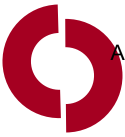

As of January 6, 2012, this guidance applies to federal savings associations in addition to national banks.*

Comptroller of the Currency
Administrator of National Banks

Retirement Plan Services

Comptroller's Handbook

December 2007

*References in this guidance to national banks or banks generally should be read to include federal savings associations (FSA). If statutes, regulations, or other OCC guidance is referenced herein, please consult those sources to determine applicability to FSAs. If you have questions about how to apply this guidance, please contact your OCC supervisory office.

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Retirement Plan Services — Overview

Background

This booklet provides an overview of services that national banks may provide to retirement plans. It includes information about the risks inherent in such services and provides a framework for managing those risks. The booklet also provides national bank examiners with expanded examination procedures, which supplement the core assessment standards in the "Large Bank Supervision" and "Community Bank Supervision" booklets of the *Comptroller's Handbook*. This booklet's examination procedures, which are optional, may be used when the specific products or risks warrant review beyond the core assessment.

Offering retirement plan services exposes a national bank to a range of risk factors. The nature and scope of the bank's services determines which risks are present and the quantity of those risks. Given the variety of laws and regulations that apply to retirement accounts, compliance risk is generally high. Because personal retirement assets are involved, and there is frequently a fiduciary relationship between the bank and its customers, reputation risk is also a substantial factor. Given the sheer volume of transactions associated with many retirement plan service relationships, operational risk is generally high. Finally, if a bank markets a new or complex retirement plan service, either on its own or in a strategic alliance with a domestic or foreign partner, strategic risk will likely be a significant consideration.

The Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (IRC) are the primary sources of law governing the structure, administration, and operation of employee benefit plans. These laws were significantly amended by the Pension Protection Act of 2006 (PPA). The U.S. Department of Labor (DOL) is responsible for the administration and enforcement of ERISA. The Internal Revenue Service (IRS) is responsible for the administration and enforcement of the IRC. The OCC anticipates that DOL and IRS will issue regulations and interpretations of various provisions of the PPA over the next few years. These issuances will likely have a substantial impact on national banks that provide services to pension plans.

Employee benefit plans have become a vital part of a worker's total compensation, and they help employers attract and retain personnel. ERISA divides employee benefit plans into two general groups:

- Employee pension benefit plans.
- Employee health and welfare benefit plans.

Employee pension benefit plans (retirement plans) are the most common type of plan serviced by national banks. Employers, including corporations, governmental entities, and non-profit organizations, sponsor retirement plans to accumulate retirement funds for their employees. Retirement plans are an employee benefit that offer both the employer and plan participants favorable income tax benefits. Individuals may also establish individual retirement accounts (IRAs) to set aside funds for retirement. These tax-advantaged accounts, authorized under section 408 of the IRC, are another retirement asset frequently serviced by national banks.

Retirement plans come in many forms and vary according to the type of benefits provided, the manner in which plan assets are administered, income tax treatment, and the method used to determine benefits paid to plan participants and beneficiaries. Refer to Appendix A, "Types of Retirement Plans," for a more complete overview of the various types of retirement plans.

While the focus of this booklet is retirement plans and the services banks typically provide to these plans, banks also frequently serve as trustee or administrator of a health and welfare benefit plan. These plans are subject to ERISA and must be administered accordingly. Examples of types of health and welfare benefit plans are medical, dental, vision, long-term health care, disability, tuition assistance, day-care, supplemental unemployment benefits, and counseling.

As the primary regulator of national banks offering retirement plan services, the OCC's examination focus is two-fold. First, the OCC assesses the material risks associated with the bank's activities in this area and the potential impact those activities may pose to the bank itself. Does the bank have the requisite systems, policies, and oversight in place to ensure that it can offer retirement plan services without undue risk to the bank itself? Second, the OCC assesses the risks associated with the specific retirement plan services offered by the bank. Specifically, is the bank complying with the laws, regulations, and

fiduciary responsibilities imposed by ERISA and Part 9 that apply to the retirement plan services the bank is providing?

Types of Retirement Plan Services

A national bank may provide a full range of retirement plan services for employers and individuals and may operate in several capacities when doing so. The following capacities represent levels of fiduciary responsibility (from high to low):

- A fiduciary with discretionary investment authority (investment manager or trustee).
- A fiduciary with no discretionary investment authority (directed trustee or agent).
- A service provider with no discretionary authority (participant record keeper or custodian).

National banks typically do not serve as plan administrators for any but their own plans because that role requires them to take on extensive liability. In most situations, the employer (plan sponsor) serves as the plan administrator with the ultimate legal responsibility for running the plan. The plan administrator generally hires a third party administrator, such as a bank, to perform the administrative tasks required by the plan.

Trustee Services

ERISA, which is summarized in Appendix B, requires that all employee benefit plan assets be held in trust and that each plan have at least one named fiduciary. National banks may serve as trustee, or co-trustee, for employee benefit plans. The trustee is a "fiduciary" with respect to the plan and is responsible for ensuring that administration of trust assets is proper and complies with the plan and applicable law. In some cases, one or more persons (employees of the plan sponsor or members of a union, for example) are named as the plan's trustees, and the bank serves as custodian for the trustees. The plan and the trust agreement, which may be either a single or two separate documents, establish the various powers, rights, and duties given to the trustee and the employer. Under ERISA, the trustee has the exclusive authority and discretion to manage and control the assets of the plan unless that authority has been reserved by the employer/plan sponsor or properly assigned to a third-party investment manager.

As noted above, a retirement plan may expressly provide that the trustee is subject to the direction of a named fiduciary. In this case, the trustee is often referred to as a "directed trustee." A directed trustee is required to follow directions of the named fiduciary, provided those directions are made in accordance with the terms of the plan and are not contrary to ERISA. When the authority to manage, acquire, or dispose of the assets of the plan is delegated to one or more investment manager(s), the trustee is a "non-discretionary trustee." Directed and non-discretionary trustees must have reasonable processes in place to determine that the directions given or the actions taken by other fiduciaries are not contrary to ERISA.

When serving as an IRA trustee, a national bank's duties and responsibilities may range from performing only ministerial functions to exercising limited or full investment discretion. Ministerial functions of an IRA trustee/custodian include reporting contributions, distributions, and other matters required by the IRC, such as asset valuations, annually to the IRS and the IRA owner.

Investment Management Services

A national bank may provide investment management and advisory services to a retirement plan in either a trustee or agency capacity. If a national bank obtains investment discretion or control of ERISA retirement plan assets, renders investment advice on such assets for a fee, or receives other compensation for such an account, the bank becomes a fiduciary to the plan and must comply with ERISA's investment standards. For all retirement plans, whether or not subject to ERISA, national banks must comply with other applicable law, including applicable sections of 12 CFR 9, Fiduciary Activities of National Banks.

For additional information relating to investment management services and an overview of ERISA's investment standards, refer to the "Investment Management Services" booklet of the *Comptroller's Handbook*.

Custody Services

Banks traditionally offer custody services to plan sponsors and trustees of retirement plans. Typical custody services include settlement, safekeeping, pricing, and reporting of customers' transactions and the market value of the assets held. Although ERISA 3(14) states that a custodian is a party-in-interest and a fiduciary with respect to a retirement plan, courts have generally taken

the position that custodians are not fiduciaries for ERISA purposes unless they perform a function that is fiduciary in nature. Risk management processes for custody services are discussed further in the "Custody Services" booklet of the *Comptroller's Handbook*.

Participant Recordkeeping

A trustee or custodian maintains records of assets and transactions at the plan level; at the same time, a participant record keeper maintains individual participant records for each eligible participant of retirement plans known as individual account plans, e.g., 401(k) plans. The participant record keeper (which may or may not be the trustee or custodian) processes and/or maintains records of contributions, investment transactions, income collections, and expenses for each plan participant. It also monitors vesting levels, accrual of benefits, and amounts eligible for participant loans or other distributions.

Other Non-Fiduciary Services

The following are examples of non-fiduciary services that national banks may provide to a retirement plan's sponsor:

- **Pay benefits to the plan's participants and process their withholding tax payments.** (See the "Operational Control Processes" section of this booklet for further discussion of benefits payments.)

- **Process participants' loans from individual account plans** pursuant to ERISA 408(b)(1). (See the "Operational Control Processes" section of this booklet for further discussion of participant loans.)

- **Provide consulting.** These services are generally performed by or under the supervision of attorneys. Consulting services play an important role for a retirement plan, both in the initial design and during the plan's administration. A bank that provides consulting service works with the plan sponsor to design a plan that meets the specific needs of both the sponsor and plan participants and complies with the IRC and ERISA. Services related to plan design are "settler" services and may not be charged to the plan. Fiduciary expenses related to ongoing administration, including amendments required by

law, are allowable plan expenses. (For additional information, see DOL Advisory Opinion 2001-01.)

- **Perform compliance testing.** Usually for plans where the bank already serves as participant record keeper. Compliance testing includes testing for discrimination (e.g., race, religion, age, and gender), contribution limits, and "cross-testing" across the various age and contribution levels of a plan's participants to ensure the plan does not discriminate in favor of highly-compensated employees. Compliance units often prepare informational tax returns for the plan using the IRS Form 5500 series. The complex regulatory framework surrounding retirement plans requires compliance personnel to maintain a sound knowledge of retirement services, the IRC, and other applicable laws and regulations.

- **Measure the plan's performance.** Doing so involves calculating and reporting the return on a portfolio and various portfolio segments over a specified time. Performance measurement enables portfolio managers to compare their investment performance with market indices for similar investment styles. For further details on performance measurement, see the "Investment Management Services" booklet of the *Comptroller's Handbook*.

Regulatory Framework

Initially, the IRS served as the exclusive regulator of private pension plans. The Revenue Acts of 1921 and 1926 allowed employers to deduct pension contributions from corporate income, and allowed for pension fund income to accumulate tax free subject to qualification rules. Shortly after Congress enacted the Welfare and Pension Plans Disclosure Act in 1959, the DOL was given enforcement, interpretative, and investigative powers over employee benefit plans to prevent mismanagement and abuse of plan funds.

Internal Revenue Code

The IRC includes a substantial number of sections that govern the deductibility of employer contributions to employee benefit plans and the taxability, or exclusion from income, of such contributions and benefits to employees. IRC Sections 401(a) and 501(a) provide that a trust holding retirement plan assets will qualify for favorable treatment only if it meets the

lengthy requirements of Section 401(a) and the sections that follow. Various other IRC sections affect trustees by imposing significant tax reporting responsibilities and other obligations.

ERISA

ERISA was enacted in 1974 and has since been supplemented by a number of legislative actions, most notably the PPA of 2006. This comprehensive federal statute governs the operation and administration of all employee pension and welfare benefit plans. Appendix B contains a summary of the four major sections of the ERISA statute, as well as ERISA's definitions of commonly used terms such as "fiduciary," "party in interest," and "plan sponsor."

ERISA was enacted to provide rights, protections, safeguards, and guarantees for plan participants and beneficiaries. ERISA preempts all conflicting state laws, and effectively establishes a national standard of fiduciary responsibility for persons administering any aspect of a retirement plan. ERISA also contains provisions that authorize the DOL to penalize fiduciaries that breach their fiduciary duties and responsibilities. OCC Bulletin 2006-24, "Interagency Agreement on ERISA Referrals" (which replaced a 1980 agreement), reflects the longstanding commitment of the federal banking agencies to refer possible material violations of ERISA to the DOL.

ERISA, by its express terms, does not apply to governmental plans, church plans, plans maintained outside the United States for the benefit of nonresident aliens, and unfunded excess benefit plans (nonqualified plans). Governmental plans generally are subject to state laws, which often include provisions on fiduciary responsibility that are similar to ERISA's or that incorporate its provisions by reference. Refer to Appendix B for a more detailed summary of ERISA and excerpts of its most significant provisions.

Fiduciary Responsibility

ERISA imposes a variety of specific duties and responsibilities on institutions and individuals who are fiduciaries, as defined under ERISA 3(21)(A). It should be noted that a person does not need to be named as a fiduciary in order to be a fiduciary. The determining factor is the actions that have been taken by that party.

Fiduciary Standards of Care. ERISA requires fiduciaries to discharge all of their duties with respect to a plan "solely in the interest" of the plan's participants and beneficiaries. Courts have interpreted this to mean that fiduciaries must act "with complete and undivided loyalty." Together with the exclusive purpose rule, this is ERISA's codification of the common law duty of loyalty. ERISA 404(a)(1) establishes the following standards of care:

- **The Exclusive Purpose Rule.** Section 404(a)(1)(A) is part of ERISA's codification of the IRC's "exclusive benefit" rule. It states that a plan fiduciary must act for the exclusive purpose of providing benefits to participants and their beneficiaries, and to defray reasonable expenses.

- **The Prudent Expert Rule.** Section 404(a)(1)(B) is ERISA's codification of the common law duty of care. Under this provision, a fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aim." ERISA's "prudent expert" rule establishes a standard of care that is higher than that of a common law trust fiduciary.

- **Diversification**. Section 404(a)(1)(C) requires fiduciaries to diversify the investments of the plan unless it is clearly prudent not to do so.

- **Compliance with Plan Documents**. Section 404(a)(1)(D) requires fiduciaries to act in accordance with plan documents, insofar as they are consistent with ERISA.

Plan fiduciaries may be held personally liable for losses that result from a breach of the basic standards of conduct. The fiduciary standards of care found under ERISA 404(a)(1)(A) are supplemented by prohibited transaction rules under ERISA 406. The latter prohibits certain types of transactions between plans and parties in interest (including fiduciaries and plan service providers) and also specifically prohibits fiduciaries from causing plans to engage in transactions that involve the potential for fiduciary conflicts of interest. Section 4975 of the IRC includes substantially similar prohibited transaction rules applicable to qualified retirement plans and IRAs. A violation of an IRC prohibited transaction rule may result in the imposition of excise taxes. For more information, see Appendix C, "Prohibited Transactions."

Risks

National banks that provide retirement plan services are subject to many types of risks. The following sections address these risks from the perspective of the OCC's risk assessment system (RAS). Generally, retirement plan services will affect the compliance, transaction, strategic, and reputation risk factors of the RAS. For definitions of each of these risks, see the "Large Bank Supervision" and "Community Bank Supervision" booklets of the *Comptroller's Handbook*.

Compliance Risk

Compliance risk is a substantial factor in the overall risk framework for retirement plan services. Compliance risk encompasses not only compliance with applicable laws and regulations but also adherence to sound fiduciary principles, prudent ethical standards, specifications in client documents, and internal policies and procedures. A bank that does not comply with the prohibited transaction rules must correct the transactions and may be required to pay excise taxes. Even if the amount involved in a prohibited transaction is relatively small, excise taxes and penalties can amount to substantial sums. A bank that does not comply with applicable law can also suffer from litigation, regulatory action, and damage to its reputation. While the financial impact of any specific compliance failing is often difficult to estimate, it can be significant in relation to earnings and capital.

If the operation of a retirement plan does not conform with IRS and DOL requirements, it presents the risk that the plan will lose its tax exempt status. Income taxes and penalties may then apply. Corrective action may also be required to preserve a plan's qualification when operational violations occur. Similarly, in order for IRA owners to obtain tax advantages, they must not have any personal use of assets in an IRA. Should there be an improper current use of IRA assets, the account ceases to be an IRA. Favorable tax treatment is lost and amounts involved become taxable income to the IRA owner in the current period. If a bank's actions, or its failure to act, contributed to such results, the liability to the bank could be substantial.

Managing compliance risk associated with retirement plan services requires specialized expertise in a challenging regulatory environment. ERISA and the IRC are complex statutes and are subject to frequent revision and interpretation in the form of legislation, regulation, and DOL and IRS

issuances. Factors that could raise an institution's level of compliance risk are:

- Deficient account acceptance and review processes.
- Lack of sound procedures for administration of complex assets such as derivatives, or for higher risk assets such as employer stock.
- Lack of knowledge and weaknesses in training programs.
- Weak internal compliance systems.
- Failure to consult legal counsel when appropriate.

Transaction Risk

Transaction risk is inherent in the delivery of services to retirement plans. A bank may process large volumes of many types of transactions. Sound internal control processes and a high degree of accuracy are required. Transaction risk increases when a bank offers participant recordkeeping services. The volume of transactions at a participant level is exponentially higher than at the plan level. A bank must have the appropriate tools to aggregate participant-level transactions, such as mutual fund purchases and sales, into consolidated plan-level transactions. Receipts, such as contributions and income on investments, must be allocated timely to participant accounts, and balanced to plan-level totals. Allocation errors can be difficult and time-consuming to correct.

The information systems necessary to properly service retirement plans are costly to acquire and must be updated in response to changes in the regulatory environment. Participant recordkeeping requires a complex recordkeeping system that is typically distinct from the core trust accounting system. Benefit payment systems and certified reporting packages are examples of other systems a bank may use to support retirement plan services, regardless of whether it offers recordkeeping services. Factors that could raise an institution's level of transaction risk include:

- Deficient processes and controls related to:
  - Plan contributions and/or distributions;
  - Securities-related transactions;
  - Tax withholding and reporting; and
  - Valuation of retirement plan assets.
- The use of manual (rather than automated) information systems.

- Inadequate information systems.
- Inadequate disaster recovery planning.
- Failure to effectively manage third-party vendor relationships.

Strategic Risk

Retirement plan services can be an important component of bank profitability and shareholder value. Financial success requires a sound strategic planning process embraced by the board and senior management. Because the regulatory environment is complex and dedicated processing systems are costly, providing retirement plan services requires a substantial and long-term commitment. Examples of factors that could raise an institution's level of strategic risk are:

- Failure to provide adequate resources to the retirement plan services line of business and related control functions.
- Lack of sufficient scale to operate at a profitable level.
- Weaknesses in the administration of acquisitions, mergers, and alliances.

Reputation Risk

A good reputation is essential to successfully offering retirement plan services. Competition for retirement plan clients is intense; negative publicity, whether deserved or not, can damage a bank's ability to compete. When offering services that make the bank an ERISA fiduciary, an institution should have an untarnished reputation in order to attract and retain business. An institution's reputation is enhanced through the ability to provide state-of-the-art products and services, competitive investment performance, high-quality customer service, and compliance with applicable law. Factors that could raise an institution's level of reputation risk include:

- Errors in processing and poor customer service.
- Poor investment performance or lack of a clear and consistently applied investment management philosophy.
- Violations of applicable law or regulation, regulatory enforcement action, litigation, or other negative publicity.
- Lack of a strong ethical culture and internal control environment.
- Sales practices that are incompatible with fiduciary responsibilities.

Risk Management

This section provides a framework for managing risks associated with retirement plan services. A bank's risk management structure must effectively assess, measure, monitor, and control risk. Because risk strategies and organizational structures vary, there is no standardized risk management system that works for every bank. Each bank should establish a risk management system suited to its own needs and circumstances. The "Asset Management" booklet of the *Comptroller's Handbook* provides additional guidance on risk management systems.

Board and Management Supervision

Retirement plan services must be managed under the direction of a national bank's board of directors. The board may assign authority for the management of retirement plan services activities to officers, directors, employees, or committees, but the board retains the overall responsibility for supervision (12 CFR 9.4). A variety of workable systems or organizations may be acceptable as long as each member of the board is aware of and fulfills his or her responsibilities.

Strategic Planning

The increasing competition and dynamic nature of the financial services industry demand strategic planning and monitoring. The board is responsible for approving the bank's strategic asset management goals and objectives, and for providing the necessary managerial, financial, technological, and organizational resources to achieve those goals and objectives. The board and senior management must understand that offering certain retirement plan services activities, such as participant recordkeeping, requires a significant and ongoing investment in technology.

Management

The board and senior management are responsible for the selection of an experienced and competent management team. Management succession planning and ongoing education programs are also essential given the competitive nature of the industry, employee mobility, and the frequency of changes in statutory and regulatory requirements.

Policies

The board, or its designated committee(s), should adopt policies that promote sound risk management processes. Policies should promote ethical practices, the avoidance of prohibited transactions, and strong internal controls. These policies should be complemented by sound audit coverage and appropriate management information systems (MIS). The board or its designated committee(s) should review policies at least annually and should revise them when appropriate.

Policies should provide personnel with guidance concerning the types of business and level of risk that management will accept. At a minimum, this guidance should define and describe:

- Types of business the bank generally will accept (e.g., defined benefit plans, defined contribution plans, ESOPs, 401(k) plans). Appendix A describes the types of plans a bank is likely to service.
- Services the bank will offer (e.g., trustee, investment manager, custodian, and recordkeeping).
- Target size of retirement plans the bank will accept.
- Types of assets the bank will accept as plan investments (e.g., readily marketable securities, employer securities, real estate, closely held companies, hard to value assets).
- Appropriate exception authorizations and tracking systems.

Management must also ensure that the bank will be able to collect fees that are commensurate with the costs and risks associated with delivery of the products and services offered. Such fees must take into account various legal requirements under ERISA and the IRC. See Appendix D, "Fee and Compensation Issues," for further discussion of this issue.

Product and Service Development

In developing and implementing strategies for retirement plan services, management should establish a uniform process for assessing the risk of new and existing retirement services. (See OCC Bulletin 2004-20, "Risk Management of New, Expanded, or Modified Bank Products and Services.") The approval process for new products or services should include review by risk management, operations, accounting, legal, audit, and business line management, as applicable. Proposed products, services, and distribution

channels should be evaluated and tested prior to full implementation. Depending on the significance of the new product/service and its impact on the bank's risk profile, senior management, and in some cases the board, should provide the final approval.

Third-Party Service Providers

National banks increasingly use third-party vendors to provide technology services or to perform and deliver various administrative and operational services to retirement plans. The OCC encourages national banks to use third-party vendors that provide reasonable, safe-and-sound opportunities to enhance product offerings, improve earnings, and diversify operations. The OCC expects national banks to have an effective process for managing third-party service arrangements.[1]

Indemnification and Liability Insurance

ERISA 410(a) provides that any plan provision that "purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty . . . shall be void as against public policy." In 1975, DOL issued Interpretive Bulletin 75-4, "Interpretive Bulletin Relating to Indemnification of Fiduciaries," that provides examples of when indemnification is permitted. For example, the bulletin allows an employer to indemnify a plan fiduciary that provides services to that employer's employees. According to IB 75-4, so long as the fiduciary remains fully responsible and liable, another party, such as an insurer, may satisfy any liabilities incurred by the fiduciary.

Section 410(b) of ERISA permits (but does not require) fiduciaries to be covered by fiduciary liability insurance. DOL Advisory Opinion 2002-08A provides guidance on indemnification rights of non-fiduciary service providers, such as banks, that provide recordkeeping or custodial services to a plan.

Account Acceptance

The retirement plan services business is competitive. Providers compete for the opportunity to provide trustee, investment management, custody, and

[1] OCC Bulletin 2001-47, "Third-Party Relationships," provides guidance on outsourced technologies and technologies acquired from third-party vendors. OCC Advisory Letter 2000-9, "Third-Party Risk," provides guidance for establishing an effective vendor management program.

recordkeeping services to retirement plans. This process often involves retirement plan consultants or plan sponsors sending out requests for proposals (RFPs) to prospective service providers. Banks generally submit a proposal to the consultant or plan sponsor, who then awards the business to the most competitive bidder.

Pre-acceptance Reviews

National banks are required by 12 CFR 9.6(a) to review a prospective fiduciary account before accepting it. As part of the pre-acceptance review process, a bank should determine whether it has the expertise and systems to properly manage the account and whether the account meets the bank's risk and profitability standards. Nonstandard plan documents should be reviewed by counsel. The pre-acceptance review should consider the type of account, governing documents, services to be provided by the bank, and the assets held in the account. The results of this review should be appropriately documented in the bank's records.

After a bank submits a bid in response to an RFP and before it accepts the retirement plan account, the bank has the opportunity to assess the risk of each requested service, review the prospective client for compliance with internal policy, and determine whether the fee is commensurate with the services it intends to provide. Banks that do not use a formal RFP process to consider the risks associated with the account should have a process in place that assesses the risk of each service they plan to provide. The bank should maintain a record of accounts accepted and declined.

Establishment of Accounts

Account administrators often use checklists to ensure that they obtain all information needed to establish an account. These checklists usually itemize all the documents required to open an account (governing document, asset schedules, fee schedules, etc.). It is common to prepare a synoptic record during account set-up and review. The synoptic record provides a summary of the documents that state the bank's capacity and responsibilities and a brief summary of the account's investment policy statement. In some cases, this information is maintained as part of the bank's trust accounting system.

Once an account has been formally established, it is ready to be funded, usually by the deposit of retirement plan assets. The operations department

must have controls in place to ensure that all assets reflected on the account inventory are received and appropriate accounting entries are made. If the bank provides participant recordkeeping services, the bank must have processes for conversion and balancing of records at the participant level as well as at the account, or retirement plan, level.

Account Administration

It is a fundamental duty of retirement plan fiduciaries to act solely in the best interests of plan participants and beneficiaries. The duty of loyalty and ERISA's fiduciary standards of care underlie the administration of retirement plan accounts.

Account Reviews

Post-acceptance review of discretionary accounts. Following acceptance of a retirement plan for which the bank has investment discretion, such as a defined benefit plan, the bank must, in accordance with12 CFR 9.6(b), promptly review all the plan assets to evaluate whether they are appropriate for the account. The appropriateness of each asset will depend on the investment objective of the account. An investment policy statement should be created that establishes the account's investment objectives and strategies. Refer to the "Investment Management Services" booklet of the *Comptroller's Handbook* for additional information on investment policy statements.

Annual investment review of discretionary accounts. Under 12 CFR 9.6(c), a bank must review all assets in each fiduciary account for which it has investment discretion at least once during each calendar year. The review must determine whether account assets are appropriate, individually and collectively, for the account. During the review, the bank should analyze investment performance and should confirm or update the account's investment policy statement, including asset allocation guidelines.

Review of directed or non-discretionary trustee accounts. Unless otherwise stated in the plan document, under ERISA section 403(a), a trustee is presumed to have investment discretion for plan assets. A retirement plan, however, may expressly provide that the trustee is subject to the direction of a named fiduciary so long as the directions are made in accordance with the terms of the plan and are not contrary to ERISA. Because a bank may retain co-fiduciary liability when investments are directed by a party other than a

qualified investment manager (e.g., when a bank acts merely as a directed trustee), a bank should have a process to determine that investment transactions directed by such a party (whether an employer, employee, or broker) do not create co-fiduciary liability for the bank. Processes for monitoring co-fiduciary liability vary. These processes include reviewing each non-recurring transaction as it occurs (preferably prior to occurrence), and performing an annual review to determine that assets conform with the plan document and that no prohibited transactions are evident.

Directed trustees have certain responsibilities when a plan invests in employer securities. While ERISA 407 relieves the trustee of any conflict of interest, the investment must be subject to the proper direction of a named fiduciary and must be prudent.

Department of Labor Field Assistance Bulletin 2004-03, "Fiduciary Responsibilities of Directed Trustees," contains additional guidance on the responsibilities of directed trustees. In this bulletin, the DOL states that a directed trustee is a fiduciary, although its duties are significantly narrower than that of a discretionary trustee. While the directed trustee is not specifically obligated to determine the prudence of every transaction, it has a duty to inform the named fiduciary of any material non-public information the trustee possesses that is necessary for a prudent decision. In addition, when a directed trustee sees clear and compelling public indications that following a fiduciary's instructions would not be in the plan's best interests, it may have a duty to reject the named fiduciary's instruction without further inquiry.

Trustees are generally relieved of co-fiduciary liability for following investment directions from a properly appointed investment manager that meets the qualification requirements set forth in ERISA 3(38). Those requirements include a written acknowledgment by the investment manager that they are a fiduciary with respect to the plan. However, a bank acting as trustee should be alert to the potential for participation in a transaction that is prohibited under ERISA or is contrary to the plan document.

Administrative reviews. Completing periodic administrative account reviews is a sound risk management practice. Such reviews help to determine whether account coding and other synoptic information is accurate and whether accounts are being administered in accordance with governing instruments and policies and procedures. Administrative reviews may also be

used to evaluate service quality and identify opportunities to expand service offerings. Administrative reviews are generally completed by an administrative officer and are often submitted to and reviewed by an appropriate fiduciary committee.

Co-Fiduciary Liability

Under certain circumstances, plan fiduciaries may be liable for a breach of fiduciary duty even if they play no direct role in the activity causing the breach. Under ERISA 405, fiduciaries may be held liable if they participate in acts or omissions by other fiduciaries that they know constitute a breach of ERISA's fiduciary responsibility rules or if they knowingly undertake to conceal those acts or omissions. Only if a plan's fiduciary makes reasonable efforts to remedy a breach by another fiduciary is it relieved of liability.

Retirement plan service providers must be aware of the activities of co-fiduciaries and have adequate processes in place to manage the risks associated with the services co-fiduciaries provide. Banks should have access to legal advice to assess co-fiduciary liability. They should also have a process to consult with ERISA counsel when they identify a potential for co-fiduciary liability.

Managing Prohibited Transactions

The IRC and ERISA contain similar provisions addressing prohibited transactions. The pertinent rules are in ERISA 406 and IRC 4975. Qualified plans are subject to both sets of rules; IRAs are subject only to IRC 4975. Banks should develop policies and procedures that address the requirements of ERISA and the IRC. The policies and procedures should provide guidance on how to prevent the bank from entering into a prohibited transaction. They should also provide guidance on managing a transaction or situation that would normally be prohibited, but that is exempted by a statutory provision or by a prohibited transaction exemption (PTE). ERISA provides a number of statutory exemptions to arrangements that would otherwise be considered prohibited transactions. The following statutory exemptions, and the most common prohibited transaction class exemptions, are discussed in more detail in Appendix C:

- Investment in employer securities.
- Loans to Employee Stock Ownership Plans (ESOPs).

- Loans to participants.
- Investment in bank deposits.
- Use of a bank's Collective Investment Funds.
- Cross-trading.
- Investment advice provided under an eligible investment advice arrangement.
- Offering ancillary services.

Because ERISA and other retirement plan laws and regulations are complex, bank employees must receive initial training, ongoing monitoring, and continuing education so that they are in a position to detect and prevent potential prohibited transactions.

Other ERISA Compliance Issues

Section 404(c) Plans. ERISA 404(c) rules provide an opportunity for plan participants and beneficiaries to exercise control over the assets in their plan accounts. This provision also enables a plan fiduciary to limit its liability for certain fiduciary responsibilities, provided certain requirements are met (see Appendix A, "Types of Retirement Plans"). The rule provides that if a participant in an individual account plan (typically a 401(k) plan) exercises control over the assets in his or her account, the trustee and other fiduciaries will be relieved from liability for losses resulting from the participant's exercise of control. Fiduciaries are not, however, relieved from liability for matters that are not a result of the participant's exercise of control. For example, a named fiduciary typically selects the plan's investment alternatives and must do so in a prudent manner. Even when a participant or beneficiary directs his or her own investments, a plan trustee cannot follow investment instructions that contradict the terms of the plan. In addition, because fiduciaries may be liable for damages resulting from participants' investment choices in plans that do not comply with 404(c), banks must continue to perform adequate due diligence and monitoring for both 404(c) and other plans.

Investment Advice and Investment Education. The PPA of 2006 and the DOL in FAB 2007-1, "Statutory Exemption for Investment Advice," recognize that plan participants need access to investment education. The PPA added a new statutory exemption to the general prohibition under ERISA against plan fiduciaries providing investment advice to plan participants regarding investments that result in the payment of additional advisory and other fees to

the fiduciaries or their affiliates. In order to qualify for this exemption, investment advice is limited to an "eligible investment advice arrangement" offered to participants and beneficiaries of defined contribution plans who direct the investment of their accounts under the plan and to beneficiaries of IRAs, and other self-directed savings vehicles such as health savings accounts (HSAs), Archer medical savings accounts (MSAs), and Coverdell education savings accounts. An eligible investment advice arrangement is:

> [A]n arrangement that either provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the investment of plan assets do not vary depending on the basis of any investment option selected, or uses a computer model under an investment advice program that meets the requirements set forth in ERISA section 408(g)(3).

FAB 2007-1 does not affect prior guidance issued by DOL regarding investment advice. For example, DOL had previously allowed investment advisers to collect additional fees if the advice they provided was under an investment advice arrangement and was made pursuant to methodologies developed and overseen by an independent financial expert. DOL had also permitted investment advice arrangements that provided for additional fees to be paid to an adviser provided such fees were "offset" against fees that were otherwise payable to the adviser by the plan.

When a national bank acts as trustee or in a fiduciary capacity under ERISA and gives "investment advice" to a plan participant, unless it falls under the new exemption, it will lose the protection provided under 404(c), and may become exposed to fiduciary liability resulting from a participant's investment decisions.

Fees. Fees charged to a retirement plan by a national bank are governed by ERISA 403(c)(1) and 404(a)(1)(A)(ii), which allow a plan fiduciary to charge reasonable fees. What is "reasonable" will vary based upon the circumstances of each retirement plan.

A bank should fully disclose all fees to plan fiduciaries. Plan fiduciaries must obtain sufficient information to make informed decisions on the reasonableness of any fees or other compensation paid directly or indirectly by the plan. The plan sponsor or other independent, authorized, named fiduciary should review and approve the fee schedule at the time the

retirement plan contracts with the bank for services. The named plan fiduciary should receive adequate advance notice to approve subsequent changes in the fee schedule as circumstances change, and should have the authority to move the account to another service provider if necessary.

A bank should use caution when receiving fees from sources other than the plan sponsor or the retirement plan itself. Examples of such fees include "12b-1 fees" (paid by mutual funds to cover marketing, distribution, and sales expenses), other shareholder servicing fees provided by mutual funds, and revenue sharing arrangements. Banks should seek the advice of legal counsel when they intend to receive fees, services, or discounts from a third party that result from a retirement plan's investments. Specific situations are discussed in Appendix D, "Fee and Compensation Issues."

Investment Management

When national banks provide investment management services to retirement plans, they are fiduciaries and must comply with ERISA's investment standards. ERISA's "prudent expert" rule (section 404(a)(1)) establishes a standard of care that is higher than that of a common law trust fiduciary. For all retirement plans, including those not subject to ERISA, national banks must comply with other applicable law, including 12 CFR Part 9, Fiduciary Activities of National Banks.

Investment managers and advisors of retirement plans should assess the needs of the plan, develop an appropriate investment policy, and monitor implementation of the investment policy. A complete discussion of the processes for managing risk when providing investment management services is contained in the "Investment Management Services" booklet of the *Comptroller's Handbook*. The booklet also contains a thorough discussion of ERISA's investment standards. Situations that may present unique risks are discussed below.

Prohibited Investment Management Transactions

Employer securities. Investing in employer securities is a prohibited transaction, but in certain circumstances such activity is exempted by ERISA 407.[2] DOL has granted individual exemptions to this general prohibition that

[2] Under ERISA 407, plans may not acquire or hold employer securities or employer real property unless they are qualifying employer securities (QES) or qualifying employer real property (QER).

allow, subject to specified conditions, the requesting asset manager that maintains a model or index driven fund to acquire, hold or dispose of securities that are issued either by the manager or by an affiliate, such as a bank holding company.

Banks acting as trustee or investment manager generally do not invest retirement plan assets in employer securities or employer real property, unless properly directed by authorized, named fiduciaries. Although such an investment may be permissible, national banks should use reasonable risk management processes, and enlist the aid of legal counsel when appropriate, to determine whether the investment meets the standard of prudence and to assess potential fiduciary or co-fiduciary liability.

Mutual funds. A national bank should have a sound mutual fund selection process. Prohibited transactions may arise when using bank-affiliated or third-party mutual funds. Such investments must be prudent. DOL Prohibited Transaction Exemption 77-4 and DOL Advisory Opinion 93-26A outline disclosure, approval, and fee requirements related to the use of affiliated mutual funds by employee benefit plans and IRAs. DOL Advisory Opinion 2005-10A illustrates that a bank may also offer affiliated mutual funds when there is a dollar-for-dollar offset of mutual fund fees against the management fees charged to the account. A prohibited transaction may result from the use of third-party mutual funds if the fund provider pays the bank 12b-1, shareholder servicing, or similar fees. DOL Advisory Opinions 97-15A (Frost) and 97-16A (Aetna) address these situations. For further information see Appendix C, "Prohibited Transactions," and Appendix D, "Fee and Compensation Issues."

Other Investment Management Risks

Asset concentrations. ERISA 404(a)(1)(C) requires fiduciaries to diversify the investments of a plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. A national bank should have processes in place to monitor concentrations, and should maintain documentation to demonstrate the prudence of specific asset concentrations.

Additionally, plans may not acquire employer securities or employer real property if, immediately after the acquisition, the aggregate fair market value of the investment exceeds a statutory limit of 10 percent of the fair market value of all the assets of the plan. The 10 percent limit of Section 407 does not apply to "eligible individual account plans," which include most 401(k) plans and profit sharing plans [ERISA §407(b)(1)]. PTE 91-38 provides a class exemption when a bank-maintained CIF acquires QES or QER.

Alternative investments and unique assets. An investment manager's duty to prudently manage assets applies to alternative, non-marketable, or unique assets such as hedge funds, real estate, derivatives, and personal notes. The investment manager should have an adequate process to determine that a particular investment will further the purposes of the plan, taking into consideration:

- The liquidity needs of the account;
- The availability of valuation information and marketability of the asset;
- The experience of the bank (or of the expert hired by the bank to manage the asset);
- Other investments;
- The plan's investment strategy; and
- The loss a divestiture would cause to the plan.

Investment managers are not required to be experts in all aspects of the management of a plan's assets, but they are expected to seek the advice or retain the services of an expert when dealing with aspects in which they are not expert, and when conducting critical reviews of an investment of a kind that is outside their areas of expertise.

Proxy voting – employer securities. The DOL considers the voting of proxies to be an important investment management function that should not be delegated. The voting of shares of employer securities is subject to additional requirements. In general, proxies must be passed through to participants. When the bank is trustee or investment manager, it is usually responsible for voting unallocated shares and/or shares not voted by participants. Shares should be voted in accordance with the plan, and in the best interests of the participants. It is possible that these two requirements will conflict. The bank should have review processes in place, and capable legal counsel available, to resolve these situations. A bank may determine that hiring a third party to vote shares will eliminate conflict situations. See DOL Interpretive Bulletin 2509.94-2 for additional guidance on proxy voting.

Cross-Trades. In February 2007, DOL issued an interim final rule (Statutory Exemption for Cross-Trading of Securities) that implements section 408(b)(19) of ERISA, the prohibited transaction exemption for certain cross-trades (enacted through the PPA). DOL defines a cross-trade as "the purchase and sale of a security between a plan and any other account managed by the same investment manager." The new ERISA cross-trading exemption allows

cross-trades between ERISA accounts and other accounts managed by the same investment manager only if certain conditions are satisfied. Under DOL's interim final regulation, the investment manager must have written cross-trading policies that include:

- A description of the criteria the manager will apply in determining that the cross-trade is beneficial to both parties to the transaction;
- A description of how the manager will determine that the cross-trades are effected at the security's "independent market price," including the identity of sources used to establish prices;
- A description of the procedures the manager uses to ensure compliance with the requirement that each plan participating in the cross-trade have a minimum asset size of $100 million;
- A description of how the manager will mitigate potential conflicts in its responsibilities to the parties involved in the cross-trade transaction;
- A requirement that the manager allocate cross-trades among accounts in an objective and equitable manner and a description of the allocation method(s) used;
- The identity of the compliance officer responsible for reviewing the manager's compliance with its cross-trading policies and procedures; and
- A description of the scope of review to be conducted by the compliance officer.

Operational Control Processes

Basic control processes should be an intrinsic part of all services a bank offers. Control processes related to retirement plan services include the monitoring and reconcilement of contributions, asset transactions, benefit payments, and participant recordkeeping systems. The services a bank provides should be documented in contracts or other forms of service level agreements.

Detailed below are operational activities that national banks may perform whether or not they act as participant record keeper. Participant recordkeeping services are discussed in a separate section of this booklet.

Monitoring Contributions for Appropriateness and Timeliness

A plan sponsor's failure to deposit contributions to a plan may result in a prohibited transaction. To avoid being associated with a plan sponsor's breach, a bank should have processes in place to flag both late contributions as well as contributions that may constitute a prohibited transaction.

While banks typically disclaim responsibility for a retirement plan's funding policy and whether contributions are made on a timely basis, they are frequently in a position to remind a plan sponsor of a funding shortfall. With respect to defined benefit (DB) plans, a bank trustee will generally not have information regarding whether a plan is properly funded. This obligation to monitor the timeliness of contributions varies by type of account, with 401(k) employee deferrals being the primary focus. Because 401(k) contributions are made regularly (each payroll period), failure to receive funds is generally readily identifiable. The DOL requires that employee deferral amounts be deposited to the plan as soon as administratively feasible (usually within a few days) but no later than 15 business days after the end of the month in which the funds were withheld. 29 CFR 2510.3-102(a) and (b).

Banks should also monitor for situations in which an employer contributes assets to a plan that constitute a prohibited transaction. These situations generally arise due to a connection between those assets and the plan sponsor. Bank procedures should include provisions to notify the employer, monitor the employer's response, and notify the appropriate regulatory agency in the event of significant non-compliance with the plan's funding policy.

Processing Benefits and Withholding Taxes

Processing benefit payments, withholding taxes, and preparing IRS Form 1099-R are administrative services that banks may provide to assist plan sponsors and IRA owners. When a bank provides participant recordkeeping services, it calculates the amount to be distributed in addition to processing the benefit payments. Types of payments to participants and beneficiaries include:

- Lump sum or periodic payment (payments must begin by age 70½).
- Hardship withdrawal (if specified in the defined contribution plan document).

- Distribution subject to a Qualified Domestic Relations Order (QDRO).
- Distribution of accrued benefit at termination of employment.
- Other early withdrawals (before age 59½) may be subject to a 10 percent penalty.

A bank should establish standardized procedures for processing distributions that address all the above payment types. The procedures should ensure that distribution requests conform to the plan document and are properly approved. Each hardship withdrawal or QDRO distribution must be evaluated individually and may involve interpretation of legal documents. When required, a bank should monitor the age of plan participants as well as IRA owners in order to ensure compliance with minimum distribution requirements.

Processing Participant Loans

Participant loans are an optional feature for defined contribution plans, most often 401(k) plans. Participant loans are not permitted for defined benefit plans, and IRA owners may not borrow from IRA assets. Bank trustees distribute loan proceeds from plan assets, as directed by the plan administrator or other party, and deposit loan repayments to the participants' accounts. When the bank is also the participant record keeper, additional duties customarily include calculating the maximum loan amount and preparing loan documents. In recent years, "paperless loans" have become popular, although there are some restrictions on their use. With a paperless loan, execution of the loan disbursement check constitutes signing of the loan promissory note. Participant loan processes are often automated and rely upon a voice response unit or an Internet website.

Participant loans must be authorized in the plan document, and must be made consistent with a participant loan policy. While there is no requirement that each plan must offer participant loans, ERISA includes a statutory exemption from the prohibited transaction rules that enables plans to offer loans to participant employees. However, numerous restrictions apply that limit the loan amount, loan term, interest rate, and availability of plan loans. 29 CFR 2550.408b-1. These restrictions should be considered in the development of the loan policy. A typical loan policy contains the following information:

- The identity of the party responsible for administering the loan policy (usually the plan administrator).
- The procedure for applying for a loan.
- The basis on which loans will be approved/denied.
- The procedure for determining a reasonable interest rate.
- The definition of eligible collateral.
- The events constituting default and the steps that will be taken in the event of a default.

Banks should have internal controls to ensure that participant loans comply with the plan, loan policy, and legal requirements. Such loans should be properly approved prior to issuance, and spousal consent should be obtained if a joint and survivor annuity is the normal form of benefit. Procedures should address calculation of the maximum loan amount and preparation of loan documents. If the plan makes more than 25 loans per year, or more than five loans secured by real estate, the bank (as the participant recordkeeper) must comply with12 CFR 226, Truth in Lending, Federal Reserve Regulation Z. Section 226 requirements include preparation of Truth in Lending disclosure statements.

Once a loan is issued, the trustee bank must monitor repayment. Delinquent loans are usually reported to the plan participant and the employer. If a delinquency is not cured, it becomes a taxable distribution. Final rules under IRC section 72(p), applicable to loans issued after January 1, 2002, state that a participant loan will be deemed a distribution at the end of a "cure period." That period cannot extend beyond the end of the quarter following the quarter in which the missed payment was due. The bank should have a reasonable process for handling loans issued prior to January 1, 2002. The amount of the loan in default, plus accrued interest, is reported as a taxable event on IRS Form 1099.

Valuing Retirement Plan Assets

All asset management activities require accurate asset prices. The following retirement plan activities all rely on asset valuations:

- Calculation of units of employer securities purchased/sold (i.e., by a company stock fund).
- Conversion of company stock to cash prior to distribution, and proper tax reporting.

- Calculation of the funding obligation for defined benefit plans.
- Plan/participant reporting, including regulatory reporting for both pension plans and IRAs.

Banks should have sound, risk-based processes for periodic (at least annual) valuation of all assets, including those that are not widely traded. Thinly traded or closely held company stock in ESOPs should be reviewed for risks related to certain types of transactions that need an independent appraisal. Leveraged ESOPs require an initial independent valuation of those shares that will be purchased by the ESOP. Those shares must be re-valued annually in order to establish a fair market repurchase price for the company to buy back shares from retiring, deceased, and departing employees, as well as for the ESOP to meet IRS reporting requirements.

Assets that are difficult to value cost more to manage and may require independent valuations. The bank should determine who will pay these costs before the bank receives or acquires these assets. Sound, risk-based valuation processes for company stock or difficult-to-price assets will help reduce risk and will likely increase efficiency.

Meeting Reporting Requirements

Retirement plans are subject to unique reporting requirements. In addition to account level statements, participant level statements must be produced if the bank serves as record keeper. Regardless of capacity, bank service providers are expected to provide certified statements that comply with ERISA 103. An annual informational return, IRS Form 5500, is also required. The plan administrator is responsible for filing the Form 5500, but it may contract with another party, such as the record keeper, to assist in preparing the form. The bank, as trustee or custodian for an IRA, is responsible for preparing an annual IRS Form 5498.

Bank processes should ensure timely and accurate production of statements/ reports. Factors to consider include verifying that all transactions have been posted (e.g., end of period mutual fund distributions), asset prices are current, and, if applicable, participant statements balance to overall plan records.

Processing Transactions and Making Contingency Plans

A bank's information systems must be capable of processing and reporting large volumes of many types of transactions and providing the fundamental accounting records and management reports necessary for retirement plan administration. In addition to a primary trust accounting system, there may be a need for participant recordkeeping and client reporting systems designed specifically for the retirement plan services line of business.

The systems needed to properly service retirement plans are complex and costly to obtain. In addition, ongoing changes in the retirement plan industry require a commitment to system maintenance. A bank that wishes to service retirement plans must be prepared to maintain appropriate systems, internal controls, and staffing.

The bank must also make contingency plans for disruptions to data processing systems. A contingency plan, which is an extension of a bank's internal controls and physical security, specifies how the bank will continue operations following these disruptions. If the bank relies on an outside servicer for the bulk of its data processing, it should take steps to determine whether the contingency plans of the servicer are adequate, and whether its own plans complement those of the servicer. Comprehensive contingency planning policies and procedures for all business lines are a responsibility of the board of directors and senior management. For further details regarding contingency planning, see the FFIEC's "Business Continuity Planning" IT Examination Handbook.

Participant Recordkeeping

Defined contribution retirement plans require participant recordkeeping services. While the trustee or custodian maintains records of assets held and securities transactions at the plan level, the record keeper maintains records at the participant level. Recordkeeping services may be provided by the bank or third parties. The plan may contract directly with the third party, or the bank may contract with the third party. The liability to the bank varies accordingly.

The employer provides information on employee service and eligibility to the record keeper using the employee census. For each eligible participant, the record keeper maintains records of the amount contributed by the employer

and/or the employee, before and after tax, the percent vested, the investments held in the participant's account, and the amount of any earnings. The record keeper accounts for changes in investment elections, calculates the maximum participant loan amount available, and processes distributions when a participant retires or terminates, at the direction of the plan administrator. Detailed records are also maintained to project benefits for highly compensated employees to ensure their benefits do not exceed legal limitations.

Typical activities performed by the participant record keeper include:

- Allocating contributions to individual participant accounts.
- Purchasing assets with contributed funds, in accordance with participant investment elections.
- Processing changes in investment elections.
- Processing distribution requests — e.g., periodic pension, lump sum.
- Processing requests for participant loans.
- Posting income to individual participant accounts.

When processing investment transactions and income, a bank aggregates the total buys and sells for each investment option and places trades for the aggregate amounts. The recordkeeping system is used to aggregate the trades, and to allocate them to individual participant accounts. A critical control function is balancing the core trust accounting system to the participant recordkeeping system. Out-of-balance conditions should be aged and addressed. Contributions, benefit payments, and participant loan processing are addressed elsewhere in this booklet.

Amounts forfeited by employees who terminate prior to becoming fully vested must be allocated annually. Forfeitures can be calculated in a variety of ways and are generally held for a period of years in case terminated employees are reinstated. A record keeper will allocate those funds, based on the plan's provisions. Forfeitures are typically used to offset fees or reduce future employer contributions, or are allocated to other participants.

Banks, like other plan fiduciaries, periodically are required to address how to handle assets that belong to missing defined contribution plan participants or their beneficiaries. DOL FAB 2004-02, "Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans," provides a list of the search methods a plan fiduciary should use when attempting to locate a

missing participant or beneficiary, before a plan fiduciary can determine the participant simply cannot be found. Once a fiduciary determines that a participant is missing, the missing participant's plan assets can be distributed consistent with the options set forth in FAB 2004-02. These options include rollover of assets into an IRA; establishment of an insured bank account in the name of the missing participant; or escheat of the account balance to the applicable state's unclaimed property fund.

Banks providing participant recordkeeping services should have sound transaction-processing controls. The controls should ensure that transactions are promptly and accurately posted. Transactions should be subject to routine internal control processes to ensure that independent personnel:

- Balance all daily trades to participant records.
- Balance aggregate totals to depository records, bank records, and participant records at least monthly.
- Have processes to report aged out-of-balance positions to management in a timely manner.

Compliance. Recordkeeping involves some compliance activities. A compliance department may support the primary recordkeeping function. Compliance functions include performing discrimination tests and ensuring that required reports, such as Form 5500s, are filed on a timely basis. While the contract between the record keeper and the client determines what type of compliance support will be provided to a particular plan, these duties are usually performed by the record keeper.

If the retirement plan is to maintain its preferred tax status, the plan must not be discriminatory in nature. A series of tests must be met to ensure that the plan does not favor highly compensated employees. The compliance department may be required to determine who are key and highly compensated employees. Compliance may also perform various calculations to ensure that a particular plan conforms with tax requirements. These calculations may include determining whether the plan is "top heavy," performing IRC section 415 calculations and 401(k) discrimination tests, and correcting failed Actual Deferral Percentage/Actual Contribution Percentage tests.

Plan administrators are required to provide a variety of reports to plan participants. The most important of these are the Summary Plan Description

(SPD) and the Summary Annual Report (SAR). Various IRS or DOL reports may also be filed on behalf of the plan, including a request for an IRS Letter of Determination and annual IRS Form 5500 filings. Plan administrators may contract with the bank or other service providers to assist them in providing required reports.

Banks offering compliance services must have established processes and qualified staff. The services to be provided to each plan should be clearly delineated in a service agreement. Control and monitoring processes should be in place to ensure timely and accurate completion.

Retirement Services Examination Procedures

The use of the following expanded procedures is optional. Examiners decide whether to use these procedures during pre-examination planning and after reaching core assessment conclusions. The use of specific procedures is determined by the retirement plan services offered by the bank, and the complexity and risks associated with those services. The decision to use expanded procedures is coordinated with the asset management examiner responsible for planning fiduciary examination activities for the applicable bank and must be adequately documented in the work papers. See the "Community Bank Supervision" and "Large Bank Supervision" booklets of the *Comptroller's Handbook*.

If the bank provides retirement plan services through an entity for which the OCC is not the primary functional regulator, the supervisory approach should be discussed with the Functional Examiner-in-Charge (FEIC) for asset management and bank examiner in charge (EIC) before commencing any type of examination activity for such an entity. The "Large Bank Supervision," "Asset Management," "Investment Management Services," and "Related Organizations" booklets of the *Comptroller's Handbook* provide OCC supervisory policies relating to functional supervision.

Planning Activities

Objective: To review the quantity of risk and the quality of risk management relating to retirement plan services and to establish the timing, scope and work plans for the supervisory activity.

1. Consult the following sources of information, if applicable, and review the types, risk characteristics, and distribution channels of retirement plan services provided by the bank:

   - ❑ OCC information databases.
   - ❑ Previous reports of examination, analyses, related board and management responses, and work papers.
   - ❑ The asset management profile (as described in the "Asset Management" booklet of the *Comptroller's Handbook*).
   - ❑ Internal and external audit reports.

- ❑ OCC correspondence files.
- ❑ Call reports.
- ❑ Supervisory reports issued by functional regulators.
- ❑ Fiduciary risk monitoring reports from the board, committees, business lines, risk management groups, compliance, legal, and audit functions.

2. Discuss the following with retirement plan services management:

   - Significant risk issues and management strategies;
   - Significant changes in strategies, products, services, and distribution channels;
   - Significant changes in organization, policies, controls, and information systems; and
   - External factors that are affecting services.

3. Develop a preliminary risk assessment for the retirement plan services area and review it with the asset management FEIC and/or bank EIC for perspective and examination planning coordination.

4. Reconfirm and finalize the timing, scope, and work plans for examination activity to be completed during the supervisory cycle. If applicable, prepare and submit a revised planning memorandum for approval by the asset management FEIC that includes the following information:

   - Examination activity objectives, including a description of the types of accounts, services, or processes to be reviewed.
   - The types (on-site and quarterly monitoring), schedules, and projected workdays of examination activities.
   - The scope of examination procedures to be completed, including the use of expanded procedures and risk-oriented sampling guidelines. The memorandum should address the amount of testing or direct verification that may be necessary. The scope of examination activity and the selected procedures should be consistent with the risk assessment and should focus on the bank's higher risk activities. Decisions concerning the use of expanded procedures should be clearly documented.

- The examiner resources and activities necessary to complete the supervisory review, such as assignment details, meetings, and final written products.

The "Bank Supervision Process," "Large Bank Supervision," "Community Bank Supervision," and "Asset Management" booklets of the *Comptroller's Handbook* contain additional guidance on and procedures for examination planning activities.

Retirement Plan Services — Quantity of Risk

Conclusion: The quantity of risk is (low, moderate, high).

Objective: To determine the quantity of risk in retirement plan services.

1. Analyze the bank's strategic plan for retirement plan services. Consider the following factors:

    - The magnitude of change in established corporate mission, goals, culture, values, or risk tolerance;
    - The financial objectives as they relate to the short- and long-term goals of the bank;
    - Diversification by product, geography, and customer demographics;
    - Past performance in offering new products and services;
    - Risk of implementing innovative or unproven products, services, or technologies; and
    - Potential or planned entrance into new businesses, product lines, or technologies (including new delivery channels), particularly those that may test legal boundaries.

2. Determine the bank's appetite for risk by considering its willingness to provide services involving:

    - Employer securities or real property.
    - Asset concentrations.
    - Non-marketable assets and tangible assets.
    - Individually directed and/or broker-held assets (self-directed brokerage accounts).
    - Participant recordkeeping.

3. Discuss with management the impact of the factors listed below on types and quantity of reputation risk from retirement plan services:

    - The market's or public's perception of the corporate mission, culture, and risk tolerance of the bank;
    - The perception of the bank's financial stability; and
    - The market's or public's perception of the quality of products and services offered by the bank.

4. Discuss with management the impact of the factors listed below on the types and quantity of strategic risk from retirement plan services:

   - Economic, industry, and market conditions;
   - Legislative and regulatory changes;
   - Technological advances;
   - Competition and merger and acquisition plans; and
   - Multi-state fiduciary operations.

5. Analyze management information reports relating to transaction processing and reporting within the retirement plan services organization. Consider the following structural factors:

   - The volume, type, and complexity of transactions, products, and services offered through the bank;
   - The condition, security, capacity, and recoverability of systems;
   - The complexity and volume of conversions, integrations, and system changes;
   - The development of new markets, products, services, technology, and delivery systems to maintain competitive position and gain strategic advantage; and
   - The volume and severity of operational, administrative, and accounting control exceptions and losses from fraud and operating errors.

6. Analyze the types and volume of litigation and customer complaints:

   - Discuss significant litigation and complaints with bank management.
   - Determine the risk to capital and the appropriateness of corrective action and follow-up processes.

   If necessary, refer to the "Litigation and Other Legal Matters" booklet of the *Comptroller's Handbook* for additional procedures.

7. Analyze the types and level of policy exceptions, internal control deficiencies, and legal violations that have been identified and reported internally in relation to retirement plan services. Review information from the following sources:

- Board and committee minutes and reports.
- Risk management and compliance reports.
- Control self-assessment reports.
- Internal and external audit reports.
- Regulatory reports.
- Other OCC examination programs.

8. Review the most recently completed bank information technology examination reports:

    - Discuss the findings and recommendations relating to retirement plan services with management.
    - Determine whether management has met its commitments to take corrective action and has addressed other recommendations.

9. Review the most recently completed OCC examination activity of the bank's asset management operations:

    - Discuss the findings and recommendations relating to retirement plan services with OCC examiners and bank management.
    - Determine whether management has taken corrective action to address previous concerns or to implement OCC recommendations.

10. Analyze conclusions from the retirement plan services "Quality of Risk Management" examination procedures. Incorporate those conclusions into the evaluation of risk. Consider the level of compliance with:

    - The plan document or other governing instrument;
    - ERISA, the IRC, PPA of 2006, and related DOL issuances;
    - Other federal law; and
    - Bank policies and operating procedures.

11. Reach a conclusion on the types and quantity of risk from retirement plan services based on the findings of these and other related examination activities.

Retirement Plan Services Quality of Risk Management

Board and Management Supervision

Conclusion: The quality of risk management is (weak, satisfactory, strong).

Note: The adequacy and scope of the audit coverage may affect the level of examiner testing and sampling of retirement services control activities. Whenever possible, evaluate the audit function early in the examination process. Refer to the "Internal and External Audits" booklet of the *Comptroller's Handbook* for additional procedures.

Objective: To determine the quality of board and senior management supervision of retirement plan services.

1. Determine and evaluate the types of risk management processes used by the board and senior management. Consider the following:

   - Board and senior management information reports;
   - Fiduciary risk management groups;
   - Fiduciary committee structures, responsibilities, and performance;
   - Management information systems;
   - Compliance programs;
   - Control self-assessments; and
   - Audit program.

2. Evaluate the effectiveness of board and senior management supervision of risk from retirement plan services. Consider:

   - The types and frequency of board and senior management reviews to determine adherence to policies, operating procedures, and strategic initiatives;
   - The accuracy, timeliness, relevance, and distribution of management information reports;
   - How strategic initiatives and policies are communicated within the organization, and determine whether the communication processes are adequate.

- The responsiveness to risk control deficiencies and the effectiveness of corrective action and follow-up activities;
- The frequency, content, and usefulness of litigation reports; and
- The responsiveness to internal and external audits and regulatory examinations.

Objective: To determine the quality of policies and procedures and their consistency with the bank's strategic direction for retirement plan services.

1. Obtain the bank's policies and strategic plan relating to retirement plan services.

2. Evaluate policies and procedures. Consider whether:

   - Policies are formally approved and periodically reviewed by the board or a designated committee.
   - The policy adequately addresses applicable law, including ERISA and 12 CFR Part 9.
   - Bank policy establishes a risk management and internal control framework that addresses:

     – Organizational and functional responsibilities;
     – Defined lines of authority and responsibility;
     – Delegation authority and approval processes;
     – Standards for dealing with affiliated organizations; and
     – Personnel practices.

   - Policies include appropriate account acceptance and administration guidelines that address:

     – New account acceptance processes;
     – Account reviews;
     – Investment reviews;
     – High-risk accounts (e.g., ESOPs) and high-risk assets (e.g., employer securities);
     – Bank Secrecy Act compliance and anti-money laundering controls;
     – Customer information privacy;
     – Fees and other expenses;

- Tax preparation and reporting; and
- Account closings.

- Policies effectively address information systems and technology applications. Consider:

  - Accounting and other transaction record keeping systems;
  - Management information system requirements;
  - Customer information security; and
  - Systems security and disaster recovery plans.

- Policies establish:

  - Policy exception definitions and guidelines;
  - Policy exception tracking and reporting processes;
  - Client reporting guidelines;
  - Control self-assessment processes;
  - Guidelines for error correction and reporting, including disposition of gains and losses; and
  - Customer complaint resolution procedures.

- These guidelines and processes are adequate.

3. Determine whether the bank has appropriate policies to address potential prohibited transactions and conflicts of interest. The policies should address, but not be limited to:

   - Retention of own bank stock/bank holding company stock (DOL Advisory Opinion 92-23).
   - Use of proprietary mutual funds (PTE 77-4 and Advisory Opinion 2005-10A).
   - Receipt of 12b-1 or other fees from mutual funds (DOL Advisory Opinions 97-15 and 97-16).
   - Use of own/affiliate bank deposits (ERISA 408(b)(4)).
   - Use of an affiliated broker/dealer (PTE 86-128).
   - The timely clearing of overdrafts (PTE 80-26 and Advisory Opinion 2003-02A).

4. Determine that the bank has appropriate investment management policies, including policies for voting proxies on company stock (DOL Interpretive Bulletin 94-2).

5. Review the strategic plan and supporting financial projections, and determine whether the policy is consistent with the bank's strategic goals and objectives.

6. Document the conclusions and recommendations focusing on any deficiencies identified in the policymaking and implementation process. Discuss with management.

Objective: To determine the quality of retirement plan services management and supporting personnel.

1. Obtain a list of management and key supporting personnel that includes the following information:

   - Title and job responsibilities;
   - Formal education and training; and
   - Related work experience and accomplishments.

2. Determine whether management and supporting personnel are:

   - Competent based on the complexity of the bank's retirement services lines of business;
   - Knowledgeable of strategic plans, risk tolerance standards, and policies related to retirement plan services; and
   - Aware of the bank's code of ethics, if applicable, and committed to high ethical standards.

3. Evaluate the adequacy of staffing levels by reviewing and discussing:

   - Current strategic initiatives and financial goals;
   - Current business volume, complexity, and risk profile;
   - Recent staffing analyses and recommendations; and
   - The impact of company cost-cutting programs, if applicable.

Audit and Internal Controls

Objective: To determine whether the board and management have implemented an appropriate control system to manage the risk arising from retirement plan services activities. Discuss control processes with senior management to gain an understanding of the control culture and structure.

1. Evaluate internal controls for retirement services processes. Consider:

    - The control environment.
    - Risk assessment.
    - Control activities.
    - Information and communications.
    - Self-assessment or monitoring.

2. Evaluate the bank's process for managing the risk and on-going quality of services provided to retirement services clients. Consider:

    - Whether service agreements are used to clearly delineate duties.
    - Effectiveness of the methods used to measure performance and/or the quality of service.
    - Timeliness in completing services and duties.
    - Adequacy of related exception monitoring and follow-up.

3. Evaluate internal controls surrounding retirement plan administration activities. Consider:

    - Business development practices.
    - The effectiveness of periodic account review processes.
    - The control placed on high-risk processes (e.g., employer securities, real estate, and hardship withdrawal/QDRO processing).
    - Compliance reviews of processes and internal controls used.
    - MIS processes used to control high-risk activities.

4. Evaluate the internal controls over operational functions, using as references any independent tests of the control structure, such as audits and SAS 70 reviews. Consider the segregation of duties related to:

    - Data input and balancing functions.

- Appropriate authorization to release funds or assets.
- Logical (ID and password) access to automated systems.
- The control placed on high-risk processes (e.g., participant recordkeeping, tax withholding and reporting).
- Data security.
- Independent reconcilement.
- Exception monitoring.

5. Determine whether retirement services activities receive a suitable audit. Consider:

   - The frequency and scope of audits performed, including whether all significant activities and controls are covered.
   - The risk assessment process.
   - The level of the audit staff's expertise in retirement plan services.
   - The quality of audit reports and supporting workpapers.

6. Evaluate formal compliance and/or risk management functions. Consider:

   - Formal/informal structures.
   - Reporting lines – independent or within the line of business.
   - Quality of risk assessment (identification of high-risk processes).
   - Control self-assessments.
   - Reporting procedures.
   - Follow-up on weaknesses identified by compliance/risk management reviews, audits, regulatory examinations, etc.
   - Litigation and complaint processes.

7. Determine whether MIS is adequate for the nature and volume of business being conducted. Evaluate whether MIS is timely, accurate, and useful for measuring performance of administrative and operational functions and information systems. Consider management's use of earnings reports, risk assessments, audit reports, compliance reports, committee reports, and litigation reports.

8. If necessary, and if approved by the asset management EIC, complete appropriate examination procedures in the "Internal Control" booklet of the *Comptroller's Handbook*.

Account Acceptance and Administration

Objective: To determine the quality and effectiveness of account acceptance processes. (Examiners may use the worksheets in Appendix E to assist in completing the account acceptance and review procedures.)

1. Evaluate the account acceptance process for retirement plans. Determine whether:

   - The process is formalized and adequately documented.
   - Appropriate information is obtained during the due diligence review and effectively used in the approval process.
   - Bank employees comply with any policies supporting the process, and there is an appropriate approval process for policy exceptions.
   - The acceptance process complies with 12 CFR 9.6(a), Pre-acceptance Reviews.

2. Select a sample of recently accepted retirement plan accounts for review. If possible, include a variety of account types and bank capacities, such as co-trustee.

3. For each selected account, determine whether the account acceptance process adequately considered:

   - The bank's level of technical expertise and operational capabilities;
   - The bank's duties, obligations, and fiduciary responsibility;
   - The terms and conditions of the governing instrument, and the character of the account parties;
   - Current or foreseeable problems in administering the account;
   - The adequacy of compensation for accepting the risks associated with administering the account;
   - The types of assets currently in the portfolio, and the types of assets to be purchased and managed in the portfolio;
   - Environmental issues;
   - Input from portfolio managers, risk managers, and legal counsel;
   - Potential or actual conflicts of interests; and
   - Co-fiduciary relationships.

4. Determine whether the bank has:

   - Adequate checklists or other methods of ensuring that all the necessary documentation is obtained for the account.
   - Effective plan conversion processes, if the bank serves as recordkeeper.
   - Original or authenticated copies of the plan and/or other governing documents.
   - Accurate inventories or schedules of assets delivered to the bank or placed in the bank's control for custody and protection.
   - Thorough administrative files that contain:
     - Synoptic data (type of plan, investment powers, expected contribution and distribution activity, and other relevant historical data);
     - Legal documents;
     - Correspondence;
     - Account reviews;
     - Investment transactions;
     - Tax documents and reports; and
     - Regulatory filings.
   - Tickler files or other tracking methods that ensure the timely preparation and execution of future duties such as account reviews, required distributions, tax form filings, and fee and statement information.

5. Evaluate the initial post-acceptance review for each selected account for which the bank has investment discretion. Determine whether the reviewers:

   - Review the governing instrument and determine its purpose, intent, investment guidelines, and powers;
   - Review all discretionary assets to determine whether they are appropriate for the account, as required by ERISA and 12 CFR 9.6(b);
   - Determine whether acceptance of the account complies with internal policies and procedures; and
   - Approve each account's investment policy statement.

Objective: To determine the quality of retirement plan account administration processes.

1. Select an appropriate sample of established retirement plan accounts. A sufficient number of accounts should be selected to form a reliable assessment of the bank's processes. Account selection should be based on risk factors such as size, complexity, litigation, and insider relationships, and must be sufficient to satisfy the examination's objectives. When selecting accounts for review, consider:

   - Accounts with asset concentrations.
   - ESOPs (especially leveraged ESOPs).
   - Accounts with qualifying employer securities, qualifying employer real property or other real property, closely held stock, partnerships, notes, or other assets that are not readily marketable.
   - Accounts holding stock, obligations, or other investments of the bank or any of its affiliates.
   - Accounts with participant loans.
   - Accounts directed by qualified third-party investment managers, the employer, or plan participants.

2. Review each selected account and determine whether administrative processes are adequate and effective. Determine whether:

   - The account's activity conforms with the terms of the plan or other governing instrument and is in the best interest of plan participants and beneficiaries;
   - The account's activity complies with applicable law including ERISA, 12 CFR Part 9, and the IRC;
   - For discretionary accounts, investment management activities are appropriate, and the bank performs investment reviews in accordance with 12 CFR 9.6(c) and other applicable law;
   - The bank performs ERISA compliance reviews to detect prohibited transactions for accounts where the bank serves as trustee;
   - The bank prepares and provides accurate account statements and required IRS forms;
   - The bank avoids conflicts of interest and prohibited transactions;

- The bank charges and reports accurate account fees and complies with the reasonable compensation provisions of 12 CFR 9.15 and ERISA; and
- Any services provided by a third-party vendor are properly performed, and the vendor's charges are appropriate and reasonable.

3. For ESOPs and other accounts holding qualifying employer securities (QES) or qualifying employer real property (QERP), determine the following:

   - The acquisition of QES or QERP was permitted in the plan document (ERISA 404(a)(1)(D)).
   - The acquisition is prudent, meets appropriate diversification standards, and is for the exclusive benefit of participants and beneficiaries (ERISA 404(a)(1)(B) & (C)).
   - For defined benefit plans, the fair market value of the QES or QERP immediately after acquisition did not exceed 10 percent of the fair market value of the plan (ERISA 407(a)(3)). (Certain defined contribution plans, e.g., ESOP/stock bonus, are exempt.)
   - The bank's files indicate that a review of the current financial condition and history of the employer or its affiliate was performed before purchasing or retaining the QES or QERP so as to demonstrate that actions were prudent and exclusively for the benefit of participants (ERISA 404(a)).

4. Evaluate controls the bank uses to limit risk from retirement plans that use third-party investment managers. Consider whether the third-party investment manager:

   - Was appointed pursuant to the terms of the plan document, and in a written agreement between the plan sponsor and the investment manager.
   - Meets the definition of an investment manager (ERISA 3(38)).
   - Stated in the advisory agreement, or in a separate written statement to the bank, that it is a registered investment advisor under the Investment Advisors Act of 1940 and a fiduciary with respect to the plan (ERISA 3(38)).

5. Evaluate controls the bank uses to limit risk when investments are directed by an employer, advisory committee, or other party who is not a qualified investment manager as defined in ERISA 3(38). Consider whether:

   - The party directing investments is authorized by the plan document.
   - The bank monitors activities to ensure that transactions with parties in interest are avoided.
   - Investment in employer securities meets ERISA's prudence standards. (See FAB 2004-03.)

6. For defined contribution plans in which the bank receives investment direction from individual plan participants, determine whether:

   - The plan and investments conform to ERISA 404(c).
   - The plan and related documents provide appropriate authorization for participants to direct investments.
   - Investment options include at least three vehicles with varying risk and return characteristics (ERISA 404).
   - Investment holdings fail to meet prudence standards (ERISA 404).

7. Determine whether the bank adequately controls risk in offering employee education services and/or investment advice to plan participants. Consider:

   - The frequency and forms of contact or delivery.
   - Mechanisms for monitoring delivery system usage rates and costs.
   - Disclosures and disclaimers.
   - Compliance with DOL Interpretive Bulletin 96-1, Advisory Opinion 2001-09, and other relevant DOL issuances.
   - Whether the advice is offered through an "eligible investment advice arrangement" to plan participants consistent with PPA and DOL requirements.

8. Determine whether fiduciary managers and administrators have an adequate knowledge and understanding of the accounts assigned to them. Determine whether:

   - Fiduciary accounts are assigned to a specific administrator.

- Fiduciary managers are aware of account problems such as litigation, complaints, and other important administrative matters.
- Account administrators have maintained account files in accordance with policy and sound administrative practices.

9. Evaluate the bank's processes for administering co-trustee accounts:

    - Determine whether proper and timely written authorizations are obtained from co-fiduciaries or others whose approval may be required for important actions; and
    - Determine the effectiveness of the process of obtaining and following up on co-fiduciary approvals.

Operational Control Processes

Objective: To determine whether the bank has implemented control processes that effectively manage transaction and compliance risks related to retirement plan operations.

1. Evaluate the bank's processes for addressing employee elective deferral contributions that are not received in a timely manner. Such contributions must be provided to the trustee as soon as administratively feasible, but no later than the 15th business day of the month following the month in which the contribution was withheld.

2. Evaluate the process for distributions to participants. Consider whether:

    - Directions are proper and approved by an authorized party (i.e., plan administrator). This may involve spousal consent.
    - Distributions are calculated accurately, if applicable (i.e., if record keeper
    - Distributions involving a Qualified Domestic Relations Order (QDRO) are reviewed by legal counsel.
    - Income taxes, other deductions, and penalties, as required by law, are properly withheld.
    - Benefit payments and direct rollovers are payable to proper parties.

3. Determine that the bank's procedures ensure that expenses charged to qualified plans meet DOL guidelines for allowable expenses. (Advisory Opinion 2001-01A and Field Assistance Bulletin 2003-3).

4. Determine that the bank has adequate processes for preparing certified statements. Bank service providers must certify, within 120 days after a plan's year-end, information required by the plan administrator to publish an annual report (ERISA 103(a)(2)(B)). In addition to asset holdings and transactions, certified statements should include (if applicable):

   - Information pertaining to party-in-interest transactions;
   - Reportable transactions exceeding 5 percent of the current value of assets; and
   - Past-due leases and loans.

5. Determine that the bank has adequate processes to accurately update asset values for regulatory reporting and distribution purposes.

6. For accounts with participant loans, verify that loans are authorized by the plan document and verify that there is a participant loan policy. Perform testing, as necessary, to ensure loans comply with regulatory restrictions and the loan policy. Ensure that:

   - Maximum loan amount is no more than the lesser of $50,000 or 50 percent of the participant's vested balance, reduced by the highest outstanding loan balance in the past 12 months. (Exception: Participants with a vested balance of $10,000 or less may borrow up to the full $10,000, if allowed under the terms of the plan.)
   - Loan term is no more than five years, unless the loan is for purchase of a primary residence.
   - Loans are based on a level amortization repayment schedule.
   - Loans are available to all participants on a fair and equitable basis (ERISA 408(b)(1)).
   - Loans bear a reasonable rate of return (ERISA 408(b)(1)).
   - Loans are adequately secured (ERISA 408(b)(1)).
   - Delinquent loans are reported periodically to the participant and/or plan administrator, and determination is made of loans "deemed distributions" (IRC section 72(p)).

- Loans deemed distributions (principal plus accrued interest) are reported on IRS Form 1099.

7. If the bank prepares loan documents, ensure that procedures provide for:

   - Preparation of Truth-in-Lending disclosures, to the extent required by Regulation Z, for plans that issue more than 25 loans per year.
   - Loan documents that name the plan (and not the bank, unless in its capacity as trustee) as the lender.
   - Limits on paperless loans to appropriate circumstances (e.g., when there is no need for spousal consent) and maintenance of cancelled checks as original loan documents.

8. Review the bank's overdraft procedures. Overdrafts represent an extension of credit from the bank to a party-in-interest that are prohibited, unless exempted under PTE 80-26, or as an ancillary service under DOL Advisory Opinion 2003-02A.

9. Determine whether the bank has appropriate procedures for escheatment of outstanding checks from qualified plans (see ERISA Opinion Letter 94-41A and DOL Field Assistance Bulletin 2004-2).

10. Ensure that the bank's procedures for searching for and notifying missing participants of terminated defined contribution plans are consistent with the methods specified in DOL FAB 2004-02. When the missing participant cannot be located, ensure that the options the bank uses for distribution of any assets are also consistent with FAB 2004-02.

11. Review the bank's risk management processes for IRAs and determine whether to perform testing of IRAs using the worksheet in Appendix E. Consider the bank's processes for

    - Ensuring that prohibited transactions are avoided.
    - Documenting investment changes.
    - Valuing IRA assets (whether as trustee or custodian).
    - Monitoring each account holder's age and required minimum distributions.
    - Processing distributions and withholding amounts.

- Preparing IRS Forms 5498 (annual informational returns) and Forms 1099 (distributions).

Participant Recordkeeping

Objective: To assess the effectiveness of the bank's risk management practices for participant recordkeeping services, and to determine whether the bank has processes in place to manage transaction and compliance risks related to such services.

Note: If the bank performs recordkeeping, incorporate retirement plan operations procedures into the evaluation of participant recordkeeping. If the bank outsources participant recordkeeping, see "Vendor Management" below.

1. Determine whether the bank has effective procedures in place to balance the recordkeeping system to the core trust accounting system. Procedures should include:

    - Reconciling between the two systems.
    - Verifying that transactions, pricing, and other information received through system interfaces are processed timely and accurately.
    - Verifying that transactions, such as changes to investment allocations or contribution levels, pricing updates, etc., received through system interfaces or direct input, are processed timely. This often involves reviewing reports reflecting VRU (voice response unit) or Internet activity and rejects from daily processing.
    - Evaluating procedures for resolution of reconciling differences. Outstanding items should be aged and escalated.
    - Ensuring that there is a process for balancing participant statements to core accounting statements.

2. Verify whether the bank regularly receives updated participant information. Information may be obtained in the form of annual census information for traditional balance forward plans, or may be provided with each payroll/contribution for daily valued plans.

3. Determine whether the bank monitors the age of participants and informs the plan administrator of participants reaching the age for

required minimum distributions. The nature of the arrangement with the client may determine how/whether this duty is performed.

4. Verify that an analysis of forfeited plan assets is performed at least annually. Procedures for determining proper treatment of forfeited amounts will require reference to the plan document, and in some cases direction from the plan administrator.

5. Review the bank's procedures for handling late contributions. Verify that the bank has a process for addressing situations where plan contributions are not made as soon as administratively feasible.

6. Review the bank's procedures for handling distribution of plan benefits Verify that the bank has distribution procedures that include:

   - Review of distribution directions from authorized individuals or the plan administrator.
   - Documentation of calculations used to determine the applicable distribution amount.
   - Payment to the appropriate participant and/or beneficiary, or rollover to another qualifying plan or IRA.
   - Legal review for any distributions to a QDRO.
   - Review of any fees charged to a participant.

7. If required by the agreement with the client, verify that compliance tests are performed and results reported to the client. Preliminary reports may be run to identify potential issues, such as excess contributions. Tracking mechanisms should be in place to ensure that IRS Form 5500 series reports are submitted when the client has contracted for this service. Also review procedures for preparing summary plan descriptions and/or summary annual reports, if the bank provides these services.

Vendor Management

Objective: To determine whether the board and management have established effective processes to manage services provided by third-party and affiliated service providers.

1. When the bank contracts with third parties to provide retirement plan services, determine the adequacy of the bank's selection and monitoring processes. For affiliated service providers, similar negotiation and oversight processes are needed. Refer to OCC Bulletin 2001-47, "Third-Party Relationships: Risk Management Principles," for guidance. Consider the bank's processes for:

   - Vendor due diligence reviews.
   - Contract negotiations and approvals.
   - Vendor monitoring, including the frequency and quality of information reviewed.
   - Identifying personnel to serve as the points of contact with the vendor, and to conduct ongoing monitoring.

2. For data processing services, determine whether the board or a designated committee reviews the vendor's financial information annually. See the FFIEC's "Outsourcing Technology Services" IT Examination Handbook for guidance.

Objective: To consolidate the conclusions and recommendations from retirement plan services examination activities into final conclusions on the quantity of risk and quality of risk management.

1. Obtain conclusion memoranda and other risk assessment products from completed examination procedures. Ensure that conclusions and recommendations are accurate, supported, and appropriately communicated.

2. Finalize quantity of risk and quality of risk management conclusions for input into the following, as applicable:

    - Core knowledge database.
    - Core assessment standards (CAS).
    - Risk assessment system (RAS).
    - Uniform Interagency Trust Rating System (UITRS).
    - CAMELS.
    - Report of examination.
    - Asset Management Profile (for Large Bank exams).

Objective: To communicate examination findings and initiate corrective action, if applicable.

1. Provide the asset management EIC the following information, if applicable:

    - Conclusions for quantity of risk and quality of risk management (CAS, RAS, UITRS).
    - Draft report of examination comments.
    - Matters requiring attention (MRA).
    - Potential material violations of ERISA that may require referral to the DOL, pursuant to OCC Bulletin 2006-24, “Interagency Agreement on ERISA Referrals.”
    - Violations of law and regulation, corrective actions, and management commitments.
    - Other recommendations made to bank management.

2. Discuss examination findings with the asset management EIC and adjust findings and recommendations as needed. Contact the supervisory office before the exit meeting with management if the retirement plan services area exhibits significant weaknesses or concerns, such as:

   - The area is less than satisfactory.
   - The institution's policies, procedures, or controls have not proven effective and require strengthening.
   - The UITRS compliance assessment shows significant weakness.
   - The exam findings are likely to contribute to a UITRS composite rating of 3 or worse.
   - The level of any risk is moderate and increasing because of retirement plan services.
   - The level of any risk is high because of retirement plan services.

3. Hold an exit meeting with appropriate fiduciary committees and/or other risk managers to communicate examination conclusions, and obtain commitments for corrective action, if applicable. Allow management time before the meeting to review draft examination conclusions and report comments.

4. Prepare appropriate comments for the asset management examination conclusion memorandum. Include the following, as applicable:

   - The objectives and scope of completed supervisory activities;
   - Overall conclusions, recommendations for corrective action, and management commitments and time frames; and
   - Comments on any recommended administrative actions, enforcement actions, and civil money penalty referrals.

Objective: To finalize retirement plan services examination activities in the current supervisory cycle and determine the appropriate examination strategy for the subsequent supervisory cycle.

1. Prepare an updated supervisory strategy for retirement plan services and provide it to the asset management EIC for review, approval, and submission to the EIC.
2. Prepare a memorandum or update work programs with any information that will facilitate future examinations.

3. Organize and reference work papers in accordance with OCC guidelines.

As of January 6, 2012, this guidance applies to federal savings associations in addition to national banks.*

Appendix A: Types of Retirement Plans

(Congress periodically changes the applicable dollar amounts, percentages, and employee age requirements for the various retirement plans discussed in this section through amendments to the IRC and ERISA.)

Employee Benefit Pension Plans

ERISA defines an employee pension benefit plan as any plan, fund, or program that is established or maintained by an employer or employee organization and that provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of employment or beyond.

An employer-sponsored retirement plan can be either a qualified plan or a non-qualified plan. A qualified plan, one that "qualifies" for special tax treatment under Section 401(a) of the Internal Revenue Code, provides the following tax advantages to the employer and the employee:

- Employer contributions to the accounts of plan participants are not taxable to plan participants until they are withdrawn;
- Employer contributions to the plan are immediately tax deductible, up to specified limits;
- Employees may be able to contribute salary to the plan on a pre-tax basis;
- Employer and employee contributions and investment earnings accumulate tax-deferred or tax-free in a tax-exempt trust fund; and
- Certain favorable tax treatments are available when the plan ultimately distributes benefits to plan participants.

Not only corporations but also self-employed persons can establish qualified retirement plans.

To qualify for favorable tax treatment, a retirement plan must meet certain standards including:

- Adequate, nondiscriminatory coverage of employees;
- Minimum vesting requirements;
- Minimum distribution requirements; and
- Nondiscriminatory contributions and benefit accruals.

Qualified retirement plans are categorized as defined benefit or defined contribution plans. The difference between the two is in how contributions and distributions are made. Defined benefit plans, if they are in the private sector, do not usually require participants to contribute, and thus have come to be known as "fully funded" plans. All defined benefit plans, private and public, determine benefits by a formula set forth in the plan. Defined contribution plans, in which each participant has an individual account, determine benefits solely from the amounts contributed and investment gains and losses allocated to the individual account.

Because qualified retirement plans cannot discriminate in favor of highly compensated employees, nonqualified plans have been created to attract, retain, reward, and supplement the income of higher paid employees. A nonqualified plan, funded through a vehicle such as a Rabbi Trust, defers compensation, including most forms of executive or incentive compensation, or otherwise provides benefits payable at retirement or termination of employment. It does not qualify for favorable tax treatment.

Master and Prototype Plans

When a bank provides retirement plan services to a defined benefit or defined contribution plan, the bank's file will generally include documents that specify whether the retirement plan is a "master" or "prototype" plan. Master and prototype plans provide employers with alternatives to preparing custom documents for their specific employee benefit plan(s). Use of master and prototype plans streamlines the process to gain IRS approval of the form of the plan. While there is no legal requirement to request a Letter of Determination from the IRS that states that they approve a plan as to form, making the request is a standard risk management practice for master and prototype plans, and for custom plan documents.

A ***master plan*** is a form of qualified plan typically established by a sponsoring financial institution. The plan is preapproved by the IRS and is then made available to employers for adoption. Under a master plan, the sponsoring organization establishes a single funding medium (i.e., trust or custodial account) for joint use by all adopting employers. The plan consists of three parts:

- A basic plan document, which is identical for all the employers that adopt the plan;
- An adoption agreement, which generally contains options that an employer may select that relate to eligibility, vesting, and contribution or benefit levels; and
- A trust agreement under which all participating plan investments are held.

The employer executes an adoption agreement to establish a plan using the master plan document. The financial institution, as the sponsoring organization, files the plan document form, the adoption agreement, and the trust agreement with the IRS and asks for an opinion that the master plan is acceptable to the IRS as a qualified plan and meets all the latest IRS 401(a) requirements.

A ***prototype plan*** is similar to a master plan except that the sponsoring organization establishes a separate funding medium for each adopting employer. Prototype plans are much more prevalent in the retirement plan services industry than master plans. In addition to financial institutions, law firms and accounting firms are common sponsors of prototype plans.

Master or prototype plans may use either ***standardized*** or ***non-standardized*** adoption agreements. An employer that adopts a standardized DC plan may generally rely on the sponsoring organization's IRS opinion letter and does not need to secure a separate determination letter. While a non-standardized plan provides an adopting employer more choices with regard to plan design, it also creates the potential for a plan to become discriminatory. Employers may request a determination letter from the IRS regarding non-discrimination issues.

Defined Benefit Pension Plans

Standard defined benefit pension plans (DB plans) guarantee a specific or determinable benefit to participants at retirement. Eligibility for retirement is generally established by a formula that is based upon factors such as employee's age and years of service. DB plans require the sponsoring employer to contribute over a period of years the amounts necessary to fund those benefits. Funding policies for DB plans are complex because they must address the issue of liabilities (both accumulated and projected) in the form of benefit payments, and determine how these liabilities will be funded through

contributions and the expected return on investment of these funds. Because DB plans guarantee a certain level of benefit, the employer is required to make up the shortfall through additional contributions if investments do not perform as expected. While a sponsoring employer may decide to freeze some or all of the benefits associated with its DB plan, ensuring compliance with ERISA's requirements (e.g., notices, distributions, nondiscrimination rules, and benefit eligibility) remains an ongoing issue for a bank that serves in a fiduciary capacity for that frozen plan.

ERISA created the Pension Benefit Guarantee Corporation (PBGC) to provide a federal insurance program that insures participants against the loss of benefits arising from the complete or partial termination of their pension plan by their employers. Plan participants, especially those that are highly compensated, may not be insured for their total plan benefits. These insurance benefits are funded by premiums paid by plans covered by the program. With minor exceptions, all DB plans are covered.

Cash balance plans. Cash balance plans and other "hybrid" plans are a form of DB plan having attributes of both DB and DC plans. Unlike traditional DB plans, in which an employer aggregates assets, cash balance plans establish individual accounts for each participating employee. Traditional DB plans define an employee's benefit as a series of monthly payments for life to begin at retirement; by contrast, cash balance plans define the employee's benefit using a stated hypothetical account balance that may be used to purchase an annuity. Like other DB plans, cash balance plans have minimum funding standards. Employer contributions are determined actuarially to ensure that the plan's funds (the cash balance) are sufficient to provide the promised benefits.

Defined Contribution Pension Plans

DC pension plans, or eligible individual account plans, do not promise or guarantee a specific benefit. Each participant has an individual account under the plan and is entitled only to the amount in his or her account at retirement age. Some plan members access funds before they retire or before they reach retirement age; such drawdowns are potentially subject to tax penalties. The amount of an employee's benefit is based upon the cumulative net contributions, distributions, income, expenses, gains or losses in that participant's account. In some instances, plan participants may also benefit from forfeitures resulting from employees who left the plan prior to

vesting. Contributions are based on criteria established in the plan. Company contributions may be based on a percentage of profits of the company, the salary of a participant, or other factors. Some plans allow employees to contribute a percentage of their salary. Defined contribution plans are not insured by the PBGC. There are several types of DC plans, as described below.

In **profit-sharing plans**, the employer contributes to the plan each year an amount determined at the employer's discretion or based on a formula in the plan. They typically allocate the contribution, pro rata, according to the compensation paid to each participant. While these plans are called "profit sharing," the company need not make a profit to contribute to the plan.

401(k) plans are individual account plans. The employee may direct the employer to contribute part of the employee's salary to his or her account. Known as "elective deferral contributions," these amounts are usually a percentage of compensation. Subject to certain limits, elective contributions are made on a pre-tax basis. These employee contributions, up to a maximum of $15,500 per year (as of 2007) that will be periodically adjusted for inflation increases, as well as an additional maximum "catch-up" amount of $5,000 (as of 2007) per year for persons age 50 and over (which will be periodically adjusted for inflation increases), are excluded from the employee's gross income for the year in which they are made and are not subject to taxation until distributed. Like other profit-sharing plans, 401(k) plans may include employer stock as one of the investment options. In addition to employee deferral contributions, the employer may make profit-sharing or matching contributions. The employer's contribution is often determined by a matching formula (e.g., the employer contributes $1 for each $1 contributed by the employee, to a maximum of 3 percent of salary). Employer contributions may be in cash or in company stock, as provided in the plan document.

404(c) plans are individual account plans (similar to 401(k) plans) that are designed to take advantage of a safe harbor provided under ERISA 404(c). ERISA 404(c) plans allow each participant to exercise control over the assets in his or her account. Although the participants are not considered fiduciaries, the trustees and other fiduciaries will be relieved from liability for losses resulting from the participant's exercise of control, provided the following stated conditions are met:

- Plan participants must have the opportunity to exercise control by investing their accounts among a broad range of investment alternatives. At least three investment alternatives must be provided, each of which is diversified and has materially different risk and return characteristics. In practice, the three alternatives are generally the following types of investment vehicles:
  - A “no-risk” investment,
  - A stock investment (employer stock may be a choice, but special requirements apply); and
  - A fixed-income investment.

- A plan sponsor must provide a plan participant the opportunity to make investment changes with a frequency that is appropriate to the market volatility of the investment alternatives. Plan participants must be able to make changes to at least three of the investment vehicles no less than once a quarter.

- If an investment vehicle permits investment changes more often than quarterly, the participant must have the ability to immediately roll the proceeds into another plan investment vehicle that is a low-risk, liquid investment choice. Special provisions pertain to investments in stock of the employer/sponsor.

- Plan participants must be given sufficient information to make informed investment decisions. The plan’s sponsors must make specific disclosures about the plan itself, as well as each authorized investment alternative.

Fiduciaries that do not comply with 404(c)’s specific requirements may be liable for damages resulting from participants’ investment choices.

Money purchase pension plans (MPPPs) are plans that require an employer to declare and contribute a specific percentage of eligible employees’ compensation to the plan each year. Employers are obligated to fund the plan, and are subject to the imposition of a penalty tax if required contributions are not made. The advantage offered by MPPPs is that an employer, such as a small business, may contribute the lesser of 25 percent of compensation or $44,000, to an employee’s MPPP account. These contributions are tax deductible by the employer and accumulate on a tax deferred basis until withdrawn at retirement.

Target benefit plans are individual account plans that are a hybrid of a money purchase plan and a defined benefit plan and are intended to provide a "targeted" benefit upon retirement. They are like DB plans in that the employer contributions to each participant account are established through a DB formula calculated by an actuary. They are like typical DC plans in that there are no guarantees that the targeted benefit will be paid at retirement. If the earnings of the fund differ from those assumed, it increases or decreases the benefits payable to the participant, instead of causing an increase or decrease in employer contributions. In this regard, a target benefit plan operates much like a MPPP. The difference is that with a MPPP, contributions for identically compensated employees are the same even though their ages differ; in a target benefit plan, age is one of the factors that determine the size of the contributions.

Employee stock ownership plans (ESOPs) are DC plans established to invest primarily in employer stock. A company sets up a trust, into which it contributes either new shares of its own stock or cash to buy existing shares. As discussed in greater detail below, if the trust borrows money to buy new or existing shares, it is known as a leveraged ESOP. Regardless of how the plan acquires stock, company contributions to the trust are tax-deductible, within certain IRC limits. Shares in the trust are allocated to individual employee accounts. The ESOP plan document specifies whether an employee leaving the company receives the vested balance in stock or cash. If it is in stock, the company must agree to buy it back from the employee at its fair market value (unless there is a public market for the shares). In private companies, employees must be able to vote their allocated shares on major issues, such as closing a plant or relocating employees. In public companies, employees must be able to vote on all issues.

When an ESOP purchases employer securities that are not publicly traded, including convertible preferred stock, the stock must be valued by a qualified independent appraiser, and it must be reappraised at least annually thereafter. Appraisals are also required at the time of significant transactions, e.g., transactions with major shareholders. The DOL imposes a high standard for appraisals, and there have been a number of court cases that pertain to the proper valuation of employer securities. Because of the elevated risk associated with acting as trustee for an ESOP, bank fiduciaries are cautioned to exercise care when determining whether appraisers and their appraisals are independent and competent.

In a leveraged ESOP, the ESOP borrows money from a bank (which may also be the trustee bank) or other qualified lender. The company usually guarantees that it will make contributions to the trust to enable the trust to amortize the loan on schedule. Alternatively, the parties may agree that the company will borrow directly from the lender and make a loan to the ESOP. There are specific exemptions from ERISA's prohibited transaction rules for loans to leveraged ESOPs. These exemptions require that any shares of qualifying employer securities that are used as collateral for such a loan be held in a segregated account. The employer makes annual contributions to the plan that are used to fund ESOP loan payments. The shares held as collateral are released and allocated to participants as the loan is paid off.

Specific ESOP requirements are found in 26 CFR 54.4975-11.

403(b) plan. Established under IRC section 403(b), this type of DC plan is a tax-sheltered or a tax-deferred annuity program. A 403(b) is limited to the employees of educational, religious, or charitable organizations. The maximum contribution rules and withdrawal privileges for a 403(b) are similar to those of a 401(k) plan. Like the 401(k), pre-tax contributions and earnings remain tax free until withdrawn.

There are two main differences between a 401(k) and 403(b) plan. First, unlike the 401(k) plan, investment options in the 403(b) plan are limited to annuities and mutual funds (except for church plans). Second, the 403(b) plan permits additional contributions under certain conditions that would otherwise exceed the normal 401(k) annual limit.

A **457(b) plan** is a "non-qualified" retirement plan established for the benefit of state and local government employees, or the employees of tax-exempt organizations. In 2007, 457(b) participants could make contributions (elective or non-elective) of up to $15,500 (an amount that will be periodically adjusted for cost of living increases). Governmental participants may make additional contributions beginning in the year they attain age 50. Until withdrawn, these contributions and all earnings remain untaxed. The 457(b) plan assets of tax-exempt employers are subject to the claims of the employer's creditors, but those of plans sponsored by governmental entities are not. Plan distributions may occur at retirement, on separation from employment, as the result of an unforeseeable emergency, or at death. Distributions are subject to immediate taxation at ordinary income tax rates.

Proceeds from plans of tax-exempt organizations are ineligible for transfer to an IRA.

A **Keogh (HR-10) plan** is a qualified retirement plan established by the Self Employed Individuals Tax Retirement Act of 1962, otherwise known as the Keogh Act, or HR-10. Keogh plans may be set up by self-employed persons, partnerships, or owners of unincorporated businesses. Keoghs may be either DB or DC plans. As DC plans, they may be structured as a profit-sharing, a money purchase, or a combined profit-sharing/money purchase plan. Keogh plans may not authorize loans. Contributions and all earnings accumulate free of tax until withdrawn, generally at retirement. Under normal circumstances, withdrawals prior to age 59 1/2 are subject to a 10 percent distribution penalty in addition to ordinary income tax, however, distributions are eligible for transfer to an IRA.

Simplified employee pensions (SEPs) are "non-qualified plans" defined in IRC section 408(k). A SEP allows a small employer to avoid the complex administration and expense of qualified retirement plans when establishing a retirement plan for employees. Under a SEP, an employer may contribute to IRAs established in each employee's name. Such arrangements are known as SEP-IRAs. An employer's contributions to a SEP are discretionary, and employee vesting is immediate. Employees may withdraw or transfer funds at any time. Because these accounts are IRAs, the amounts held in a SEP-IRA are subject to all IRS rules regarding transfer, withdrawal, and taxation of IRAs. (See IRA discussion below.)

Taft-Hartley plan benefits may be provided under collective bargaining agreements to those union workers who typically move from one employer to the next as specific jobs (such as construction) start and finish. Each Taft-Hartley fund is a trust that typically has an equal number of sponsoring union and management representatives serving as trustees. A Taft-Hartley plan may provide union members with DB or DC benefits, including 401k options, as well as health and welfare benefits. Depending upon the benefits provided, these plans not only require traditional investment management and administration services, but generally require specialized expertise in tax, ERISA, labor and health care laws and regulations.

Individual Retirement Accounts (IRAs)

An IRA is a tax-advantaged personal retirement savings plan authorized under section 408 of the IRC that is available to most persons who receive taxable earned income during the year. There are several types of IRAs for which banks routinely offer services. The most common are described below. While most banks accept IRA assets, bank retirement plan service departments generally focus on rollover IRAs and converted Roth IRAs because smaller accounts are less likely to benefit as fully from the professional retirement plan services banks can offer.

The three most common types of IRAs are traditional IRAs, rollover IRAs (i.e., IRAs funded with proceeds "rolled over" from an employee benefit plan such as a 401(k) plan), and Roth IRAs. Traditional and Roth IRAs funded with annual contributions are generally smaller in size and may be administered on the retail side of the bank if they are held in a custodial capacity rather than as trustee. National banks are very active in servicing rollover IRAs, including ones that are converted to Roth IRAs. IRAs that are funded with rollovers from 401(k) plans may be sizeable and can benefit from professional investment management expertise.

Contributions to an IRA may be tax deductible in whole or in part. Tax-deductible contributions and income earned in a traditional IRA are not taxed until distributions commence. In a Roth IRA, contributions are made on an after-tax basis and qualifying withdrawals, including withdrawals of earnings, are not taxed. In order to retain tax advantages, the IRA owner must not have any personal use of the assets held in the IRA. Should there be such improper use, the account would be disqualified as an IRA, favorable tax treatment would be lost, and the amounts involved would be considered taxable income to the IRA owner.

The IRC requires a bank, broker, or other trustee/custodian to hold the assets of the IRA. The IRC uses the terms "trustee" and "custodian" interchangeably, and custodians of IRAs are considered equivalent to trustees by the IRS and the DOL. However, for purposes of 12 CFR 9, a bank is a fiduciary with respect to an IRA only if the bank is named trustee, exercises investment discretion, or otherwise acts in a "fiduciary capacity" as defined in12 CFR 9.2(e). National banks are required to have fiduciary powers to serve as a trustee for an IRA. They do not, however, need fiduciary powers to act as an IRA custodian.

Traditional IRAs are available to those under age 70 1/2 who have employment compensation (i.e., wages). Non-working spouses are also eligible to contribute to traditional IRAs. Contributions to a traditional IRA are only fully tax deductible to the extent that the employee and any non-working spouse are not covered by a retirement plan at the employee's work. If they are covered by a retirement plan, the deductibility of an IRA is subject to an income test.

An eligible wage-earning individual may contribute up to $4,000 per year ($5,000 in 2008 and adjusted for inflation thereafter) and an additional $1,000 per year catch-up contribution if age 50 or older. A non-working spouse of an eligible individual may also contribute up to those amounts. While anyone may contribute up to the maximum annual amounts to an IRA, based upon their annual wages and retirement plan coverage, they may not be able to deduct some or all of their annual IRA contribution.

Earnings within the traditional IRA grow tax-deferred until withdrawn. Penalty-free withdrawals may begin after age 59 ½. Prior to 59 ½, penalties apply to any withdrawn earnings unless the IRA holder has died, or unless the funds are used for certain eligible expenses (e.g., part of a series of substantially equal periodic payments; health insurance premium payments for unemployed individuals; payments of medical expenses in excess of 7.5 percent of an individual's adjusted gross income; home purchase by a qualified first-time buyer; higher-education expenses; or an IRS levy). Traditional IRA withdrawals must begin when the owner reaches age 70 ½, and taxes are owed on the earnings. In order to ensure that IRA assets, like most retirement assets, are withdrawn and taxed prior to death, the IRC generally imposes an annual required minimum distribution (RMD) based upon life expectancy. Particularly for owners over 70, proper valuation of IRA assets is critical in order to ensure the required RMD is made each year.

The PPA of 2006 made several significant changes to the IRC pertaining to IRA contribution and withdrawal requirements. For example, persons who are at least 70 ½ may make direct transfers of up to $100,000 per year from their IRA to a charity and incur no federal tax obligation for withdrawal of IRA assets. However, any such transfer must have occurred by January 1, 2008.

Roth IRAs were created in 1998. The primary difference between a Roth IRA and most traditional IRAs is that contributions to a Roth IRA are not tax deductible and eligibility is restricted to those whose earned income, as

measured by their adjusted gross income (AGI), falls below income caps established for each of the tax filing statuses. The benefit of a Roth IRA is that earnings are not taxed, and RMDs are not imposed upon a Roth owner, even at age 70 ½.

Until 2010, amounts in traditional IRAs may be converted to a Roth IRA, provided the taxpayer's modified AGI for the transfer year falls below IRC limits (currently $100,000). Transferred amounts must be included in that year's income, but the money transferred is exempt from the customary 10 percent excise tax for IRA withdrawals prior to age 59 1/2. No withdrawal of earnings on the transferred amounts can be a qualified distribution until five tax-years after the transfer. For years 2010 and beyond, the IRC currently includes a provision that eliminates the $100,000 income limitation on Roth conversions.

Rollover IRAs are traditional IRAs set up by individuals who wish to receive a distribution from a qualified retirement plan. While traditional and Roth IRAs are contributory (i.e., they are designed to accept annual contributions subject to IRC limits), a distribution transferred to a rollover IRA is a one-time event that is not subject to any contribution limits. Additionally, the distribution may be eligible for subsequent transfer into another IRA or a qualified retirement plan available through a new employer. To retain this eligibility, the IRA must be composed solely of the original distribution and earnings (i.e., be non-contributory), and the new employer's plan must permit the acceptance of rollover contributions.

Further details on IRA provisions may be found in IRS Publication 590, "Individual Retirement Accounts." See also 26 USC Section 408.

SEP-IRA (See **simplified employee pensions** above**.)**

Savings Incentive Match Plan for Employees (SIMPLE). Established by the Small Business Protection Act of 1996, a SIMPLE may be set up by employers who have no other retirement plan and who have 100 or fewer employees. Employees with at least $5,000 in compensation are eligible to participate. Contributions are immediately vested with the employee, and deposits and earnings in the account accumulate tax free until withdrawn. In general, distributions from a SIMPLE are taxed as are those from an IRA. Unlike an IRA or SEP, however, employees who withdraw money from a SIMPLE IRA within two years of their first participation in the plan will be assessed a

penalty tax on such withdrawals of 25 percent (rather than the customary 10 percent).

Appendix B: ERISA Definitions and Summary

The primary objective of ERISA (as amended by the Pension Protection Act of 2006), codified at 29 USC 1001 et seq., and interpreted through regulations by the Employee Benefits Security Administration of the DOL at 29 CFR 2550, is to protect the rights and interests of employee benefit plan participants and their beneficiaries. ERISA establishes standards for the administration of retirement plans, and the investment of a plan's assets. ERISA consists of four major titles:

- Title I contains definitions and general rules applicable to retirement plans, as well as provisions on fiduciary duty, reporting and disclosure, and enforcement.
- Title II amends the original IRC provisions relating to retirement plans.
- Title III establishes interagency jurisdiction[3] and mandates coordination and exchanges of information between supervisory agencies.
- Title IV establishes the Employee Benefits Security Administration (EBSA), formerly known as the Pension Welfare Benefit Association (PWBA), and the Pension Benefit Guaranty Corporation (PBGC), an insurance fund for defined benefit pension plans that is funded by annual premiums assessed against plans.

The provisions of Title I are of particular interest to national banks offering retirement plan services. Among Title I's requirements for establishing a retirement plan is a written plan detailing the administration of the plan and the assignment of responsibilities for management and administration. Part 4 of Title I of ERISA establishes fiduciary responsibilities. The following pages contain selected definitions from ERISA related to retirement plans and a summary of Part 4.

[3] See OCC Bulletin 2006-24, "Interagency Agreement on ERISA Referrals."

Selected Definitions

Title I - Protection of Employee Benefit Rights; §3 - ERISA Definitions

For purposes of this title:

(2)(A) Except as provided in subparagraph (B), the terms "**employee pension benefit plan**" and "**pension plan**" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program–

(i) provides retirement income to employees, or
(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(7) The term "**participant**" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "**beneficiary**" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit there under.

(9) The term "**person**" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(14) The term "**party in interest**" means, as to an employee benefit plan–

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;
(B) a person providing services to such plan;
(C) an employer any of whose employees are covered by such plan;
(D) an employee organization any of whose members are covered by such plan;
(E) an owner, direct or indirect, of 50 percent or more of–
(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,
(ii) the capital interest or the profits interest of a partnership, or
(iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);
(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);
(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of–
(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,
(ii) the capital interest or profits interest of such partnership, or
(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);
(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent of subparagraphs (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of the Internal Revenue Code of 1986 is permitted to make payments under section 4223 shall be treated as a party in interest with respect to such trust.

(15) The term "**relative**" means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

(16)

(A) The term "**administrator**" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "**plan sponsor**" means –

(i) the employer in the case of an employee benefit plan established or maintained by a single employer,

(ii) the employee organization in the case of a plan established or maintained by an employee organization, or

(iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

(21)

(A) Except as otherwise provided in subparagraph (B), a person is a **fiduciary** with respect to a plan to the extent

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940, such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this title, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained

in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

(26) The term "**current value**" means fair market value where available and otherwise the fair value as determined in good faith by a trustee or a named fiduciary (as defined in section 402(a)(2)) pursuant to the terms of the plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination.

(34) The term "**individual account plan**" or "**defined contribution plan**" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "**defined benefit plan**" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant--

(A) for the purposes of section 202, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 204, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

(38) The term **"investment manager"** means any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2))--

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

Title I – Part 4 - ERISA § 407(d)(5) Definitions of QES and QERP

(4) The term "**qualifying employer real property**" means parcels of employer real property--

(A) if a substantial number of the parcels are dispersed geographically;

(B) if each parcel of real property and the improvements thereon are suitable (or adaptable without excessive cost) for more than one use;

(C) even if all of such real property is leased to one lessee (which may be an employer, or an affiliate of an employer); and

(D) if the acquisition and retention of such property comply with the provisions of this part (other than section 404(a)(1)(B) to the extent it requires diversification, and sections 404(a)(1)(C), 406, and subsection (a) of this section).

(5) The term "**qualifying employer security**" means an employer security which is--

(A) stock,

(B) a marketable obligation (as defined in subsection (e)), or
(C) an interest in a publicly traded partnership (as defined in section 7704(b) of the Internal Revenue Code of 1986), but only if such partnership is an existing partnership as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203).

Summary of ERISA Title 1, Part 4 – Fiduciary Responsibility

ERISA defines a "fiduciary" in ERISA § (3)(21)(a). ERISA establishes specific rules governing the conduct of all plan fiduciaries and specifies certain transactions which are prohibited. The major provisions of Part 4 of Title 1 of ERISA, which establish fiduciary responsibilities, are outlined below in summary form. Examiners should review the complete provisions of ERISA when evaluating a specific fact situation.

ERISA § 401 – Coverage

Not every employee benefit plan is subject to ERISA's fiduciary responsibility rules. Specifically exempted are governmental plans, certain church plans, plans established solely to comply with Workmen's Compensation, unemployment compensation or disability insurance laws, and unfunded non-pension benefit plans.

ERISA § 402 – Establishment of Plan

Every employee benefit plan must be established in accordance with a written plan. Such plan must provide for one or more named fiduciaries that jointly or severally have authority to control and manage the operation and administration of the plan. Every plan must:

- Specify a procedure for carrying out the funding policy of the plan.
- Formally delegate to named fiduciaries responsibility for the operation and administration of the plan.
- Specify the basis for contributions to and payments from the plan.
- Provide a procedure for amending the plan.

Plan sponsors are generally responsible for ensuring that a plan meets the requirements of ERISA.

ERISA § 403 – Establishment of Trust

All assets of an employee benefit plan shall be held in trust by one or more trustees. The trustees shall be either named in the trust instrument or plan document, or appointed by a named fiduciary. The trustee(s) shall have the exclusive authority and discretion to manage and control the assets of the plan, except to the extent that:

- The plan expressly provides that the trustees(s) are subject to the direction of a named fiduciary. In that case, the trustee(s) shall act in accordance with proper directions of such fiduciary, which are made in accordance with the terms of the plan and ERISA.
- Authority to manage assets of the plan is delegated to one or more investment managers.

§ 403(b) provides certain exemptions from the rule that assets be held in trust. For example, assets of a plan that consist of insurance contracts or policies, or other assets held by an insurance company are excluded.

§ 403(c) contains the requirement that the assets of the plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the plan.

ERISA § 404 – Fiduciary Duties

§ 404 outlines four Fiduciary Standards of Care that are discussed within the body of this booklet:

- The Exclusive Purpose Rule.
- The Prudent Expert Rule.
- Diversification.
- Compliance with Plan Documents.

§ 404(c) addresses fiduciary liability with regard to individual account plans where participants exercise control over the assets in their accounts. While the participants are not deemed to be fiduciaries, if the requirements of § 404(c) are met, other fiduciaries shall not be liable for losses resulting from the participant's exercise of control. § 404(c) is also discussed elsewhere in this booklet.

ERISA § 405 – Liability for Breach by Co-Fiduciary

A retirement plan fiduciary may be subject to liability from the acts of another fiduciary. This liability may occur even when the fiduciary is acting in directed or non-discretionary capacity. Private pension plan fiduciaries will be liable under ERISA §405 for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

- If he participates knowingly in, or undertakes to conceal, an act or omission of another fiduciary, knowing such act/omission is a breach;
- If, by his failure to comply with § 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
- If he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts to remedy the breach.

ERISA § 406 – Prohibited Transactions

ERISA § 406(a) prohibits a fiduciary from knowingly causing a plan to engage in transactions with parties in interest that constitute a direct or indirect:

- Sale, exchange or leasing of any property
- Lending of money or other extension of credit
- Furnishing of goods, services or facilities
- Transferring of plan assets to a party in interest or use of plan assets by (or for the benefit of) a party in interest
- Acquiring of plan sponsor's securities or real property. (Special exemptions are included in ERISA §407.)

§ 406(b) prohibits self-dealing by plan fiduciaries:

- Dealing with a plan's assets in his own interest or for his own benefit.
- Acting on behalf of a party whose interests are adverse to the interests of the plan, its participants or beneficiaries in any transaction involving the plan.
- Receiving any consideration for himself from any party dealing with the plan in connection with a transaction involving assets of the plan.

The terms "party in interest" and "fiduciary" are included in the Definitions section of this Appendix.

ERISA § 407 – 10 Percent Limitation with Respect to Acquisition and Holding of Employer Securities and Employer Real Estate by Certain Plans

This section allows a plan to acquire or hold qualifying employer securities (QES) or qualifying employer real property (QERP) under certain circumstances. The general rule, which applies to defined benefit plans, is that a plan may not acquire QES or QERP if, immediately after such acquisition, the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10% of the fair market value of total plan assets. This rule does not apply to eligible individual account plans (i.e. defined contribution plans). ESOPs are exempt from the 10% limitation and are subject to specific ESOP rules.

§ 407(d)(4) and (5) define QES and QERP. There are a number of restrictions on QERP, including the requirement that the real property consist of a substantial number of parcels that are geographically dispersed. The terms "qualifying employer security" and "qualifying employer real property" are included in the Definitions section of this appendix.

ERISA § 408 – Exemptions from Prohibited Transactions

ERISA § 408, as amended by the PPA, contains 20 statutory exemptions, and provides for the Secretary of Labor to establish a procedure pursuant to which exemptions from the prohibited transaction rules may be granted. Statutory exemptions include:

- Investment in employer Securities
- Loans to Employee Stock Ownership Plans (ESOPs)
- Loans to participants
- Investment in bank deposits
- Use of bank's Collective Investment Funds
- Cross-trading and block trading
- Investment advice provided under an eligible investment advice arrangement
- Offering ancillary services

See Appendix C: Prohibited Transactions for further discussion.

ERISA § 409 – Liability for Breach of Fiduciary Duty

Any fiduciary who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by Title 4 shall be personally liable to make good to such plan any losses resulting from the breach. They must also restore to such plan any profits the fiduciary gained through use of plan assets. The fiduciary shall also be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. However, no fiduciary shall be liable for a breach of fiduciary duty that was committed before (s)he became a fiduciary or after (s)he ceased to be a fiduciary.

ERISA § 410 – Exculpatory Provisions; Insurance

Generally, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part is void as against public policy. This does not preclude a fiduciary from purchasing insurance to cover liability for his actions, or a plan or employer from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of an act or omission of a fiduciary (with certain conditions).

ERISA §411 – Prohibition Against Certain Persons Holding Certain Positions

Section 411 prohibits a person convicted of certain crimes, such as embezzlement, bribery or extortion, from serving in any capacity with regard to an employee benefit plan for a period of time after such conviction or the end of their imprisonment. The prohibition applies to both the individual and the hiring party. Penalties include fines up to $10,000, imprisonment for not more than five years, or both.

ERISA § 412 – Bonding

In general, each fiduciary or other person who handles the assets of a plan must be bonded. Corporate fiduciaries with capital of at least $1,000,000 are exempt. For non-exempt parties, the amount of bond is 10% of the assets handled, with a minimum of $1,000 and a maximum of $500,000.

Appendix C: Prohibited Transactions

Prohibited transactions under ERISA rules are transactions that occur as a result of a statutory violation. ERISA's prohibited transaction rules apply to institutions or individuals who are fiduciaries or "parties in interest" to a retirement plan. IRC section 4975 provides for a tax on these prohibited transactions. While IRA accounts are not subject to ERISA, they are subject to penalties for prohibited transactions under IRC 4975. 12 CFR 9 and other applicable laws govern conflicts of interest and self-dealing for non-qualified retirement plans.

ERISA 406 addresses prohibited transactions in two parts. The first part prohibits fiduciaries of plans from causing the plan to engage in transactions with parties in interest. The second part prohibits transactions that may involve self-dealing or other fiduciary misconduct.

ERISA 406(a) prohibits a fiduciary from knowingly causing an ERISA-governed plan to engage in five types of transactions between the plan and parties in interest. These transactions constitute a direct or indirect:

- Sale, exchange, or lease of any property.
- Loan (including any extension of credit).
- Provision of goods, services, or facilities.
- Transfer of plan assets to a party-in-interest (or use of plan assets by or for the benefit of a party-in-interest).
- Acquisition of plan sponsor's securities or real property. (Special exemptions are included in ERISA 407.)

ERISA 406(b) prohibits a fiduciary from:

- Dealing with a plan's assets in its own interest or for its own benefit.
- Acting on behalf of a party whose interests are adverse to the interests of the plan, its participants, or beneficiaries in any transaction involving the plan.
- Receiving any consideration for itself from any party dealing with the plan in connection with a transaction involving assets of the plan.

Prohibited Transaction Exemptions

While the prohibitions of ERISA 406 are extensive, and the penalties can be severe (the IRS may assess an excise tax of up to 100 percent), there are numerous exemptions to the prohibited transaction restrictions.

Types of Prohibited Transaction Exemptions

Prohibited transactions exemptions (PTEs) exempt fiduciaries (or transactions) from restrictions imposed by section 406 of ERISA. There are three types of exemptions: statutory exemptions, class exemptions, and individual exemptions. A complete list of PTEs is available at DOL's website (http://www.dol.gov/ebsa/regs/main.html).

Statutory Exemptions. ERISA 408 contains statutory exemptions, and requires the Secretary of Labor to establish a procedure by which exemptions from the prohibited transaction rules may be granted. The exemption procedures are described in DOL regulations 29 CFR 2570.30 through 2570.52. In addition, ERISA 407 permits a plan to acquire and hold employer securities and employer real property, subject to certain limitations. The statutory exemptions applied most often are discussed later in this section.

Class Exemptions. Prohibited transaction class exemptions (PTCEs or simply PTEs) apply to classes of fiduciaries and transactions. PTEs amount to an administrative expansion of transactions permitted under the prohibited transaction rules and should be considered, together with statutory exemptions and transitional rules, when determining whether a particular transaction is prohibited. Selected PTEs are discussed in the following paragraphs.

Individual Exemptions. An individual PTE applies only to particular transactions or parties, and only the specific party exempted or the parties to the exempted transaction may rely on it. In 1996, the DOL implemented an expedited exemption procedure (EXPRO) in the form of a class exemption (PTE 96-62). Applicants may obtain an individual exemption in as little as 75 days if their application demonstrates that (1) at least two substantially similar exemptions were granted by the DOL in the previous 60 months; (2) the proposed transaction poses little, if any, risk of abuse or loss to the plan; and (3) an independent fiduciary, who will represent the interests of the plan

during the execution and pendency of the transaction, has determined that the proposed transaction is in the interests of the plan and protects the plan and its participants and beneficiaries. EXPRO exemptions are detailed on the DOL's Web site.

Statutory Exemptions

Employer Securities. The investment in employer securities, including own bank or affiliate securities held in the bank's own employee benefit plans, is a prohibited transaction under section 406(b)(1) unless the employer complies with the requirements of ERISA 407.[4] Transactions in employer securities are also subject to ERISA 408(e). Although such investments may be permitted, a bank acting as a trustee or as an investment manager will generally not invest retirement plan assets in qualified employer securities (QES) or qualified employer real property (QERP) unless properly directed by authorized, named fiduciaries. DOL Field Assistance Bulletin 2004-3 provides guidance on a directed trustee's responsibilities with regard to employer securities. A directed trustee is generally not obligated to make an independent determination of the prudence of each transaction. However, if a fiduciary, such as a directed trustee, has knowledge of a fiduciary breach by another fiduciary, it may be held liable as a co-trustee. National banks should use reasonable risk management processes to assess the potential for liability for a breach of co-fiduciary duties under applicable law.

Employee Stock Ownership Plan (ESOP) Loans. ESOPs are designed to invest primarily in "qualifying employer securities."[5] A "leveraged" ESOP is an ESOP that borrows money from a bank or the employer and uses the proceeds of the loan to purchase employer stock. ERISA section 408(b)(3) [see also IRC 4975(d)(3)] exempts a loan to an ESOP from prohibited transaction rules if that loan is primarily for the benefit of participants and

[4] Under ERISA 407, plans may not acquire or hold employer securities or employer real property unless they are qualifying employer securities (QES) or qualifying employer real property (QER). Additionally, plans may not acquire employer securities or employer real property if, immediately after the acquisition, the aggregate fair market value of the investment exceeds a statutory limit of 10 percent of the fair market value of all the assets of the plan. The 10 percent limit in section 407 does not apply to "eligible individual account plans," which include most 401(k) plans and profit-sharing plans [ERISA §407(b)(1)]. PTE 91-38 provides a class exemption when a bank-sponsored CIF acquires QES or QER.

[5] "Qualifying employer securities" means publicly traded common stock of the employer. If the employer has no publicly traded common stock, the ESOP may invest in common stock of the employer so long as it has voting power and dividend rights that are equal to or greater than that of any other class of the employer's common stock.

beneficiaries, and if the loan's interest rate is reasonable. Further, if the plan gives collateral to a party-in-interest for such a loan, the collateral must be QES. Under this exemption, a party-in-interest, such as a bank trustee, may lend money to an ESOP, and a party-in-interest, such as the employer, may guarantee repayment of the loan.

Bank Deposits. When a national bank is a fiduciary or other party-in-interest to a plan, ERISA 408(b)(4) provides a statutory exemption for the investment of plan assets in own bank deposits that bear a reasonable interest rate. The exemption may be used by plans that cover only employees of the bank or its affiliates. Other retirement plans may also use this exemption to invest plan assets in bank deposits. However, a provision in the plan must expressly authorize such an investment, or a fiduciary (other than the bank or its affiliate) that is expressly empowered by the plan to instruct the trustee with respect to such investment must authorize it.

Collective Investment Fund (CIF). ERISA 408(b)(8) [see also IRC 4975(d)(8)] permits a transaction between a plan and a bank's CIF if the investment is a sale or purchase of an interest in the fund under two conditions: the transaction must be specifically authorized by the plan, a trust agreement, or an independent fiduciary, and the bank must receive no more than reasonable compensation. For CIFs that are tax exempt under Revenue Ruling 81-100, authorization, and incorporation by reference of the CIF trust itself, must be adopted as part of the plan. For additional information, see the "Collective Investment Funds" booklet of the *Comptroller's Handbook*.

Ancillary Services. ERISA 408(b)(6) permits a bank to receive not more than reasonable compensation for providing ancillary services to a retirement plan that is consistent with sound banking and financial practice and is in the best interest of the participants and their beneficiaries. Ancillary services include overdraft protection services, discussed in the DOL Advisory Opinion 2003-02A.

Cross-trades. The PPA of 2006 added section 408(b)(19) to ERISA that contains an exemption for an investment manager to cross-trade between ERISA accounts and other accounts managed by the same manager if certain conditions are satisfied. See a summary of these conditions in the explanation of "cross-trades" under "Other Investment Management Risks" in this booklet's narrative section. The PPA also added section 408(b)(15) to

ERISA that allows “block trades” to occur between a plan and a party in interest (other than a fiduciary) so long as certain requirements are met.

Investment Advice. The PPA of 2006 added section 408(b)(14) to ERISA that provides an exemption for the provision of investment advice by fiduciaries to plan participants so long as the advice is through an “eligible investment advice arrangement.” An “eligible investment advice arrangement” is an arrangement that meets certain threshold requirements, such as audit, notice, and disclosure, and either: (a) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the investment of plan assets do not vary depending on the basis of any investment option selected; or (b) uses a computer model under an investment advice program that meets certain specified conditions in connection with the provision of investment advice to a participant or beneficiary. See DOL FAB 2007-01 for more specific guidance.

Participant Loans. Loans made by the plan to parties-in-interest who are participants or beneficiaries of the plan are exempted from the prohibited transaction rules if such loans comply with the provisions of 408(b)(1), IRC 72(p), and other regulatory requirements. The “Operational Control Processes” section of this booklet includes a discussion of participant loan requirements.

Prohibited Transaction Class Exemptions (PTEs)

Proprietary Mutual Funds – PTE 77-4. A bank’s use of investment discretion to invest retirement plan assets in the shares of affiliated investment companies (e.g., mutual funds) constitutes a prohibited transaction. DOL issuance PTE 77-4 covers the purchase or sale by a plan of shares of a registered open-end investment company when the investment adviser of the investment company is also a fiduciary (or an affiliate thereof) with respect to the plan, and is not an employer of any of the employees covered by the plan. PTE 77-4 provides relief from the prohibitions of ERISA 406(a) and 406(b). PTE 77-4 contains various disclosure and approval requirements. Specifically, an independent plan fiduciary must approve the investment in writing, after receiving the following information:

- A current prospectus of the investment company.

- A full and detailed written disclosure of the investment advisory fee and other fees charged to or paid by the plan and the investment company including the nature and extent of any differential between the rates of such fees, the reasons why the fiduciary adviser considers investment in the investment company to be appropriate, whether there are any restrictions on which plan assets may be invested in the affiliated mutual funds and, if so, the nature of such restrictions.
- New disclosures (required if there is any change in any of the rates of fees). The independent fiduciary must approve in writing the continued purchase, sale, and holding of the investment company shares or be allowed to terminate the current arrangement.

A plan is prohibited from paying a bank fiduciary sales commissions (including 12b-1 fees paid for distribution services) in connection with purchases or sales of investment company shares covered by the exemption. The plan also may not pay a bank fiduciary, or its affiliates, additional investment advisory or investment management fees with respect to plan assets invested in the investment company shares. To ensure that this provision is not violated, the plan may either pay a plan-level investment advisory or management fee and receive a credit against its plan-level fee for its pro rata share of investment advisory fees paid by the investment company, or the plan-level fee can be waived for those assets invested in the affiliated mutual fund.

In addition to PTE 77-4, DOL Advisory Opinion 2005-10A allows investment in affiliated mutual funds if there is an offset of all fees received from the fund by the bank against the fees the plan would otherwise pay.

Conversions of Collective Investment Funds to Mutual Funds – PTE 97-41. The exemption permits the conversion of a bank's collective investment fund that holds ERISA assets to a registered investment company (mutual fund) subject to conditions.

Use of Affiliated Brokers – PTE 86-128 (amended 2002). The PTE originally permitted the use of affiliated brokers only if all profits were credited back to the plan. The 2002 amendment allows trustees to use affiliated brokers for plans that have net assets of at least $50 million. To the extent a group of plans maintained by a single employer or controlled group of employers is pooled for investment purposes in a single master trust, those plans would qualify for the exemption as well. The amendment has annual disclosure

requirements requiring a trustee to submit the following information to the independent fiduciary of each authorizing plan:

- The total brokerage commissions paid to brokers affiliated with the trustee;
- The total brokerage commissions paid to brokers not affiliated with trustee;
- Average brokerage commissions paid to affiliated brokers; and
- Average brokerage commissions paid to unaffiliated brokers.

Securities Lending – PTEs 81-6 and 82-63. PTE 81-6 outlines specific conditions under which employee benefit plans may lend securities to banks and broker-dealers that are parties in interest. These conditions include the delivery of suitable collateral from the borrower to the lending plan. In addition, the borrower must not have discretionary authority over the investments of the plan, must deliver financial information to the lending fiduciary, and must execute a written loan agreement. PTE 82-63 authorizes the lending agent to receive reasonable compensation paid in accordance with a written agreement. However, an independent fiduciary must grant prior written approval for the compensation arrangement and may terminate such compensation upon advance written notification.

Appendix D: Fee and Compensation Issues

Fees charged to a retirement plan by a national bank are governed by ERISA 408(b)(2) and 408(c)(2). ERISA permits a bank providing retirement plan services to charge a plan reasonable compensation for services rendered, or to obtain reimbursement of expenses properly and actually incurred while performing its duties with the plan. However, the “reasonable compensation” provisions do not apply to a fiduciary that receives full-time pay from an employer whose employees are participants in the plan; such a fiduciary may not receive any compensation in addition to its pay other than reimbursement for expenses.

Determining a “reasonable” fee requires review of the circumstances for each retirement account. Open negotiation and full and fair disclosure are required to ensure that service providers disclose sufficient information so that plan fiduciaries may make informed assessments concerning the prudence of the arrangements. Service provider compensation should be approved by a fiduciary independent of the service provider to ensure that prohibited self-dealing is avoided.

Because of the potential for conflicts of interest, numerous issuances from the DOL address fees and compensation. Fee transparency and potential conflicts of interest are also of interest to other regulatory agencies, including the SEC. As described in greater detail in the “Conflicts of Interest” booklet of the *Comptroller’s Handbook*, national banks are required to have processes in place to ensure ongoing compliance with 12 CFR 9.12.

Receipt of 12b-1 or Administrative Fees

Some mutual funds pay fees to third parties to defray the cost of shareholder servicing and administrative services. Mutual funds may also pay distribution fees under Investment Company Act Rule 12b-1 (12b-1 fees). When a bank receives such fees, it may use them to reduce the fees charged to the plan sponsor. However, 12b-1 fees are fund expenses that reduce the returns realized by plan participants.

Even if authorized by an independent fiduciary, a bank’s receipt of 12b-1 or administrative fees may violate sections 406(b)(1) and (3) of ERISA. In 1997, DOL provided guidance in Advisory Opinions 97-15A (Frost) and 97-16A (Aetna). The DOL’s conclusions differed given the two fact situations.

According to the Frost letter (Advisory Opinion 97-15A), if a bank as directed trustee is directed, in accordance with section 403(a)(1) or 404 of ERISA, to invest in a mutual fund that pays the bank a fee, the investment would not be considered a conflict of interest. That is, the trustee would not be dealing with the assets of the plan for its own account in violation of section 406(b)(1). The DOL stated that the "mere receipt by the trustee of a fee or other compensation from the mutual fund in connection with such investment would not in and of itself violate section 406(b)(3)."

In this situation, although Frost had discretion with regard to certain plans, the 12b-1 fee arrangements were fully disclosed to the plans' named fiduciaries. In addition, Frost used the 12b-1 fees to offset other fees the plans owed to the bank on a dollar-for-dollar basis and credited any excess 12b-fees to the plans. Opinion Letter 97-15A also states that a trustee that advises a plan in which the assets are invested in mutual funds that pay additional fees to the advising trustee would generally violate the prohibitions of ERISA section 406(b)(1). DOL Advisory Opinion 2005-10A, issued to Country Trust, applies the same concepts in connection with affiliated mutual funds.

In the Aetna letter (Advisory Opinion 97-16A), the DOL opined that a recordkeeper that is not a fiduciary under ERISA could receive 12b-1 fees (without a fee offset) from an outside mutual fund when plan participants direct the investments. The DOL said further that such an arrangement would not violate section 406(b)(3) of ERISA if certain conditions were satisfied.

The DOL stated that a person would not be exercising discretionary authority or control over the management of a plan or its assets solely as a result of deleting or substituting a fund from a program of investment options and services offered to plans, provided that the appropriate plan fiduciary in fact makes the decision to accept or reject the change. In this regard, the fiduciary must be provided advance notice of the change, including any changes in fees received, and must be afforded a reasonable period of time to decide whether to accept the change and, if choosing to reject it, to secure a new service provider. Advisory Opinion 2003-09A, issued to ABN AMRO, applies similar principles in connection with a program of bundled services offered to 401(k) plans by a bank, where the product included a combination of affiliated and non-affiliated mutual funds.

In a 1997 information letter issued to the American Bankers Association (ABA), the DOL confirmed that the principles enunciated in the Frost and Aetna advisory opinions would apply to other banks that receive 12b-1 fees while acting as directed trustees of employee pension plans and providing "bundled services" (i.e., a comprehensive program of administrative, custodial, and investment services by affiliated or non-affiliated entities).

Soft Dollar Arrangements

Broker/dealers not only execute trade orders but also provide other services, such as research. In soft dollar arrangements, a fiduciary or advisor receives these other products and services in exchange for directing its clients' brokerage transactions to the broker/dealer. Since brokerage commissions typically do not segregate these services from the cost of basic order execution, the fiduciary or advisor generally receives these services at no cost. National bank fiduciaries that execute soft dollar arrangements may create a conflict of interest if they use clients' assets to benefit themselves.

The DOL considers soft dollars to be plan assets. National bank policies regarding soft dollars should ensure compliance with ERISA Technical Release 86-1. The limited safe harbor in Section 28(e) of the Securities Exchange Act of 1934 is available only to a fiduciary who exercises discretion with respect to an account and who uses soft dollars to pay for brokerage and research services. If a plan fiduciary does not exercise investment discretion or uses soft dollars to pay for non-research services, the safe harbor is not available and the transaction may violate not only 12 CFR 9.12 but also securities laws and the fiduciary responsibility provisions of ERISA. For additional information on soft dollar arrangements in general, refer to OCC Bulletin 2007-07, "Use of Commission Payments by Fiduciaries," and to the "Conflicts of Interest" booklet of the *Comptrollers Handbook*.

Sweep Fees

A bank's use of fiduciary authority to increase its compensation by determining the timing or amount of plan assets to be swept may constitute a prohibited transaction. However, under appropriate circumstances, sweeps may constitute ancillary services under ERISA 408(b)(6) for which bank fiduciaries may charge additional fees. An opinion of ERISA counsel is recommended prior to assessment of sweep fees.

Float

Banks often maintain general or "omnibus" accounts to facilitate transactions by employee benefit plans. Typically, these accounts hold contributions pending investment directions. In addition, fiduciaries typically transfer funds to a general account prior to issuing checks to make plan distributions or other disbursements. Funds are held in the account, where the bank gains the benefit of float, until checks are presented for payment.

In Advisory Opinion 93-24A, the DOL expressed the view that a trustee's exercise of discretion to earn income for its own account from the float attributable to outstanding benefit checks constituted a prohibited transaction. The trustee that was the subject of the opinion did not disclose the float to employee benefit plan customers. In a subsequent information letter to the ABA, the DOL indicated that "if a bank fiduciary openly negotiated with an independent plan fiduciary to retain float attributable to outstanding benefit checks as part of its overall compensation, then the bank's use of float would not be self-dealing because the bank would not be exercising its fiduciary authority or control for its own benefit. Therefore, to avoid problems, banks should, as part of their fee negotiations, provide full and fair disclosure regarding the use of float on outstanding checks."

More recently, the DOL issued Field Assistance Bulletin 2002-3, providing additional guidance concerning the obligations of plan fiduciaries and service providers regarding float. The bulletin reiterated that float should be regarded as part of the service provider's compensation and should be fully disclosed. To avoid possible self-dealing violations of section 406(b), both plan fiduciaries and plan sponsors must avoid giving the service provider discretion to affect the amount of compensation received from float.

Fees on Own Bank Plans

The general rule under ERISA is that the payment of fees from a plan to its fiduciary, such as a bank that sponsors its own pension plan, is a prohibited transaction under ERISA 406(b). However, ERISA section 408(c)(3) provides that if a fiduciary provides services to a plan without the receipt of compensation or other consideration (other than reimbursement of direct expenses properly and actually incurred in the performance of such services), the provision of such services does not, in and of itself, constitute a

prohibited act described in section 406(b) of ERISA. Payment of fiduciary fees to the bank sponsor of a plan is addressed in DOL Advisory Opinion 79-49.

Appendix E: Worksheets

Pension Plans

ESOPs

IRAs

Pension Plan Worksheet

BANK NAME:	ACCOUNT NAME:	ACCOUNT NUMBER:
ACCOUNT TYPE:	BANKS CAPACITY:	LAST REVIEW DATE:
ACCOUNT OFFICER:	INVESTMENT OFFICER:	INVESTMENT AUTHORITY:
DATE OF PLAN/AMENDMENT:	CURRENT MARKET VALUE:	

GENERAL ADMINISTRATIVE MATTERS

	Yes	No
1. Is an appropriate governing instrument on file (e.g., plan document, adoption agreement, trust agreement, investment management agreement, and custody agreement)? If the bank is trustee, it should have a copy of the plan.		
2. Is there an IRS letter of determination (LOD) regarding the tax-exempt status of the plan? (While LODs are not required, it is considered sound business practice to request them for custom and non-standardized prototype plans.)		
3. Prior to formal approval of a new account, was there an adequate pre-acceptance review (per 12 CFR 9.6(a)) to ensure that the bank will be able to appropriately administer the account at a reasonable profit? Was customer due diligence performed per BSA/AML guidelines?		
4. Is account coding accurate with regard to account type, capacity, investment authority, etc.?		
5. Is a list of authorized signers on file?		

ASSETS/INVESTMENT MANAGEMENT

6. Who has investment authority as described in the plan?

Bank _____ (Go to question 7)
Investment Manager ______ (Go to question 6a)
Employer/Named Fiduciary ______ (Go to question 7)

INVESTMENT MANAGER	Yes	No
6a. Does the plan provide for naming an investment manager?		
6b. Is an investment manager named? If so, who is it? ______________________________		
6c. Is the investment manager registered under the Investment Advisors Act of 1940?		
6d. Has the investment manager acknowledged in writing that it is a fiduciary with respect to the plan? (May be in form of a Qualified Professional Asset Manager (QPAM) letter.)		
6e. Has an ad hoc agreement been executed by the bank and investment manager, if the manager will be affirming trades?		
Go to question 10.		

INVESTMENT POLICY STATEMENT (Describe, including any unique restrictions or provisions):

Objective:	%	$	Actual:	%	$
Equity			Equity		
Fixed Income			Fixed Income		
Other			Other		
Liquid			Liquid		
Total			Total		

	Yes	No
7. Are plan investments in accordance with plan documents and, for discretionary accounts, investment objectives? (ERISA Section 402(b)(1))		
8. Are plan investments adequately diversified (ERISA Section 404(a)(1))?		
9. For discretionary accounts, are assets held on approved lists or is the decision to retain them documented and supportable?		
10. Are all assets, including unique assets and assets not widely traded, priced timely and accurately?		
11. Are proxy voting responsibilities carried out appropriately in accordance with plan documents and per DOL Interpretive Bulletin 94-2?		

QUALIFYING EMPLOYER SECURITIES AND QUALIFYING EMPLOYER REAL PROPERTY

		Yes	No
12.	If the account is a DB plan, are qualifying employer securities (QES) no more than 10% of the market value of the plan? (10% test applies as of the date of acquisition of the QES/QERP.)		
13.	If the account, other than a DB plan, is eligible to invest in QES and QERP, is the amount of QES and QERP held not more than the level allowed by the plan, or 10% of the market value if not noted in the plan (ERISA 407)? (Test applies as of acquisition date.)		
14.	If QES are held, what are the plan's requirements for determining the fair market value? ____________________		
15.	If the QES is not publicly traded, is there a proper valuation and review?		
16.	Is voting of QES carried out properly? This should include pass-through voting and trustee voting of unallocated/unvoted shares.		

BANK/AFFILIATE PRODUCTS AND CONFLICTS OF INTEREST

		Yes	No
17.	If the plan holds deposit accounts of the trustee or affiliates, is the rate of interest reasonable and is the investment expressly authorized by the plan or an authorized party?		
18.	If the plan participates in own bank CIFs, is this participation expressly authorized by the plan, and if the plan participates in any CIFs that are tax-exempt under RR 81-100, are the terms of the CIF incorporated by reference? (The CIF must be tax exempt under RR 81-100 if agency accounts are to participate.)		
19.	If the bank recommends use of bank-affiliated mutual funds, have the requirements of PTE 77-4 on prohibited transactions been satisfied? An independent fiduciary must be given a prospectus and written disclosure of the arrangement and the fees involved (including notification of any changes in fees), and the fiduciary must approve these documents. Investment management fees may not be charged at both the plan and fund level. Alternatively, the bank may perform a dollar-for-dollar offset of fees as described in AO 2005-10A.		
20.	If the plan holds own-bank stock, is the stock either in a directed account or is it a segregated asset under the control of a named fiduciary with investment discretion?		

	Yes	No
21. If the bank receives 12b-1 or shareholder servicing fees, did the bank consult with counsel before entering into such an arrangement, and is the arrangement conducted in compliance with applicable guidance from the DOL? When investments are directed by another fiduciary, and the bank's receipt of these fees is disclosed, there is no prohibited transaction. If the trustee has discretion, there should be a dollar-for-dollar offset or credit to the plan. 22. If an affiliated broker/dealer is used, are transactions allowable? Were transactions directed by a QPAM? Or if the bank is discretionary trustee, were all profits credited to the plan, or does the plan have assets greater than $50 million and does it disclose annually all affiliated and unaffiliated brokerage commissions, per PTE 86-128 (rev.)?		

ACCOUNT REVIEWS

	Yes	No
23. Are account reviews adequately documented? Address both 12 CFR 9.6 reviews for discretionary accounts, and the monitoring of committee directed trusts.		

ACCOUNT ACTIVITY & OPERATIONS

	Yes	No
24. If the bank is trustee, is the bank familiar with the funding policy for the plan, and does it have reasonable processes for determining whether the plan sponsor makes contributions per the funding policy? Participant contributions must be received as soon as it is administratively feasible for the plan sponsor to segregate and deposit the contributions, but no later than the 15th business day of the month following the month in which the funds were withheld. 25. Are distributions to participants processed appropriately? Consider approval of the plan administrator, withholding of taxes as required and/or requested, and payment directly to the participant (IRA rollovers directly to the IRA trustee/custodian). Hardship withdrawals and payments subject to a QDRO should be given a higher level of review by the bank. 26. Do other distributions (e.g., payment of plan expenses) meet DOL guidelines for allowable expenses? (Advisory Opinion (AO) 2001-01A)		

		Yes	No
27.	If the plan allows for loans to participants, do the loans comply with ERISA and the IRC? If authorized in the plan, one can loan up to 100% of the vested interest to a maximum of $10,000. Otherwise, unless there are greater restrictions in the plan, the maximum loan amount is 50% of the participant's vested interest to a maximum of $50,000, after lookback. Other requirements are level amortization at least quarterly, maximum term of 5 years (unless loan is to buy primary residence) and reasonable interest rate, and spousal consent for plans whose normal form of payment is a joint and survivor annuity.		
28.	Is the appropriate named fiduciary notified of any loan delinquencies, and are there procedures for deeming loans as distributions? New rules for deemed distributions were issued 7/2000 and apply to loans made on or after 1/1/02. These state that the cure period within which a loan can be brought current cannot exceed the end of the calendar quarter that follows the calendar quarter in which the missed installment payment was due. For loans made before 1/1/02, plan administrators must apply a reasonable, good faith standard of compliance.		
29.	Has the bank provided certified annual statements within 120 days of plan year-end?		
30.	If the bank provides discrimination testing or preparation of annual Form 5500 series, was the service timely?		
31.	Are forfeiture amounts maintained and applied per the plan?		

OTHER

		Yes	No
32.	Does the bank have a reasonable process for identifying prohibited transactions?		
33.	Have there been any party-in-interest transactions (ERISA 406)?		
34.	If the bank is a co-fiduciary, has it taken reasonable steps to avoid breaches of fiduciary duty by other co-fiduciaries?		
35.	Has the account been administered solely in the best interest of plan participants, and to defray administrative costs?		

Comments/Problems Noted

Employee Stock Ownership Plans (ESOP) Worksheet

(To be completed in addition to the Pension Plan Worksheet)

ACCOUNT NAME	ACCOUNT NUMBER	EXAMINER INITIAL

	Yes	No
1. Does the plan document state that it is the intent of the plan to invest primarily in QES?		

List transactions in QES, if any:

Date	Security Type	BOT / sold	Trans. Price	Val. Date	Val. Price

	Yes	No
2. If QES was purchased from or through a disqualified person, was each transaction supported by an independent valuation?		
3. For non-publicly traded QES, did the bank review valuations at least annually, and did the bank determine that each transaction with a disqualified person was adequate?		
4. Are voting rights attached to the QES passed through to the participants? [IRC 409(e)]		
5. Is there a put option requiring the employer to buy back non-traded QES after distribution to the participants? [54.4975(b)(10), IRC 409(h)]		
6. If this ESOP is an S-ESOP, is it in compliance with IRC Sec 409 limits on allocation to disqualified persons?		

If the ESOP borrowed to acquire QES (“leveraged ESOP“), complete the following:

7. Is the loan made at least on the same basis as one between independent parties?		
8. Is the loan from the trustee bank?		
9. Were the loan proceeds used to purchase QES? [54.4975-7(b)(4)]		
10. Is the loan without recourse against the ESOP? [54.4975-7(b)(5)]		
11. Has a segregated account been established to hold collateral QES?		
12. Is collateral QES released from encumbrance in amounts consistent with the regulations to avoid plan disqualification? [54.4975-7(b)(8)]		

INSTRUCTIONS / EXPLANATIONS

QES VALUATIONS – For transactions between a plan and a disqualified person, the QES value must be determined as of the date of the transaction. For non-traded QES, the bank should review the adequacy of the valuation and the independence of the stock appraiser.

DISQUALIFIED PERSON – The definition of disqualified person is essentially the same as the definition of party-in-interest except for a few technical differences. Definition of parties-in-interest is in ERISA 3(14). See IRC 4975(e)(2) for the definition of disqualified person.

FOR S-ESOPS – If disqualified persons own 50% or more of the equity of the S corporation, then such disqualified persons cannot receive an allocation in the ESOP. If the ESOP was established before 3/14/01 and such ESOP-owned shares are in an S corporation (i.e., the S election was effective), these prohibited allocation rules take effect for plan years beginning on or after 12/31/04. For such calendar year plans, these rules will take effect in 2005. If there was no S-ESOP established before 3/14/01, the rules are effective for plan years ending after 3/14/01. For such calendar year plans, these rules take effect in 2001.

LOAN FROM TRUSTEE BANK – If the loan is from the trustee bank, a potential conflict of interest exists. The bank should be aware that it may have to resign from the account if the company that has established the ESOP begins to have financial problems. If the company cannot pay the contributions needed to make the loan payments, the bank is caught between foreclosing on the loan and acting as trustee for the best benefit of the participants in the ESOP. The bank should resign before this situation occurs.

USE OF LOAN PROCEEDS – The proceeds of an exempt loan must be used, within a reasonable time, only to acquire QES, repay such loan, or repay a prior exempt loan.

LOAN WITHOUT RECOURSE – An exempt loan must be without recourse against the ESOP, but may be secured by the stock purchased with the proceeds of the loan.

COLLATERAL QES – QES acquired with the proceeds of an exempt loan must be maintained in a suspense account while encumbered as collateral against the loan. As the loan is repaid, the collateral QES must be released from encumbrance according to the rules stated in the regulation.

VOTING RIGHTS – QES – Under IRC 409(e)(2) and (e)(3) each participant or beneficiary in the plan must be entitled to direct the plan as to the manner in which QES allocated to their individual accounts is voted.

PUT OPTION – QES acquired with the proceeds of an exempt loan by an ESOP after 9/30/76, must be subject to a put option, exercisable only by the participant, his or her beneficiary, or estate, if it isn't publicly traded when distributed or if it is subject to a trading limitation when distributed.

IRA Worksheet

Bank Name Charter No.	Examination Date	Examiner Initials

Account Name ____________________ Date Opened______________________

Account Number____________________ Date Bank Acquired_________________

Administrator______________________ Bank's Capacity ___________________________

Does the account have an investment advisor? If Yes, who? __________________________

Circle Account Type: Traditional IRA Rollover IRA Roth IRA Other

Does the bank have an executed IRA document/adoption agreement? Yes___ No___	Beneficiary Designation Yes____ No___ Spousal Consent Yes___ No___ N/A____

Account Administration	
1. Was adequate pre-acceptance review and account approval performed if account is new? (Include BSA/OFAC/USA PATRIOT Act compliance.)	Yes___ No___N/A___
2. Are assets allowable for IRAs? IRAs cannot hold collectibles and loans to the account holder are prohibited.	Yes___ No___
3. Are all IRA assets (in both trust and custodial IRAs) valued at least annually?	Yes___ No___
4. Is the account set up to generate an annual IRS Form 5498?	Yes___ No___
5. If periodic contributions were received, does the bank verify they were allowable for the type of IRA? Contributions should be in cash (vs. securities or other assets) except for initial funding of a rollover IRA/converted Roth IRA).	Yes___ No___N/A___
6. Is the account coded properly on the bank's recordkeeping system?	Yes___ No___
7. Does the bank notify IRA account holders of required minimum distributions (RMDs)? Is fair market value (FMV) used for RMDs?	Yes___ No___ N/A___
8. For participants over age 70½, have required minimum distributions started, and continued annually, as required by law? (No later than the April 1st following the date the participant reaches age 70½, unless the participant is still employed at age 70½.)	Yes___ No___ N/A___

9. If distributions have been made, were appropriate taxes and penalties withheld if the account holder was not at least age 59 ½? Or did the distribution qualify for an exception? (Rollover, hardship, SEPP.)	Yes___ No___ N/A___
10. Is the account set up to generate an IRS Form 1099 if distributions are made? Was FMV adequately determined for distributions?	Yes___ No___ N/A___
11. Do any account activities require a SAR to be filed?	Yes___ No___ N/A___
Prohibited Transactions between the IRA and a Disqualified Person.	
Based upon a review of asset holdings and transactions, has the account engaged in any of the following prohibited transactions (per IRC 4975, a disqualified person includes the IRA owner, family members, fiduciaries and service providers)?	
12. Sale, exchange, or lease of property between the IRA and a disqualified person? (IRC Sec. 4975(c)(1)(A))	Yes___ No___ If yes, explain.
13. Lending of money or other extensions of credit between the IRA and a disqualified person (i.e., participant loans)? (IRC Sec. 4975(c)(1)(B))	Yes___ No___ If yes, explain.
14. Furnishing of goods, services, or facilities between the IRA and a disqualified person? (IRC Sec. 4975(c)(1)(C))	Yes___ No___ If yes, explain.
15. Transfer or use of assets of the IRA for the benefit of a disqualified person? (IRC Sec. 4975(c)(1)(D))	Yes___ No___ If yes, explain.
16. Dealing with IRA assets for their own account or in their own interest? (IRC Sec. 4975(c)(1)(E))	Yes___ No___ If yes, explain.
17. Receiving consideration for a disqualified party's personal account in connection with a transaction that involves plan assets? (IRC 4975(c)(1)(F) and ERISA 406(b)(3))	Yes___ No___ If yes, explain.
18. Use of bank-affiliated mutual funds? Have requirements of PTE-77 and Advisory Opinion 2005-10A been satisfied? (Cannot charge both plan and fund level fees. Alternatively, dollar-for-dollar fee offset must be performed.) (IRC Sec. 4975(c)(2) and ERISA 408(a))	Yes___ No___ If yes, explain.
Discretionary IRA Accounts **Date of Last Investment Review** ________	
19. Is the asset allocation appropriate given the account's investment policy statement?	Yes___ No___
20. Is the account properly managed?	Yes___ No___
21. Is the account properly diversified?	Yes___ No___

Summary of Exceptions:

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References

Laws

Employee Retirement Income Security Act of 1974
Internal Revenue Code
    26 USC 408, Individual Retirement Accounts
    26 USC 584, Common Trust Funds
    26 USC 4975, Tax on Prohibited Transactions
Investment Company Act of 1940
Pension Protection Act of 2006
Securities Exchange Act of 1934

Regulations

12 CFR 9, Fiduciary Activities of National Banks
12 CFR 12, Recordkeeping and Confirmation Requirements for Securities Transactions
12 CFR 226, Truth in Lending (Regulation Z)
29 CFR 2550, Employee Benefit Services Administration, DOL (Rules and Regulations for Fiduciary Responsibility)

Comptroller's Handbook Booklets

"Asset Management"
"Bank Supervision Process"
"Community Bank Supervision"
"Conflicts of Interest"
"Custody Services"
"Internal and External Audits"
"Internal Control"
"Investment Management Services"
"Large Bank Supervision"
"Management Information Systems"
"Related Organizations"

OCC Issuances

OCC Bulletin 98-46, "Uniform Interagency Trust Rating System"
OCC Advisory Letter 2000-9, "Third-Party Risk"

OCC Bulletin 2001-47, "Third-Party Relationships: Risk Management Principles"
OCC Bulletin 2004-20, "Risk Management of New, Expanded, or Modified Bank Products and Services: Risk Management Process"
OCC Bulletin 2006-24, "Interagency Agreement on ERISA Referrals"
OCC Bulletin 2007-7, "Soft Dollar Guidance: Use of Commission Payments by Fiduciaries"

Department of Labor Issuances

DOL Advisory Opinions
- 79-49, Fee on Own Bank Plan
- 92-23A, Purchases of Bank Holding Company Stock
- 93-24A, Bank Agents and Trustees Earning Interest From 'Float'
- 93-26A, Application of PTE 77-4 to IRAs
- 94-4A, Escheat Law Preemption
- 97-15A, Payment of Fees from a Mutual Fund When Bank Has Discretion (Frost Letter)
- 97-16A, Receipt of Fees from Unrelated Mutual Funds (Aetna Letter)
- 2001-01, Plan Expenses
- 2001-9, Asset Allocation Services
- 2002-08A, Indemnification and Hold-harmless Provisions
- 2003-02A, Overdraft Protection Services
- 2003-09A, Receipt of Fees from Proprietary Mutual Funds
- 2005-10A, Offset of Fees Received in Connection with Mutual Funds

DOL Prohibited Transaction Class Exemptions
- PTE 77-4, Open-End Mutual Funds Investment Advisor
- PTE 80-26, Interest-free Loans (Overdrafts)
- PTE 81-6 (amended), Securities Lending
- PTE 81-8, Short Term Investments
- PTE 82-63, Provision of Securities Lending Services: Payment of Compensation
- PTE 84-14, Qualified Professional Asset Managers (QPAMs)
- PTE 86-128 (rev.), Agency Transactions Executed by Fiduciary Broker-Dealers
- PTE 96-23, In-House Professional Asset Managers
- PTE 96-62, EXPRO (procedures to engage in certain prohibited transactions)

PTE 97-41, Exchange of Collective Investment Fund Assets for Bank-Affiliated Mutual Fund Shares
PTE 2002-12, Cross-Trades of Securities
PTE 2002-51, Voluntary Fiduciary Corrective Program Class Exemption

DOL Field Assistance Bulletins
2002-03, Disclosure and other Obligations Relating to 'Float'
2003-03, Allocation of Expenses Among Plan Participants in a Defined Contribution Plan
2004-02, Fiduciary Duties and Missing Participants in Defined Contribution Plans
2004-03, Fiduciary Responsibilities of Directed Trustees
2006-03, Periodic Pension Benefit Statements
2007-01, Statutory Exemption for Investment Advice

DOL Interpretive Bulletins
2509.75-4, Indemnification of Fiduciaries
2509.94-1, ETIs: Economically Targeted Investments (Social Investing)
2509.94-2, Written Statements of Investment Policy, Including Proxy Voting Policy
2509.96-1, Participant Investment Education

DOL Technical Bulletins
86-1, Soft Dollars and Directed Commissions for Securities Transactions

Federal Financial Institutions Examination Council Issuances
BSA/AML Examination Handbook
"Business Continuity Planning" IT Examination Handbook
"Outsourcing Technology Services" IT Examination Handbook

Internal Revenue Service Issuances
Internal Revenue Services Publications and Interpretations
Revenue Ruling 81-100, "Group Trusts"