

This handbook section provides guidance on applications filed by Federal savings associations that wish to engage in fiduciary activities pursuant to Section 5(n) of the Home Owners' Loan Act (HOLA) (12 U.S.C. § 1464(n)). Section 5(n) provides that the Director of the Office of Thrift Supervision (OTS) has the authority to grant Federal savings associations the right to act in any fiduciary capacity in which State banks, trust companies, or other corporations that compete with Federal savings associations are permitted to act under the laws of the State in which the Federal savings association is located. A Federal savings association will be located for trust purposes in those states where it has an office in which it conducts fiduciary activities. A Federal savings association is operating in a particular state if its activities in that state include accepting fiduciary appointments, executing documents accepting fiduciary appointment, providing investment advice regarding fiduciary assets, or making decisions regarding investments or distributions of fiduciary assets. A Federal savings association is not located in such states where its only activities include marketing fiduciary services and performing specified incidental duties, including advertising, marketing, soliciting fiduciary business, answering questions and providing information to customers, acting as liaison between the savings association and a customer (such as forwarding requests for distributions, changes in investment objectives, forms, or funds received from the customer), and inspecting or maintaining custody of fiduciary assets or holding title to real property.

OTS regulations (12 C.F.R. Part 550) define fiduciary capacity, describe how to obtain fiduciary powers, grant exceptions for certain activities, address the proper exercise of fiduciary powers, and provide for the surrender and revocation of those powers.

State chartered savings associations do not need OTS approval in order to act in a fiduciary capacity. They must, however, conduct fiduciary operations in accordance with State law and should follow the standards for the exercise of fiduciary powers outlined in 12 C.F.R. Part 550.

A Federal savings association may terminate its fiduciary powers by filing a certified copy of its board of directors' resolution signifying this change with the OTS Regional Office responsible for its supervision. See also 12 C.F.R. §§ 550.530-50.

FILING REQUIREMENTS

Authority To Act Without Fiduciary Powers

Federal savings associations do not need fiduciary powers to offer certain trust and asset management products and services. Examples include acting as:

- Trustee of an employee benefit plan created for the benefit of the savings association's own employees. (This exemption does not, however, apply when acting as trustee for the benefit of employees of a parent, affiliate, subsidiary, or other related entity.)
- Trustee or Custodian of self-directed accounts that include IRA's, Roth IRA's, Health / Medical Savings Accounts, and Education Savings Accounts.
- Agent, Custodian, Escrow Agent, and Safekeeping Agent for individuals or corporate entities provided no investment discretion or advice is involved.

If there are questions as to whether fiduciary powers are needed to act in a certain capacity or perform a certain function, the savings association should contact the OTS Regional Office responsible for its supervision.

Delegated Authority

Initial discussions and correspondence regarding the application for fiduciary powers should be directed to the OTS Regional Office responsible for the applicant's oversight. Generally, the OTS Regional Office processes applications for fiduciary powers under delegated authority. Exceptions would include those applications that raise a significant issue of law or policy or request approval of waivers of statutes, regulations, OTS policy, or significant application requirements. See Delegation Section 040 of the applications handbook for information on the delegation process.

Expedited and Standard Processing Procedures

The fiduciary powers application is not subject to the expedited processing procedures described in 12 C.F.R. Part 516. It will be processed using the procedures set forth in 12 C.F.R. §§ 516.210-516.290.

Pre-filing Meeting Requirements

Pre-filing meetings between the applicant and the OTS are not required. Applicants are, however, encouraged to contact the OTS Regional Office to determine if a meeting may expedite the application process, particularly if the application involves unique or unusual issues.

Information and Fiduciary Powers Application Form Requirements

Unless otherwise directed by the OTS Regional Office, all applications for fiduciary powers should be filed with the OTS Regional Office in accordance with 12 C.F.R. Part 516. The applicant is required to submit all documents and information set forth in OTS Form 1240, including an original and two copies of each application and the appropriate application fee. Original signatures are required on one complete set of executed documents. For applications that are not delegated to the OTS Regional Office, three additional copies of the application should be filed at the OTS Washington office, addressed to the attention of the Applications Filing Room.

The fiduciary powers application form is, for the most part, self-explanatory and easy to follow. There are, however, some questions and requests for information included on the form that warrant clarification, particularly for those new to trust and asset management activities.

- **Section I, Question 1** – “Exclusively” means that the savings association as an entity will only be offering trust and asset management services and will not be offering banking services such as savings accounts, checking accounts, or loans to individuals.
- **Section I, Question 5** – If the savings association applies for “limited fiduciary powers” it will **ONLY** be able to offer the services specifically granted by the limited powers. Any expansion of powers will require another formal application.

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- Section I, Question 5a – “Corporate” means relating to corporate or municipal bond issues and stock transfer activities.
 - Section II, Question 8 – While the only oversight committee required by regulation is the Audit Committee, it is expected, and is industry practice, that the Board establish at least one committee specifically responsible for trust and asset management activity oversight. In small savings associations there is often only one trust committee, while in larger ones, separate committees for trust administration, trust investments, trust compliance, etc. are common. You should determine the committee structure best suited to your organization and best for providing adequate Board and management oversight. Keep in mind that 12 C.F.R. § 550.470(b) requires that a majority of the members of the Audit Committee not serve on any trust committee.
 - Section V, Questions 1 – 9 – The primary concern with regard to the savings association’s business plan relating to trust and asset management activities is that the level of activity and financial projections reflect realistic estimates and goals. Overly optimistic new business and earnings estimates will be more cause for OTS concern, particularly if they are regularly missed, than realistic estimates and acknowledgement of likely losses for a few years. Management’s plans for supporting those losses should be included in the business plan.

Exercising Fiduciary Powers

Once approved, a Federal savings association may exercise only those powers requested in the application process and specified in the OTS approval. This may include the complete range of fiduciary activities (full fiduciary powers) or may be restricted to specific fiduciary activities (limited fiduciary powers). A savings association should be aware that regardless of the fiduciary powers granted by OTS, there are situations that will require additional OTS approval prior to offering fiduciary services. They include:

- If a savings association is granted fiduciary powers by OTS but does not exercise its powers for at least five years, it must file a new application and receive OTS approval prior to accepting any fiduciary accounts.
- If a savings association is granted full fiduciary powers by OTS but does not offer a certain business line (e.g., employee benefit accounts) for at least five years, and that business line is materially different from the business line(s) it is offering (e.g., personal trust accounts), it must file a new application and receive OTS approval prior to offering the new business line.
- If a savings association is granted limited fiduciary powers by OTS and wants to expand into fiduciary activities materially different than those specifically authorized, it must file a new application and receive OTS approval prior to commencing those activities.

If a savings association wants to commence fiduciary activities in states other than those listed and approved in one or more existing applications, prior OTS approval is not required. The savings association must, however, file a notice with OTS in accordance with 12 C.F.R. § 550.125 within 10 days of commencing those activities in a new state. A notice is not required if activities in a new state

will consist only of those ancillary to the exercise of the savings association's existing fiduciary business, e.g., marketing of existing services.

A notice to OTS is not required to move previously approved fiduciary activities to a new location within a state.

Confidentiality

Requests to keep specific portions of the application confidential should be submitted in writing at the time of the application. In accordance with the Freedom of Information Act, the request should discuss the justification for the requested treatment and should specifically demonstrate the harm (e.g., to competitive position, invasion of privacy) that would result from the public release of the information. OTS will not treat as confidential the portion of any application describing plans to meet Community Reinvestment Act objectives.

Information for which confidential treatment is requested should be: (1) specifically identified in the public portion of the application by reference to the confidential section; (2) separately bound or aggregated; and (3) labeled "confidential." The applicant should follow these same procedures when filing any supplemental information. OTS will determine whether information designated as confidential must be made available to the public under the Freedom of Information Act and will advise the applicant before it makes such information available.

Eligibility Examinations

If the application for fiduciary powers includes the acquisition of all or part of an existing institution's trust or asset management business, OTS may request to see the most recent examinations and audits conducted by the institution's regulators and auditors. OTS may require that an eligibility examination of the savings association be conducted if six or more months have passed since its last examination or audit or if there were significant areas of supervisory concern noted and an assessment of corrective actions is considered necessary.

The OTS Regional Office should determine the need for an eligibility examination as early in the application process as possible. The examination may be conducted on- or off-site or a combination of both. A Preliminary Examination Response Kit requesting information for the examiners will be forwarded to the savings association being acquired prior to the examination. OTS does not normally charge a fee for an eligibility examination. However, it may do so if the examiners encounter problems that require expansion of the normal eligibility examination scope.

REVIEW GUIDELINES**Processing Procedures and Time Frames**

As noted in the Delegated Authority section, applications for fiduciary powers, including any requests for waiver of an application requirement, should be forwarded to the Regional OTS Office unless otherwise directed. Regional and Washington staff will together determine whether an application may be delegated to the OTS Regional Office for approval. If the application falls outside of the

delegated authority parameters, both the OTS Regional and Washington Offices will review the application.

Within five business days of receipt of the application and the application fee, the OTS Regional Office shall notify the applicant of their receipt. The application fee must accompany the application in order for it to be considered filed. For non-delegated applications, the application will not be considered filed until received by both the OTS Washington and Regional Offices.

Within 30 calendar days of receipt of a properly filed application, OTS will either:

- Consider the application complete,
- Request additional information in writing, or
- Notify the applicant that the application is materially deficient.

If OTS does not act within 30 calendar days of receipt of a properly filed application, the application will be considered complete, commencing the period for OTS review. Requests for waiver of an application requirement may be considered granted unless otherwise notified by OTS within this 30-day period.

If OTS requests additional information to support the application, the information must be submitted within 30 calendar days of the date of the request letter. OTS may grant a limited extension of time to submit the information if requested in writing prior to the expiration of the period. Failure of the applicant to respond to a request for additional information within the 30 calendar days or extension period may be considered a withdrawal of the application or grounds for its denial.

Upon receipt of additional requested information, OTS has 15 calendar days to review it. If necessary, OTS may extend its review period by an additional 15 calendar days and will notify the applicant prior to the expiration of the initial 15-day period. Within the 15-day period (or 30-day period, if extended) OTS will either:

- Consider the application complete,
- Request additional information in writing, or
- Notify the applicant that the application is materially deficient.

Failure by OTS to act within 15 calendar days of receipt of additional requested information will result in the application being considered complete, commencing the period for OTS review. If further information is requested, the 30-day submission and 15-day review timeframes, as well as possible extensions, will be repeated.

If OTS decides to conduct an eligibility examination, OTS may notify the applicant that the application will not be considered complete until the examination is concluded and any additional information resulting from the examination is received, reviewed, and considered adequate.

Once OTS considers the application complete it has 60 calendar days to review all of the submitted information and either approve or deny the application. The review period can be extended an additional 30 calendar days, provided OTS notifies the applicant before the expiration of the initial review period. If OTS fails to act within the 60-day period the application is considered approved and the applicant may commence fiduciary activities. If multiple applications are submitted representing one overall business transaction, the applicable review period for all applications is the review period for the application with the longest review period, subject to statutory review period timeframes.

During the review period, OTS may again request additional information to resolve or clarify issues presented in the application. In situations in which an application presents a significant issue of law or policy, OTS may extend the review period as necessary to resolve the situation. In these cases, written notice must be provided to an applicant no later than the expiration of the review period.

For purposes of calculating processing time frames, OTS does not include the day of the act or event in determining the starting date. In determining the end of a time period, when the day is a Saturday, Sunday, or a Federal holiday, the last day will be the next day that is not a Saturday, Sunday, or Federal holiday.

Under 12 C.F.R. § 516.290, if OTS has not acted on a pending application within two calendar years after the filing date and determines that the applicant is no longer actively pursuing it, OTS may consider the application withdrawn. Applications that are subject to this withdrawal provision are those where applicants have failed to take timely action such as filing required additional information or have failed to take reasonable steps to address other circumstances within the applicant's control.

Regulatory Criteria

In determining whether to approve an application, OTS considers information furnished as part of the formal application process, information available through public records and filings, and prior supervisory experience relating to the applicant. Factors to be considered are set forth in 12 C.F.R. § 550.100 and include:

- The savings association's financial condition, including capital, and whether capital meets the standards prescribed by state law and appears sufficient to support the proposed activities.
- The savings association's overall performance relating to its current activities.
- The fiduciary powers the savings association proposes to exercise.
- The nature of the supervision to be given fiduciary activities, including the qualifications and experience of the responsible directors, officers, and staff.
- The availability of legal counsel to provide advice on fiduciary matters.
- The needs of the community for the fiduciary services.
- Any other facts or circumstances OTS considers proper.

Decision Guidelines

Statutory and regulatory requirements relating to the approval of fiduciary powers are designed to ensure the safe and sound operation of the savings association and its ongoing viability. OTS should consider the following factors in analyzing the savings association's application and supporting documentation to determine if it satisfies the criteria for approval:

- Did the applicant furnish the following information and documentation to support its request for fiduciary powers?
 - * Properly executed application – OTS Form 1240.
 - * Specify and apply for only those fiduciary powers it expects to exercise.
 - * Board of Directors resolution approving the exercise of fiduciary powers and naming the entity that will be exercising them.
 - * Legal opinion, including citations, from independent counsel stating that the fiduciary services to be offered are permitted under state law in all states where the applicant will conduct fiduciary activities.
 - * Certification that the capital to be maintained, at a minimum, is adequate to meet state law requirements for state-chartered banks, trust companies, and corporations exercising fiduciary powers in the states where it intends to conduct core fiduciary activities.
 - * Provisions for depositing securities with state authorities if the state requires corporations acting in a fiduciary capacity to deposit securities with it for the protection of private or court trusts.
 - * Organization chart of the applicant's overall institution (parent, subsidiaries, and affiliates), including descriptions of the business lines of each, and a discussion of any intended use of related entities to support the proposed fiduciary activities.
 - * Organization chart of personnel, including the Board of Directors, various committees, and management responsible for the oversight, direction, and performance of the proposed fiduciary activities.
 - * Resumes of those responsible for the oversight and management of fiduciary activities.
 - * Written policies and procedures to support the proposed fiduciary activities, including the specific requirements of 12 C.F.R. § 550.140.
 - * At a minimum, a three-year business plan relating to proposed fiduciary activities.
 - * Litigation threatened or pending against the applicant, its parent, affiliates, or subsidiaries and the status of any government investigations against the applicant, its parent, affiliates, or subsidiaries during the past ten years.
 - * Evidence of the applicant's current insurance coverage and any changes considered necessary to address the proposed fiduciary activities.
- Has legal counsel for fiduciary matters been chosen and has its qualifications been determined?

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- Has the Board of Directors established a committee structure relating to the proposed fiduciary activities? Has it assigned members and duties?
 - Does the applicant intend to use dual Board members, officers, or staff (i.e., individuals employed by both the applicant and any related entity)? Has the applicant established the proposed reporting structure, including the allocation of time and costs, and addressed potential conflicts of interest?
 - Do the board of directors and senior management have the knowledge and expertise necessary to properly oversee the proposed fiduciary activities?
 - Are staffing levels adequate to support the proposed fiduciary activities?
 - Does the business plan and its underlying assumptions appear to be reasonable?
 - Is the audit program adequate to oversee the proposed fiduciary activities, and do the auditors have the necessary knowledge and expertise to properly execute the program?
 - Does the applicant intend to outsource certain functions relating to the proposed fiduciary activities, e.g. data processing, investment management? Has the applicant executed appropriate contracts, established oversight procedures, and mandated performance requirements? Has management assessed potential conflicts of interest, transactions with affiliates, and anti-tying considerations?
 - Does the applicant intend to use any employees, agents, or independent contractors of the parent, affiliate, subsidiary, service corporation, or independent third-party in the marketing, advertising, or soliciting of customers for the proposed fiduciary activities? If so, how will it train and supervise them to ensure compliance with applicable law and the applicants policies and procedures?
 - Are direct or indirect business referral fees going to be paid, and if so, how will they be determined, who will be eligible, and what is the expected impact on fiduciary income?
 - Has the applicant formulated the investment decision-making process relating to fiduciary accounts for which it has investment responsibility?
 - Has the applicant developed an appropriate risk management program for the size and character of the proposed fiduciary activities?
 - Has the applicant developed a compliance management program, including training and an appropriate level of self-assessments and compliance audits, to ensure adherence to applicable laws, regulations, and sound fiduciary principles?
 - Does the applicant have an Internet site, and if so, how will it incorporate fiduciary activities ? Consider requirements under 12 C.F.R. Part 555, if applicable.
 - Is the proposed data processing system adequate to support the proposed fiduciary activities? Has the menu of available MIS reports and customer reports been established, and has management determined that they are adequate to ensure compliance with 12 C.F.R. §§ 550.410 through 550.430 and 12 C.F.R. Part 551?

Conditions

Applications for fiduciary powers are not subject to standard approval conditions and often contain very specific, nonstandard conditions. Such conditions may be warranted where the proposed fiduciary activities are integrated with services or activities involving affiliates or other related entities, where unique administrative or operational circumstances exist, or due to the risk profile of the proposed activities. The application review staff may recommend nonstandard conditions of approval after careful review and consideration of the information presented by the applicant. Such conditions must be supported in the final recommendation memorandum. The regional office must consult with the Washington Office before imposing non-standard conditions in delegated applications.

Any nonstandard conditions incorporated into the approval letter must be summarized in the National Applications Tracking System record for the application. This requirement helps OTS to provide the public a complete listing of all applications approved with nonstandard conditions of approval.

Examples of frequently imposed nonstandard conditions include:

- At least 50 percent of the members of the savings association's audit, trust, and investment committees must be directors who are not officers or employees of the savings association, the holding company, or any affiliates, and who have not otherwise been determined by the Regional Office to lack sufficient independence. If compliance with this condition involves the selection of additional directors, each director must receive the prior written approval of the Regional Office.
- Prior to engaging in any fiduciary activity, the savings association must develop and submit to the Regional Office for review an oversight program, consisting of a comprehensive audit program, a compliance management program, and a risk management program. The association must fully implement the audit program prior to commencing operations. It must also fully implement the compliance management program within 90 days and the risk management program within 180 days of commencing operations.

The audit program should address auditor qualifications, audit scope and method, committee involvement, reporting, and the process for effectuating corrective action.

The compliance management program should ensure compliance with applicable law. It should include, at a minimum: (a) the assignment of specific compliance responsibilities to experienced staff; (b) training for affected staff; (c) routine self-evaluations; (d) periodic compliance audits; and (e) appropriate written policies and procedures.

The risk management program should establish criteria to identify, measure, monitor, and control risks within the fiduciary activities.

- For a savings association that will market products through its affiliates or cross-market products:

The holding company, its affiliates, and the savings association must comply with the anti-tying restrictions of 12 U.S.C. §§ 1464(q) and 1467a(n) and must develop written procedures

to effect such compliance. The procedures must be submitted for the review and nonobjection of the Regional Office prior to engaging in fiduciary activities (alternative language if not cross marketing at the onset of business: at least 30 calendar days prior to the commencement of the cross-marketing activity).

- For savings associations that intend to use affiliate mutual funds in fiduciary accounts where they have investment discretion:

The savings association must submit a reasoned opinion of counsel to the Regional Office within 90 days following the commencement of operations. The counsel opinion should verify that the savings association has included in its planned investment decision process measures that address the inherent conflicts associated with investing in proprietary or affiliated mutual funds (i.e., mutual funds for which the savings association or an affiliate acts as the investment adviser). Such measures should ensure that the investments are authorized under applicable law, subject to written policies and procedures, and appropriate for each individual account. The savings association must also document its initial decision-making process and continued oversight of fund performance.

RECORDKEEPING REQUIREMENTS

OTS is required to consolidate all correspondence related to the processing of a notice or an application into a file copy to be sent to a central file. Both the OTS Regional and Washington Offices will maintain a separate file copy for nondelegated filings. The file copy must include a copy of the original filing including all exhibits, all amendments, all internal and external correspondence between interested parties, all documentation associated with the review and analysis of the filing, and all decision, recommendation memorandum, and compliance material. The file copy must be organized and separated into public and confidential material, and clearly identified as such. The public and confidential sections must be arranged in chronological order.

MONITORING AND CONTROL

The OTS Regional Office will monitor compliance with all conditions imposed in connection with an application's approval. The applicant must submit evidence of satisfaction of the conditions included in the approval order or letter to the OTS Regional Office within the stated time frames.

OTS should notify the examiners and staff responsible for the oversight of the savings association regarding action taken on an application and provide them a copy of the approval order or letter. The first examination of the savings association following the approval should include a review of compliance with all conditions of approval and any changes in operations resulting from the approval.

OTS will review the application file after receiving all compliance material to ensure that the file is complete and to correct any deficiencies before sending the file to storage.

The OTS Washington Office may conduct a post audit review of an application and its supporting documentation in the OTS Regional Office.

INFORMATION SOURCES

Statutes

12 U.S.C. § 1464(l)	HOLA Section 5(l); Retirement Accounts
12 U.S.C. § 1464(n)	HOLA Section 5(n); Trusts
12 U.S.C. § 1464(q)	HOLA Section 5(q); Tying Arrangements
12 U.S.C. § 1468	HOLA Section 11; Transactions with Affiliates

Regulations

12 C.F.R. Part 516	Applications Processing Guidelines
12 C.F.R. Part 550	Trust Powers of Federal Associations
12 C.F.R. § 563.41	Transactions with Affiliates

Other

OTS Regulatory Handbook 23 A & 23B of the Federal Reserve Act	Trust Activities Transactions with Affiliates
New Directions 99-7	Eligibility Exam Procedures
Thrift Bulletin 82a	Third Party Arrangements

Forms

OTS Form 1240	Application for Fiduciary Powers
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