

Introduction

Savings associations that engage in trust and asset management activities are subject to numerous laws and regulations.

Federal statutes and regulations, such as those issued by the OTS, will apply to the savings association as a corporate entity; for example, in its relationships between the thrift and any of its affiliates or subsidiaries, and in defining the scope of its trust powers.

State statutory law will apply to trust and asset management activities being conducted within the state's jurisdiction (unless preempted by federal law). Such state statutes may cover a wide range of topics to include: principal and income, prudent investment, fiduciary accounts being invested in certain mutual funds, liability of corporate trustees providing services to irrevocable life insurance trusts, virtual representation, probate statutes and/or environmental liability.

Several federal laws will apply to the savings association if its trust department engages in certain activities or administers certain types of accounts. For example, ERISA will apply if a savings association provides products or services to qualified employee benefit plans. Provisions of various securities laws will affect a savings association engaging in trust and asset management activities. For example, savings associations providing discretionary trust services will have to register as an investment adviser with the SEC under the Investment Advisers Act of 1940 if the trust accounts they administer total over \$25 million. For amounts lower than \$25 million, registration with the state(s) may be required. The Internal Revenue Code may apply insofar as it relates to the administration of personal, charitable and employee benefit accounts as well as the administration and investment of foundation assets.

OTS Laws and Regulations Specifically Applicable to the Trust and Asset Management Activities of Savings Associations**Statutory - Home Owner's Loan Act (HOLA) - 12 U.S.C. §1461**

In §5(n)(1) of HOLA, the Director of the Office of Thrift Supervision is given the authority to permit a federal savings association to apply, by special permit, for the right to act as trustee, executor, administrator, guardian or in any other fiduciary capacity in which state banks, trust companies or other corporations which compete with federal savings associations are permitted to act under the laws of the state in which the federal savings association is located. Subject to OTS regulations, service corporations may invest in state or federally chartered corporations which are located in the state in which the home office of the federal savings association is located and which are engaged in trust activities.

Another part of HOLA, §5(l) gives federal savings associations the authorization to act as trustee of any trust created or organized in the U.S. and forming part of a stock bonus, pension or profit-sharing plan which qualifies or qualified for tax treatment under section 401(d) of the Internal Revenue Code of 1986 and to act as trustee or custodian of an individual retirement account within the meaning of section 408 if the funds of the trust or account are invested only in savings accounts or deposits in a federal savings association or in obligations or securities issued by the federal savings association. All funds held in a fiduciary capacity by any federal savings association may be commingled for the purposes of investment but individual records need to be kept by the fiduciary for each participant and must show in proper detail all transactions it engages in.

§5(n)(2) states that a federal savings association exercising any or all of the trust powers enumerated, shall segregate all assets held in any fiduciary capacity from the general assets of the association and keep a separate set of books and records showing in proper detail all transactions engaged in. §5(n)(3) states that funds deposited or held in trust by the association awaiting investment must be carried in a separate account. These funds must not be used by the association in the conduct of its business unless it sets aside in the trust department, United States bonds or other securities approved by the Director.

§5(n)(4) provides protection to trust and asset management account assets in the event of a failure of a federal savings association. It indicates that the owners of the funds held in trust for investment shall have a lien on the bonds or other securities set apart, in addition to their claim against the estate of the association.

§5(n)(5) states that whenever the laws of a state require corporations acting in a fiduciary capacity to deposit securities with the state authorities for the protection of private or court trusts, federal savings associations so acting shall be required to make similar deposits. These securities shall be held for the protection of the private or court trusts, as provided by state law. Federal savings associations in such cases shall not be required to execute bonds usually required of individuals if state corporations under similar circumstances are exempt from this requirement. Federal savings associations shall have power to execute such bonds when so required by the laws of the state involved.

Under §5(n)(7) it is unlawful for any federal savings association to lend any officer, director or employee any funds held in trust under the powers conferred by HOLA. Any officer, director or employee making such loan or to whom such loan is made, may be fined not more than \$50,000 or twice the amount of that person's gain from the loan, whichever is greater or may be imprisoned not more than 5 years, or may be both fined and imprisoned, in the discretion of the court.

§5(n)(8) lists the factors to be considered in reviewing an application for permission to exercise trust powers. Under this section, the OTS may consider: (a) the amount of capital of the applying federal savings association; (b) whether or not such capital is sufficient under the circumstances of the case; (c) the needs of the community to be served; and (d) any other facts and circumstances that seem to it proper. The OTS may grant or refuse the application accordingly, except that no permit shall be issued to any association having capital less than the capital required by state law of state banks, trust companies and corporations exercising such powers.

Surrender of trust powers is discussed in §5(n)(9). It indicates that any federal savings association may surrender its right to exercise the trust powers it was granted and have returned to it any securities which it may have deposited with the state authorities, by filing with the Director a certified copy of a resolution of its board of directors indicating its intention to surrender its right. Upon receipt of such a resolution, the OTS, if satisfied that such federal savings association has been relieved in accordance with state law of all duties as trustee, executor, administrator, guardian or other fiduciary, may in the Director's discretion, issue to the thrift a certificate that it is no longer authorized to exercise the trust powers it was granted.

OTS Regulations - Part 550 Fiduciary Powers of Savings Associations

The OTS has promulgated detailed regulations regarding the fiduciary activities of savings associations. All federal savings associations must conduct their fiduciary operations in accordance with 12 U.S.C. §1464(n) and the regulations contained in 12 CFR §550.10 - 550.620.

Transactions with Affiliates - §563.42(b)

Under 12 U.S.C. §1468(1)(a), Sections 23A and 23B of the Federal Reserve Act shall apply to every savings association in the same manner and to the same extent as if the savings association were a member bank, except for certain exceptions. Consequently, the OTS has issued regulations regarding transactions with affiliates. See 12 CFR §563.41 and §563.42. §563.42 has particular relevance to savings associations with fiduciary activities. §563.42(b) states that a savings association and its subsidiaries shall not purchase as fiduciary any securities or other assets from any affiliate unless the purchase is permitted: (a) under the instrument creating the fiduciary relationship; (b) by court order; or (c) by law of the jurisdiction governing the fiduciary relationship. There are other conditions contained in this section that a savings association should be familiar with.

State Laws and Regulations Specifically Applicable to the Trust and Asset Management Activities of Savings Associations

There are many state statutes that will be relevant to savings associations conducting trust and asset management activities. Some of these state statutes will be a version of a uniform law. Uniform laws are written and adopted by The National Conference of Commissioners on Uniform State Laws (NCCUSL). NCCUSL is a nonprofit unincorporated association, comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico and the U.S. Virgin Islands. Each jurisdiction determines the method of appointment and the number of commissioners actually appointed. Most jurisdictions provide for their commission by statute. Each uniform law commissioner must be a member of the bar, serve for a specific term and receive no salary or fees for their work with the Commission. Uniform laws are officially promulgated by NCCUSL for consideration by the states. State legislatures are encouraged to adopt the uniform acts exactly as written, to “promulgate uniformity in the law among the states.” However, uniform acts often serve only as guideline legislation, which states can borrow from or adapt to suit their individual needs and conditions. NCCUSL maintains a very useful web site at www.nccusl.org.

In 1994, the Uniform Law Commissions adopted and promulgated the Uniform Prudent Investor Act for consideration by state legislatures. So far, 35 states and the District of Columbia have adopted some version of the uniform prudent investor act (see www.nccusl.org/uniformact_factsheets/uniformacts-fs-upria.htm, for a complete list of states that have adopted some version of the uniform act). The purpose of the uniform prudent investor act as described by NCCUSL is as follows:

This act removes much of the common law restriction upon the investment authority of trustees of trusts and like fiduciaries. It allows such fiduciaries to utilize modern portfolio theory to guide investment decisions. A fiduciary's performance is measured on the performance of the whole portfolio, not upon the performance of each investment singly. The act allows the fiduciary to delegate investment decisions to qualified and supervised agents. It requires sophisticated risk-return analysis to guide investment decisions.

In 1997, the Uniform Law Commissioners adopted and promulgated the Uniform Principal and Income Act for consideration by state legislatures. So far, 14 states and the District of Columbia have adopted some version of the uniform law. In 8 states, a version of the uniform act has been introduced to the state legislature for consideration. (see www.nccusl.org/uniformact_factsheets/uniformacts-fs-upia.htm for a list of states that have passed or introduced some version of the uniform law). The purpose of the uniform law as described by NCCUSL is as follows:

This act revised the Uniform Principal and Income Act of 1931 and 1962, which has been adopted in 41 states. The purpose of the new act, like its predecessors, is to provide procedures for trustees administering an estate in separating principal from income, and to ensure that the intention of the trust creator is the guiding principle for trustees. A revision is necessary so that principal and income allocation rules can function with modern trust investment practices.

In 2000, the Uniform Law Commissions adopted and promulgated the Uniform Trust Code for consideration by state legislatures. The uniform law has not yet been adopted by any state but has been introduced in 4 states. (see www.nccusl.org/uniformact_factsheets/uniformacts-fs-utc.htm for a list of states where the uniform law has been introduced). The purpose of the uniform law as described by NCCUSL is as follows:

To provide a comprehensive model for codifying the law on trusts. While there are numerous Uniform Acts related to trusts, such as the Uniform Prudent Investor Act, the Uniform Principal and Income Act, the Uniform Trustees' Powers Act, the Uniform Custodial Trust Act, and parts of the Uniform Probate Code, none is comprehensive. The UTC will enable states which enact it to specify their rules on trusts with precision and will provide individuals with a readily available source for determining their state's law on trusts.

Other Federal Laws and Regulations Specifically Applicable to the Trust and Asset Management Activities of Savings Associations

ERISA - Employee Retirement Income Security Act of 1974

ERISA (29 U.S.C. §1001(b)) was designed to establish minimum standards of fiduciary conduct for trustees, administrators and others dealing with retirement plans, to provide for their enforcement through civil and criminal sanctions, to require adequate public disclosure of the plans' administrative and financial affairs and to improve the equitable character and soundness of private pension plans.

The administration of ERISA is divided among the Labor Department, the Internal Revenue Service and the Pension Benefit Guaranty Corporation (PBGC). Prior to a 1978 reorganization, there was an overlapping responsibility for administration of the parallel provisions of Title I of ERISA and the tax code by the Labor Department and the IRS, respectively. As a result of this reorganization, the Labor Department has primary responsibility for reporting, disclosure and fiduciary requirements; and the IRS has primary responsibility for participation, vesting and funding issues. However, the Labor Department may intervene in any matters that materially affect the rights of participants, regardless of primary responsibility.

The Department of Labor has extensive regulations regarding Title I of ERISA beginning at 29 CFR §2509. The PWBA also issues other guidance in the form of advisory opinions, informational letters and exemptions. Within the PWBA, the Office of Regulations and Interpretations develops and issues policies, regulations, opinions and interpretations regarding the fiduciary, reporting, disclosure and coverage provisions of ERISA. Within the PWBA, the Office of Exemption Determinations, grants administrative exemptions from the prohibited transaction provisions of ERISA. The office has two divisions, one of which is responsible for class exemptions and the other, individual exemptions.

Investment Advisers Act of 1940

The Investment Advisers Act of 1940 (the Advisers Act) requires any individuals or companies meeting the definition of “investment adviser” to register with the Securities and Exchange Commission (SEC), unless excluded or prohibited from such registration. Savings associations with trust powers will, most likely, meet the definition of investment adviser under the Advisers Act, but unlike banks, they are not excluded from the definition of investment adviser. More information regarding SEC investment adviser requirements can be found on the SEC’s web site at www.sec.gov.

Generally, only larger savings associations, those that have \$25 million or more of assets under management will be permitted to register with the SEC. Smaller savings associations may be required to register under state law with state securities authorities. Individuals acting on behalf of the savings association, deemed investment adviser representatives, may have notice, exam and fee requirements in the state where their place of business is located. All entities meeting the definition of investment adviser in the Advisers Act are subject to certain requirements and prohibitions contained in the Advisers Act whether registered with the SEC, a state securities authority or not at all. One such section of the Act, the anti-fraud provisions found in Section 206, prohibit investment advisers from engaging in any fraudulent, deceptive or manipulative practices with any client or prospective client.

Some state laws, in their definition of investment adviser, exempt entities such as savings associations and trust companies. If the appropriate state law exempts an entity from the definition of investment adviser then the state’s laws regarding the institution’s investment adviser representatives will not apply. If the savings association is registered with the SEC as an investment adviser, the savings association may be subject to a state’s notice-filing requirements for SEC registered investment advisers and the requirements regarding its investment advisory representatives. In some cases, the state laws regarding notice-filings and investment advisory representatives of SEC registered investment advisers may not apply if the state excludes savings associations from its definition of investment adviser. More information on state laws regarding investment advisers can be found on The North American Securities Administrators Association, Inc.’s web site at <http://www.nasaa.org/>.

Securities Exchange Act of 1934

Under the Securities Exchange Act of 1934, it is unlawful for any “broker” or “dealer” to make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security unless such broker or dealer is registered in accordance with subsection (b) of this section. The terms “broker” and “dealer” have always excluded banks (but not thrifts). After the passage of Gramm-Leach-Bliley, the banking industry no longer has an across the board exclusion but instead must fit their securities activities into one, or more, of eleven stated categories. Many of the categories contain conditional language. The SEC, on May 11, adopted interim final rules addressing the bank exceptions to broker dealer registration, 66 *FR* 27760, May 18, 2001. Within the interim rules is a provision that treats savings associations the same as banks for broker-dealer registration purposes. Thrifts engaging in trust and asset management activities must now follow the same provisions as banks in regards to their securities activities. All securities activities not fitting within the eleven stated exemptive categories must either be moved out of the thrift or the thrift must register as a broker dealer.

Investment Company Act of 1940

Prior to the passage of Gramm-Leach-Bliley savings associations could not offer common and collective pooled funds unless they were registered under the Investment Company Act and the interests in the pooled funds had to be registered under the Securities Act of 1933. Gramm-Leach-Bliley in Title II, Section 223 revised the definition of “bank” for purposes of the Investment Company Act. This change expands the current exemption from registration for bank common and collective funds to include similar funds offered by savings associations.

This provision is effective as of May 12, 2001.