

## I. INTRODUCTION

Pursuant to Section 333.3 of the FDIC Rules and Regulations, except under limited circumstances as set forth in Section 303.242(a) and discussed below, a state nonmember bank or state savings association seeking to exercise trust powers must obtain prior written consent from the FDIC.

The FDIC does not grant trust powers, rather the FDIC grants consent to exercise trust powers authorized or approved by the state authority. State law governs whether an activity constitutes a fiduciary relationship requiring trust powers. Some relationships, such as trustee, guardian, and executor/administrator of a deceased person's estate, are generally recognized to be fiduciary relationships requiring trust powers. Other relationships, such as various types of custodian or agent, may or may not be fiduciary relationships requiring trust powers, depending on each state's laws.

### Prior Consent Not Required

Section 333.101(b) of the FDIC Rules and Regulations states that an insured state nonmember bank or state savings association, not exercising trust powers, may act as trustee or custodian for Individual Retirement Accounts (IRA), Self-Employed Retirement Plans, Roth IRAs, Coverdell Education Savings Accounts, Health Savings Accounts, and other similar accounts without the prior written consent of the FDIC provided:

- The bank's or state savings association's duties as trustee or custodian are essentially custodial or ministerial in nature;
- The bank or state savings association is required to invest the funds received from such plans only in the bank's own time or savings deposits, or in any other assets at the direction of the customer provided that the bank or state savings association does not exercise any investment discretion or provide any investment advice with respect to such account assets; and,
- The bank's or state savings association's acceptance of such accounts without trust powers is not contrary to applicable state law.

Section 303.242 of the FDIC Rules and Regulations states that the FDIC's prior consent to exercise trust powers is not required in the following circumstances:

- Where a state nonmember bank or state savings association received authority to exercise trust powers from its chartering authority prior to December 1, 1950<sup>1</sup>; or,
- Where an insured depository institution continues to conduct trust activities pursuant to authority granted by its chartering authority subsequent to a charter conversion or withdrawal from membership in the Federal Reserve System.

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<sup>1</sup> State nonmember banks approved for federal deposit insurance after December 1, 1950, are required to file an application for consent to exercise trust powers, which may be done separately from, or simultaneously with, the application for deposit insurance or other application types.

The FDIC will accept trust powers granted by the Federal Reserve, former Office of Thrift Supervision, and the Office of the Comptroller of the Currency to an institution or state savings association that subsequently becomes a state nonmember bank or state savings association. In such cases, no application to the FDIC for consent to exercise trust powers is required, but the bank or state savings association must comply with any requirements its state banking authority imposes concerning the exercise of trust powers. Generally, the state banking authority will require that a state chartered institution has state-granted trust powers.

If a state nonmember bank or state savings association owns a non-deposit, non-FDIC-insured trust company subsidiary, the FDIC's consent is not required to exercise trust powers if the trust company is a separately chartered and separately capitalized legal entity. This is true whether the bank creates a new trust company subsidiary or acquires a trust company subsidiary by purchase or merger. In all such cases, the FDIC will look to whatever requirements the chartering authority imposes on the trust company itself.

## II. FORM OF APPLICATION

Section 303.242 of the FDIC Rules and Regulations sets forth procedures to be followed by a state nonmember bank or state savings association that seeks to obtain the FDIC's prior written consent to exercise trust powers. Under Section 303.242, applicants shall submit to the appropriate Regional Office (RO) a completed, *Application for Consent to Exercise Trust Powers*, FDIC Form 6200/09. Applicants may submit the application electronically via the FDIC's secure electronic delivery system or in hardcopy. For more information on the electronic delivery of applications, refer to *Applications Overview*, Section 20.1 of these Procedures. The FDIC may request additional information at any time during processing of the filing.

Applicants may seek full or limited trust powers. The application should provide sufficient details regarding the types of powers sought, the specific trust activities that will be conducted, and any proposed servicing arrangements. In addition, the application should identify the proposed primary trust officer. Case Managers should ensure that relevant background information is provided regarding the proposed primary trust officer and any other individuals that are expected to be involved in managing the trust department.

As instructed in the application form, if the applicant is not an "eligible depository institution," as defined in Section 303.2(r) of the FDIC Rules and Regulations, the application should also provide the composition of the trust committee and relevant background information on the members, information regarding the trust counsel, and projections of trust accounts, assets, and profitability for the first three calendar years after the trust department begins operations.

## III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers are to review and process these applications following the steps below and refer to *Applications Overview*, Section 1.1 of these Procedures, for general processing guidance for all application types.<sup>2</sup>

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<sup>2</sup> Case Managers should follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, and other instructions as applicable, in *Applications Overview*, Section 1.1 of these Procedures.

1. These applications are to be reviewed upon receipt, or as promptly as possible, to determine whether expedited processing applies or there are issues that would justify removal of the application from expedited processing pursuant to Section 303.11(c)(2) of the FDIC Rules and Regulations. Applications processed under expedited procedures will be deemed approved 30 days after receipt of a substantially complete application.

Note: Matters that may cause concern and possibly justify removing an application from expedited treatment may include the existence of a 3-rated management component or a relatively new institution with which the FDIC has had little experience with the institution or management team.

2. Establish the system record under Trust in the appropriate system of record – Consent to Exercise Trust Powers. All applications should be entered into the system within three days of receipt. In all cases, dates and comments in the record should be updated regularly to reflect the current status of the application.
3. Initially review all materials for completeness, and request additional information if necessary. The Case Manager should ensure that the applicant's board of directors has formally adopted the FDIC's Statement of Principles of Trust Department Management in accordance with the application form instructions. If the application is deemed substantially complete, an acceptance letter may be prepared and sent to the applicant. If related filings are involved, the Case Manager should coordinate with the applicant and the applicable state and federal regulatory agencies to ensure that all information submissions are promptly provided to the FDIC.
4. Analyze the application and complete the appropriate Summary of Investigation (SOI) form.<sup>3</sup> Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI. Refer below to *Areas of Consideration*, Part IV of this Section, for guidance concerning the analysis of the proposal and the comments to be included in the SOI.
5. If approval is being recommended, prepare a draft approval letter. The letter should specify whether consent is being granted to exercise full or limited trust powers. If consent to exercise limited trust powers is being granted, specify exactly which limited trust powers the consent covers. When consent applies to a limited trust power capacity that appears in more than one general line of trust business (such as trustee, agent, or custodian), it is important to state which type(s) of specific powers (e.g., trustee) the consent covers - personal trust, employee benefit trust, or corporate trust. The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written commitment to adhere to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions*, Section 1.11 of these Procedures, for additional guidance regarding the imposition of conditions.
6. If deficiencies may result in denial of the application, the RO should advise the applicant of the deficiencies to ensure that all necessary facts are obtained prior to making a decision. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, for further guidance.

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<sup>3</sup> Case Managers should follow the general instructions and SOI requirements for all types of applications located in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instruction in this Section.

7. For applications that cannot be acted on under delegated authority, forward the SOI and the draft letter to the WO for final action. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.
8. Once approved, email a copy of the letter to the WO Trust Examination Specialist.
9. Update the system of record to reflect the date forwarded to the WO, if applicable, the action, the date of the action, the expiration date, the hours devoted to the application, and any other required information.
10. Once consummated, ensure that the trust powers information is entered into both the structure database and the Specialty Examination Structure – Trust module in the system of record.

#### IV. AREAS OF CONSIDERATION

Risk exposure in fiduciary activities may vary significantly with the type of accounts accepted and the extent of discretionary powers exercised. In general, for trust departments that propose to offer more complex account types (e.g., corporate trust accounts or employee benefit accounts) or exercise full discretionary powers over any type of account, Case Managers are to consult with RO or WO trust specialists to ensure all key aspects of the proposal and underlying risks are fully understood. As necessary, the Case Manager should also refer to the FDIC's Trust Examination Manual and other applicable resources. Additional information regarding the analysis of applications for consent to exercise trust powers is also contained in *Applications*, Section 12.1 of the Risk Management Manual of Examination Policies.

##### SOI Comments

Each SOI should include a description of the proposal that provides appropriate contextual information, identifies the type of trust powers being sought, and describes the proposed trust activities. The SOI should discuss the extent that any third-party service providers (whether affiliated or non-affiliated) will be used to administer trust accounts and/or manage trust investments. The SOI comments should also address any recommended non-standard conditions to be imposed, any other significant matters, and the RO recommendation.

The Case Manager should consider the following items when evaluating the application for the FDIC's consent for the institution to exercise trust powers, and, as warranted, address these matters in the SOI comments.

**Business Planning** – Case Managers should assess the level of planning and due diligence performed by the institution prior to filing an application for consent to exercise trust powers. If the offering of trust services is expected to become a material source of revenue (relative to revenue from other business lines) or a significant area of the institution's operations, the Case Manager should consider requesting the applicant's business plan or strategic plan for the trust activities or an institution-wide plan that incorporates the trust activities. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional guidance regarding business plans.

**Capital** - If trust activity is expected to become a material activity of the applicant, traditional measures of capital adequacy (such as leverage and risk-based capital ratios) may be less relevant because the primary risk activities take place off-balance sheet. In such cases, a more in-depth analysis is required to understand whether the applicant will maintain sufficient capital for its anticipated risk profile. The capital adequacy analysis should focus on the size, type, and complexity of projected trust activities and the degree of investment and administrative discretion. The Case Manager should also consider the volume and types of projected trust assets; and the proportion of revenue, operating expenses, and net income projected to be derived from trust activities.

The WO is available to assist in determining the most appropriate capital methodology and the Case Manager should consult with the WO regarding proposed capital levels if the trust activity is expected to represent a material portion of an applicant's overall business activities.

**Competition and Source/Type of Potential Business** - To determine the need and projected market for the proposed trust powers, applicants typically analyze the need for trust services within the anticipated market area, including the location, size, and types of trust services provided by other financial services companies and the expected sources of new business (e.g. existing customers or new customers).

**Community Reinvestment Act (CRA)** - Although an applicant must have a satisfactory or better CRA rating to qualify for expedited processing for any filing, the CRA performance of an applicant will not serve as a basis for denial in this type of application, as set forth in Section 345.29 of the FDIC Rules and Regulations.

**Trust Profitability** – Determine whether the trust activity will be operated as a profit center or as an accommodation to customers. As required by the application, the applicant should provide written estimates of profitability based on projections of the number of accounts and related fee income. The impact of any continuing trust operating losses should be analyzed with a view toward materiality and impact on the overall condition of the institution. Many small banks may offer trust services at a loss to obtain or retain deposit or loan relationships, or as a community service. In such cases, typically management (1) has a reasonable method for measuring income and expenses, (2) reports trust profitability to the board of directors at least annually, and (3) obtains approval from the board of directors for the operation of an unprofitable line of business.

**Trust Recordkeeping** - Trust recordkeeping is different from all other types of records maintained by a bank for its deposit and lending functions. Determine whether the applicant will establish an adequate recordkeeping system for the type and volume of business projected.

**Deposit Structure** - Core deposits may be generated as a result of trust activities and, if projected, should be analyzed to determine the overall impact on the institution.

**Premises and Fixed Assets** - Determine whether the new department will require a substantial new investment in premises and fixed assets.

**Outsourcing of Trust Activities** - Trustees are permitted to outsource trust account management and/or trust investment functions, if prudent and cost effective. In delegating such responsibilities, a trustee should: 1) exercise reasonable care, skill, and caution in selecting the service provider; 2) establish the scope and terms of the delegation, consistent with the purposes of the trust; and, 3) monitor the service provider's performance. Case Managers should obtain adequate information so the FDIC can determine whether decisions to outsource an activity and the selection of service providers meet fiduciary standards, and that the requisite oversight, controls, and contractual provisions are in place for any third-party servicer relationships. Additional information is included in *Outside Contracting for Fiduciary Services*, Section 10(G) of the Trust Examination Manual.

## **V. TIME FRAMES FOR PROCESSING**

### **Expedited Processing for Eligible Depository Institutions**

An application processed under expedited procedures will be deemed approved 30 days after the FDIC's receipt of a substantially complete application.

### **Standard Processing**

RO Processing Guideline: 30 days from receipt of a substantially complete application.

WO Processing Guideline: 30 days from receipt from RO.

## **VI. PUBLICATION REQUIREMENT**

None.

## **VII. DELEGATED AUTHORITY**

Delegations of authority regarding applications, notices and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures.

## **VIII. REFERENCES**

*Sections 303.242, 333.3, and 333.101 of the FDIC Rules and Regulations*

*The Statement of Principles of Trust Department Management*

*Trust Examination Manual*

*RMS Risk Management Manual of Examination Policies, Section 12.1, Applications*