



Pooled Investment Guidance

Pooled investment funds often referred to as a Common Trust Fund (CTF) or an Employee Benefit Collective Investment Fund (CIF) is permissible pursuant to South Dakota Codified Law (SDCL) 51A-6A-29(7). CTFs are pooled assets held in individual trust accounts while CIFs are pooled qualified (employee benefit) funds. CTFs and CIFs are established under Section 584 of the Internal Revenue Code and IRS Revenue Ruling 81-100, respectively. A Section 584 CTF is not subject to taxation if the CTF is established and operated in compliance with the Comptroller of the Currency (OCC) regulations. OCC regulation regarding the operation of these types of pooled investment vehicles is 12 CFR 9.18 (Reg 9.18). A Section 584 CTF is commonly referred to as a Reg 9.18 (a)(1) fund. An 81-100 CIF is typically established in a form identical to that outlined by Reg 9.18(a)(2); however, an 81-100 CIF does not have to comply with OCC regulation, but must comply with ERISA guidance. Reg 9.18 generally addresses items considered as standard industry practice and, therefore, serves as a guide to the prudent operation of qualified CIF's. Therefore, the operation of a qualified CIF under OCC guidelines, or guidelines substantially similar, is recommended. Reg 9.18 can be viewed on the OCC's website.

Annual Report Requirements

Reg 9.18(b)(6)(ii) requires each fund to issue an annual report that is intended both for the company and the beneficiaries of participating accounts. At least once during each 12 month period, a financial report of the fund based on the audit must either be furnished, or made available, at no charge to each person who would receive an accounting from each participating trust account. It may also be provided to prospective customers. The financial report must contain a list of investments at both cost and current market value, a summary of investment changes for the period reflecting purchases (with costs) and sales (with profit or loss), income and disbursements since the last report, and notation of any investments in default. The report may not contain predictions of future fund performance, but many include historical performance data. Part 344(e) of the FDIC Rules and Regulations requires the company to at least annually give or send to the customer a copy of a financial report of the fund, or provide notice that a copy of such report is available and will be furnished upon request to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. The report shall be based upon an audit made by independent public accountants or internal auditors responsible only to the board of directors.

Management Fees

Reg 9.18 (9)(ii) states a reasonable fund management fee may be charged only if the amount of the fee does not exceed an amount commensurate with the value of legitimate services of tangible benefit to the participating fiduciary accounts that would have been provided to the accounts were they not invested in the fund. The OCC Examination Manual further clarifies, the trust company may charge a fee for managing a CTF provided that the participant's share of that fee, together with the other fees charged to that participant, do not exceed the fees the participant would have paid for services if the funds had not been invested in a CTF.

Fee Disclosure:

A fiduciary has a common law duty to fully and properly account to the client for assets entrusted to it. Under 12 CFR 9.18 (9) a duty to disclose that a management fee or investment adviser fee being charged must be made in the Plan Document, on applicable fee schedules, and to participating account holders in advance of the fee being assessed. A 30-day prior notice is considered standard industry practice before commencing a new or higher fee on existing accounts, unless the governing instrument of each participating account states a shorter or longer notice period or waives the prior notice requirement.

Expense Reimbursement

The OCC authorizes reimbursement from fund assets of reasonable expenses directly associated with operating a CTF. 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 CTF assets; and all other reasonable costs incurred in the operation and administration of a fund.

Documentation

The trust company's primary duty is the management and care of assets for others. As such, the trust company is obligated to manage fund assets in a manner beneficial to account participants. Management fee assessments and expense reimbursements must be supported and adequately documented. Written records and management meeting minutes should document and demonstrate an undivided loyalty to account participants.

Conflict of Interest and Self -Dealing

Written policies and procedures should address conflict of interest and self-dealing guidance. The creation of a pooled investment fund and associated management fee assessments and expense reimbursements will generally increase conflict of interest and self-dealing risk exposure. Trust company management is obligated to provide personnel with comprehensive guidance including the trustee's duty of undivided loyalty to fund participants. At minimum, written policy should address receipt of fees beyond the trustee's fee (CTF fees, 12b-1 fees, sweep fees, etc.).