

OCC Explores Changes to Fiduciary Capacity Definition and Requirements for Non-Fiduciary Custodial Activities

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Financial Services

On April 29, 2019, the Office of the Comptroller of the Currency (OCC) issued an Advance Notice of Proposed Rulemaking (ANPR) seeking comment on (1) expansion of the term “fiduciary capacity” in part 9 and part 150 of the OCC’s regulations to include certain trust-related roles authorized under state law, potentially including roles that do not involve investment discretion, and (2) promulgation of a rule to codify standards applicable to non-fiduciary custodial activities. Both components of the ANPR could result in the imposition of additional compliance obligations on national banks, federal savings associations, national trust companies, and federal branches and agencies. Comments are due June 28, 2019.

(1) Expansion of the Term “Fiduciary Capacity”

OCC fiduciary regulations apply requirements to banks that are acting in a “fiduciary capacity,” a term that is defined by an enumerated list of roles. For example, part 9 defines “fiduciary capacity” to include “trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gifts to minors act; investment adviser, 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).

The ANPR describes recent developments in state trust laws that have resulted in the creation of new trust-related roles—particularly in directed trusts—that are not referred to as “trustees” under state law. The ANPR lists the following examples:

- “trust directors” under the Uniform Directed Trust Act;
- “investment trust advisers,” “distribution trust advisers,” and “trust protectors” under the Illinois Trust and Trustees Act; and
- “advisers” and “protectors” under Delaware law.

The OCC notes in the ANPR that these roles may entail fiduciary obligations similar to the responsibilities of a trustee, unless provided otherwise in the trust instrument.

However, the terminologies that state trust laws use to describe these roles do not overlap with the enumerated capacities in the OCC’s existing definition of “fiduciary capacity.” The OCC believes that these gaps may lead to uncertainty about the applicability of part 9 to trust-related activities, and this uncertainty may make it difficult to manage litigation risk and understand OCC expectations for such activities.

The OCC is requesting comment on whether to revise the definition of “fiduciary capacity” to include “any activity based on the authority a national bank or Federal savings association has

with respect to a trust, such as the power to make discretionary distributions, override the trustee, or select a new trustee.” Expansion of the term “fiduciary capacity” in this manner would resolve some uncertainty about the scope of permissible fiduciary capacities in part 9 and part 150 but also subject these trust-related roles to the requirements applicable to fiduciary activities. Some of these roles may not be subject to equivalent fiduciary requirements under state law.

The OCC also invites comment broadly on whether it should modify its definition of “fiduciary capacity” to authorize new activities that are considered fiduciary activities under state law. New York, for example, has authorized as fiduciary certain digital asset-related activities not currently captured by the OCC’s fiduciary rules.

(2) Non-Fiduciary Custodial Activities

The custodial activities performed by a national bank, federal savings association, national trust company, and federal branch or agency—when not acting in a fiduciary capacity—are subject to requirements in OCC guidance (e.g., Comptroller’s Handbook, Custody Services (Jan. 2002)) but are not subject to the requirements of the OCC’s fiduciary regulations in part 9 or part 150. The volume and complexity of non-fiduciary custodial activities have increased significantly, leading the OCC to believe that promulgation of a non-fiduciary custody rule could mitigate the heightened risk associated with these activities and clarify the OCC’s supervisory expectations for how they are conducted. Any rule promulgated by the OCC could establish a single consistent standard for non-fiduciary custodial activities and fiduciary custodial activities and address the following four core elements: (1) separation and safeguarding of custodial assets; (2) due diligence in selection and ongoing oversight of sub-custodians; (3) disclosure in custodial contracts and agreements of the custodian’s duties and responsibilities; and (4) effective policies, procedures, and internal controls.

The OCC requests comment on whether a rule for non-fiduciary custodial activities should include various requirements listed in the ANPR, including maintaining custody assets separate from the bank’s assets, placing custody assets in the joint custody or control of no fewer than two officers or employees, performing in-depth due diligence and ongoing monitoring of sub-custodians, and limiting the types of entities eligible to serve as sub-custodian.

The OCC anticipates that any additional compliance burden associated with a new rule for non-fiduciary custodial activities would be minimal because OCC guidance currently imposes standards and requirements on such activities. A new rule would, however, provide the basis for an enforcement action if a bank’s conduct were inconsistent with the standards and requirements.

Additionally, a new rule would likely subject non-fiduciary activities to requirements similar to those currently set forth in part 9 and part 150 that apply to fiduciary custodial activities. If it adopts a rule for non-fiduciary custodial activities, the OCC may also make conforming amendments to the requirements in part 9 and 150 that apply to fiduciary custodial activities.

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