SOUTH DAKOTA
Division of Banking

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Bank Secrecy Act Guidance

On October 26, 2001, the USA PATRIOT Act (Patriot Act) became effective, bringing significant amendments and additions to the customer identification and Anti-Money Laundering (AML) provisions of the Bank Secrecy Act (BSA). The U.S. Department of the Treasury rules implementing BSA are codified at Title 31 Code of Federal Regulation (CFR) Chapter X entitled "Financial Recordkeeping and Reporting of Currency and Foreign Transactions." Chapter X Section 1010.100 defines a financial institution to include a commercial bank or trust company organized under the laws of any state or of the U.S.

In short, all South Dakota chartered trust companies must develop and implement policies and procedures to ensure compliance with BSA reporting requirements. The South Dakota Division of Banking (Division) performs a BSA review in conjunction with each trust company's regularly scheduled examination. Trust company management is strongly encouraged to consult with legal counsel or others with knowledge and expertise in the field in developing a program for BSA compliance that is specific to each trust company's respective business plan.

The following guidance is not all inclusive, but provides trust company management with fundamental BSA provisions:

<u>Anti-Money Laundering Program</u>

Section 1010.210 requires financial institutions, including trust companies, to establish an AML program designed to guard against using the trust company to facilitate money laundering or terrorist financing. On September 15, 2020, the Financial Crimes Enforcement Network (FinCEN) issued a final rule that amended Section 1010.210 to include state-chartered non-depository trust companies under the definition of a "bank" for AML purposes. Additionally, FinCEN amended Section 1020.100 and removed Section 1010.205, which effectively ended all prior AML exemptions for persons subject to supervision by state banking authorities. As such, all state-chartered non-depository trust companies are required to include the following components in their AML Programs:

- Development of internal policies, procedures, and controls;
- The designation of a compliance officer;
- An ongoing employee training program; and,
- An independent audit function for testing purposes.

FinCEN's final rule permits each institution lacking a federal functional regulator to take a risk-based approach to tailor its AML program to suit its own size, needs, and operational risks. Therefore, all South Dakota-chartered public and private trust companies are required to complete periodic risk assessments of their products and services, customer base, and geographic location(s) to assist in identifying any potential areas that may present a higher level of risk for money laundering activity. Refer to the FinCEN website or Federal Financial Institutions Examination Council's (FFIEC) BSA/AML Examination Manual for risk assessment and AML guidance. The FinCEN website should be used as a resource for trust companies to review statutes and administrative rulings, access forms, obtain definitions, review FAQ's, and review Federal Register notices.

Customer Identification Program

Section 1010.220 requires financial institutions, including trust companies, to establish a Customer Identification Program (CIP). Section 1020.220 provides specific guidance for creating and maintaining an adequate CIP. The CIP covers accounts established to provide custodial and trust services. Generally, a trust company must implement a written CIP commensurate with its size and complexity. The intent of the regulation, at a minimum, is to require financial institutions to implement reasonable procedures to verify the identity of any person seeking to open an account, to the extent reasonable and practicable; maintain records of the information used to verify the person's identity; and determine whether the customer appears on any list of known or suspected terrorists or terrorist organizations issued by any Federal government agency. To date, no Federal government agency has provided the Division with a list of known or suspected terrorists or terrorist organizations. Financial institutions will be notified if a list is designated for the purposes of this regulation. In the meantime, there are no interim requirements for checking any lists for CIP compliance.

Beneficial Ownership Rule:

Section 1010.230 requires financial institutions, including trust companies, to establish and maintain written procedures that are reasonably designed to identify and verify the beneficial owners of legal entity customers and to include such procedures in their AML Program required under 31 U.S.C. 5318(h) and its implementing regulations. The Beneficial Ownership Rule was applied to state-chartered non-depository trust companies by FinCEN's final rule issued on September 15, 2020. Effective November 16, 2020, all South Dakota-chartered trust companies must identify and verify the beneficial owners of legal entity customers and will have until March 15, 2021, to comply with FinCEN's final rule. The Beneficial Ownership Rule is not retroactive and as such, South Dakota-chartered trust companies are not required to identify and verify the beneficial owners of legal entity customers' existing prior to November 16, 2020. Refer to the Division's Customer Identification Guidance and FinCEN's website for Beneficial Ownership Rule guidance.

Office of Foreign Assets Control Reporting

Financial institutions should be aware that Office of Foreign Assets Control (OFAC) review provisions are separate and distinct from the CIP provisions. OFAC review provisions require financial institutions to compare new accounts against government lists of known or suspected terrorists or terrorist organizations. The OFAC review identifies countries, entities, and individuals that pose a threat to the national security, foreign policy, or economy of the U.S. Every financial institution is required to periodically review OFAC-generated lists to determine and report any "hits." While not required by specific regulation, financial institutions should establish and maintain an effective, written OFAC compliance program commensurate with their OFAC risk profile (based on products, services, customers, and geographic locations). The program should identify higher-risk areas, provide for appropriate internal controls for screening and reporting, establish independent testing for compliance, designate an employee responsible for OFAC compliance, and ensure training for appropriate personnel in all relevant areas of the institution. The OFAC compliance program should be commensurate with the financial institution's respective risk profile.

Financial Crimes Enforcement Network Section 314(a) Reporting

Financial institutions should also be aware that their responsibilities to share information with FinCEN are separate and distinct from CIP and OFAC provisions. FinCEN issues Section 314(a) notices approximately every two weeks. When these notices (which identify individuals and entities suspected of illegal activities) are received, financial institutions are required to compare their customer list with the list of businesses and

individuals on the 314(a) notice to determine and report any positive matches. The requests contain subject and business names, addresses, and as much identifying data as possible to assist the financial industry in searching their records. The financial institutions must query their records for data matches, including accounts maintained by the named subject during the preceding twelve months and transactions conducted within the last six months. Financial institutions have two weeks from the posting date of the request to respond with any positive matches. If the search does not uncover any matching of accounts or transactions, the financial institution is instructed not to reply to the 314(a) request.

Regulatory authorities impose FinCEN review and reporting provisions on the institutions they supervise. The Division requires all South Dakota-chartered public trust companies to comply with FinCEN reporting provisions. To obtain access to the 314(a) Secure Information Sharing System (SISS), each public trust company is required to submit to the Division the following information:

- Trust company tax identification number;
- Point of contact name and title;
- Point of contact mailing address (street number or box number, city, state, zip);
- Point of contact email address;
- Point of contact phone number; and,
- Point of contact fax number.

The Division will forward the information to FinCEN for processing. The designated point of contact will then receive a notification from FinCEN whenever new 314(a) case information has been posted on the SISS. After receiving the FinCEN notification, each public trust company registers their username (which is their full email address), receiving a temporary password to access the system.

<u>Currency Transaction Reporting</u>
Section 1010.310 requires financial institutions, including trust companies, to report currency transactions involving amounts greater than $10,000, subject to certain exceptions. It is acknowledged that transactions involving trust and other fiduciary accounts rarely involve currency, but if such a transaction occurs and the amount is greater than $10,000, then the trust company must file a Currency Transaction Report with FinCEN within 15 days of the transaction.

<u>Suspicious Activity Reporting</u>
Section 1010.320 requires financial institutions, including trust companies, to file a Suspicious Activity Report (SAR) with FinCEN for transactions involving $5,000 or more in funds and assets if the financial institution knows, suspects, or has reason to suspect that:

- The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any federal law or regulation or to avoid any transaction reporting requirement under federal law or regulation;
- The transaction is designed to evade any requirements of this part or of any other regulations promulgated under BSA regulations; or,
- The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the financial institution knows of no reasonable

explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

Foreign Financial Account Reporting

Section 1010.350 requires financial institutions, including trust companies, to file a Report of Foreign Bank and Financial Accounts (TD-F 90-22.1), or any successor forms. In general, each U.S. person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists.