

## **CHAPTER 6-05.2 FIDUCIARY POWERS**

### **6-05.2-01. Policies and procedures on brokerage placement practices.**

Each banking institution exercising investment discretion with respect to an account must adopt and follow written policies and procedures intended to ensure that its brokerage placement practices comply with all applicable laws and regulations. Among other relevant matters, the written policies and procedures should address when appropriate:

1. The selection of persons to effect securities transactions and the evaluation of the reasonableness of any brokerage commissions paid to such persons.
2. The acquisition of any services or products, including research services, in return for brokerage commissions.
3. The allocation of research or other services among accounts, including those which did not generate commissions to pay for the research or other services.
4. The need, in appropriate instances, to make disclosures concerning the policies and procedures to prospective and existing customers.

### **6-05.2-02. Administration of fiduciary powers.**

1. The board of directors is responsible for the proper exercise of fiduciary powers by the banking institution. All pertinent matters, including the determination of policies, the investment and disposition of property held in a fiduciary capacity, and the direction and review of the actions of all officers, employees, and committees used by the banking institution in the exercise of its fiduciary powers, are the responsibility of the board. In discharging this responsibility, the board of directors may assign, by action duly entered in the minutes, the administration of any of the banking institution's fiduciary powers as it may consider proper to assign to its directors, officers, employees, or committees as it may designate.
2. No fiduciary account may be accepted without the prior approval of the board of directors, or of the directors, officers, or committees to whom the board may have designated the performance of that responsibility. A written record must be made of all acceptances and of the relinquishment or closing out of all fiduciary accounts. Upon the acceptance of an account for which the banking institution has investment responsibilities, a prompt review of the assets must be made. The board must ensure that at least once during every calendar year, and within fifteen months of the last review, all the assets held in or for each fiduciary account where the banking institution has investment responsibilities are reviewed to determine the advisability of retaining or disposing of the trust assets.
3. All officers and employees taking part in the operating of trust activities must be adequately bonded.
4. Every banking institution exercising fiduciary powers must designate, employ, or retain legal counsel who is readily available to pass upon fiduciary matters and to advise the banking institution as to its trust activities.
5. Every banking institution exercising fiduciary powers must adopt written policies and procedures to ensure that the federal securities laws are complied with in connection with any decision or recommendation to purchase or sell any security. The policies and procedures, in particular, must ensure the banking institution may not use inside information in connection with any decision or recommendation to purchase or sell any security.

### **6-05.2-03. Books and accounts.**

1. Every banking institution exercising fiduciary powers must keep its fiduciary records separate and distinct from other records of the banking institution. All fiduciary records necessary for reporting purposes must be maintained for such time as to enable the banking institution to furnish such information or reports with the commissioner. The fiduciary records must contain full information relative to each account.

2. Every banking institution must keep an adequate record of all pending litigation to which it is a party in concerning its exercise of fiduciary powers.
3. A banking institution must retain the records required for a period of three years from the later of the termination of the fiduciary account relationship to which the records relate or of litigation relating to the account.

#### **6-05.2-04. Audit of trust activities.**

A committee of directors, exclusive of any active officers of the bank, must, at least once during each calendar year and within fifteen months of the last audit, make suitable audits of the trust activities or cause suitable audits to be made by auditors responsible to the board of directors, and must ascertain whether the trust activities have been administered in accordance with law and sound fiduciary principles. The board of directors may, instead of the periodic audit, adopt an adequate continuous audit system. A report of the audits and examination required under this section, together with any action taken, must be noted in the minutes of the board of directors.

#### **6-05.2-05. Uninvested or undistributed funds.**

Uninvested or undistributed funds held by a banking institution in a fiduciary capacity must not be held uninvested or undistributed any longer than is reasonable for the proper management of the account. Each banking institution exercising fiduciary powers must adopt and follow written policies and procedures intended to ensure that the maximum rate of return available for trust-quality, short-term investments is obtained consistent with the requirements of the governing instrument or law. The policies and procedures must take into consideration all relevant factors, including the anticipated return that could be obtained while the cash remains uninvested or undistributed, the cost of investing the funds, and the anticipated need for the funds.

#### **6-05.2-06. Self-dealing.**

1. Funds held by a banking institution as fiduciary may not be invested in stock or obligations of, or property acquired from, the banking institution or its directors, officers, or employees, or individuals with whom there exists such a connection, or organizations in which there exists such an interest, as affects the exercise of the best judgment of the banking institution in acquiring the property, or in stock or obligations of, or property acquired from, affiliates of the banking institution or their directors, officers, or employees, unless authorized by the instrument creating the relationship or as authorized by law.
2. Property held by a banking institution as fiduciary may not be sold or transferred, by loan or otherwise, to the banking institution or its directors, officers, or employees, or to individuals with whom there exists such a connection, or organizations in which there exists such an interest, as affects the exercise of the best judgment of the banking institution in selling or transferring the property, or to affiliates of the banking institution or their directors, officers, or employees except:
  - a. As authorized by the instrument creating the relationship or as authorized by law;
  - b. When the banking institution has been advised in writing by its counsel or auditor that it has incurred as a fiduciary a contingent or potential liability and desires to relieve itself of that liability, a sale or transfer may be made with the approval of the board of directors, provided that the banking institution, upon consummation of the sale or transfer, makes reimbursement in cash at no loss to the account;
  - c. To purchase at market value, defaulted investment funds; or
  - d. Where ordered by the board.
3. Funds held by a banking institution as fiduciary may not be invested by the purchase of stock or obligations of the banking institution or its affiliates unless authorized by the instrument or as authorized by law. If the retention of stock or obligations of the banking institution or its affiliates is authorized by the instrument creating the relationship, by court order, or by law it may exercise rights to purchase its own stock

or securities convertible into its own stock when offered pro rata to stockholders. When the exercise of rights or receipt of a stock dividend results in fractional share holdings, additional fractional shares may be purchased to complement the fractional shares so acquired.

4. A banking institution may sell assets held by it as fiduciary in one account to itself as fiduciary in another account if the transaction is fair to both accounts and if the transaction is not prohibited by the terms of any governing instrument.
5. A banking institution may make a loan to an account from the funds belonging to another account when the making of a loan to a designated account is authorized by the instrument creating the account from which the loan is made.
6. A banking institution may make a loan to an account and may take, as security for the loan, assets of the account provided the transaction is fair to the account.

**6-05.2-07. Custody of investments.**

1. The investment of each account must be kept separate from the assets of the banking institution and must be placed in the joint custody or control of not less than two of the officers or employees of the banking institution designated for that purpose by the board of directors or by one or more officers designated by the board. The banking institution may permit the investments of a fiduciary account to be deposited elsewhere.
2. Except for commingled investments, the investments of each account must be kept separate from those of all other accounts or adequately identified as the property of the relevant account.