



BANKING ISSUANCE

Comptroller of the Currency
Administrator of National Banks

Type: Banking Circular

Subject: Sweep Fees

TO: Chief Executive Officers of National Banks Authorized to Exercise Fiduciary Powers,
Deputy Comptrollers (District), and Examining Personnel

PURPOSE

This issuance cautions national banks concerning certain trust department uses of "sweep" cash management programs under circumstances in which banks receive supplemental fees for participation of fiduciary accounts in the programs.

BACKGROUND

As a means to meet their responsibility to obtain the maximum return for fiduciary cash balances which are awaiting investment or distribution, a number of national banks have acquired or established programs for the systematic investment of such balances in various short-term investment media commonly referred to as "sweep" systems. Some of these banks directly or indirectly have imposed additional or supplemental fees on fiduciary accounts for performing this cash management function.

A. "Sweep Fees"

It is not clear whether under the laws of the various states governing trusts a fiduciary may charge an additional fee beyond that specified by the governing instrument for performing what is now recognized as being one of its basic responsibilities. While it is recognized that additional fees may be taken where the trustee renders professional or other services not usually performed by trustees in the administration of a trust, it is uncertain whether, in the case of national banks, a sweep fee generally falls into this category. See 12 C.F.R. § 9.10. Thus, this Office cautions that the laws of the various states governing trusts may prohibit a fiduciary from charging sweep fees unless specific authority to impose such a charge exists in the appropriate governing instrument, court order, or valid consents are obtained after full disclosure from all parties in interest. See, generally, Restatement (Second) of Trusts §§ 242(d), (f),(h) and (i)(1957). We note that the staff of the Board of Governors of the Federal Reserve System ("Board"), in an opinion dated March 20, 1985, has concluded that the imposition of a sweep fee raises a conflict of interest issue where the fiduciary has investment discretion. The Board advised fiduciaries to obtain appropriate authorization after proper disclosure.



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This Office encourages national banks to obtain a reasoned opinion of counsel as to the permissibility of the practice of charging sweep fees under applicable local law. To the extent that the practice is not prohibited under local law, the Office will accept that sweep fees are compensation for separate trust services. Therefore, the reasonableness of a sweep fee is governed by 12 C.F.R. § 9.15(a). That rule provides in pertinent part that

[i]f the amount of compensation for acting in a fiduciary capacity is not regulated by local law or provided for in the instrument creating the fiduciary relationship or otherwise agreed to by the parties, a national bank acting in such capacity may charge or deduct a reasonable compensation for its services.

12 C.F.R. § 9.15(a).

With respect to the legality of this practice for accounts subject to ERISA, banks are encouraged to seek the prior advice of the Department of Labor. We observe in this regard that in a letter dated August 1, 1986, the Department of Labor concluded that section 408(b) (2) of ERISA does not exempt from the prohibition in section 406(b) sweeps into in-house funds when a bank uses its fiduciary authority over plan funds to increase the amount of its compensation by determining the timing or amount of plan funds to be transferred into the sweep fund. The August 1, 1986 letter states, however, that under appropriate circumstances sweeps into in-house funds may constitute "ancillary services" under section 408(b) (6) of ERISA for which bank fiduciaries may charge additional fees.

B. Disclosure

As a matter of prudent banking practice, national banks are encouraged to disclose fully fees taken in their periodic statements to fiduciary account parties in interest. Such disclosure normally would be made at least annually, and should be in a separate line item which states in dollars and cents the total amount of such fees charged or attributed to the account since the previous report.



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ORIGINATING OFFICE

Questions regarding this issuance may be directed to the Trust Examinations Division (202) 874-4447.

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