SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

DIVISION OF BANKING

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NONDEPOSITORY TRUST COMPANY APPLICATION INSTRUCTIONS

The South Dakota Division of Banking (Division) compiled these instructions to assist in the preparation of the documents required to form a South Dakota nondepository trust company pursuant to South Dakota Codified Laws (SDCL) Chapter 51A-6A. The Trust Company Application Form (Application) must be filed with a Biographical and Financial Report (available on the Division's website) for each individual who will act as an organizer, board member, officer, key employee, or principal owner of the proposed trust company.

Pursuant to SDCL 51A-6A-17, an independent criminal background investigation, independent credit report, and litigation report must be submitted for each incorporator, organizer, board member, officer, key employee, and principal owner of the proposed trust company. Persons convicted of certain crimes are ineligible participants. Criminal background investigations for public trust company individuals will be performed via fingerprints on cards provided by the Division. Two fingerprint cards, one for the Federal Bureau of Investigation and one for the South Dakota Division of Criminal Investigation, must be submitted along with a check made payable to the "SD DCI" for $43.25 for each individual submitting the fingerprint cards. Criminal background investigations for private trust company individuals require only a name-based criminal background investigation performed by an independent third party, in addition to a credit report and litigation report. For both public and private trust companies, litigation reports may be provided as a third-party report or by way of a sworn affidavit if sufficiently detailed. In addition to the above background investigation requirements, foreign applicants must provide the report of a worldwide independent background investigation by an appropriate organization (e.g., Thomas Reuters World-Check, Lexis Nexis InstantID International, etc.)

A principal owner is defined as any person who owns or has the ability or power to vote, directly, acting through one or more other persons, or otherwise indirectly, 10 percent or more of the outstanding shares or ownership units of a proposed trust company.

Terms for corporations and limited liability companies are interchangeable.

Draft Application

Applicants are required to submit a PDF copy of a draft Application with supporting documentation for Division review prior to a final submission. If the draft review determines the proposed business model and ownership is suitable, the Division will notify the applicants of any required revisions/additions and schedule an in-person applicant meeting with the director of banking (Director). At this time, the applicants will be directed to provide a revised and complete final version of the Application at the applicant meeting. All proposed directors are required to attend the in-person applicant meeting. An electronic fill-in version of the Application can be found at the Division's website.

Final Application Instructions and Trust Company Requirements

The applicants are required to submit one PDF copy of the fully executed Application and supporting documents to the Division. The PDF copy must be submitted on a secure electronic storage device or via a secure electronic transmittal system consisting of two files: a confidential file and non-confidential file. Each file should adequately bookmark Application sections and exhibits.

- A nonrefundable application fee of $5,000 payable to the "SD DOB" shall accompany the Application. [SDCL 51A-6A-6]
- The name of the proposed trust company must be different from the name of any other bank or trust company having its principal office in South Dakota. [SDCL 51A-6-5]
- If approved, the capitalization of the proposed trust company shall not be less than $200,000 or a level deemed appropriate by the Director, which must be paid in and deposited prior to the commencement of business operations as provided by statute. [SDCL 51A-6A-19]
- Pursuant to ARSD 20:07:22:01, a South Dakota-chartered trust company is subject to an annual supervisory fee computed at the rate of seven cents per $10,000 of total trust assets under management, administration, or custody as reported as of the end of December. The minimum annual fee is $3,750 and the maximum annual fee is $20,000 for private trust companies, while the minimum annual fee is $4,500 and the maximum annual fee is $30,000 for public trust companies. In addition, trust companies shall pay the actual cost for each on-site examination and the additional supervision costs for any trust company operating under an enforcement action.
- If approved, a fidelity bond and Director's and Officer's (D&O) insurance policy of at least $1,000,000 each must be purchased prior to the commencement of business operations. The applicants are encouraged to include errors and omission coverage within, or in addition to, the D&O policy. [SDCL 51A-6A-19]
- If approved, a deposit must be pledged to the Division in an amount no less than $100,000 or a level deemed appropriate by the Director prior to commencement of trust business operations. [SDCL 51A-6A-19.2]
- The Application requires a copy of the proposed trust company's articles of incorporation/organization, business plan, feasibility study if available, the offering circular or offering letter if capital is to be raised by public offering or private placement offering, and various other attachments. The applicant may also elect to furnish additional attachments in response to or as additional support for certain questions. All attachments should be clearly labeled and referenced to the applicable question of the Application, and should be presented in the sequence in which the questions they support appear in the Application.
- If the applicant desires confidential treatment for certain materials submitted with the Application not customarily accorded such treatment, a written request with justification should be submitted with the Application. Such requests will be addressed on a case-by-case basis in the context of statutory authority and requirements. [SDCL 51A-6A-4]
- Except for signatures, responses should be typewritten and must be provided for all questions and information the Application requires. The words "not applicable" or "none" should be used, if appropriate. The Attestation Section of the Application shall include original signatures and dates.
- The Director may request additional information or clarification of any responses in the Application. Any such requests shall be answered within 30 days; absent valid extenuating circumstances, failure to do so may be construed by the Director to be abandonment of the Application.
- The Application will be reviewed by the Director. The Director is not responsible for delay due to failure to submit a complete Application.
- The applicant is required to report any material changes in facts or circumstances reported on the Application that occur subsequent to filing, but prior to conclusion of the Application processing period.

- File the Application, attachments, and application fee with the Division at:

  South Dakota Division of Banking
  1714 Lincoln Avenue, Suite 2
  Pierre, South Dakota 57501

Application Approval Process

When the Application is deemed complete, the Division will publish a "Notice of Application" in the community most directly impacted by the proposed trust company. A 15-day comment period will commence on the publication date and at the close of the comment period, the Director is provided 15 days to issue a decision on the Application. The Director will issue a Director's Decision and Order (Order) to the applicants confirming charter approval or denial. An applicant aggrieved by the Director's action on the Application, may, within 15 days after the notice has been mailed, file with the Division a written request for a hearing before the South Dakota Banking Commission (Commission). Any person who has filed a written objection to the Application may, within 15 days after the notice has been mailed, file a motion with the Commission in accordance with § 1-26-17.1 to become a party to the Application proceeding and request a hearing before the Commission.

The Order will direct the applicants to submit to the Division the original copy of the fully executed Articles of Incorporation/Organization (Articles), along with a check made payable to the South Dakota Secretary of State (SD SOS) to cover the filing fee. The Division will forward the Articles to the SD SOS for filing. After filing, the Division will forward a copy of the filed Articles to the applicants. A cover letter will accompany the Articles directing the organizers to submit the following information to the Division before the charter and certificate of authority are issued:

- Trust company contact name, email address, phone number, and title
- Fully executed bylaws/operating agreement
- Copy of Adopted Statement of Principles of Trust Management
- Proof of capital pursuant to SDCL 51A-6A-10 and 51A-6A-19
- Proof of insurance pursuant to SDCL 51A-6A-19
- Pledge Agreement and proof of pledge pursuant to SDCL 51A-6A-19.2
- ACH Authorization Form
- Oath of Board Members
- List of Owners Schedule
- Officers and Employees Schedule

An electronic copy of the Pledge Agreement, Template Statement of Principles, ACH Authorization Form, Oath of Board Members, List of Owners Schedule, and Officers and Employees Schedule can be found on the Division's website.

After all the documents are received and approved, the Division will issue the proposed trust company with a charter and certificate of authority. At that time, the proposed trust company can exercise trust powers and conduct other trust business related to a South Dakota chartered trust company. The applicants are encouraged to thoroughly review SDCL Chapter 51A-6A, which pertains to the creation and operation of a South Dakota trust company and SDCL Title 55 which addresses South Dakota trust law. These statutory provisions are available for online viewing at the South Dakota Legislative Research Council website.

Additional Applicable Laws, Rules, and Interpretations
The following definitions are intended to provide the applicants with a basic overview of South Dakota Codified Laws (SDCL), Administrative Rules of South Dakota (ARSD), and the South Dakota Division of Banking (Division) interpretations pertaining to the creation of a South Dakota-chartered trust company.

Private Trust Company (ARSD 20:07:22:03)
A private trust company is one that does not engage in trust company business with the general public or otherwise hold itself out as a trustee or fiduciary for hire by advertising, solicitation, or other means and instead operates for the benefit of a family or families, regardless of whether compensation is received or anticipated.

Public Trust Company (SDCL 51A-6A-1(12A))
A trust company that engages in trust company business with the general public by advertising, solicitation or other means, or a trust company that engages in trust company business but does not fall within the definition of a private trust company established by the commission through rules promulgated pursuant to chapter 1-26.

Trust Company Business (SDCL 51A-6A-1(14))
Engaging in, or representing or offering to engage in, the business of acting as a fiduciary for hire.

Fiduciary for Hire (SDCL 51A-6A-1(7))
Acting as an administrator, conservator, custodian, executor, guardian, personal representative, or trustee, for any person, trust, or estate for compensation or gain or in anticipation of compensation or gain.

South Dakota Situs Requirements (SDCL 51A-6A-11.1)
South Dakota-chartered trust companies are generally encouraged to adopt a business model that provides that most, if not all, account administration and corresponding legal, audit, and compliance functions are performed in South Dakota to demonstrate a sound physical presence.

A public trust company shall:
1) Maintain office space in South Dakota for trust company business and for the storage of, and access to, trust company records required by SDCL 51A-6A-30;
2) Hold no less than two quarterly governing board meetings with a quorum physically present in South Dakota each calendar year;
3) Employ, engage, or contract with at least one trust officer or key employee to provide services for the trust company in South Dakota related to the powers of the company in SDCL 51A-6A-29 and to facilitate the examinations required by SDCL 51A-6A-31; and
4) Perform trust administration in South Dakota.

Trust Administration (ARSD 20:07:22:04)
For purposes of SDCL 51A-6A-11.1, trust administration in South Dakota means that at least three of the following are performed wholly or partly in South Dakota for the accounts under the management, administration, or custody of the trust company:
1) Annual account reviews;

2) Annual investment reviews;
3) Trust accountings;
4) Account correspondence;
5) Completing trust account tax returns;
6) Distributing account statements; or
7) Depositing uninvested customer funds into a bank chartered under SDCL title 51A or into another federally insured bank or credit union, headquartered in this state or having a branch located in this state.

Notwithstanding the definition above, trust administration as set forth in SDCL 51A-6A-11.1(4) may be satisfied by other means if the director determines the nature and degree of risks presented by the trust company are low based upon a review of the size, nature, and number of accounts administered by the trust company and the number of employees or persons performing services for the trust company in South Dakota.

If the size, risk profile, or rate of growth of a trust company changes, the director may, to the extent it is deemed necessary, require additional administration be performed in South Dakota to satisfy the requirement in SDCL 51A-6A-11.1(4) as defined by this section.

Office Space (SDCL 51A-6A-11.2)
For purposes of SDCL 51A-6A-11.1, office space in South Dakota for each public trust company shall:
1) Be in premises distinct and divided from the office space of any other entity;
2) Have the name, charter, and certificate of authority of the trust company prominently displayed;
3) Have access to premises in or adjacent to the office space sufficient to facilitate onsite examinations by the division;
4) To the extent the trust company maintains hard copies of any documents required to be maintained pursuant to SDCL 51A-6A-30, have a secure fireproof file cabinet that contains all such hard copies; and
5) To the extent the trust company maintains any record electronically, have a secure computer terminal or other secure electronic device that provides access to such records, including account information, as necessary to facilitate an efficient and effective examination.

Director Approval of Office Space (SDCL 51A-6A-11.3)
Upon application by a trust company, the director may approve office space that does not meet the requirements of SDCL 51A-6A-11.2 if the director determines the nature and degree of risks presented by the trust company are low based upon a review of the size, nature, and number of accounts administered by the trust company, the structure and business plan of the trust company approved by the division, and the number of employees or persons performing services for the trust company in South Dakota.

If the size, risk profile, or rate of growth of a trust company changes, or if a trust company's office space is insufficient to facilitate onsite examinations by the division, the director may impose additional office space requirements.

Officer and Key Employee (SDCL 51A-6A-17)
The term officer does not include individuals who are not involved in the ongoing policy making or management of the trust company.

The term key employee does not include an employee whose primary responsibilities will be limited to clerical or support duties.

Interstate Activity

While this definition does not apply to private trust companies, it may be a helpful resource for the applicants of a private trust company that will rely on individuals or entities located in other jurisdictions (Host States) for administrative and operational support.

SDCL 51A-6A-58 allows existing South Dakota-chartered trust companies (public or private) to establish trust service offices (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. SDCL51A-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 require the creation of 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.

<u>Trust Charter Application Review Process</u>

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. 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 business will be performed 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 trust company may modify its application to ensure all trust company business will be performed in South Dakota.

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 application process:

- Residence of proposed officers, board members, or other key employees
- Proposed location of meetings of the governing board
- Proposed location of meetings of any committees established by the governing board
- Proposed location of account administration performance
- Proposed location of investment management performance
- Proposed 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

- Proposed location where discretionary distribution decision will be made
- Proposed location of service provider due diligence review performance
- Proposed location of custody vault
- Proposed location of account files and records in hard copy form, or stored on an electronic server
- Proposed location of marketing services

If the exercise of any trust company powers is to be contracted out to, or performed by, a service provider, the Division will verify that the service 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 detailed written description of their duties and responsibilities, intended travel frequency, and the duration of time they will spend in South Dakota fulfilling said duties and responsibilities.

Interstate Account Management

If accepting trust accounts that are administered under the laws 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 under the governing document 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 Service Office Application Process

The Division utilizes an Application for Interstate Trust Activities (Interstate Application) to facilitate the TSO approval process. The Interstate Application 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. 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 trust company, 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 an additional 15 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. A fill-in version of the Interstate Application can be accessed on the Division's website.

Applicable Provisions of South Dakota Codified Laws

SDCL 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 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 SDCL 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.

SDCL 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.

SDCL 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.