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## **DIVISION OF BANKING**

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## **MEMORANDUM**

NUMBER: 10-004

DATE: April 15, 2015

TO: SOUTH DAKOTA TRUST COMPANIES

FROM: BRET AFDAHL, Director

RE: INTERSTATE TRUST GUIDANCE

This Memorandum is intended to clarify the South Dakota Division of Banking's (Division) position and expectations on the important topic of interstate trust activity. A significant percentage of South Dakota chartered trust companies maintain a presence in other jurisdictions (Host State) to varying degrees. The Division wants to ensure that all trust companies chartered in South Dakota are in compliance with South Dakota Codified Laws (SDCL) addressing trust service offices (TSOs). In addition, the Division wants to ensure that any trust company exercising trust company powers in another jurisdiction has reduced the potential for jurisdictional issues by obtaining the necessary approvals for the exercise of trust company powers in a location other than the one specified in their certificate of authority.

SDCL 51A-6A-58 allows existing South Dakota-chartered trust companies (public or private) to establish TSOs both in South Dakota and in Host State jurisdictions after first applying for and obtaining the approval of the Director. SDCL 51A-6A-1(15) defines a TSO as any office, agency, or other place of business at which the powers granted to a South Dakota trust company are exercised. SDCL 51A-6A-29 provides a broad definition of trust company powers. Trust company powers exercised at a location other than that identified on the certificate of authority for South Dakota-chartered trust companies may create the need for a TSO.

For trust companies chartered as of the date of this Memorandum, as part of the regular examination process, the Division will conduct a review to determine where trust company powers are being exercised. The review will be fact specific and will consider all circumstances before a determination is reached. If powers granted to the trust company are being exercised at a location other than the place of business specified on the trust company's certificate of authority, a TSO application will be required. As an alternative to establishing a TSO, a trust company may modify its practices and or structure to ensure that all trust company powers are exercised at the location identified on the certificate of authority. If the trust company elects to modify its practices and or structure in lieu of establishing a TSO, the trust company must present a detailed plan to the Division and provide follow-up documentation to substantiate the proposed changes.

While it is not possible to provide an exhaustive list of the types of facts and circumstances that the Division will consider during upcoming examinations, following is a list of activities that the Division will consider as part of its review to determine if a particular trust company is exercising trust company powers at a location other than the one specified in their certificate of authority:

- Location of meetings of the governing board
- Location of meetings of any committees established by the governing board
- Work location of executive officers, managers, trust officers, or other key employees of the trust company
- Location of account administration performed by the trust company
- Location of investment management performed by the trust company
- Location of account opening and trust document execution
- Location of trust company custody vault
- Location of account files and records in hard copy form or stored on an electronic server

If the exercise of any trust company powers are contracted out to, or are performed by, a third party service provider, the Division will review the initial and ongoing due diligence performed by the trust company. The Division will verify that the trust company is documenting the status of all third party service providers to ensure that the third party service providers are appropriately registered, licensed, chartered, exempt, or otherwise not subject to regulation as provided in Host State or Federal law or regulation.

In addition, the Host State regulatory authorities may require an additional application or impose additional conditions on the approval of an application for interstate trust activities. An applicant for a TSO may restrict the activities that will be provided in the Host State by including language of limitation in its application to the Division and in any application required by the Host State. The Division may then issue a TSO approval that is limited to the services specified in the application and include the same limitations in the certificate of authority. Certain states provide for a limited office approval. The Division is willing to work with trust companies to apply for a limited office approval if preferred by the trust company and if the facts and circumstances demonstrate that the practices and structure of the trust company are appropriately limited.

The Division revised the trust charter application review process to include a thorough assessment of trust company powers proposed to be exercised at locations outside of South Dakota. Applicant trust companies must provide a detailed and factual statement describing the services to be provided in any Host State for evaluation by the Division. If it appears that trust company powers will be exercised by the applicant in a Host State(s), the Division will require the applicant to commit to applying for a TSO if and when a charter is granted. As an alternative to establishing a TSO, the applicant trust company may modify its application to ensure all trust company powers will be exercised at the proposed location in South Dakota.

The Division utilizes the Conference of State Bank Supervisors Uniform Application for Interstate Trust Activities (CSBS Application) to facilitate the TSO approval process. If a TSO is required, South Dakota trust companies are directed to complete and submit to the Division the CSBS Application. When deemed complete, the Division makes arrangements to forward the CSBS Application to the Host State regulatory authority for notice and comment. After receiving any comments and ensuring that any additional requirements by the Host State regulatory authority are addressed by the applicant trust company, the Division will publish notice in the impacted Host State trade area as required by SDCL 51A-2-16. Following a 30-day period for comment, the Director is provided fifteen days to issue a decision on the application, and, if approved, the Director will issue a certificate of authority that must be openly displayed at the TSO location.

#### CSBS Uniform Application for Interstate Trust Activities

The CSBS Interstate Trust Activities Task Force developed the CSBS Application. It is intended to satisfy the filing requirements of all states that permit interstate trust operations, thus eliminating the need for interstate trust institutions to file multiple forms if they operate in numerous states. The form is not intended to replace the forms various state regulatory authorities currently utilize to approve intrastate activities for the institutions that they charter and regulate. The CSBS Application can be accessed through the following website:

[http://www.csbs.org/regulatory/policy/Documents/uniform\\_appl\\_interstate\\_trust.pdf](http://www.csbs.org/regulatory/policy/Documents/uniform_appl_interstate_trust.pdf)

#### Applicable South Dakota Codified Laws

51A-6A-58. Establishment of trust service offices--Application. After first applying for and obtaining the approval of the director, one or more trust service offices may be established and operated by a trust company incorporated under the laws of this state or by an out-of-state trust institution, if and to the extent that the state, territory, or district in which the out-of-state trust institution is chartered or licensed to engage in a trust company business grants authority for a trust company organized and doing business under the laws of this state to establish an office in that state, territory, or district. An application to establish and operate a trust service office or to relocate an existing trust service office shall be submitted and approved in the manner set forth in § 51A-6A-4. A trust company may establish a trust service office in another state, territory, or district and may conduct any activities at that office that are permissible for a trust company under the laws of that state, territory, or district subject to the laws of this state and subject to the rules, orders, or declaratory rules of the commission or the director.

51A-6A-1(15) "Trust service office," any office, agency, or other place of business at which the powers granted to trust companies are exercised either by a trust company other than the place of business specified in a trust company's certificate of authority or within this state by an out-of-state trust institution.

51A-6A-29. Powers of trust company. A trust company may exercise the following powers necessary or incidental to carrying on a trust company business, including:

- 1) Act as agent, custodian, or attorney-in-fact for any person, and, in such capacity, take and hold property on deposit for safekeeping and act as general or special agent or attorney-in-fact in the acquisition, management, sale, assignment, transfer, encumbrance, conveyance, or other disposition of property, in the collection or disbursement of income from or principal of property, and generally in any matter incidental to any of the foregoing;
- 2) Act as registrar or transfer agent for any corporation, partnership, association, limited liability company, municipality, state, or public authority, and in such capacity, receive and disburse money, transfer, register, and countersign certificates of stock, bonds, or other evidences of indebtedness or securities, and perform any acts which may be incidental thereto;
- 3) Act as trustee or fiduciary under any mortgage or bond issued by a person;
- 4) Act as trustee or fiduciary under any trust established by a person;
- 5) Act as fiduciary, assignee for the benefit of creditors, receiver, or trustee under or pursuant to the order or direction of any court or public official of competent jurisdiction;
- 6) Act as fiduciary, guardian, conservator, assignee, or receiver of the estate of any person and as executor of the last will and testament or administrator, fiduciary, or personal representative of the estate of any deceased person when appointed by a court or public official of competent jurisdiction;
- 7) Establish and maintain common trust funds or collective investment funds pursuant to the provisions of chapter 55-6; or
- 8) Act in any fiduciary capacity and perform any act as a fiduciary which a South Dakota bank with trust powers may perform in the exercise of those trust powers.