governing self-dealing and conflicts of interest). Alternatively, the OCC could use provisions of the Investment Advisers Act of 1940 (Advisers Act)[4] as a point of reference. Under the Advisers Act, as implemented by the Securities and Exchange Commission (SEC),[5] an investment adviser must, among other things: (1) Provide clients and prospective clients with a written disclosure statement about the adviser's business practices and educational and business background; (2) comply with specific contractual requirements in their dealings with clients, including a prohibition against assigning an advisory contract without client consent and restrictions on performance fee arrangements; (3) comply with prohibitions against misstatements or misleading omissions of material facts and fraudulent acts or practices; and (4) comply with anti-fraud provisions dealing with advertising, solicitations, and custody or possession of client funds. In addition, the Supreme Court has held that a registered investment adviser owes its clients an affirmative duty of good faith and full and fair disclosure of all material facts, especially where the adviser's interests may conflict with those of its clients.[6]

Fiduciary Officers and Employees (Proposed § 9.2(f))

The proposal replaces the term ''trust department,'' defined at § 9.1(j), with the term ''fiduciary officers and employees,'' to reflect the increasing diffusion of fiduciary functions throughout a national bank.

Investment Discretion (Proposed § 9.2(j))

As mentioned earlier, the proposal defines the term ''fiduciary capacity'' to include any capacity involving investment discretion on behalf of another. The new term ''investment discretion,'' in turn, includes any account for which a national bank has the authority to determine what securities or other assets to purchase or sell on behalf of the account. The OCC considers this term to apply whether or not the bank itself in fact exercises that discretion or delegates that function to another.

Approval Requirements (Proposed § 9.3)

Consistent with § 9.2 of the current regulation, the proposal directs a national bank seeking approval to exercise fiduciary powers and a person seeking approval to organize a special-purpose national bank limited to fiduciary powers, to appropriate provisions in 12 CFR part 5 (rules, policies, and procedures for corporate activities).

Administration of Fiduciary Powers (Proposed § 9.4)

The proposal relocates most of the substance of current § 9.7 to proposed § 9.4, but relocates provisions in current § 9.7 relating to policies and procedures, review of assets, and recordkeeping, to other sections specifically addressing those topics (proposed §§ 9.5, 9.6, and 9.8, respectively). The proposal also relocates a provision in current § 9.7 relating to the need for fiduciary counsel to proposed § 9.5 (policies and procedures).

The proposal continues to place the primary responsibility for a national bank's fiduciary activities on its directors. Under the proposal, as under the current rule, the board may assign functions related to the exercise of fiduciary powers to bank directors, officers, employees, and committees thereof. The proposal allows a national bank to use personnel and facilities of the bank to perform services related to the exercise of its fiduciary powers, and to allow any department of the bank to use fiduciary officers and employees and facilities to perform services unrelated to the exercise of fiduciary powers, to the extent not prohibited by applicable law. The proposal retains the requirement that all fiduciary officers and employees must be adequately bonded.

The proposal adds a new provision, at proposed § 9.4(c), to clarify that a national bank may enter into an agency agreement with another entity to purchase or sell services related to the exercise of fiduciary powers. This provision reflects the OCC position contained in Fiduciary Precedent 9.1300 (found in the ''Comptroller's Handbook for Fiduciary Activities'').[7]

Policies and Procedures (Proposed § 9.5)

Current § 9.5 requires a national bank to adopt policies and procedures with respect to brokerage placement practices but not with respect to other areas of fiduciary practice. The proposal, on the other hand, requires that a national bank have written policies and procedures to ensure that its fiduciary practices comply with applicable law. The proposal lists particular areas that a bank's policies and procedures should address.

Several of the items on this list of required policies and procedures stem from provisions located in other sections of the current regulation, including methods for ensuring that fiduciary officers and employees do not use material inside information in connection with any decision or recommendation to purchase or sell any security (current § 9.7(d)); selection and retention of legal counsel readily available to advise the bank and its fiduciary officers and employees on fiduciary matters (current § 9.7(c)); and investment of funds held as fiduciary, including short-term investments and the treatment of fiduciary funds awaiting investment or distribution (current § 9.10(a)).

Other items on the list are not based on requirements in the current regulation, including methods for preventing self-dealing and conflicts of interest, allocation to fiduciary accounts of any financial incentives the bank may receive for investing fiduciary funds in a particular investment,[8] and disclosure to beneficiaries and other interested parties of fees and expenses charged to fiduciary accounts. The OCC believes that these new items are important to the proper exercise of national bank fiduciary powers, and should be addressed in a bank's policies and procedures.

The OCC invites comment on whether to add any items to, or delete any items from, the proposed list.

Review of Assets of Fiduciary Accounts (Proposed § 9.6)

The proposal clarifies current § 9.7(a)(2) by explicitly requiring national banks to perform two distinct types of written asset reviews with respect to fiduciary accounts: individual account reviews and reviews of assets by issuer.[9] Before accepting a fiduciary account, a national bank must review the account to determine whether it can administer the account properly. After accepting a fiduciary account for which

[4] 15 U.S.C. 80b–1–80b–21. Under the Advisers Act, investment advisers generally must register with the Securities and Exchange Commission if, for compensation, they engage in the business of advising others, either directly or through certain types of publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities. Banks and bank holding companies are, for the most part, exempt from the requirements of the Advisers Act.

[5] The SEC's rules governing investment advisers are found at 17 CFR part 275.

[6] See *SEC* v. *Capital Gains Research Bureau,* 375 U.S. 180 (1963); *Transamerica Mortgage Advisors, Inc.,* v. *Lewis,* 444 U.S. 11, 17 (1979).

[7] See also 12 U.S.C. 1867 (regulation and examination of bank service corporations); Fiduciary Precedent 9.1390 (fiduciary support services rendered by agent); and Trust Interpretive Letter #168 (August 3, 1988) (use of an affiliate to perform trust administrative and investment services).

[8] See Fiduciary Precedent 9.3115 (acceptance of financial benefits by bank fiduciaries).

[9] See Fiduciary Precedent 9.4102.