Office of Thrift Supervision **January 8, 1998**
Department of the Treasury

Transmittal
TR–189

Federal Register, Vol. 62, No. 249, pp. 67696-67708 **Number: TR–189**

The attached final rule modernizes the rules governing fiduciary activities of federal savings associations supervised by the Office of Thrift Supervision (OTS).

The revised regulation, effective January 1, 1998, is the first comprehensive update of OTS fiduciary rules since 1980, and reflects developments in the fiduciary activities of federal associations. The final rule streamlines and clarifies the regulation and eliminates unnecessary regulatory burden.

The final rule consolidates all of OTS' fiduciary powers regulations into one part and incorporates significant interpretative opinions. It makes only minor changes from the version that was proposed on July 23, 1997. For example, it provides that OTS-regulated state-chartered savings associations must conduct their fiduciary operations in accordance with state law, but that OTS may restrict or prohibit activities that threaten an association's safety and soundness.

A federal thrift, under the rule, can offer any fiduciary service authorized for competing providers (including state or federally chartered banks) operating in the same state as the thrift's trust office. The rule notes that federal thrifts may provide trust services from offices in more than one state.

OTS also has amended its Community Reinvestment Act (CRA) regulations to exempt from CRA requirements certain special-purpose financial institutions that do not make loans or offer other commercial or retail banking services to the public in the ordinary course of business, other than as incident to their specialized operations. This exemption reflects the banking agencies' long-standing policy. Until now, the OTS rule differed from those of the other agencies because when the CRA rules were first adopted, OTS did not regulate any savings associations that could be considered special purpose institutions. This is no longer the case, since some OTS-regulated thrifts have organized solely to offer trust services locally or nationwide. Accordingly, the final rule makes the OTS CRA regulation consistent with those of other federal banking regulators.

OTS emphasized that when a special-purpose institution begins to take deposits or make commercial or retail banking services available to the public, it will be fully subject to CRA.

Specific fiduciary activities covered by the regulation include: acting in traditional fiduciary capacities, such as trustee, executor, administrator, and guardian; acting in any capacity in which the institution possesses investment discretion on behalf of another; and providing investment advice for a fee, regardless of whether or not the customer follows that advice.

The revised OTS rule is consistent with changes adopted earlier in 1997 by the Office of the Comptroller of the Currency (OCC) for national banks. OTS said it intends to follow a proposed OCC interpretive ruling on investment advisors, which provides numerous examples of activities that do not entail providing investment advice for a fee.

The final rule was published in the December 30, 1997, edition of the *Federal Register*, Vol. 62, No. 249, pp. 67696-67708.

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Attachment

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67696 Federal Register / Vol. 62, No. 249 / Tuesday, December 30, 1997 / Rules and Regulations

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 545, 550, 563e, and 571

[No. 97–129]

RIN 1550–AB09

Fiduciary Powers; Community Reinvestment Act

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision ("OTS") is issuing a final rule revising its fiduciary powers regulation. The final rule updates, clarifies, and streamlines OTS regulations, incorporates significant interpretive guidance, and eliminates unnecessary regulatory burden. The final rule consolidates all regulations on the fiduciary powers of Federal savings associations into a single part. Additionally, this part has been revised to incorporate the OTS current policy statement on the fiduciary activities of State-chartered savings associations.

The OTS is also amending its Community Reinvestment Act ("CRA") regulations. The change conforms the scope of the OTS's CRA regulations to the regulations of the other Federal banking agencies. It exempts certain savings associations that do not perform commercial or retail banking services by

granting credit to the public in the ordinary course of business.

EFFECTIVE DATE: January 1, 1998.

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SUPPLEMENTARY INFORMATION:

I. Background

On July 23, 1997, the OTS published a notice of proposed rulemaking seeking comment on its regulations governing the fiduciary operations of Federal savings associations. 62 FR 39477. The proposal was the first comprehensive revision of the fiduciary powers regulations at 12 CFR part 550 since 1980.

The proposed rule was intended to update, streamline, and clarify these regulations. It also reflected the changes that Federal savings associations and their fiduciary operations have undergone since 1980, and incorporated significant interpretive opinions. Overall, the purpose of the proposed rule was to facilitate the continued development of fiduciary business consistent with safe and sound practices. Consistent with section 303 of the Community Development and Regulatory Improvement Act of 1994 ("CDRIA"), the proposed rule conformed OTS's fiduciary powers rules more closely to rules of the other agencies, specifically the rules issued by the Office of the Comptroller of the Currency at 12 CFR part 9, as revised at 61 FR 68543 (December 30, 1996).

The OTS also sought comment on exemptions from the OTS's regulations implementing the Community Reinvestment Act ("CRA"). Specifically, the OTS proposed to conform its CRA regulations to the other Federal banking agencies by exempting certain special purpose savings associations. Special purpose savings associations were exempted if they do not perform commercial or retail banking services by granting credit to the public in the ordinary course of business, other than as incident to their specialized operations.

II. Comments Received

Four commenters responded to the proposal: Two Federal savings associations, one State regulatory agency, and one community reinvestment organization. Generally, the two Federal savings associations supported the proposal, but suggested specific changes. The State regulatory agency did not support or oppose the proposal, but also made suggestions. The community reinvestment organization opposed the proposed CRA exemption for special purpose savings associations.

III. Discussion

A. Fiduciary Powers

1. Structure of Revised Part 550

The proposed fiduciary powers rule was written in a traditional regulation format. The final fiduciary powers rule issued today uses the plain language drafting techniques promoted by the Vice President's National Performance Review Initiative and new guidance in the Federal Register Document Drafting Handbook (January 1997 edition). The primary goal of plain language drafting is to make regulations easier to understand. Plain language drafting emphasizes informative headings (often written as a question), non-technical language (including the use of "you"), and sentences in the active voice.

Although commenters did not have an opportunity to comment on the plain language format prior to this final rule, the OTS believes that the benefits of the plain language format justify its use. Even though the OTS has substantially reorganized the rule, the substance of the proposed regulation did not change as a result of the format. The OTS welcomes comments on the format and suggestions on how to improve it.

2. Section-by-Section Discussion

A discussion of the comments follows. This discussion generally does not address provisions on which the OTS received no comments or only supporting comments. Unless specifically discussed below, the proposed rules are adopted with only plain language format changes.

Section 550.10 What regulations govern the fiduciary operations of savings associations?

Proposed § 550.1 stated that part 550 is issued pursuant to 12 U.S.C. 1464(n) (section 5(n) of the Home Owners' Loan Act ("HOLA")). Proposed § 550.1 also stated that part 550 sets forth the standards that apply to the fiduciary activities of Federal savings associations. This section has been incorporated into final § 550.10(a), which states that a Federal savings association is required to conduct its fiduciary operations in accordance with 12 U.S.C. 1464(n) and the provisions of part 550.

The final rule at § 550.10(b) includes a new paragraph that was not included in the proposed rule. This provision incorporates, without substantive change, language from the existing policy statement regarding the fiduciary activities of State-chartered savings associations at 12 CFR 571.15. Final § 550.10(b) states that a State-chartered savings association must conduct its fiduciary operations in accordance with State law. The rule, however, also recognizes the OTS's interest in those operations. As such, the final rule requires State-chartered savings associations to exercise fiduciary powers in a safe and sound manner, and clarifies that these associations and their subsidiaries should follow the standards for the exercise of fiduciary powers set out in part 550.[1] The final rule also states that the OTS will monitor the fiduciary operations of State-chartered savings associations and their subsidiaries, and may restrict or prohibit activities that threaten the safety and soundness of the association.

Section 550.20 What are fiduciary powers?

The proposed rule at § 550.2 defined fiduciary powers as the authority the OTS permits a Federal savings association to exercise pursuant to 12 U.S.C. 1464(n). The definition also stated that the scope of a Federal savings association's fiduciary powers depends on the powers that the State grants to competing fiduciaries in the State in which the Federal savings association is located.

One commenter argued that the OTS should explicitly state that if an activity does not fall into the OTS's definition of fiduciary activity, but is an otherwise permissible activity for a Federal savings association or its operating subsidiaries, the association or subsidiary should be permitted to engage in that activity. The commenter maintained that it is irrelevant whether State competitors are allowed to engage in that activity and whether that activity is considered a fiduciary activity by the State.

The final rule adopts the language of the proposed rule. By the terms of the

[1] State-chartered savings associations are particularly advised to adhere to § 550.140, which contains the standards for the exercise of fiduciary powers. In exercising their fiduciary powers, State-chartered savings associations should also observe the procedures and policies required by Part 550 in the areas of fiduciary personnel and facilities, custody and control of assets, investing funds of a fiduciary account, deposit of funds awaiting investment or distribution, restrictions on self-dealing, and audit requirements.

statute, the scope of a Federal savings association's fiduciary powers is determined by the authority a particular State grants to competing fiduciaries in the State in which the Federal savings association is located. The reference in § 550.20 to State law is, thus, compelled by the statutory language.

We decline to adopt a blanket statement in this regulation about the applicability of particular State laws to activities that are otherwise permissible for a Federal savings association. Federal savings associations interested in conducting such activities should consult the statutory basis for that activity and the regulations that govern its exercise before engaging in the activity. The applicability of particular State law to the activity would depend on an analysis of each situation as it arises.

Section 550.30 What fiduciary capacities does this regulation cover?

Under the proposed rule, fiduciary capacity included specified fiduciary positions such as acting as a trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, custodian under a uniform gifts to minors act, any capacity in which the Federal savings association possesses investment discretion on behalf of another, or any other similar capacity that the OTS authorizes under 12 U.S.C. 1464(n).[2] The proposed definition also included acting as an investment adviser, if the Federal savings association receives a fee for its investment advice. In interpreting this provision, the OTS stated that it intended to follow a proposed OCC interpretive ruling on the meaning of investment advisor for a fee.[3] Under the OCC interpretation, the term investment advisor generally means that the institution provides advice or recommendations concerning the purchase or sale of specific securities, such as an institution engaged in portfolio advisory and management activities. The term generally excludes those activities in which the investment advice is merely incidental to other services.

One commenter argued that fiduciary capacity should not include a trustee under a deed of trust, a receiver or assignee under one's own security instrument in a default situation, a custodian under a uniform gift to minors act account, or a trustee under real estate or land trust. While the commenter generally supported the adoption of the OCC proposed interpretive ruling on investment advisors receiving a fee, it suggested that investment advisory and related activities that do not involve investment discretion should not be subject to part 550, even if performed for a fee.

The final rule at § 550.30 addresses the fiduciary capacities that are covered by part 550. The final rule continues to cite the specific fiduciary capacities in the proposed rule. Some of the specific capacities are enumerated under 12 U.S.C. 1464(n)(1). Others, such as custodian under a uniform gift to minors act, have long been cited under the OTS and OCC fiduciary powers regulations. The final rule also includes any capacity in which the association possesses investment discretion on behalf of another, and acting as an investment advisor for a fee.

The OTS has not adopted the commenter's proposal to exclude certain fiduciary capacities. Initially, we note that the applicability of part 550 to some of the specifically-listed fiduciary positions will depend on what the fiduciary in the relationship actually does. For example, "trustee" is a specifically-listed fiduciary capacity at § 550.30(a). The final rule at § 550.580(c), however, excepts a Federal savings association from part 550 if the association acts as the trustee of a fiduciary account that involves no active fiduciary duties and applicable law permits the association to act in that capacity. Similarly, an investment adviser that receives a fee for advice is a specifically-listed fiduciary capacity at § 550.30(j). The OTS, however, has indicated that it will follow the OCC's proposed interpretive ruling on investment advisers, which provides numerous examples of activities that do not constitute the provision of investment advice.[4] Finally, we note that the final rule generally excludes relationships'—other than those specifically listed'—where the Federal savings association does not have investment discretion.

As noted, one commenter argues that a Federal savings association that gives investment advice for a fee should not be deemed to be acting in a fiduciary capacity if it is not making the investment decision.

The OTS disagrees. When a customer pays a Federal savings association a fee in return for providing investment advice—whether or not that customer follows the advice—the customer has a reasonable expectation of receiving advice that is free of conflicts of interest. Such an approach is also consistent with other Federal statutes that provide enhanced protection to customers of certain investment advisers who receive a fee.[5] Consistent with the OCC's rules at part 9, the OTS believes that the distinction between paid and unpaid investment advice reflects the reasonable expectation of Federal savings association customers.

Even under this approach, the OTS maintains some flexibility in determining what is investment advice. As noted, the OCC has issued a proposed interpretive ruling on the meaning of this phrase, and the OTS intends to follow that interpretation. Such guidance, in combination with the exemption in final § 550.580(c), should suffice to ensure proper application of the concept of acting in a fiduciary capacity.

Finally, the preamble to the proposed rule noted that bank employees who engage in certain securities transactions for customers are subject to various recordkeeping and confirmation requirements under the rules of the other Federal banking agencies.[6] The proposal sought comment on whether the OTS should issue a separate proposed rulemaking adopting those rules for employees of Federal savings associations.

Two commenters noted that the other banking agencies are currently revising their rules. The commenters urged the

[2] The proposed rule sought comment on whether the final rule should rely on State law to determine the dividing line between fiduciary and non-fiduciary activities. One commenter opposed this alternative. The OTS believes that the definition of fiduciary capacity should foster consistent application of part 550 for all Federal savings associations. Accordingly, the OTS will not rely exclusively on State law in determining whether a particular activity amounts to acting in a fiduciary capacity. We note that the OCC also rejected a State law approach in its final rule on fiduciary activities of national banks.

[3] 62 FR 36746 (July 9, 1997).

[4] These include financial advice and counseling, including strategic planning of a financial nature, merger and acquisition advisory services, advisory and structuring services related to project finance transactions, and providing market economic information to customers in general; client-directed investment activities where the fee does not depend on the provision of investment advice; investment advice incidental to acting as a municipal securities dealer; real estate asset management; real estate consulting; advice concerning bridge loans; services for homeowners' associations; tax planning and structuring advice; and investment advice authorized by the OCC under 12 U.S.C. 24 (Seventh) as an incidental power necessary to carry on the business of banking.

[5] See, e.g., 29 U.S.C. 1002(21)(A) (fiduciaries of ERISA accounts); 15 U.S.C. 80b–2(a)(11) (Investment Advisers Act, which generally applies to any person who, for compensation, engages in the business of advising others. Although banks are exempt from the Investment Advisers Act, Federal savings associations are not, and investment advisers employed by Federal savings associations must therefore register with the SEC).

[6] 12 CFR part 12 (OCC); 12 CFR 208.8(k) (FRB); 12 CFR part 344 (FDIC).

OTS to wait and see what revisions are made before engaging in formal rulemaking. The OTS agrees and has deferred consideration of this issue.

Section 550.60 What other definitions apply to this part?

The proposed rule at § 550.2 defined applicable law as "the law of a State or other jurisdiction governing a Federal savings association's fiduciary relationships, any applicable Federal law governing those relationships, the terms of the instrument governing a fiduciary relationship, or any court order pertaining to the relationship." One commenter urged the OTS to specify that State law does not apply to the fiduciary activities of Federal savings association except to the extent specifically required by section 5(n) of the HOLA.

The final rule does not adopt the commenter's suggestion. Both the OTS's Trust Activities Handbook and prior OTS precedent recognize that State law may apply to the fiduciary activities of a Federal savings association.[7] However, by defining applicable law to include "the law of a State * * * governing a fiduciary relationship," the OTS does not intend to affect its precedent in the area of Federal preemption. The fiduciary operations of Federal savings associations are subject to a complex interplay between Federal and State law.

The OTS has noted that although State law may apply, in certain circumstances, to the fiduciary operations of a Federal savings association, Federal law grants the OTS the plenary authority to regulate all aspects of the operations of Federal savings associations, including fiduciary operations.[8] Consistent with this role, the OTS has promulgated these detailed regulations to govern the fiduciary operations of Federal savings associations. Any State law that conflicts with any of these regulations or section 5(n) of the HOLA is preempted.[9]

Moreover, even though State law applies in limited circumstances, the next question is: "*Which* State's laws apply?" A Federal savings association is subject only to the laws of the State (or States) in which it is located. The OTS has found that a Federal savings association is located, for fiduciary purposes, in each State in which it operates a fiduciary office.[10] The OTS has further found that an association is not located in a State in which it only markets its fiduciary services [11] or performs certain activities incidental to serving as a testamentary trustee or a trustee holding real estate.[12]

The definition of applicable law is not intended to set an order of priority among the various authorities. Rather, the intent of the definition is to identify the various authorities that may govern a Federal savings association's fiduciary activities. Preemption and conflicts of law issues in the fiduciary area are highly fact-specific and cannot be resolved by reference to a general blanket rule of priority. The OTS believes the better practice is to continue to handle specific questions about the applicability of particular State laws on a case-by-case basis. Accordingly, the final rule adopts the proposed definition of applicable law.

Section 550.130 What fiduciary powers may a Federal savings association exercise?

Proposed § 550.4(a) stated that a Federal savings association may exercise only those fiduciary powers stated in the OTS's approval of a fiduciary application. Moreover, unless otherwise provided in the OTS's approval, a Federal savings association may exercise fiduciary powers only in those offices listed in the application.

One commenter argued that the office limitation is restrictive, and that there is no valid legal or policy reason for requiring a Federal savings association to file a new application when it opens a new branch or office. The commenter argued that appropriate information about such expanded operations could be provided through a notice or approval process.

The final rule adopts the proposed rule without substantive change. Like the proposed rule, § 550.130 states that the location restriction only applies "unless otherwise provided in the approval." This language gives the OTS the legal authority to specify at the time that it approves a fiduciary powers application that the applicant may expand the offices out of which it exercises approved fiduciary powers by simply filing a notice with the OTS. The willingness of the OTS to grant an initial approval that authorizes subsequent expansion through such a process will depend on a number of factors, including an institution's financial and managerial resources, history of regulatory compliance, level of fiduciary expertise, and so forth.

Thus, a decision whether the OTS will authorize an expanded network under a notice process cannot be made until the initial fiduciary powers application is submitted and reviewed.[13] Since the proposed rule would permit the addition of new offices using notice process where appropriate, the commenter's revision has not been incorporated in the final rule. The proposed language is sufficient to alleviate the commenter's concern.

Section 550.140 Must a Federal savings association adopt and follow written policies and procedures in exercising fiduciary powers?

Proposed § 550.6 set out the general standards that a Federal association must follow in exercising its fiduciary powers. The proposed rule specifically provided that a Federal savings association must exercise its fiduciary powers prudently and in compliance with applicable law.

The proposed rule further provided that a Federal savings association must use standards in exercising its fiduciary powers that are consistent with safety and soundness, promote sound fiduciary administration, and enable the Federal savings association to adequately monitor the condition of its fiduciary operations. Unlike the OCC's fiduciary powers regulation, the proposed rule did not require a Federal savings association to maintain written policies and procedures governing the exercise of fiduciary powers. Compare 12 CFR 9.5.

Two commenters addressed proposed § 550.6. One, a Federal savings association, supported the proposal. The other, a State regulatory agency, argued that the OTS should require Federal savings associations to develop, maintain, and follow procedures, especially in the areas of self-dealing and conflicts of interest. This commenter argued that written policies and procedures are necessary to properly manage risks in these areas.

Upon further consideration, the OTS has determined that requiring written policies and procedures in this area is appropriate. Since 1989, the OTS Trust Activities Handbook has "strongly encouraged" associations to adopt written policies and procedures covering all major aspects of their

[7] OTS Trust Activities Handbook, § 130 at 75 (1992); OTS Op. Chief Counsel (March 28, 1996) at 9. The example noted in both of these authorities is State probate law, which prescribes the standards of conduct of an institution acting as an executor.

[8] 12 U.S.C.A. 1464(a) (West Supp. 1995); OTS Op. Chief Counsel (March 28, 1996) at 8.

[9] OTS Op. Chief Counsel (March 28, 1996) at 8; OTS Trust Activities Handbook, § 130 at 75 (1992).

[10] 62 FR 39479; OTS Op. Chief Counsel (March 28, 1996).

[11] OTS Op. Chief Counsel (June 21, 1996).

[12] OTS Op. Chief Counsel (August 8, 1996).

[13] *See* OTS Op. Chief Counsel (December 24, 1992).

fiduciary business, to communicate such policies to all interested personnel, to monitor compliance with the policies, and to periodically review and update the policies to ensure their current application. Comprehensive, well-developed policies and procedures on fiduciary activities, if followed, monitored, and enforced, are an effective method of preventing exposure to liability, operating loss and the loss of public confidence in the association. Such policies and procedures promote high-quality fiduciary administration, facilitate compliance with applicable laws and regulations, and increase operating efficiencies.

Accordingly, consistent with the OCC's 12 CFR 9.5, the final rule adopts the requirement for written policies and procedures. Specifically, the OTS final rule requires Federal savings associations to adopt and follow written policies and procedures adequate to maintain its fiduciary activities in compliance with applicable law. The final rule also provides examples of areas that the policies and procedures should address, where appropriate. The list includes brokerage placement practices, the prevention of misuse of material inside information, the prevention of self-dealing and conflicts of interest, the selection and retention of legal counsel, and the investment of funds (including funds awaiting investment or distribution).[14] The OTS does not intend the list to be exhaustive.

Section 550.260 How may a Federal savings association invest funds of a fiduciary account?

Proposed § 550.12(a) provided that, where consistent with applicable law, a Federal savings association may invest fiduciary assets in certain described collective investment funds. One commenter expressed concerns about the scope of this provision, specifically whether it authorized fiduciary assets to be invested in collective investment funds established under other authority, such as the OCC's collective investment funds regulation, 12 CFR 9.18.

Upon review, the OTS has determined to significantly revise this section. A collective investment fund can be exempt from taxation if it is administered in accordance with applicable provisions of the Internal Revenue Code. Section 584 of the Internal Revenue Code exempts certain funds from taxation if they are administered in accordance with OCC regulations. This IRC section applies to funds established by savings associations as well as banks. As a result, the OTS fiduciary powers regulation has always incorporated the requirements of 12 CFR 9.18 by reference. The OTS proposed rule included some of the OCC requirements applicable to collective investment funds and incorporated others by reference. By revising the final rule to incorporate all of the requirements by reference, the OTS believes it will reduce the confusion about the regulation's scope and applicability.

New § 550.260(b) authorizes a Federal savings association to invest fiduciary funds in a collective investment fund and to establish and administer such a fund. All such activities must be done in accordance with the OCC's detailed regulations governing this area. As a Federal savings association must already comply with those requirements in order to maintain the tax-exempt status of its collective investment fund, this change will help to reduce regulatory duplication and overlap, consistent with the objective of section 303 of CDRIA.

The final rule eliminates the language in § 550.12(a), which caused the commenter's concern that the proposed rule would have prohibited a savings association from investing in an otherwise permissible collective investment fund maintained by an affiliated or unaffiliated State bank or trust company. Under § 550.260(a), which replaces § 550.11, a savings association is authorized to invest funds of a fiduciary account in a manner consistent with applicable law.[15]

Sections 550.290–550.320 Funds Awaiting Investment or Distribution

Proposed § 550.10(b)(1) and (c) stated that a Federal savings association with investment discretion or discretion over distributions may deposit funds awaiting investment or distribution in the commercial, savings, or other department of the association, or with an affiliated insured depository institution, unless the deposit is prohibited by applicable law. To the extent that the funds are not insured by the FDIC, the association is required to set aside acceptable collateral as security. See proposed § 550.10(b)(2). The proposed provisions are adopted without substantive change at §§ 550.290 through 550.320.

Under the proposed rule, acceptable collateral includes surety bonds, to the extent that such bonds provide adequate security and are not prohibited by applicable law. See proposed § 550.10(b)(2)(iv). One commenter urged the OTS to adopt a national standard allowing Federal savings associations to use security bonds, without regard to State prohibitions.

Section 550.320(d) of the final rule continues to provide that surety bonds may be used to collateralize self-deposits unless prohibited by applicable law. This approach grants Federal savings associations the ability to collateralize self-deposits with surety bonds, while preserving for each State the ability to prohibit this practice for all fiduciaries operating in the State.

Sections 550.440–550.480 Audit Requirements

Proposed § 550.9 prescribed the audit requirements for fiduciary activities. The proposed rule required Federal savings associations to conduct an annual audit of significant fiduciary activities. Alternatively, the proposed rule permitted a continuous audit, which allows a Federal savings association to arrange for a discrete audit of each significant fiduciary activity at an interval commensurate with the nature and risk of the activity.[16] Under the proposed rule, all audits are conducted under the direction of the fiduciary audit committee. This committee may consist of a committee of the association's

[14] We note that two of the listed areas are derived from requirements in current part 550. They are the use of material inside information in connection with any decision or recommendation to purchase or sell any security (current § 550.5(c)) and the selection and retention of available legal counsel (current § 550.5(d)).

[15] Moreover, § 9.18(a), which is intended to clarify that traditional common law prohibitions against commingling fiduciary assets do not affect a national bank's ability to invest in a collective investment fund maintained by the bank or an affiliated bank, addresses investments in collective investment funds maintained by an affiliated State chartered trust company. This provision permits a national bank to invest assets that it holds as fiduciary in a collective investment fund maintained by one or more affiliated "banks" exclusively for the collective investment and reinvestment of money contributed to the fund by the bank, or by one or more affiliated banks. Section 581 of the Internal Revenue Code, which the OCC regulation implements, defines "bank" to include "a trust company incorporated and doing business under the laws of * * * any State, a substantial part of the business of which consists of * * * exercising fiduciary powers similar to those permitted to national banks under the authority of the [OCC], and which is subject by law to supervision and examination by State * * * authority having supervision over banking institutions." Under this definition, we believe that "bank" as used in the OCC regulation includes an affiliated State chartered trust company.

[16] While recognizing that the frequency of discrete audits for Federal savings associations that use a continuous audit system will vary depending on the nature and risk of the activity being audited, the OTS does not intend to allow an association using a continuous audit system to avoid discrete audits indefinitely. Although the final rule does not specify how often such discrete audits must be conducted, they must occur at reasonable time frames.

directors or an audit committee of an affiliate of the association.

One commenter supported the proposal to allow an audit committee of a savings and loan holding company to audit the fiduciary activities of its subsidiary Federal savings association. The commenter argued that the same option should be available to bank holding companies that own Federal savings associations.

Although the preamble to the proposed rule addressed the audit committee of a savings and loan holding company, the language of the proposed rule permitted an audit committee of an affiliate to direct the audit. Affiliate, as defined in the rule, could include a savings and loan holding company and a bank holding company, provided that specified ownership, control or other criteria are met.[17] Accordingly, the proposed rule would permit these arrangements. The final rule at § 550.470 is unchanged on this point.

In the preamble to the proposed rule, the OTS invited commenters to address the relationship between the audit requirement and the OTS's fiduciary examination process. In particular, the OTS sought comment on the extent to which examiners should rely on an association's internal or external fiduciary audits.

One commenter, a Federal savings bank, supported an audit report-based fiduciary examination policy. The commenter suggested that the OTS should first review an association's internal or external audit reports, and commence an on-site fiduciary examination only when those reports and any additional information indicated a basis for further examination. The commenter asserted that this approach would provide administrative savings and would not compromise safety and soundness or consumer protection. The OTS believes that the relationship between the audit and examination processes are properly addressed in OTS instructions to examiners and in the Handbook, rather than the rule. The OTS will consider these comments if it revises the Handbook or its examination instructions.

Sections 550.580–550.620 Activities Exempt From This Part

Proposed § 550.3 identified certain fiduciary activities that are not covered by part 550. This section incorporated current § 545.102, which permits a Federal savings association to act as a trustee or custodian of an Individual Retirement Account or a Keogh account, including self-directed accounts. A Federal savings association may also act as a trustee with no active fiduciary duties so long as authorized by applicable law.

Under proposed § 550.3(b), however, a Federal savings association may invest the funds of the accounts in limited investments. The proposed rule also set forth existing requirements governing the administration of accounts and compensation. See proposed § 550.3(c) and (d). These provisions are adopted in the final rule at subpart E, with one clarification. Final § 550.600 has been revised to clarify that the limitations on investments apply only to Federal savings associations acting in the fiduciary capacities described under § 550.580.

The proposed rule at § 550.3(e) required Federal savings associations to make certain disclosures where fiduciary accounts are not limited to FDIC-insured deposits. One commenter urged the OTS to eliminate this requirement as duplicative and unnecessary. The commenter noted that similar disclosures are required under the Interagency Statement on Retail Sales of Nondeposit Investment Products.

The OTS disagrees. The Interagency Statement "generally do[es] not apply to the sale of nondeposit investment products to non-retail customers, such as sales to fiduciary accounts administered by an institution."[18] To ensure that adequate disclosures are made to non-retail customers holding fiduciary accounts with Federal savings associations, the final rule adopts the proposed disclosure requirement. Final § 550.610 has been slightly revised to clarify that the disclosure requirement only applies to Federal savings associations acting in the fiduciary capacities described under § 550.580.

B. CRA Exemption

The OTS also proposed to revise its regulations prescribing the scope of the CRA regulations to make the CRA's application to savings associations consistent with its application to banks. Under the current rule at § 563e.11(c), the CRA regulations apply to all savings associations. By contrast, the CRA regulations of the other banking agencies exempt certain special purpose institutions, including fiduciaries, that do not perform commercial or retail banking services by extending credit to the public in the ordinary course of business, other than incident to their specialized operations.

This regulatory exemption reflects the banking agencies' long-standing policy in this area. The OTS's scope provisions differed from the other banking agencies' scope provisions because, at the time that the current rule at § 563e.11(c) was promulgated, the OTS did not regulate any savings associations that could be considered special purpose institutions. This is no longer the case. Thus, the proposed amendment to the CRA regulations was intended to recognize the existence of special purpose savings associations and to provide the same regulatory treatment for such institutions as would be afforded them if they were regulated by one of the other banking agencies.

One commenter, a community reinvestment organization, opposed any exemption to the CRA regulations. Instead, the commenter argued that the CRA should be expanded to include non-bank entities that provide bank-like services. The commenter argued that the OTS should refrain from adopting the exemption and that all the other agencies should eliminate it.

By contrast, a Federal savings association argued that the proposed CRA exemption does not go far enough. It notes that the OCC recently approved a bank charter for a company that would provide bill payment services, checking, or other deposit accounts. The OCC approved the institution's request for designation as a wholesale or limited purpose bank.[19] The commenter argued that all such companies should be added to the list of examples in the proposed rule, even if the checking or other deposit accounts are linked to overdraft lines of credit or similar products.

The OTS has adopted the special purpose savings association exemption without change. The OTS believes that the other Federal banking agencies' exemption for similar institutions argues strongly for a parallel thrift exemption. Some thrifts now meet the definition of a special purpose institution. The OTS has, by interpretation, exempted these institutions from coverage under the CRA regulations in a manner identical to the way in which they would be treated if they operated with a bank charter and were regulated by one of the bank regulators. The amendment to the CRA regulations merely formalizes the OTS's interpretation of the CRA regulations' application to such charters. If any special purpose savings association takes deposits or extends credit to the public in the ordinary

[17] See 12 U.S.C.A. 221a(b)(4) (West 1989).

[18] Interagency Statement on Retail Sales of Nondeposit Investment Products at 3.

[19] OCC Conditional Approval # 253 (August 20, 1997), 1997 OCC Ltr. LEXIS 98.

course of business other than as incident to its specialized operations, so that it no longer falls within the regulatory definition, then it immediately becomes subject to CRA regulation and examination by the OTS. The OTS will monitor such savings associations' activities through its safety and soundness, compliance, and trust examinations.

The OTS believes that any expansion of coverage of the CRA to include non-bank entities, as one of the commenters suggested, is a legislative issue. The OTS is not today expressing a view on whether such expansion would be appropriate or, if so, how it should be structured or implemented. The possibility that the CRA may be applied more broadly in the future does not convince the OTS that it should treat thrifts differently from banks in the interim.

We also do not believe that the exemption should be unilaterally extended to entities that only provide bill payment services and checking or other deposit accounts, as one commenter suggested. We note that the OCC did not exempt such institutions from the CRA regulations. Rather, the OCC granted a request for a limited purpose designation, which means that a separate provision of the CRA regulations applies.[20] A limited purpose designation subjects the institution to the Community Development Test, which is specially tailored to measure the performance of wholesale or limited purpose institutions. A limited purpose designation, however, is not an exemption from the CRA regulations. The OCC's approval of such a limited purpose designation does not affect whether the same institution is subject to the banking agencies' current, and the OTS's new, exemption for special purpose institutions.

IV. Derivation Chart for Revised Part 550

The following chart gives of an overview of the changes made to part 550.

Revised provision	Former provision	Comments
§ 550.10(a)		Added.
§ 550.10(b)	§ 571.15	Modified and added.
§ 550.20	§ 550.1(k)	Modified.
§ 550.30	§ 550.1(c) and (h)	Significantly modified.
§ 550.40	§ 550.1(f)	Modified.
§ 550.50	§ 550.1(a)	Modified.
§ 550.60	§§ 550.1(g) and (j)	Significantly modified.
§§ 550.70–120	§§ 550.2(a)–(c)	Modified.
§ 550.130	§ 550.2(d)	Modified.
§ 550.140	§ 550.5(c) and (d)	Modified and new provisions added.
§§ 550.150–190	§§ 550.5(a)(1), (b) and (e)	Significantly modified.
§§ 550.200–220	§ 550.5(a)(2)	Significantly modified.
§§ 550.230–250	§ 550.11	Modified.
§ 550.260	§§ 550.9 and 550.13	Significantly modified.
§§ 550.290–320	§ 550.8	Significantly modified.
§§ 550.330–370	§ 550.10	Modified.
§§ 550.380–400	§ 550.12	Modified.
§§ 550.410–430	§§ 550.5(a)(2) and 550.6(a)	Significantly modified.
§§ 550.440–480	§ 550.7	Significantly modified.
§§ 550.490–510	§ 550.4	Significantly modified.
§ 550.520	§ 550.15	Modified.
§§ 550.530–550	§ 550.14	Modified.
§§ 550.560–570	§ 550.16	Modified.
§§ 550.580–620	§ 545.102	Modified and added.

The following provisions from the former part 550 have been removed in the final rule: § 550.1(b); § 550.1(d); § 550.1(e); § 550.1(h); § 550.1(i); § 550.3; § 550.5(d); and § 550.6(b).

V. Effective Date

Section 553(d) of the Administrative Procedure Act ("APA") requires an agency to publish a substantive rule at least 30 days before its effective date. Section 553(d)(1) of the APA, however, exempts substantive rules that relieve a restriction from the 30-day delayed effective date requirement.

The final rule relieves regulatory restrictions. For example, the final rule eliminates certain requirements of the old regulations, such as former § 550.3 (Consolidation or merger of two or more Federal savings associations), former § 550.5(d) (Retention of legal counsel), and former § 550.6(b) (Record of pending litigation). Moreover, the final rule clarifies some existing responsibilities. This final rule is therefore exempt from the 30-day delayed effective date requirement.

VI. Executive Order 12866

The Director of OTS has determined that this final rule does not constitute a "significant regulatory action" for the purposes of Executive Order 12866.

VII. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, Section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OTS has determined that the final rule will not result in expenditures by State, local, or tribal governments or by the private sector of $100 million or more. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Act of 1995.

[20] 12 CFR 25.21(a)(2) and 25.25. The parallel OTS citations are 12 CFR 563e.21(a)(2) and 563e.25.

VIII. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The final rule liberalizes requirements and reduces burdens for Federal savings associations that exercise fiduciary powers, regardless of size. Accordingly, a regulatory flexibility analysis is not required.

IX. Reporting and Recordkeeping Requirements

The collection of information requirements contained in this final rule have been submitted to and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under OMB control number 1550–0037. Comments on the collections of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (1550–0037), Washington, D.C. 20503, with copies to the Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552.

The collection of information requirements in this final rule are found in 12 CFR 550.70–550.120, 550.260, 550.410–550.430, 550.440–550.480, and 550.530–550.550. The OTS requires this information for the proper supervision of Federal savings associations' fiduciary activities. The likely respondents/recordkeepers are Federal savings associations.

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number assigned to the collection of information in this final rule is displayed at 12 CFR 506.1(b).

List of Subjects

12 CFR Part 545

Accounting, Consumer protection, Credit, Electronic funds transfers, Investments, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 550

Accounting, Reporting and recordkeeping requirements, Savings associations, Trusts and trustees.

12 CFR Part 563e

Community development, Credit, Investments, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 571

Accounting, Conflict of interests, Investments, Reporting and Recordkeeping requirements, Savings associations.

Authority and Issuance

Accordingly, the Office of Thrift Supervision amends Title 12, Chapter V, of the Code of Federal Regulations as set forth below:

PART 545—OPERATIONS

1. The authority citation for part 545 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1828.

§ 545.102 [Removed]

2. Section 545.102 is removed.

3. Part 550 is revised to read as follows:

PART 550—FIDUCIARY POWERS OF SAVINGS ASSOCIATIONS

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550.20 What are fiduciary powers?
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Compensation, Gifts, and Bequests

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550.390 May my officer or employee retain compensation for acting as a co-fiduciary?
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550.530 How do I surrender fiduciary powers?
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Subpart E—Activities Exempt From This Part

550.580 When may I act in a fiduciary capacity without obtaining OTS approval?
550.590 What standards must I observe when acting in exempt fiduciary capacities?
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550.610 What disclosures must I make when acting in exempt fiduciary capacities?
550.620 May I receive compensation for acting in exempt fiduciary capacities?

Authority: 12 U.S.C. 1462a, 1463, 1464.

§ 550.10 What regulations govern the fiduciary operations of savings associations?

(a) *Federal savings associations.* A Federal savings association ("you") must conduct its fiduciary operations in accordance with 12 U.S.C. 1464(n) and this part.

(b) *State-chartered savings associations.* (1) A State-chartered savings association must conduct its fiduciary operations in accordance with applicable State law, and must exercise its fiduciary powers in a safe and sound manner. To ensure safe and sound operations, State-chartered savings associations and their subsidiaries should follow the standards for the exercise of fiduciary powers in this part.

(2) The OTS will monitor the fiduciary operations of State-chartered savings associations and their subsidiaries to ensure that those operations are conducted in a safe and sound manner. The OTS may object to practices that deviate materially from the practices described in this part, and may restrict or prohibit activities that threaten the safety and soundness of a State-chartered savings association.

§ 550.20 What are fiduciary powers?

Fiduciary powers are the authority that the OTS permits you to exercise under 12 U.S.C. 1464(n). The scope of permissible fiduciary powers depends on the powers that the State in which you are located grants to competing fiduciaries in that State.

§ 550.30 What fiduciary capacities does this part cover?

You are subject to this part if you act in a fiduciary capacity, except as described in subpart E of this part. You act in a fiduciary capacity when you act in any of the following capacities:

(a) Trustee.
(b) Executor.
(c) Administrator.
(d) Registrar of stocks and bonds.
(e) Transfer agent.
(f) Assignee.
(g) Receiver.
(h) Guardian or conservator of the estate of a minor, an incompetent person, an absent person, or a person over whose estate a court has taken jurisdiction, other than under bankruptcy or insolvency laws.
(i) A fiduciary in a relationship established under a State law that is substantially similar to the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act as published by the American Law Institute.
(j) Investment adviser, if you receive a fee for your investment advice.
(k) Any capacity in which you have investment discretion on behalf of another.
(l) Any other similar capacity that the OTS may authorize under 12 U.S.C. 1464(n).

§ 550.40 When do I have investment discretion?

(a) *General.* You have investment discretion when you have, with respect to a fiduciary account, the sole or shared authority to determine what securities or other assets to purchase or sell on behalf of that account. It does not matter whether you have exercised this authority.

(b) *Delegations.* You retain investment discretion if you delegate investment discretion to another. You also have investment discretion if you receive delegated authority to exercise investment discretion from another.

§ 550.50 What is a fiduciary account?

A fiduciary account is an account that you administer acting in a fiduciary capacity.

§ 550.60 What other definitions apply to this part?

Affiliate has the same meaning as in 12 U.S.C. 221a(b). For purposes of this part, substitute the term "Federal savings association" for the term "member bank" whenever it appears in 12 U.S.C. 221a(b).

Applicable law means the law of a State or other jurisdiction governing your fiduciary relationships, any Federal law governing those relationships, the terms of the instrument governing a fiduciary relationship, and any court order pertaining to the relationship.

Fiduciary officers and employees means the officers and employees of a Federal savings association to whom the board of directors or its designee has assigned functions involving the exercise of the association's fiduciary powers.

Subpart A—Obtaining Fiduciary Powers

§ 550.70 Must I obtain OTS approval before exercising fiduciary powers?

Unless you are covered by subpart E of this part, you must obtain prior approval from the OTS before exercising fiduciary powers.

§ 550.80 How do I obtain OTS approval?

You must file an application under § 516.1(c) of this chapter.

§ 550.90 What information must I include in my application?

You must describe the fiduciary powers that you or your affiliate will exercise. You must also include information necessary to enable the OTS to make the determinations described in § 550.100.

§ 550.100 What factors may the OTS consider in its review of my application?

The OTS may consider the following factors when reviewing your application:

(a) Your financial condition.
(b) Your capital and whether that capital is sufficient under the circumstances.
(c) Your overall performance.
(d) The fiduciary powers you propose to exercise.
(e) Your proposed supervision of those powers.
(f) The availability of legal counsel.
(g) The needs of the community to be served.
(h) Any other facts or circumstances that the OTS considers proper.

§ 550.110 Who will act on my application?

The Director of OTS may act on any application. The Regional Director may

act on an application if it does not raise any significant issues of law or policy on which the OTS has not taken a formal position.

§ 550.120 What action will the OTS take on my application?

The OTS may approve or deny your application. If your application is approved, the OTS may impose conditions to ensure that the requirements of this part are met.

Subpart B—Exercising Fiduciary Powers

§ 550.130 What fiduciary powers may I exercise?

You may exercise only those fiduciary powers specified in the OTS approval under § 550.120. Unless otherwise provided in the approval, you may exercise fiduciary powers only from those offices listed in the application.

§ 550.140 Must I adopt and follow written policies and procedures in exercising fiduciary powers?

You must adopt and follow written policies and procedures adequate to maintain your fiduciary activities in compliance with applicable law. Among other relevant matters, the policies and procedures should address, where appropriate, the following areas:

(a) Your brokerage placement practices.

(b) Your methods for ensuring that your fiduciary officers and employees do not use material inside information in connection with any decision or recommendation to purchase or sell any security.

(c) Your methods for preventing self-dealing and conflicts of interest.

(d) Your selection and retention of legal counsel who is ready and available to advise you and your fiduciary officers and employees on fiduciary matters.

(e) Your investment of funds held as fiduciary, including short-term investments and the treatment of fiduciary funds awaiting investment or distribution.

Fiduciary Personnel and Facilities

§ 550.150 Who is responsible for the exercise of fiduciary powers?

The exercise of your fiduciary powers must be managed by or under the direction of your board of directors. In discharging its responsibilities, the board may assign any function related to the exercise of fiduciary powers to any director, officer, employee, or committee of directors, officers, or employees.

§ 550.160 What personnel and facilities may I use to perform fiduciary services?

You may use your qualified personnel and facilities or an affiliate's qualified personnel and facilities to perform services related to the exercise of fiduciary powers.

§ 550.170 May my other departments or affiliates use fiduciary personnel and facilities to perform other services?

Your other departments or affiliates may use fiduciary officers, employees, and facilities to perform services unrelated to the exercise of fiduciary powers, to the extent not prohibited by applicable law.

§ 550.180 May I perform fiduciary services for, or purchase fiduciary services from, another association or entity?

You may perform services related to the exercise of fiduciary powers for another association or other entity under a written agreement. You may also purchase services related to the exercise of fiduciary powers from another association or other entity under a written agreement.

§ 550.190 Must fiduciary officers and employees be bonded?

You must obtain an adequate bond for all fiduciary officers and employees.

Review of a Fiduciary Account

§ 550.200 Must I review a prospective account before I accept it?

Before accepting a prospective fiduciary account, you must review it to determine whether you can properly administer the account.

§ 550.210 Must I conduct another review of an account after I accept it?

After you accept a fiduciary account for which you have investment discretion, you must conduct a prompt review of all assets of the account to evaluate whether they are appropriate, individually and collectively, for the account.

§ 550.220 Are any other account reviews required?

At least once every calendar year, you must conduct a review of all assets of each fiduciary account for which you have investment discretion. In this review, you must evaluate whether the assets are appropriate, individually and collectively, for the account.

Custody and Control of Assets

§ 550.230 Who must maintain custody or control of assets in a fiduciary account?

You must place assets of fiduciary accounts in the joint custody or control of not fewer than two fiduciary officers or employees designated for that purpose by the board of directors.

§ 550.240 May I hold investments of a fiduciary account off-premises?

You may hold the investments of a fiduciary account off-premises, if this practice is consistent with applicable law, and you maintain adequate safeguards and controls.

§ 550.250 Must I keep fiduciary assets separate from other assets?

You must keep the assets of fiduciary accounts separate from your other assets. You must also keep the assets of each fiduciary account separate from all other accounts, or you must identify the investments as the property of a particular account, except as provided in §§ 550.260.

Investing Funds of a Fiduciary Account

§ 550.260 How may I invest funds of a fiduciary account?

(a) *General.* You must invest funds of a fiduciary account in a manner consistent with applicable law.

(b) *Collective investment funds.* (1) You may invest funds of a fiduciary account in a collective investment fund, including a collective investment fund that you have established. In establishing and administering such funds, you must comply with 12 CFR 9.18.

(2) If you must file a document with the Comptroller of the Currency under 12 CFR 9.18, you must also file that document with OTS under § 516.1(c) of this chapter. The OTS may review such documents for compliance with this part and other laws and regulations.

(3) "Bank" and "national bank" as used in 12 CFR 9.18 shall be deemed to include a Federal savings association.

Funds Awaiting Investment or Distribution

§ 550.290 What must I do with fiduciary funds awaiting investment or distribution?

If you have investment discretion or discretion over distributions for a fiduciary account which contains funds awaiting investment or distribution, you must ensure that those funds do not remain uninvested and undistributed any longer than is reasonable for the proper management of the account and consistent with applicable law. You also must obtain a rate of return for those funds that is consistent with applicable law.

§ 550.300 Where may I deposit fiduciary funds awaiting investment or distribution?

(a) *Self deposits.* You may deposit funds of a fiduciary account that are awaiting investment or distribution in

your other departments, unless prohibited by applicable law.

(b) *Affiliate deposits.* You may also deposit funds of a fiduciary account that are awaiting investment or distribution with an affiliated insured depository institution, unless prohibited by applicable law.

§ 550.310 What if the FDIC does not insure the deposits?

If the FDIC does not insure the entire amount of a self deposit or an affiliate deposit, you must set aside collateral as security. The market value of the collateral must at all times equal or exceed the amount of the uninsured fiduciary funds. You must place the collateral under the control of appropriate fiduciary officers and employees.

§ 550.320 What is acceptable collateral for uninsured deposits?

Any of the following is acceptable collateral for self deposits or affiliate deposits under § 550.310:

(a) Direct obligations of the United States, or other obligations fully guaranteed by the United States as to principal and interest.

(b) Readily marketable securities of the classes in which State-chartered corporate fiduciaries are permitted to invest fiduciary funds under applicable State law.

(c) Other readily marketable securities as the OTS may determine.

(d) Surety bonds, to the extent they provide adequate security, unless prohibited by applicable law.

(e) Any other assets that qualify under applicable State law as appropriate security for deposits of fiduciary funds.

Restrictions on Self Dealing

§ 550.330 Are there investments in which I may not invest funds of a fiduciary account?

You may not invest funds of a fiduciary account for which you have investment discretion in the following assets, unless authorized by applicable law:

(a) The stock or obligations of, or assets acquired from, you or any of your directors, officers, or employees.

(b) The stock or obligations of, or assets acquired from, your affiliates or any of their directors, officers, or employees.

(c) The stock or obligations of, or assets acquired from, other individuals or organizations if you have an interest in the individual or organization that might affect the exercise of your best judgment.

§ 550.340 May I exercise rights to purchase additional stock or fractional shares of my stock or obligations or the stock or obligations of my affiliates?

If the retention of investments in your stock or obligations or the stock or obligations of an affiliate in fiduciary accounts is consistent with applicable law, you may do either of the following:

(a) Exercise rights to purchase additional stock (or securities convertible into additional stock) when these rights are offered *pro rata* to stockholders.

(b) Purchase fractional shares to complement fractional shares acquired through the exercise of rights or through the receipt of a stock dividend resulting in fractional share holdings.

§ 550.350 May I lend, sell, or transfer assets of a fiduciary account if I have an interest in the transaction?

(a) *General restriction.* Except as provided in paragraph (b) of this section, you may not lend, sell, or otherwise transfer assets of a fiduciary account for which you have investment discretion to yourself or any of your directors, officers, or employees; to your affiliates or any of their directors, officers, or employees; or to other individuals or organizations with whom you have an interest that might affect the exercise of your best judgment.

(b) *Exceptions.*—(1) *Funds for which you have investment discretion.* You may lend, sell or otherwise transfer assets of a fiduciary account for which you have investment discretion to yourself or any of your directors, officers, or employees; to your affiliates or any of their directors, officers, or employees; or to other individuals or organizations with whom you have an interest that might affect the exercise of your best judgment, if you meet one of the following conditions:

(i) The transaction is authorized by applicable law.

(ii) Legal counsel advises you in writing that you have incurred, in your fiduciary capacity, a contingent or potential liability. Upon the sale or transfer of assets, you must reimburse the fiduciary account in cash in an amount equal to the greater of book or market value of the assets.

(iii) The transaction is permitted under 12 CFR 9.18(b)(8)(iii) for defaulted fixed-income investments.

(iv) The OTS requires you to do so.

(2) *Funds held as trustee.* You may make loans of funds held in trust to any of your directors, officers, or employees if the funds are held in an employee benefit plan and the loan is made in accordance with the exemptions found at section 408 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108).

§ 550.360 May I make a loan to a fiduciary account that is secured by an interest in the assets of the account?

You may make a loan to a fiduciary account that is secured by an interest in the assets of the account, if the transaction is fair to the account and is not prohibited by applicable law.

§ 550.370 May I sell assets or lend money between fiduciary accounts?

You may sell assets or lend money between fiduciary accounts, if the transaction is fair to both accounts and is not prohibited by applicable law.

Compensation, Gifts, and Bequests

§ 550.380 May I earn compensation for acting in a fiduciary capacity?

If the amount of your compensation for acting in a fiduciary capacity is not set or governed by applicable law, you may charge a reasonable fee for your services.

§ 550.390 May my officer or employee retain compensation for acting as a co-fiduciary?

You may not permit your officers or employees to retain any compensation for acting as a co-fiduciary with you in the administration of a fiduciary account, except with the specific approval of your board of directors.

§ 550.400 May my fiduciary officer or employee accept a gift or bequest?

You may not permit any fiduciary officer or employee to accept a bequest or gift of fiduciary assets, unless the bequest or gift is directed or made by a relative of the officer or employee or is specifically approved by your board of directors.

Recordkeeping Requirements

§ 550.410 What records must I keep?

You must keep adequate records for all fiduciary accounts. For example, you must keep documents on the establishment and termination of each fiduciary account.

§ 550.420 How long must I keep these records?

You must keep fiduciary records for three years after the termination of the account or the termination of any litigation relating to the account, whichever is later.

§ 550.430 Must I keep fiduciary records separate and distinct from other records?

You must keep fiduciary records separate and distinct from your other records.

Audit Requirements

§ 550.440 When do I have to audit my fiduciary activities?

(a) *Annual Audit.* If you do not use a continuous audit system described in paragraph (b) of this section, then you must arrange for a suitable audit of all significant fiduciary activities at least once during each calendar year.

(b) *Continuous audit.* Instead of an annual audit, you may adopt a continuous audit system. Under a continuous audit system, you must arrange for a discrete audit of each significant fiduciary activity (*i.e.*, on an activity-by-activity basis) at an interval commensurate with the nature and risk of that activity. Some fiduciary activities may receive audits at intervals greater or less than one year, as appropriate.

§ 550.450 What standards govern the conduct of the audit?

Auditors must follow generally accepted standards for attestation engagements and other standards established by the OTS. An audit must ascertain whether your internal control policies and procedures provide reasonable assurance of three things:

(a) You are administering fiduciary activities in accordance with applicable law.

(b) You are properly safeguarding fiduciary assets.

(c) You are accurately recording transactions in appropriate accounts in a timely manner.

§ 550.460 Who may conduct an audit?

Internal auditors, external auditors, or other qualified persons who are responsible only to the board of directors, may conduct an audit.

§ 550.470 Who directs the conduct of the audit?

Your fiduciary audit committee directs the conduct of the audit. Your fiduciary audit committee may consist of a committee of your directors or an audit committee of an affiliate. There are two restrictions on who may serve on the committee:

(a) Your officers and officers of an affiliate who participate significantly in administering your fiduciary activities may not serve on the audit committee.

(b) A majority of the members of the audit committee may not serve on any committee to which the board of directors has delegated power to manage and control your fiduciary activities.

§ 550.480 How do I report the results of the audit?

(a) *Annual audit.* If you conduct an annual audit, you must note the results of the audit (including significant actions taken as a result of the audit) in the minutes of the board of directors.

(b) *Continuous audit.* If you adopt a continuous audit system, you must note the results of all discrete audits conducted since the last audit report (including significant actions taken as a result of the audits) in the minutes of the board of directors at least once during each calendar year.

Subpart C—Depositing Securities With State Authorities

§ 550.490 When must I deposit securities with State authorities?

You must deposit securities with a State's authorities or, if applicable, a Federal Home Loan Bank under § 550.510, if you meet all of the following:

(a) You are located in the State.

(b) You act as a private or court-appointed trustee.

(c) The law of the State requires corporations acting in a fiduciary capacity to deposit securities with State authorities for the protection of private or court trusts.

§ 550.500 How much must I deposit if I administer fiduciary assets in more than one State?

If you administer fiduciary assets in more than one State, you must compute the amount of deposit required for each State on the basis of fiduciary assets that you administer primarily from offices located in that State.

§ 550.510 What must I do if State authorities refuse my deposit?

If State authorities refuse to accept your deposit under § 550.490, you must deposit the securities with the Federal Home Loan Bank of which you are a member. The Federal Home Loan Bank will hold the securities for the protection of private or court trusts to the same extent as if the securities had been deposited with State authorities.

Subpart D—Terminating Fiduciary Activities

Receivership or Liquidation

§ 550.520 What happens if I am placed in receivership or voluntary liquidation?

If the OTS appoints a conservator or receiver for you under part 558 of this chapter, or if you place yourself in voluntary liquidation, the receiver, conservator, or liquidating agent must promptly close or transfer all fiduciary accounts to a substitute fiduciary, in accordance with OTS instructions and the orders of the court having jurisdiction.

Surrender of Fiduciary Powers

§ 550.530 How do I surrender fiduciary powers?

If you want to surrender your fiduciary powers, you must file a certified copy of a resolution of your board of directors evidencing that intent. You must file the resolution with the OTS under § 516.1 of this chapter.

§ 550.540 When will the OTS terminate my fiduciary powers?

If, after appropriate investigation, the Regional Director is satisfied that you have been discharged from all fiduciary duties, the Regional Director will issue a written notice indicating that you are no longer authorized to exercise fiduciary powers.

§ 550.550 May I recover my deposit from State authorities?

Upon issuance of the OTS written notice under § 550.540, you may recover any securities deposited with State authorities, or a Federal Home Loan Bank, under subpart C of this part.

Revocation of Fiduciary Powers

§ 550.560 When may the OTS revoke my fiduciary powers?

The OTS may revoke your fiduciary powers if it determines that you have done any of the following:

(a) Exercised those fiduciary powers unlawfully or unsoundly.

(b) Failed to exercise those fiduciary powers for five consecutive years.

(c) Otherwise failed to follow the requirements of this part.

§ 550.570 What procedures govern the revocation?

The procedures for revocation of fiduciary powers are set forth in 12 U.S.C. 1464(n)(10). The OTS will conduct the hearing required under 12 U.S.C. 1464(n)(10)(B) under part 509 of this chapter.

Subpart E—Activities Exempt From This Part

§ 550.580 When may I act in a fiduciary capacity without obtaining OTS approval?

You do not need OTS approval under subpart B if you act in one of the following fiduciary capacities:

(a) Trustee of a trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan qualifying for specific tax treatment under section 401(d) of the Internal Revenue Code of 1954 (26 U.S.C. 401(d)).

(b) Trustee or custodian of a Individual Retirement Account within the meaning of section 408(a) of the Internal Revenue Code of 1954 (26 U.S.C. 408(a)).

(c) Trustee of a fiduciary account that involves no active fiduciary duties provided that the applicable law authorizes the savings association to act in this capacity.

§ 550.590 What standards must I observe when acting in exempt fiduciary capacities?

You must observe principles of sound fiduciary administration, including those related to recordkeeping and segregation of assets.

§ 550.600 How may I invest funds when acting in exempt fiduciary capacities?

If you act in an exempt fiduciary capacity under § 550.580, you may invest the funds of the fiduciary account in only the following:

(a) Your accounts, deposits, obligations, or securities.

(b) Other assets as the customer may direct, provided you do not exercise any investment discretion and do not directly or indirectly provide any investment advice for the fiduciary account.

§ 550.610 What disclosures must I make when acting in exempt fiduciary capacities?

If you act in an exempt fiduciary capacity under § 550.580 and fiduciary investments are not limited to accounts or deposits insured by the FDIC, you must include the following language in bold type on the first page of any contract documents:

Funds invested pursuant to this agreement are not insured by the Federal Deposit Insurance Corporation ("FDIC") merely because the trustee or custodian is a Federal savings association the accounts of which are covered by such insurance. Only investments in the accounts of a Federal savings association are insured by the FDIC, subject to its rules and regulations.

§ 550.620 May I receive compensation for acting in exempt fiduciary capacities?

You may receive reasonable compensation.

PART 563e—COMMUNITY REINVESTMENT

4. The authority citation for part 563e continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1814, 1816, 1828(c) and 2901 through 2907.

5. Section 563e.11 is amended by revising paragraph (c) to read as follows:

§ 563e.11 Authority, purposes, and scope.

* * * * *

(c) *Scope*—(1) *General.* This part applies to all savings associations except as provided in paragraph (c)(2) of this section.

(2) *Certain special purpose savings associations.* This part does not apply to special purpose savings associations that do not perform commercial or retail banking services by granting credit to the public in the ordinary course of business, other than as incident to their specialized operations. These associations include banker's banks, as defined in 12 U.S.C. 24 (Seventh), and associations that engage only in one or more of the following activities: providing cash management controlled disbursement services or serving as correspondent associations, trust companies, or clearing agents.

PART 571—STATEMENTS OF POLICY

6. The authority citation for part 571 continues to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1462a, 1463, 1464.

§ 571.15 [Removed]

7. Section 571.15 is removed.

Dated: December 19, 1997.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

[FR Doc. 97–33726 Filed 12–29–97; 8:45 am]

BILLING CODE 6720–01–P