
DIVISION OF BANKING

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MEMORANDUM

NUMBER: 10-010

DATE: May 5, 2023

TO: SOUTH DAKOTA TRUST COMPANIES

FROM: BRET AFDAHL, Director

RE: FinCEN CONSENT ORDER WITH STATE-CHARTERED TRUST COMPANY

On April 26, 2023, the Financial Crimes Enforcement Network (FinCEN) issued a Consent Order and assessed a civil monetary penalty to a state-chartered trust company for violations of the Bank Secrecy Act (BSA) and its implementing regulations, specifically as it relates to the detection of suspicious activity and the filing of corresponding Suspicious Activity Reports (SARs). This is FinCEN's first enforcement action against a trust company. The Board and management of all South Dakota-chartered trust companies, public and private, must review the contents of the Consent Order as soon as possible. The Consent Order can be found here:

<https://www.fincen.gov/news/news-releases/fincen-assesses-15-million-civil-money-penalty-against-kingdom-trust-company>. As identified in the press release, this enforcement action is a clear statement that FinCEN will not tolerate trust companies with weak compliance programs.

The South Dakota Division of Banking (Division) expects all trust companies to comply with all applicable federal laws and regulations, including the requirements delineated within the Consent Order. Furthermore, the Board and management of each trust company must immediately evaluate its posture related to compliance with the BSA, providing a report to the Division that includes, but is not limited to:

- Identification of high-risk customers and business lines.
- Evaluation of BSA compliance staffing levels, automated or manual systems for BSA compliance and the detection of suspicious activity, internal and external audits for BSA compliance, and any other relevant resources. This evaluation should include an assessment of the overall effectiveness and ability of the trust company to monitor ALL trust company and account-level transactions for suspicious activity.
 - Provide any red flags or criteria for determining that a transaction relates to suspicious activity. Include the date and documentation of any related training provided to staff, including the Board, management, and front-line staff.
 - If the trust company has not specifically identified such red flags or criteria, the Board must immediately do so.
 - If the SAR detection process is not currently automated, the Board and management should conduct and document a thorough assessment of the need to implement automated systems.
 - If a manual detection system is utilized, provide a written narrative of the identification, analysis, escalation, and determination processes for SARs filed and SARs considered, but not filed.
 - Determine if there are adequate resources in place for SAR review and determination. A single compliance individual or small department would likely be considered inadequate for any trust

- company with a large account base or high transaction volume, or that is otherwise engaged in higher risk business models.
- Ensure any reports used to monitor suspicious activity include contextual information (e.g., source of funds, their address(es), the Bank Identifier Code of the originating/beneficiary bank, transaction recipient, transaction purpose, etc.) about the customer and the counterparties, beyond originator or beneficiary name. All reports must be able to identify all red flags or criteria. For example, merely reviewing a general ledger-type transaction run alone is insufficient.
 - Assessment of the adequacy of the number of SARs the trust company has filed, considering the size and complexity of the trust company, transaction volume, customer base, watch list, etc. Note that the standard includes *knowing, suspecting, or having reason to suspect* SAR filing criteria are present and examining any unusual transactions to determine if it is reasonable given the facts. Proper documentation of the examination, as well as proper documentation of SARs considered and not filed, including the rationale, is required.
 - If deemed inadequate, immediately address any shortcomings by performing a look back review to identify and file SARs that should have been filed. The scope of the look back review should include, among other criteria, all high-risk customers, all foreign customers, high transaction volume, etc. The look back review period should extend to the beginning of the filing deficit. If this period exceeds five years, please contact the Division.
 - If the trust company lacks the internal resources/capability to perform the review, the Board must engage a qualified, non-affiliated third party to perform the review.
 - Identification of any instances in which a bank has force closed any trust company or account-level bank accounts. Describe the circumstances of such closure in detail, including, but not limited to, the date of closure, reasons for closure, actions taken by the trust company, etc.
 - Identification of whether the trust company has done business with any consulting group or customer broker that refers accounts/customers to the trust company. Describe the due diligence performed prior to entering into the referral arrangement, as well as any ongoing due diligence performed.

Provide the Division with a report *within 30 days* documenting the initial assessment of all of the above items, concrete and substantive action steps to be taken to address any inadequacies, and applicable timelines. If the initial assessment identifies deficiencies in the trust company's posture related to BSA, detection processes for suspicious activity, and/or the overall BSA compliance program, remedial action must be completed *within 90 days* of completing the assessment with corresponding documentation provided to the Division.

Should the Board determine that contracting with a qualified independent consultant is necessary to complete the initial assessment, the Board must engage the third party *within 30 days* of receipt of this memorandum. The trust company must provide the Division documentation of the consultant's assessment and the remedial actions taken by the Board and management in response the consultant's findings *within 90 days* of engaging the consultant.

Finally, if a SAR filing look back is necessary, it must be completed *no later than December 31, 2023*, with a full report provided to the Board and the Division.

Please also note that the Division's examination process incorporates an in-depth review of the trust company's BSA compliance program. This review includes an assessment of the automated and/or manual SAR detection processes and corresponding written policies and procedures, and a review of the trust company's documentation of SARs filed, and SARs considered but not

filed. Additionally, FinCEN has confirmed that the Division's statutory examination provisions sufficiently authorize trust companies to disclose SAR documentation to the Division pursuant to its examination of BSA compliance.

Federal regulations require all trust companies, regardless of account/asset base, business model, or public/private charter type, to implement comprehensive BSA programs. Please refer to the Division's guidance and federal guidance for assistance in the assessment and enhancement of the program.

Division Guidance: <https://dlr.sd.gov/banking/trusts/default.aspx#additional>

FFIEC BSA/AML Examination Manual: <https://bsaaml.ffiec.gov/manual>

FinCEN Advisory Publications: <https://www.fincen.gov/resources/advisoriesbulletinsfactsheets/advisories>