

OPINION NO. 68-089**Syllabus:**

1. A national bank or a bank organized under the laws of any state offering participations in a Commingled Trust Fund is exempt by Section 1707.02, Revised Code, from the provisions of Sections 1707.08 through 1707.11, Revised Code, if such bank is under the supervision of or subject to regulation by the government or state under whose laws it was organized.

2. A national bank or a bank organized under the laws of this state issuing participations in a Commingled Trust Fund is exempt from the registration requirement of Section 1707.15, Revised Code.

To: J. Gordon Peltier, Director, Department of Commerce, Columbus, Ohio
By: William B. Saxbe, Attorney General, June 6, 1968

I have before me your letter of March 15, 1968 requesting my opinion on the application of the Ohio Blue Sky Laws to the offerings of participations in a Commingled Trust Fund administered by a bank. Specifically, you have requested an answer to the following questions:

"1) Does such offering of participations in said Commingled Trust Fund constitute a sale of securities to be regulated under Sections 1707.01 to 1707.45, inclusive, Ohio Revised Code; further does the offeror have to be licensed as a dealer in securities pursuant to Section 1707.-15, Ohio Revised Code?

"2) Does this operation of a bank constitute a 'banking function' in the ordinary sense of a bank acting as a fiduciary, viz., aggressive selling of participation of mutual fund interests?

"3) Does the State of Ohio have authority to regulate sale of securities by a National bank in the manner described herein?

"4) Does the Division of Securities have jurisdiction of the sale of such interests when created by an Ohio chartered bank?"

In answer to the first part of your first question, Section 1701.01, Revised Code, provides that a "Security means * * *

an interest in any trust." However, Section 1707.02, Revised Code, provides:

"(A) 'Exempt', as used in this section, means exempt from sections 1707.08 to 1707.11, inclusive, and 1707.39 of the Revised Code.

" * * * * *"

"(C) Any security issued by and representing an interest in or an obligation of a national bank, a corporation, or a governmental agency created by or under the laws of the United States or of the Dominion of Canada, or a bank organized under the laws of any state, is exempt, if such bank, corporation, or governmental agency is under the supervision of or subject to regulation by the government or state under whose laws it was organized.

" * * * * *"
(Emphasis added)

Therefore, if the trustee is a national bank or a state bank subject to regulation by the government or state under whose laws it was organized it is not subject to the provisions of Sections 1707.08 to 1707.11, Revised Code. See also Section 1707.09, Revised Code.

In answer to the second part of your first question, it is my opinion that the offerer bank as an issuer of trust certificates is not subject to the registration provisions of Section 1707.15, Revised Code.

Section 1707.03, Revised Code, provides:

"(A) As used in this section 'exempt' means that, except in the case of securities the right to buy, sell, or deal in which has been suspended or revoked under an existing order of the division of securities under Section 1707.13 of the Revised Code, transactions in securities may be carried on and completed without compliance with sections 1707.08 to 1707.11, inclusive, of the Revised Code.

" * * * * *"

"(J) The sale of securities by a bank or credit union organized under the laws of the United States or of this state is exempt, if at a profit to such seller of not more than two per cent of the total sale price of such securities.

" * * * * *"

Thus, a bank selling participations in a Commingled Trust

Fund qualifies for the exemption under subsection (J), if the profit on the sale is less than two percent of the total sale price of such securities. Since the bank in question is also the issuer of the participations, it does not receive any profit in a resale as contemplated by subsection (J).

However, subsection (J) exempts only those banks organized under the laws of this state and under the laws of the United States. Therefore, those banks which do not qualify under subsection (J) must comply with Sections 1707.14 and 1707.15, Revised Code.

Section 1707.14, Revised Code, provides:

"(A) No person shall engage in this state in the business of acting as broker for others in the purchase or sale of securities unless such person is licensed as a dealer by the division of securities.

"(B) No person shall sell securities within this state or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless such person is licensed as a dealer by the division, except in the following cases:

"(1) When the securities are the subject matter of one or more transactions enumerated in divisions (B) to (L), inclusive, and (O) to (Q), inclusive, of section 1707.03 of the Revised Code;

"* * * * *"

The statutory exemption of Section 1707.14, supra, relieves national banks and banks organized under the laws of this state issuing participations in a Commingled Trust Fund of the obligation of registering under Section 1707.15, supra.

In answer to your second question, one acting as a trustee is considered as acting in a fiduciary capacity. 53 O. Jur. 2d, Trustee, Section 13, page 401.

In view of the answers given to your first question, it is unnecessary to answer the third and fourth questions presented in your request. The statutory exemptions from securities regulations for certain transactions in which banks are involved have been extended for the reason that state and national banks in certain instances are subject to the control of other governmental administrative agencies. Policy considerations favor the avoidance of duplication of efforts in the administration of protective measures.

Therefore it is my opinion and you are accordingly advised that:

1. A national bank or a bank organized under the laws of any state offering participations in a Commingled Trust Fund is

exempt by Section 1707.02, Revised Code, from the provisions of Sections 1707.08 through 1707.11, Revised Code, if such bank is under the supervision of or subject to regulation by the government or state under whose laws it was organized.

2. A national bank or a bank organized under the laws of this state issuing participations in a Commingled Trust Fund is exempt from the registration requirement of Section 1707.15, Revised Code.