February 7, 1963

The Honorable
The Secretary
Department of the Treasury
Washington 25, D. C.

Dear Mr. Secretary:

I read with interest the proposed revision of Regulation 9 relating to trust powers of national banks and the remarks of the Comptroller of the Currency in that connection before the Midwinter Trust Conference of the American Bankers Association in New York City on February 4, 1963. While we would not presume to suggest limits upon the extent to which powers of banks -- national or state -- should be expanded, we feel constrained to express to you our concern over some of the implications of Mr. Saxon's public remarks which bear on our responsibility to administer the Securities Act of 1933 and the Investment Company Act of 1940.

Mr. Saxon's speech appears to contemplate, among other things, the conduct by national banks of what is essentially a conventional investment company operation, perhaps on a mass merchandising basis. If so, at least a part of such operations would create relationships subject to both the 1933 and 1940 Acts. It is not our province to determine whether banks should engage in this business. Neither is it our province to intrude upon whatever modes of bank regulation the Comptroller chooses for these activities. Notwithstanding the existence of bank regulation, however, we may not ignore the Congressional mandate of applicability of our Acts to certain of the programs which will undoubtedly be generated by reason of the Regulation 9 revisions. These programs involve essentially the pooling of funds for purposes of investment by the general public. It was precisely to provide protections in these circumstances that Congress enacted the 1933 and 1940 Acts.

In recent years we encountered a comparable problem with insurance companies, who responded to the growing public interest in equity securities by developing the variable annuity. We asserted jurisdiction both under the Securities Act and Investment Company Act. The substance of the variable annuity is not significantly different from the conventional investment company share. Our position was contested with arguments that the device involved insurance, that insurance policies are not subject to registration under the 1933 Act, that insurance companies are exempt from the application of the 1940 Act and that insurance companies are regulated adequately by state authorities. The Supreme Court, however, adopted our statutory interpretations in S.E.C. v. Variable Annuity Life Insurance Company et al., 359 U. S. 65 (1959). Last month, after extensive evaluation of the legal and practical issues in this area, the Commission released its opinion in a case involving The Prudential Insurance Company of America. I am enclosing a copy of that opinion which confirms and amplifies our prior interpretations.

Our views are not unknown to the Comptroller. Indeed we requested and obtained a meeting with Mr. Saxon and members of his staff at his offices on January 9, 1963. We were cordially received and presented our views at length. Since we had a prior indication of difference in views in the area of offerings of Smathers-Keogh self-employment retirement plans by banks, we sought to demonstrate our genuine willingness to cooperate to the fullest extent by indicating the availability of a 1940 Act, though not a 1933 Act, exemption for such plans. This was a generous interpretation on our part, for strong, perhaps persuasive, arguments may be asserted for the opposite conclusion.

Prior to, during and since that meeting we have made every effort to assure the Comptroller that we would cooperate in developing a coordinated program to avoid any undue burden resulting from concurrent jurisdiction of our two agencies. We followed through by preparing a simplified form of 1933 Act registration statement for Smathers-Keogh plans, and are prepared to accommodate the banks and meet any problems expeditiously. Copies of this simplified form and my letter of transmittal to Mr. Saxon are enclosed, together with copies of his letters (December 18, 1962 and January 11, 1963) to this Commission. We regret that it is now evident that the Comptroller disagrees with our interpretation of the laws which the Congress entrusted this Commission to administer.

We stated in the enclosed Prudential opinion that "this Commission has not the qualification, much less any desire, to become involved in matters of insurance regulation." That statement applies with equal force to banking regulation. We regard the types of regulation to be different in objectives, administration and impact. They are not mutually exclusive in their application. And we do believe that if our laws are applicable to what is basically an investment company security, we must apply them uniformly -- whether the fund involved be administered by a bank, an insurance company or the conventional investment adviser.

A likely result of implementation of the proposed Regulation 9 revision is that banks will promptly create arrangements subject to the jurisdiction of statutes we must administer and enforce. This could lead to litigation, which we are seeking earnestly to avoid. Before considering action against any particular bank we would be grateful for an opportunity to meet with you, explain our interpretations in more detail, and obtain the benefit of your suggestions

Sincerely yours,

William L. Gary
Chairman

Enclosures

cc: Hon. James J. Sazon
Hon. Kermit Gordon
Hon. Myer Feldman