- Whether management is made aware of the investment risks embedded in CIFs on a regular basis.
- Whether the management information system is timely, accurate, and useful for identifying and managing risk in CIFs.

4. Evaluate CIF fiduciary committee structures, responsibilities, and performance.

5. Evaluate the effectiveness of monitoring systems to identify, measure, and track exceptions to policies and procedures.

6. Evaluate the effectiveness of formal compliance and risk management functions. Consider the following:

   - Formal and informal structures.
   - Reporting lines—whether independent or within the line of business.
   - Quality of risk assessment.
   - Control self-assessments.
   - Reporting procedures.
   - Follow-up on weaknesses identified by compliance and risk management reviews, audits, regulatory examinations, etc.
   - Litigation and complaint processes.
   - Training and expertise in CIFs.

7. Assess the effectiveness of other independent risk control functions in the CIF administration process.

8. Obtain and evaluate the annual audit and related financial reports prepared in accordance with 12 CFR 9.18(b)(6). Review for compliance with the regulation's requirements and for identified control weaknesses. Determine whether management has adequately addressed control deficiencies.

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Conclusions

Conclusion: The aggregate level of each associated risk is (low, moderate, or high). The direction of each associated risk is (increasing, stable, or decreasing).

Objective: To determine, document, and communicate overall findings and conclusions regarding the examination of the administration of CIFs.

1. Determine preliminary examination findings and conclusions and discuss with the EIC, including

   - conclusions for quantity of associated risks.
   - conclusions for quality of risk management.
   - aggregate level and direction of associated risks.
   - the overall risk in the CIFs offered by the bank.
   - the recommended ratings for the "asset management" and "compliance" elements based on the factors listed in the Uniform Interagency Trust Rating System (UITRS).
   - violations and other concerns.

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Summary of Risks Associated With CIFs				
Risk category	**Quantity of risk** (Low, moderate, high)	**Quality of risk management** (Weak, satisfactory, strong)	**Aggregate level of risk** (Low, moderate, high)	**Direction of risk** (Increasing, stable, decreasing)
Operational				
Compliance				
Strategic				
Reputation				

2. If substantive safety and soundness concerns remain unresolved that may have a material adverse effect on the bank, consider expanding the scope of the exam to cover additional CIFs to determine whether the concerns are limited to a CIF with a particular investment strategy, or whether the concerns are systemic throughout the CIF offerings of the banks.

3. Discuss examination findings with the EIC and adjust findings and recommendations as needed. If the UITRS compliance rating is 3 or worse or if the level of any risk factor is moderate and increasing or high because of the impact of CIF activities, contact the supervisory office before providing draft examination conclusions or report comments and before conducting the exit meeting with management.

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

    - Core knowledge database.
    - Core assessment standards.
    - Risk assessment system.
    - UITRS.
    - CAMELS.
    - Report of examination.
    - Asset management profile.

5. Compose conclusion comments, highlighting any issues that should be included in the report of examination. If necessary, compose a matters requiring attention comment. Comments and conclusions should focus on

    - the objectives and scope of completed supervisory activities.
    - reasons for changes in the supervisory strategy, if applicable.
    - overall conclusions, recommendations for corrective action, and management's commitments and time frames.
    - comments on any recommended administrative actions, enforcement actions, and civil money penalty referrals.

6. Discuss examination findings with bank management, including the appropriate CIF committees, to discuss violations, recommendations, and conclusions about risks and risk management practices. Communicate examination conclusions and obtain commitments for corrective action, if applicable.

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Appendixes

Appendix A: Types of CIFs

A1 and A2 Funds

An A1 fund is established under 12 CFR 9.18(a)(1) and is limited to assets held by the sponsoring bank, or by an affiliate, as trustee, executor, administrator, guardian, or custodian under a Uniform Gifts to Minors Act. The industry generally uses the term "common trust fund" when referring to A1 funds.

An A2 fund is established under 12 CFR 9.18(a)(2) and may consist only of assets of retirement, pension, profit sharing, stock bonus, or other trusts that are exempt from federal income tax. The industry generally uses the term "collective investment fund" or "collective trust" when referring to A2 funds.

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A bank is not required to be a fiduciary with discretion in order to commingle assets in an A2 plan. For an A2 plan, a bank may serve as directed agent or nondiscretionary custodian for an employee benefit (EB) plan account and may invest plan assets into its A2 fund, so long as the fund itself qualifies for an exemption from federal taxation. The bank need not act as the trustee for the underlying tax-exempt trust.

While a bank is expressly authorized by 12 CFR 9.18(a)(2)(i) to combine assets eligible for participation in an A2 fund into either an A1 or A2 fund, both 12 CFR 9.18 and section 3(c)(3) of the '40 Act limit a bank's authority to commingle assets in an A1 fund unless they are held in certain designated trusteed capacities. The OCC would expect a bank to obtain an opinion of securities counsel before investing A2 fund assets in an A1 fund. Before comingling A1 and A2 assets, a bank should carefully consider both the tax and securities law implications of combining assets in this way. It would be unusual for a bank to combine assets subject to different tax treatments or with different investment objectives into a single A1 fund. A bank may establish a network of funds or a "fund of funds" in which assets of one or more A2 funds are invested in another fund. To the extent it commingles A1 and A2 funds, a bank must be particularly careful to ensure it complies with the advertising restrictions imposed on A1 funds by 12 CFR 9.18(b)(7) and section 3(c)(3)(B) of the '40 Act. As discussed in greater detail below, these restrictions prohibit a bank from advertising or publicizing any A1 fund, except in connection with the advertisement of the bank's general fiduciary services.

A bank should ensure that admissions into its CIFs are closely scrutinized to ensure that ineligible accounts are not admitted into a CIF. The admission of even one ineligible account into a CIF could potentially raise tax and securities implications for the entire fund.

A subset of both A1 and A2 funds is a STIF. A STIF is a CIF that, while analogous to a money market mutual fund (MMMF), has significant differences. A STIF is similar to a MMMF because a STIF offers liquidity, an optimum return, and a stable value. A STIF must

comply with the detailed valuation and record-keeping requirements of 12 CFR 9.18(b)(4)(iii) rather than rule 2a-7 of the '40 Act, which imposes the standards for MMMFs.

STIFs and MMMFs are both required to limit their dollar-weighted average portfolio maturity to 60 days or less, and their dollar-weighted average portfolio life maturity to 120 days or less. A STIF must also meet the following requirements:

- Operate with a primary objective to maintain a stable net asset value (NAV) of $1.00 per participating interest.
- Adopt portfolio and issuer qualitative standards and concentrations restrictions.
- Adopt standards to address contingency funding needs.
- Adopt shadow pricing procedures—one that reflects the value of a fund's assets at amortized cost and another that reflects the market value of the fund's assets—and calculate the difference on at least a weekly basis.
- Adopt procedures for stress testing the STIF's ability to maintain a stable NAV and report adverse stress testing results to the managing bank's senior risk management.
- Provide monthly disclosures to STIF plan participants and the OCC.
- Adopt procedures that require the bank that administers the STIF to notify the OCC before or within one business day after the occurrence of one or more of six specific events.
- Use mark-to-market value accounting instead of amortized cost accounting if the market value of the portfolio falls below a NAV of $.995 per participating interest.
- Adopt procedures to take certain actions if a bank suspends or limits withdrawals or initiates liquidation of the STIF as a result of redemptions.

OCC Bulletin 2013-08, "Short-Term Investment Funds Reporting Requirements: Monthly Disclosures," provides additional details regarding the monthly disclosures a STIF must make to the OCC and the process for electronically filing those disclosures.

Other Collective Investments—12 CFR 9.18(c) Funds

12 CFR 9.18(c) authorizes other collective investments for banks in addition to those authorized under 12 CFR 9.18(a). The OCC recognizes other specific arrangements by which banks may collectively invest assets that it holds as a fiduciary, so long as applicable law does not prohibit those arrangements. Bank counsel should ensure that any such collective investment also meets the required exemptions from applicable federal securities laws. These narrowly defined collective arrangements, which are described below, are not subject to the provisions of 12 CFR 9.18(b) detailed in appendix B.

Single Loans or Obligations

As described in 12 CFR 9.18(c)(1), a bank may collectively invest assets that it holds as fiduciary in

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- a single real estate loan, a direct obligation of the United States, or an obligation fully guaranteed by the United States, or a single fixed amount security, obligation, or other property, either real, personal, or mixed, of a single issuer; or
- a variable amount note of a borrower of prime credit, if the bank uses the note solely for investment of funds held in its fiduciary accounts.

Mini-Funds

A bank often receives or holds relatively small dollar accounts in its capacity as trustee, executor, administrator, guardian, or custodian (e.g., under a Uniform Gifts to Minors Act account). Because cash balances in these accounts are often too small to be advantageously invested separately, the bank may establish a fund expressly for these balances' collective investment. The maximum amount of assets that may be held in such a "mini-fund" is $1,000,000, and the maximum number of participating accounts in any one mini-fund is 100.

Trust Funds of Corporations and Closely Related Settlors

When a trust is created by a corporation (including its affiliates and subsidiaries), or by several individual but closely related settlors, a bank is authorized to collectively invest the trust assets that it holds as a fiduciary in any investment specifically authorized by the instrument creating the fiduciary account or by court order.

Other Authorized Funds

To the extent another common or collective fund arrangement is expressly authorized by applicable law, a bank may establish such a fund. For example, many states have statutory provisions for pre-need funeral and cemetery trusts and the collective investment of the funds deposited into those trusts. Another example of a pooled fund is a pooled special needs trust authorized by the Medicaid statute and established under a specific state law. While these provisions authorize a bank to establish a fund consistent with the requirements imposed by applicable law, they do not necessarily result in the fund qualifying for an exemption under the federal securities laws. See appendix C.

Special Exemption Funds

The OCC's CIF regulations include a procedure under 12 CFR 9.18(c)(5) for the OCC to consider new types of funds and to consider modifications to existing types of funds. With OCC approval, banks are provided a means to operate an A1 or A2 fund and not comply with some or all of the provisions of 12 CFR 9.18(a) and (b). Since the issuance of revised 12 CFR 9 in 1996, however, the OCC has had few occasions to issue 12 CFR 9.18(c)(5) interpretive letters because 12 CFR 9.18 authorizes a bank to offer CIFs "where consistent with applicable law" rather than solely subject to OCC approval.

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Other Commingled Funds

A bank may serve as an administrator, investment adviser, investment manager, and/or trustee of a pooled income fund. These are funds maintained by a third-party organization, such as a church, non-profit, public charity, or an educational institution. These funds typically pool charitable gifts from individual donors, provide current tax benefits to those donors, and provide lifetime income to those donors or their beneficiaries.

Pooled funds are not CIFs and may not be operated by a bank as a CIF. Pooled funds are not governed by 12 CFR 9.18 but instead must fall within specific exemptions provided under the federal tax and securities laws (e.g., the Philanthropy Protection Act of 1995), as well as state securities laws.

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Appendix B: 12 CFR 9.18(b), Administrative Requirements

12 CFR 9.18(b) establishes the administrative requirements that a bank must comply with if it establishes and administers a CIF authorized under 12 CFR 9.18(a). These requirements are in addition to and distinct from a bank's other fiduciary responsibilities.

Written Plan—12 CFR 9.18(b)(1)

The board of directors of a bank, or a committee authorized by the board, must approve through resolution a written plan for each CIF operated by the bank. Although the regulation does not dictate a plan's specific terms, a plan must contain appropriate provisions regarding the manner in which a bank will operate the fund. At a minimum, a plan must include provisions relating to

- investment powers and policies with respect to the fund.
- allocation of income, profits, and losses.
- fees and expenses that will be charged to the fund and to participating accounts.
- terms and conditions governing the admission and withdrawal of participating accounts.
- verification of eligibility (audits) of participating accounts.
- basis and method of valuing assets in the fund.
- expected frequency for income distribution to participating accounts.
- minimum frequency for valuation of fund assets.
- how much time the bank has, following a valuation date, to do the valuation.
- bases on which the bank may terminate the fund.
- any other matters necessary to define clearly the rights of participating accounts.

A bank must make a copy of the plan available for public inspection at its main office and must provide a copy of the plan to anyone who requests it. Banks are no longer required to submit copies of CIF plans to the OCC.

Fund Management—12 CFR 9.18(b)(2)

A bank administering a CIF must have exclusive management of that fund, except as a prudent person might delegate responsibilities to others. 12 CFR 9.18(b)(2) allows a bank to delegate CIF responsibilities to others if prudent to do so.

The delegation standard is derived from the American Law Institute's Restatement (Third) of Trusts (2007), section 80, "Duty with Respect to Delegation," and section 90, "General Standard of Prudent Investment (Prudent Investor Rule)." The "Investment Management Services" booklet of the *Comptroller's Handbook* (appendix B, "Trust Investment Law") provides a detailed review of the prudent investor rule.

Delegation decisions are matters of fiduciary judgment and discretion. A bank must exercise care, skill, and caution in selecting agents and in negotiating and establishing terms of delegation, including investment responsibilities. In deciding whether to delegate

responsibilities, the bank should balance the anticipated benefits against the costs of delegation. See discussion of "Expenses" under 12 CFR 9.18(b)(10) below. OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance," provides additional risk management guidance for these types of service arrangements, and OCC Bulletin 2011-11 establishes minimum standards for CIFs offered through third-party entities, such as RIAs.

Proportionate Interests—12 CFR 9.18(b)(3)

All participating accounts in a CIF are required to have a proportionate interest in all the fund's assets. This is particularly important to consider when a CIF faces liquidity issues and there are more requests to withdraw than there are liquid assets to honor those requests. The bank, as fiduciary to both the fund and the participants in the fund, must consider the impact of any withdrawal on all participants in the fund. To the extent a CIF charges different fees to fund participants, when that differential is based on the amount and type of services the bank provides, the bank must ensure that all participants retain a proportionate interest in the assets of the CIF.

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Valuation—12 CFR 9.18(b)(4)

A bank administering a CIF must determine the market value of the fund's assets at least once every three months. Valuation dates must be established by the fund's written plan. If the bank cannot readily ascertain the market value of a particular asset, the bank shall use a "fair value" determined in good faith.

This section includes an accommodation for CIFs that are invested in assets such as real estate or private equity securities—that is, securities that are not readily marketable. A bank is required to determine the value of those assets at least once each year, rather than quarterly.

Short-term investment funds. A bank may value a STIF's assets on a cost basis, rather than at market value, for admissions and withdrawals, provided that the fund meets each of the specific requirements established by 12 CFR 9.18(b)(4)(iii). These requirements are detailed in appendix A.

While the OCC's STIF provisions are generally based on the SEC's Money Market Fund rule 2a-7, there are several significant differences. The differences are attributable to the fiduciary relationship between a bank STIF and its participants as well as the investment eligibility requirements inherent to both A1 and A2 STIFs that are not present with traditional 2a-7 money market funds.

Guaranteed investment contracts (GIC) and synthetic investment contracts (SIC). In Interpretive Letter No. 716 (1995), the OCC modified valuation requirements for CIFs that purchase GICs and SICs.[7] GICs and SICs are contracts that have almost no liquidity because

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[7] IL 716 cites Statement of Position 94-4 (SOP 94-4), "Reporting of Investment Contracts Held by Health and Welfare Benefit Plans and Defined-Contribution Plans," issued by the American Institute of Certified Public Accountants (September 23, 1994), as a basis for the OCC's interpretation. See also Financial Accounting

the contract terms generally prohibit their transfer. GICs are individually negotiated investment contracts between insurance companies and investors. SICs are individually negotiated investment contracts that provide cash flow protection for assets or pools of assets to investors who own those assets and who must sell those assets to pay plan participants.

Consistent with accounting guidance, Interpretive Letter 716 permits CIFs consisting solely of defined contribution plan assets (rather than defined benefit plan assets) that are invested solely in fully benefit-responsive GICs and SICs and liquid, short-term government securities and money market instruments to value the GICs and SICs at contract value rather than fair value. Contract value is the principal balance plus accrued interest. Although accounting guidance requires defined benefit plans invested solely in GICs and SICs to be valued at fair value, the fair value of these contracts is usually equal to their contract value.

Valuation dates. Unless specified by a fund's written plan, there is no requirement that admissions and withdrawals be permitted as frequently as valuation dates. 12 CFR 9.18(b)(1)(iv), however, requires a CIF plan to establish the terms and conditions governing admission and withdrawal. The "Admission and Withdrawal of Accounts" section, which follows, discusses the factors the OCC has considered when authorizing CIF plans that restrict admissions and withdrawals.

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Admission and Withdrawal of Accounts—12 CFR 9.18(b)(5)

The admission and withdrawal requirements for CIFs provide flexibility so long as certain standards are met. These standards are designed to ensure that a bank fiduciary treats all participating accounts fairly when governing the timing of admissions and withdrawals and when determining a fund's value for the purpose of admissions and withdrawals.

First and foremost, a bank may only admit an account to a CIF or withdraw an account from the fund on the basis of the valuation process established in the plan. This means that admissions to and withdrawals from a fund must be processed as of a specified time on an established valuation date and must be based on the market value[8] of the fund's assets as of such time. Banks must ensure that late trading of their CIFs does not occur. A bank cannot provide different fund valuations to accounts that enter or withdraw from the same CIF on the same valuation date. A narrow exclusion from this prohibition allows certain stable value funds (SVF) to, effectively, transact withdrawals at different prices on the same day: employee-directed benefit-responsive withdrawals at one price (amortized cost); and, in limited circumstances with full and timely disclosure of this option to all fund participants, employer-directed withdrawals at another price (market value). This deviation in SVF withdrawal prices must be expressly authorized by the SVF's plan, must be disclosed to all

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Standards Board Staff Position AAG INV-1 and SOP-94-4-1, *Reporting of Fully Benefit-Responsive Investment Contracts Held by Certain Investment Companies Subject to the AICPA Investment Company Guide and Defined-Contribution Health and Welfare and Pension Plans* (December 29, 2005).

[8] In a limited number of situations (e.g., STIFs and certain stable value funds) certain admissions and withdrawals may be executed at amortized cost instead of market value.

2. The amount of the fee does not exceed an amount commensurate with the value of legitimate services of tangible benefit to the participating accounts that would not have been provided to the accounts were they not invested in the fund.

Essentially, a bank may charge a fee for managing a CIF provided that the participant's share of that fee and the other fees charged to that participant do not exceed the fees the participant would have paid for services if the bank had not invested the participant's assets in the fund. A bank may charge different management fees to fund participants commensurate with the amount and types of services provided to fund participants. These variations in fees may be reflected in the number of units a participant receives. For example, if two participants are admitted with the same amount of money to invest, the bank is allowed to provide more units of the CIF to the one requiring fewer services.

A bank administering a CIF may charge reasonable expenses incurred in operating the fund to the extent not prohibited by applicable law in the state in which the bank maintains the fund. A bank must, however, absorb all expenses associated with the establishment or reorganization of a CIF. While 12 CFR 9.18 does not specifically define which expenses are "reasonable" and which are not, the OCC has authorized banks to charge reasonable expenses directly associated with operating a CIF. Those expenses include, for instance, an audit of a fund; the cost of publishing the annual financial report; all costs, commissions, taxes, transfer taxes, legal fees, and other expenses associated with the purchase or sale of CIF assets; and all other reasonable costs incurred in the operation and administration of a fund.

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Under limited circumstances, subject to strict limits, and only with express OCC approval, a fund plan may authorize the sponsoring bank to pass through to fund participants certain brokerage, transaction, and other fees associated with accounts being admitted to or withdrawn from a CIF to each participating account in the CIF. A bank would be expected to net withdrawals from a fund against admissions into that fund for each relevant date prior to passing through various fees to fund participants. This limited arrangement is designed so that long-term CIF participants do not end up absorbing the costs associated with the admission and withdrawal of shorter-term participants in the CIF. Under no circumstances may these admission and withdrawal fees be paid to the bank; they must be paid into the CIF.

An "index CIF" may charge brokerage fees and other costs to fund participants that are either admitted to or that withdraw from an index CIF. Index CIFs seek to replicate the performance of a specified index, such as the Standard and Poor's 500 Index. Trading decisions are made according to a formula that tracks the rate of return of the index by replicating the entire portfolio of the index or by investing in a representative sample of that portfolio. The OCC has also authorized a bank that administers "model-driven" A2 funds to charge these costs to participants at the time they are admitted to or withdrawn from the fund. A "model-driven fund" is a fund that seeks to outperform a third-party index based on certain pre-specified formulas or algorithms, and such a fund is quantitative in nature.

Absent express OCC authorization based on a review of the bank's methodology for passing through costs and other factors, a bank may not charge participants with the cost of entering

or exiting a CIF. The payment by an index or model-driven CIF of brokerage fees and expenses to accommodate a participant either entering or exiting the fund, however, could negatively affect the fund's return relative to the index or model for the remaining fund participants. To mitigate that impact, and in light of the limited discretion of the fund manager for an index or model-driven fund, the OCC has allowed funds with these investment strategies to allocate these costs to participants being admitted or withdrawn from either index or model-driven funds, provided that the CIF plan document discloses these charges.

While OCC regulations enable banks to develop flexible and competitive fee structures, a bank fiduciary must ensure that it does not charge excessive fees or make decisions to invest in a particular product, such as a mutual fund, solely to maximize the revenues of the bank or an affiliate. See "Use of Mutual Funds as Fiduciary Investments" (appendix E) in the *Comptroller's Handbook* booklet "Conflicts of Interest." The OCC has acknowledged that a bank may invest CIF assets in either bank-affiliated or third-party mutual funds and may receive both reasonable trust management fees from its customers and fees from the mutual fund for providing services to that fund, provided that these actions are consistent with applicable law.

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Fees must be commensurate with the value of services provided. Unless authorized by applicable law, a bank should be careful not to double-charge a fund for fees already charged by a sub-adviser for the same services. In these situations, the bank must not only determine whether the investment is prudent and appropriate for each of the trust accounts, given the investment alternatives realistically available, but also periodically review the prudence of retaining these investments.

The '40 Act authorizes mutual funds to pay certain fees (12b-1 fees) to third parties to defray the cost of shareholder servicing and administrative services. These fees frequently are used to compensate banks for providing services such as placing orders, processing purchases, processing dividend and distribution payments, and responding to customer inquiries. When a bank receives 12b-1 fees from a mutual fund based on investments in that fund by a bank-administered CIF, the bank should ensure that applicable law authorizes its receipt of the fee and that the bank discloses receipt of that fee to fund participants.

In addition to 12b-1 fees, some mutual fund complexes pay "finder fees" and other compensation to investors for placing their investments with a particular fund or for retaining their investments over time with a particular fund or fund complex. A bank administering a CIF must ensure that such fees are consistent with the OCC's self-dealing and fee regulations and with SEC and other applicable guidance in this area.

Prohibition Against Certificates—12 CFR 9.18(b)(11)

To avoid any potential compliance issues with the securities laws, a bank that administers a CIF may not issue a certificate or other document that represents a direct or indirect interest in the fund. A bank may, however, provide a withdrawing account with a document that reflects a continuing interest in an investment that has been segregated.

Good Faith Mistakes—12 CFR 9.18(b)(12)

The OCC recognizes that a bank may unknowingly run afoul of one of the CIF regulations. To motivate banks that administer CIFs to correct their good faith mistakes as promptly as possible, the regulation provides that the OCC will not determine that a bank has violated the CIF regulations when a bank makes a good faith mistake while exercising due care in connection with administering a CIF. This limited exemption applies so long as the bank, promptly after the discovery of the mistake, takes whatever action is practicable under the circumstances to remedy the mistake.

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Appendix C: CIFs and the '40 Act

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The '40 Act regulates the formation and operation of investment companies (e.g., mutual funds). The '40 Act contains two specific exclusions from the definition of "investment company" that allow banks to operate CIFs without registering them with the SEC. The first exclusion, section 3(c)(3) of the '40 Act, generally covers all A1 funds. It provides an exclusion from investment company registration for any common trust fund or similar fund maintained by a bank that is exclusively for the collective investment and reinvestment of moneys contributed by the bank in its capacity as a trustee, executor, administrator, or guardian, if

- a bank sponsors the CIF solely as an aid to the administration of trusts, estates, or other accounts created and maintained for a fiduciary purpose;
- interests in the CIF are not advertised or offered for sale to the general public except in connection with the ordinary advertising of the bank's fiduciary services; and
- fees and expenses charged by the CIF do not violate fiduciary principles established under applicable federal or state law.

In 1999, the Gramm–Leach–Bliley Act (GLBA) narrowed the '40 Act's statutory exclusion under section 3(c)(3). The GLBA imposed additional restrictions on a bank's ability to advertise a CIF and to make it available to the general public, and the GLBA further limited the fees these funds may charge. These statutory restrictions generally codified previous SEC interpretations that limited a bank's ability to market A1 funds.

Section 3(c)(11) of the '40 Act, which was not narrowed by the GLBA legislation, provides an exclusion from the registration, disclosure, and record-keeping requirements of the '40 Act for most A2 funds. Among other things, it exempts any "collective trust fund maintained by a bank" consisting solely of assets of

- any employee's stock bonus, pension, or profit-sharing trusts that meet the requirements for qualification under section 401 of the Internal Revenue Code of 1986, and
- governmental plans.

The '40 Act's exclusions under section 3(c)(3) and section 3(c)(11), like the '33 Act exemptions, do not expressly cover CIFs that contain IRA assets. This is because IRAs are created under a different IRC section than qualified EB plans, and IRAs receive their preferred tax treatment under a different IRC section. (See appendix D.) Health savings accounts and related tax-advantaged savings vehicles raise similar issues. A bank should consult with securities counsel before commingling these assets in a CIF.

Banks should also consult with securities counsel if they intend to combine different assets (e.g., personal trust and pension assets) in a single CIF. While 12 CFR 9.18(a)(2)(i) expressly authorizes these combinations, a bank should obtain specific securities law advice in this area to ensure that only eligible, trusteed assets are admitted into an A1 fund. Banks should also consider potential securities law restrictions on the investment of fiduciary assets held by one bank into an A1 fund of an unaffiliated institution. While SEC guidance authorizes affiliated

banks under a single holding company to combine their A1 and A2 funds, the SEC has not authorized a bank's consolidation of assets from unaffiliated banks into a single A1 fund. This restriction may apply even when applicable law (state trust law or the governing instrument) expressly authorizes a trustee to invest the assets in an unaffiliated bank's CIF.

A bank that is considering operating a CIF that does not clearly meet either the section 3(c)(3) or section 3(c)(11) exclusions of the '40 Act, or the related exemptions of the '33 Act, should ensure that securities counsel has reviewed the proposed fund. If the fund violates securities laws, the SEC may take enforcement action against the bank, including the imposition of penalties. The OCC is also authorized to take remedial action if a bank violates securities laws.

If a bank determines that a CIF must be registered because the fund does not meet the exemptions under the '40 Act, the bank must also determine whether it must register interests in the CIF as a "security" under the '33 Act.

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Appendix D: Specialized CIFs

This section highlights certain special-purpose CIFs that hold selected assets that may be operated in compliance with limited securities law exemptions. These funds may be operated under exemptions that do not generally apply to CIFs.

IRAs are authorized as tax-exempt accounts under section 408 of the IRC. OCC and IRS regulations authorize a bank to invest IRA assets in a CIF. Under the SEC's interpretation of the securities laws, however, a bank that operates a CIF and invests IRA assets in that fund may be considered to be operating the CIF in violation of the '33 Act and '40 Act. The SEC, however, has expressly authorized banks to operate CIFs that accept IRAs if those funds are registered with the SEC as registered investment companies under the '40 Act and as securities under the '33 Act.

Keogh plans (retirement plans for self-employed individuals) are authorized as tax-exempt under section 401(c)(1) of the IRC. Because Keogh plans, like IRAs, are not authorized as tax exempt under section 401(a) of the IRC, the securities laws could be interpreted so as to prevent a bank from collectively investing IRA assets or Keogh plan assets in a CIF unless the fund is registered as an investment company and a security. Under this interpretation of the securities laws, only EB plans qualified under section 401(a) of the IRC may be invested in A2 funds. In the absence of guidance from securities law counsel, a bank should be careful not to place IRA or Keogh assets in a CIF unless the fund qualifies for a specific exemption or is registered under the securities laws.

The SEC has recognized only limited exemptions from '33 Act registration for a CIF that contains Keogh funds. For example, '33 Act rule 180 contains a "sophisticated investor" exemption from '33 Act registration for CIFs holding Keogh account assets when the plan is either a single employer or has only employees of interrelated partnerships and when

- the employer is a law firm, accounting firm, investment banking firm, pension consulting firm, or investment advisory firm that is engaged in furnishing services of a type that involve such knowledge and experience with financial and business matters that the employer is able to represent adequately its interests and those of its employees; or
- before adopting the plan, the employer obtains expert financial advice from an entity, which is independent of the bank operating the CIF and that by virtue of knowledge and experience in financial and business matters is able to represent adequately the interests of the employer and its employees.

In addition to the narrow '33 Act rule 180 exemption, a CIF holding Keogh funds may also be structured to qualify for the "intrastate exemption" under section 3(a)(11) of the '33 Act. For the intrastate exemption to be available, however, all of the interests in the CIF must be sold within a single state or territory, and the parties to that plan must all reside and do business within that state. Any commingling of intrastate Keogh plan assets with assets from another state may nullify this exemption.

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References

Laws

12 USC 92a
Employee Retirement Income Security Act of 1974
Gramm–Leach–Bliley Act of 1999
Internal Revenue Code
Investment Company Act of 1940
Securities Act of 1933
Securities Exchange Act of 1934

Regulations

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12 CFR 9, "Fiduciary Activities of National Banks"
12 CFR 30, "Safety and Soundness Standards"
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"Bank Supervision Process"
"Community Bank Supervision"
"Federal Branches and Agencies Supervision"
"Large Bank Supervision"

Safety and Soundness, Management
"Internal and External Audits"
"Internal Control"
"Litigation and Other Legal Matters"

Asset Management
"Asset Management"
"Asset Management Operations and Controls"
"Conflicts of Interest"
"Custody Services"
"Investment Management Services"
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