

§ 9.6

12 CFR Ch. I (1–1–12 Edition)

(c) Methods for preventing self-dealing and conflicts of interest;

(d) Selection and retention of legal counsel who is readily available to advise the bank and its fiduciary officers and employees on fiduciary matters; and

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

§ 9.6 Review of fiduciary accounts.

(a) *Pre-acceptance review.* Before accepting a fiduciary account, a national bank shall review the prospective account to determine whether it can properly administer the account.

(b) *Initial post-acceptance review.* Upon the acceptance of a fiduciary account for which a national bank has investment discretion, the bank shall conduct a prompt review of all assets of the account to evaluate whether they are appropriate for the account.

(c) *Annual review.* At least once during every calendar year, a bank shall conduct a review of all assets of each fiduciary account for which the bank has investment discretion to evaluate whether they are appropriate, individually and collectively, for the account.

§ 9.7 Multi-state fiduciary operations.

(a) *Acting in a fiduciary capacity in more than one state.* Pursuant to 12 U.S.C. 92a and this section, a national bank may act in a fiduciary capacity in any state. If a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in the following specific capacities:

(1) Any of the eight fiduciary capacities expressly listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and

(2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.

(b) *Serving customers in other states.* While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fi-

duciary for, customers located in any state, and it may act as fiduciary for relationships that include property located in other states. The bank may use a trust representative office for this purpose.

(c) *Offices in more than one state.* A national bank with fiduciary powers may establish trust offices or trust representative offices in any state.

(d) *Determination of the state referred to in 12 U.S.C. 92a.* For each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship. A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.

(e) *Application of state law—(1) State laws used in section 92a.* The state laws that apply to a national bank's fiduciary activities by virtue of 12 U.S.C. 92a are the laws of the state in which the bank acts in a fiduciary capacity.

(2) *Other state laws.* Except for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks.

[66 FR 34798, July 2, 2001]

§ 9.8 Recordkeeping.

(a) *Documentation of accounts.* A national bank shall adequately document the establishment and termination of each fiduciary account and shall maintain adequate records for all fiduciary accounts.

(b) *Retention of records.* A national bank shall retain records described in paragraph (a) of this section for a period of three years from the later of the termination of the account or the termination of any litigation relating to the account.

(c) *Separation of records.* A national bank shall ensure that records described in paragraph (a) of this section are separate and distinct from other records of the bank.

§ 9.9 Audit of fiduciary activities.

(a) *Annual audit.* At least once during each calendar year, a national bank shall arrange for a suitable audit (by internal or external auditors) of all significant fiduciary activities, under the direction of its fiduciary audit committee, unless the bank adopts a continuous audit system in accordance with paragraph (b) of this section. The bank shall 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.* In lieu of performing annual audits under paragraph (a) of this section, a national bank may adopt a continuous audit system under which the bank arranges for a discrete audit (by internal or external auditors) of each significant fiduciary activity (*i.e.*, on an activity-by-activity basis), under the direction of its fiduciary audit committee, at an interval commensurate with the nature and risk of that activity. Thus, certain fiduciary activities may receive audits at intervals greater or less than one year, as appropriate. A bank that adopts a continuous audit system shall note the results of all discrete audits performed 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.

(c) *Fiduciary audit committee.* A national bank's fiduciary audit committee must consist of a committee of the bank's directors or an audit committee of an affiliate of the bank. However, in either case, the committee:

(1) Must not include any officers of the bank or an affiliate who participate significantly in the administration of the bank's fiduciary activities; and

(2) Must consist of a majority of members who are not also members of any committee to which the board of directors has delegated power to manage and control the fiduciary activities of the bank.

§ 9.10 Fiduciary funds awaiting investment or distribution.

(a) *In general.* With respect to a fiduciary account for which a national bank has investment discretion or discretion over distributions, the bank may not allow funds awaiting investment or distribution to remain uninvested and undistributed any longer than is reasonable for the proper management of the account and consistent with applicable law. With respect to a fiduciary account for which a national bank has investment discretion, the bank shall obtain for funds awaiting investment or distribution a rate of return that is consistent with applicable law.

(b) *Self-deposits*—(1) *In general.* A national bank may deposit funds of a fiduciary account that are awaiting investment or distribution in the commercial, savings, or another department of the bank, unless prohibited by applicable law. To the extent that the funds are not insured by the Federal Deposit Insurance Corporation, the bank shall set aside collateral as security, under the control of appropriate fiduciary officers and employees, in accordance with paragraph (b)(2) of this section. The market value of the collateral set aside must at all times equal or exceed the amount of the uninsured fiduciary funds.

(2) *Acceptable collateral.* A national bank may satisfy the collateral requirement of paragraph (b)(1) of this section with any of the following:

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

(ii) Securities that qualify as eligible for investment by national banks pursuant to 12 CFR part 1;

(iii) Readily marketable securities of the classes in which state banks, trust companies, or other corporations exercising fiduciary powers are permitted to invest fiduciary funds under applicable state law;

(iv) Surety bonds, to the extent they provide adequate security, unless prohibited by applicable law; and

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