



Interstate Trust Guidance

This guidance is intended to clarify the South Dakota Division of Banking's (Division's) 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 States) to varying degrees. The Division intends to ensure that all public trust companies chartered in South Dakota are in compliance with South Dakota Codified Laws (SDCL) addressing trust service offices (TSOs). In addition, the Division intends to ensure that any public trust company exercising trust company powers in another jurisdiction has reduced the potential for Host State compliance issues by obtaining the necessary expertise and approvals for the exercise of trust company powers in that jurisdiction. While this guidance does not apply to private trust companies chartered in South Dakota, it may be a helpful resource for the governing board of a private trust company that relies on individuals or entities located in Host State jurisdictions for administrative and operational support.

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.

In addition to Division TSO requirements, Host State regulatory authorities may require an additional application or impose additional conditions on the approval of an application to interstate trust activities in their jurisdiction. An applicant for a TSO may restrict the activities that will be performed 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 Host 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 services performed in the Host State are appropriately limited.

Trust Company Examination Review

During the regular trust company examination process, the Division conducts a thorough review to identify where trust company powers are being exercised. The review is fact-specific and considers 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 may 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, the following is a general list of the types of activities, facts, and circumstances that the Division considers during the examination process 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
- Location of account administration performance
- Location of investment management performance
- Location of account opening/closing, acceptance of fiduciary or custodial appointments, and the execution of documents that create or facilitate the fiduciary or custodial capacity
- Location where discretionary distribution decisions are made
- Location of service provider due diligence review performance
- Location of trust company custody vault
- Location of account files and records in hard copy form, or stored on an electronic server
- Location of marketing services

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

Please note that fiduciary activity cannot be contracted to a service provider that does not have the authority to exercise fiduciary powers. Fiduciary activity is a matter of state law and will vary by jurisdiction but is generally considered to include the acceptance of fiduciary appointments, the execution of documents that create or facilitate the fiduciary capacity, and the discretionary decisions regarding the investment or distribution of discretionary assets. As such, fiduciary functions do not include advertising, marketing, or soliciting for fiduciary business; contacting existing or potential customers, answering questions, and providing information about matters related to their accounts; acting as a liaison between the trust company and the customer (e.g. forwarding requests for distribution or changes in investment objectives, or forwarding forms and funds received from the customer); or simply inspecting or maintaining custody of fiduciary assets.

Officers and key employees of affiliated service providers are often appointed as trust company officers and key employees. Please note that any functions performed, at the service provider location, by these officers and key employees on behalf of the trust company while acting in their capacity as a trust company officer or key employee may require the need to create a TSO. However, these same officers and key employees may provide trust company services from the servicing entity location if they are acting in their capacity of an officer or key employee of the service provider, the servicing agreement between the trust company and service provider clearly identifies the services being provided, and the services are non-fiduciary in nature (unless the servicing entity is authorized to exercise fiduciary powers). During the trust charter application process, proposed officers and key employees that reside outside of South Dakota may be required to provide a written commitment that all functions performed while acting in their capacity of a trust company officer or key employee are performed in South Dakota.

Interstate Account Management

If accepting trust accounts that are administered under the law of a state other than South Dakota pursuant to governing document language, trust company management should implement procedures to ensure the trust accounts are managed in compliance with that state's regulation. Prior to acceptance, management must perform and document a thorough review of the applicable laws governing the trust account to ensure the trust company has the expertise, or access to the expertise, needed to manage the trust accounts in compliance with applicable law.

Trust Charter Application Review Process

During the trust charter application review process, the Division conducts a thorough review to identify any trust company powers proposed to be exercised at locations outside of South Dakota. The applicant is required to 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, the Division may require the applicant to commit to applying for a TSO if and when a trust charter is granted. As an alternative to establishing a TSO, the applicant may modify the application to ensure all trust company powers will be exercised at the proposed location in South Dakota.

Trust Service Office Application Process

The Division utilizes the Conference of State Bank Supervisors (CSBS) Uniform Application for Interstate Trust Activities (Interstate Application) to facilitate the TSO approval process. If a TSO is required, South Dakota-chartered trust companies are directed to complete and submit to the Division the Interstate Application. When deemed complete, the Division makes arrangements to forward the Interstate 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, the Division will publish notice in the impacted Host State trade area as required by SDCL 51A-2-16. Following a 15-day period for comment, the Director is provided 15 days to issue a decision on the application, and, if approved, the Director will issue a certificate of authority that must be prominently displayed at the TSO location.

CSBS Uniform Application for Interstate Trust Activities

The CSBS Interstate Trust Activities Task Force developed the Interstate Application 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. A fill-in version of the Interstate Application can be accessed on the Division's website.

Applicable Provisions of 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.

The provisions of this section do not apply to a private trust company unless the governing board decides to establish a trust service office in another state, territory, or district.

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.