

Introduction

An OTS savings association that has been granted trust powers is permitted to render trust and asset management services through its trust or private banking department. Trust and asset management services may be broad or limited in nature and may include settling estates, providing employee benefit and personal trust administration, investment management, custody and guardian services, to name a few. In essence, the trust department has entered into a binding contract to provide professional care and management of property belonging to others.

In some cases, a provider of trust and asset management services enters into a “fiduciary” relationship, requiring it to act in the best interests of its clients by discharging its duties and responsibilities with care, skill and prudence. In these cases, the institution becomes the fiduciary with a trust officer assigned to the relationship acting as a representative of the institution. When an OTS savings association serves in a fiduciary capacity it is held to a higher level of responsibility than an individual (private) fiduciary would be held.

A large body of common law as well as multiple state and federal laws and regulations governs trust and asset management activities. The failure of an institution to exercise its powers in accordance with these laws and regulations could expose it to financial loss and the revocation of its trust powers.

Trust and Asset Management Services

Trust and asset management services encompass a broad range of activities. These activities may be provided to individuals, corporations, partnerships, other business entities, government bodies and/or charitable organizations. Trust and asset management services are generally grouped into one of three categories: trust administration, estate administration and agency services.

Trust Administration

The term “trust” has its roots in fifteenth century England where landowners going off to war feared losing their land to the king. The landowners often conveyed (transferred) title of their land to someone they trusted, for use by the landowners’ family during their absence. This type of conveyance came to be known as a “trust.”

When an institution acts as a trustee, it has a fiduciary responsibility to act in the best interest of the account, which ultimately may be the same as the best interest of the beneficiary, that person or persons for whose benefit the trust was created. Today, trusts are typically grouped into one of five broad categories:

- Personal trusts
- Employee benefit trusts
- Corporate trusts
- Charitable trusts
- Guardianships

Estate Administration

The real property an individual owns at the time of his/her demise represents that individual's estate. Settling (administering) a decedent's estate is another category of fiduciary service rendered by an institution with trust powers. The responsibility of "settling" an estate includes: taking possession of the property included within the decedent's estate; valuing the estate's property; paying any debts of the decedent, including any estate taxes; and, distributing any property remaining within the estate after all debts and obligations of the decedent have been paid.

If the decedent died with a valid will in existence the decedent is said to have died "testate" and the settling of the decedent's estate will take place in accordance with the decedent's will (and applicable law). If, at the time of the decedent's demise, no valid will existed, the decedent is said to have died "intestate" and the decedent's estate is settled in accordance with intestacy laws and regulations. The person or entity named to settle an estate by the decedent's will is commonly referred to as the "executor" of the decedent's estate. The person or entity named to settle an estate where no will exists is commonly referred to as the "administrator" of the decedent's estate. Financial institutions are often appointed in these capacities.

Agency Services

Another major category of asset management services includes all relationships where the institution acts in an agency capacity. Under an "agency relationship," the client, more commonly referred to as the "principal," engages the financial institution to act as "agent" to perform specific duties by agreement. The principal deposits into an account certain assets and the agent handles those assets in accordance with the terms of the agency agreement. Unlike a trust, there is no conveyance of title to the account assets when the agency relationship is established; legal title to the property remains with the principal. The agent is, however, responsible for the assets deposited and accountable to the principal for those assets.

The most common agency relationships include:

- *Safekeeping*, where the agent accepts, holds and returns upon request assets that have been delivered by the principal.
- *Custodial*, where, in addition to safekeeping services, the agent performs such responsibilities as directed by the principal, including, settlement of security trades executed by the principal or his/her designee (i.e. investment advisory firm), collection of dividends and interest, payment of income and taxes and other ministerial actions.
- *Managing Agent (Investment Management)*, where in addition to custodial services, the agent is granted full (or partial) discretionary authority to invest the assets deposited to the agency account without the prior approval of the principal. When an institution has discretion in regard to any type of account, it will be deemed to be acting in a fiduciary capacity. If the savings association is providing investment advice to the principal, it is acting in a fiduciary capacity if the savings association receives a fee for the provision of that investment advice. 12 CFR §550.30(j)(k).
- *Corporate Agent*, where the agent may perform a variety of services for a corporation issuing securities, such as paying dividends to stockholders and/or interest to bondholders. Other types of corporate agency services include acting as escrow agent, warrant agent, transfer agent, dividend reinvestment agent and paying agent. A savings association will be deemed to be acting in a fiduciary capacity when it renders services as a transfer agent and/or as a registrar of stocks and bonds. 12 CFR §550.30(d)(e).

Reasons for Establishing a Trust and Naming an Institution as Trustee

Individuals, corporate entities, governmental bodies and charitable organizations establish trusts for a variety of personal and business reasons. Some of the primary reasons for establishing trusts are:

To serve as a family and/or financial planning tool. For example, a trust can be established to fund the future educational needs of minor children or to provide the financial needs of persons both during and after the grantor's/settlor's life. It may also serve as a tool to avoid unnecessary estate taxes or it may be utilized to ensure the professional management of one's assets.

To provide for retirement. For example, an individual may establish an IRA or a corporation may establish a profit sharing plan, a 401(k) plan, a money purchase pension plan or a defined benefit plan to provide retirement benefits for its employees.

To obtain favorable tax treatment. The transfer of property to certain types of trusts may result in both income and estate tax savings (mentioned above) or income tax savings through deductions, in the case of charitable contributions made through a trust (either created during life or at an individual's demise through a will).

The primary reasons for naming a financial institution as a trustee include:

Professional asset management. Individuals or noncorporate entities may not be able to provide the same level of financial expertise, advice and management, that a financial institution with a trust department can. Furthermore, an institution serving as trustee will act impartially, showing no favoritism among the trust's beneficiaries.

Relief from administrative details. A trust department has skilled employees and is better equipped to handle the daily details concerning asset management, such as executing purchases and sales of securities and recording and allocating all receipts and disbursements.

Convenience and complete services. A financial institution can provide more convenience as it can serve the same client in multiple capacities. Within its trust department, the institution can offer its clients a complete array of financial services, including safekeeping of assets and managing investments and property.

Continuity. A financial institution, as trustee, offers the benefit of continuous management of a trust for its entire term, as opposed to a change in management that might occur with an individual named as the trustee.

Objectives of Trust Regulation

The Office of Thrift Supervision (OTS) is responsible for regulating savings associations and their operating subsidiaries and service corporations as well as monitoring holding companies and their subsidiaries. A significant component of the OTS regulatory process is the on-site field examination, which serves as the primary fact-finding means of discharging its oversight responsibilities. The primary objectives of the trust and asset management examination are to:

- evaluate the institution's trust and asset management activities in accordance with the standards set out in the Uniform Interagency Trust Rating System;
- ensure that the institution exercises its trust powers in compliance with applicable law, fiduciary principles and OTS policies;

- review the institution's fiduciary operations to determine that they are being conducted in a prudent manner;
- evaluate the quality of the institution's management and directors;
- evaluate the quality of the institution's asset management, account administration and internal risk management practices;
- identify weaknesses in policies, procedures and practices requiring corrective action by management; and
- make recommendations for corrective action and, where necessary, ensure that such action is taken in a timely and proper manner.

To identify these specific objectives, trust and asset management examinations emphasize the manner in which the institution's responsibilities are being discharged in order to preclude events that, through omission or commission, could adversely impact trust and asset management accounts or the financial strength of the institution. As a result, the focal points for assessing the general condition of the trust department have become the strength of the trust department's risk management practices; the sufficiency and soundness of adopted policies and procedures; the extent of compliance with applicable law; and the extent of conformity with common law standards of fiduciary conduct.