerning the purchase or sale of specific securities), then part 9 governs that activity. In effect, the OCC explained, the new term "fiduciary capacity" generally includes those activities that the former regulation covered and does not capture additional lines of business.

In the interpretive letter, the OCC indicated that it generally will consider full-service brokerage services to involve investment advice for a fee only if a non-bank broker engaged in that activity is considered an investment adviser under the Investment Advisers Act of 1940 (Advisers Act) (15 U.S.C. 80b-1 *et seq.*).<sup>1</sup> The Advisers Act, at section 202(a)(11)(C) (15 U.S.C. 80b-2(a)(11)(C)), excludes from its definition

<sup>1</sup> Banks are excluded from the Advisers Act's definition of investment adviser. 15 U.S.C. 80b-2(a)(11)(A).

of investment adviser any broker or dealer whose performance of investment advisory services is solely incidental to the conduct of its business as a broker or dealer and who receives no special compensation for providing investment advice.

The OCC also addressed in the interpretive letter whether certain other activities came within the scope of part 9.

#### Proposal

The OCC proposes to add a new interpretation to part 9, at § 9.101, codifying the clarification contained in Interpretive Letter #769. To the extent that particular facts require additional clarifications, the OCC will address those situations on a case-by case basis as necessary.

#### Request for Comments

The OCC invites comments on any aspect of this proposal, including suggestions on whether any specific activities should be added to or removed from the list of activities that generally do not involve investment advice for a fee, found at proposed § 9.101(b)(2).

#### Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the OCC certifies that this proposal will not have a significant economic impact on a substantial number of small entities in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Accordingly, a regulatory flexibility analysis is not required. The proposal merely clarifies the scope of the regulation, and does not add any new requirements.

#### Executive Order 12866

The Office of Management and Budget has concurred with the OCC's determination that this proposal is not a significant regulatory action under Executive Order 12866.

#### Unfunded Mandates Reform Act of 1995

The OCC has determined that this proposal will not result in expenditures by state, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Reform Act of 1995. The proposal merely clarifies the scope of the regulation, and does not add any new requirements.

**List of Subjects in 12 CFR Part 9**

Estates, Investments, National banks, Reporting and recordkeeping requirements, Trusts and trustees.

**Authority and Issuance**

For the reasons set out in the preamble, chapter I of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 9—FIDUCIARY ACTIVITIES OF NATIONAL BANKS**

1. The authority citation for part 9 continues to read as follows:

**Authority:** 12 U.S.C. 24(Seventh), 92a, and 93a; 15 U.S.C. 78q, 78q-1, and 78w.

2. A new § 9.101 is added to read as follows:

**§ 9.101 Acting as investment adviser for a fee.**

(a) *In general.* As used in the definition of "fiduciary capacity" at § 9.2(e), *investment adviser* generally means a national bank that provides advice or recommendations concerning the purchase or sale of specific securities, such as a national bank engaged in portfolio advisory and management activities (including acting as investment adviser to a mutual fund). The qualifying phrase "if the bank receives a fee for its investment advice" excludes those activities in which the investment advice is merely incidental to other services.

(b) *Specific activities*—(1) *Full-service brokerage.* Engaging in full-service brokerage may entail providing investment advice for a fee, depending upon the commission structure and specific facts. In making this determination, the OCC will consider full-service brokerage to involve investment advice for a fee if a non-bank broker engaged in that activity is considered an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 *et seq.*).

(2) *Activities not involving investment advice for a fee.* The following activities generally do not entail providing investment advice for a fee:

(i) Financial advice and counseling, including strategic planning of a financial nature, merger and acquisition advisory services, advisory and structuring services related to project finance transactions, and providing market economic information to customers in general;

(ii) Client-directed investment activities where the fee does not depend on the provision of investment advice;

(iii) Investment advice incidental to acting as a municipal securities dealer;

(iv) Real estate asset management;

(v) Real estate consulting;  
(vi) Advice concerning bridge loans;  
(vii) Services for homeowners' associations;  
(viii) Tax planning and structuring advice; and  
(ix) Investment advice authorized by the OCC under 12 U.S.C. 24(Seventh) as an incidental power necessary to carry on the business of banking.

Dated: July 2, 1997.

**Eugene A. Ludwig,**

*Comptroller of the Currency.*

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**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. 97-NM-69-AD]

RIN 2120-AA64

**Airworthiness Directives; Turbo-Propeller Powered General Dynamics (Convair) Model 240, 340, and 440 Series Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to various turbo-propeller powered General Dynamics (Convair) Model 240, 340, and 440 series airplanes. This proposal would require revising the Airplane Flight Manual (AFM) to modify the limitation that prohibits positioning the power levers below the flight idle stop during flight, and to provide a statement of the consequences of positioning the power levers below the flight idle stop during flight. This proposal is prompted by incidents and accidents involving airplanes equipped with turboprop engines in which the ground propeller beta range was used improperly during flight. The actions specified by the proposed AD are intended to prevent loss of airplane controllability, or engine overspeed and consequent loss of engine power caused by the power levers being positioned below the flight idle stop while the airplane is in flight.

**DATES:** Comments must be received by August 18, 1997.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103,

Attention: Rules Docket No. 97-NM-69-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Frank Hoerman, Aerospace Engineer, Flight Test Branch, ANM-160L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (562) 527-5371; fax (562) 625-5210.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 97-NM-69-AD." The postcard will be date stamped and returned to the commenter.

**Availability of NPRMs**

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 97-NM-69-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

**Discussion**

In recent years, the FAA has received reports of 14 incidents and/or accidents involving intentional or inadvertent operation of the propellers in the ground beta range during flight on airplanes equipped with turboprop