

**Introduction and Statutory Authority**

Section 403 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (Pub. L. No. 96-221, 94 Stat. 132) amended the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(n)) (HOLA) by adding a subsection (n) to section 5. Under that section, the director of OTS is authorized to grant to an institution by special permit, the right to act as trustee, executor, administrator, guardian, or in any other fiduciary capacity in which state banks that compete with federal associations are permitted to act under state law. In the same section, service corporations are permitted to invest in state or federally chartered corporations that are located in the state in which the home office of the institution is located and engaged in trust activities. Both the statute and OTS implementing regulations contain requirements that relate to the granting, exercise, surrender or revocation of trust powers. (12 CFR §550 et al)

OTS §550.10 requires a federal savings association to conduct its fiduciary operations in accordance with 12 U.S.C. 1464(n) and 12 CFR §550.

**OTS Requirements****Content of Applications (§§550.70 - 550.120)**

A federal association desiring to exercise trust powers must file an application with the regional director if the application does not raise any significant issues of law or policy on which the OTS has not taken a formal position. If there is a significant issue of law or policy then the application should be filed with the applications filing room in Washington D.C. (12 CFR §516.1(c)). The application should indicate what trust and asset management services it wishes to offer and provide the following information:

- financial condition of the institution;
- the institution's capital;
- the trust and asset management services it wishes to exercise;
- the proposed management with oversight responsibilities of the trust powers;
- proposed legal counsel;
- needs of the community to be served; and
- the proposed business plan for offering trust and asset management services.

**Conditions for Approval (§ 550.110)**

If any of the following conditions is not met, approval of the application must be made conditional upon each being met:

- The institution's financial condition meets standards prescribed by state law and is sufficient to support the proposed trust and asset management operations
- Independent counsel for the institution has submitted a legal opinion that certifies that the proposed trust powers are properly authorized by state law

- The institution's regulatory capital satisfies OTS minimum requirements
- The institution's overall performance is satisfactory
- All proposed trust department management individuals have satisfactory experience
- Legal counsel is available to provide advice on trust and asset management issues
- There is sufficient community need for the proposed trust and asset management services
- Trust and asset management services will only be offered from those offices listed in the application

#### **Surrender of Trust Powers (HOLA § 5(n)(9), 12 CFR §550.530 - 550.570)**

The statute provides that a federal association may surrender its right to exercise trust powers by filing with the OTS a certified copy of a resolution of its board of directors indicating its intention to surrender its right. The filing of this resolution must be in accordance with 12 CFR §516.1. Upon receipt of the board resolution, the regional director shall make an investigation in order to be satisfied that the institution has been discharged from its trust and asset management duties in accordance with state law. Once that investigation is complete, the regional director may issue a written notice to the institution that it is no longer authorized to exercise trust powers. Once the written notice has been issued, the institution is entitled to have returned to it any securities that have been deposited with state authorities and may not exercise any trust powers without first applying for and obtaining a new authorization.

#### **Revocation of Trust Powers (12 U.S.C. §1464(n)(10), 12 CFR §550.560 - 570)**

The statute provides that if, in the opinion of the OTS, a savings association is exercising, in an unlawful or in an unsound manner, or has failed for a period of five consecutive years to exercise its trust powers, the OTS may issue and serve notice of intent to revoke the institution's authority to exercise said powers. The statute further provides for the form of the notice and procedures for hearings, objections, effective dates, etc. The regulations also provide that trust powers may be revoked if an institution fails to comply with the provisions of 12 CFR §550.

#### **Other Types of Services**

Exceptions (§550.580 - 550.620)

- There are instances where an institution would not need to receive OTS trust powers before engaging in fiduciary activities. See 12 CFR §550 Subpart E.
- There is an important distinction between the types of services that a trust department may provide without obtaining express permission to exercise trust powers and the types of services that require such permission. For example, a trust department may be serving as trustee for some accounts and as safekeeping agent for other accounts. Express permission is required for the former but not for the latter. If the savings association provides certain agency services the institution does not need trust powers to administer those accounts. For instance, an institution may provide escrow, safekeeping, custodian or similar type services, or act as paying agent, without having a trust department with regulatory authorization to perform trust services. A savings association will need trust powers if it accepts certain types of agency accounts that require investment discretion or where the savings association provides investment advice for a fee.

- Two reasons lie behind these distinctions. First and as noted above, OTS regulations permit institutions to act in any capacity authorized by state law or in which other institutions offering trust services are permitted to act, in order to foster competitive equality. However, not all state statutes clearly specify what types of functions constitute “fiduciary” activities requiring authorized trust powers. For example, some define “fiduciary activities” as including custodial or safekeeping functions, while others do not. The second reason is that some activities (primarily those involving nondiscretionary activities) are viewed as being implicit in the express powers of savings associations, consistent with the broadening of savings association powers by the Garn-St. Germain Depository Institutions Act of 1982 to include “the deposit or investment of funds.”