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## DIVISION OF BANKING

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## MEMORANDUM

NUMBER: 10-009

DATE: July 8, 2022

TO: SOUTH DAKOTA TRUST COMPANIES

FROM: BRET AFDAHL, Director

RE: SPECIAL PURPOSE ENTITY OVERSIGHT GUIDANCE

The South Dakota Division of Banking (Division) is aware of instances in which Special Purpose Entities (SPEs) named by trusts administered by South Dakota-chartered trust companies have failed to comply with the requirements of [South Dakota Codified Laws \(SDCL\) 51A-6A-66](#). Examples of non-compliance include the failure to provide appropriate notice to the Division; failure to file with the South Dakota Secretary of State (SD SOS); not being established for the exclusive purpose of acting as a trust protector, investment trust advisor, distribution trust advisor, or any combination of such purposes; holding an entity out as being in the business of acting as a fiduciary for hire; etc.

The Division expects trust companies to ensure that the SPE(s), that may be providing directions for investment and/or distribution activity for trusts under its management, administration, or custody, are compliant and in good standing as there may be risk in enacting transactions directed by an SPE which is not in full compliance.

Full compliance with SDCL 51A-6A-66 is required in order to exclude the SPE from regulation as a South Dakota trust company. If an SPE is not in full compliance with SDCL 51A-6A-66, it could be determined to be engaged in trust company business without authorization from the Division, and could be subject to regulatory action pursuant to SDCL Chapter 51A-6A, including [SDCL 51A-6A-11](#).

Prudent trust company management of SPEs include procedures and written guidance to address oversight responsibilities. Written guidance should include provisions to ensure proper monitoring of SPEs and their compliance with SDCL 51A-6A-66, address any forms used to facilitate oversight of the SPEs, and identify review/update timelines and responsible personnel. The account-level onboarding and administrative review processes should document SPE compliance with SD SOS filing requirements, and that the SPEs are established for the exclusive purpose of acting as a trust protector, investment advisor, distribution trust advisor, or any combination of such purposes, and that the SPE is not holding itself out as being in the business of acting as a fiduciary for hire. Additionally, written guidance should provide for a course of action in the event an SPE is unregistered, delinquent, and/or otherwise non-compliant.

Any entity holding itself out as a for-hire SPE will be deemed to be holding itself out as being in the business of acting as a fiduciary for hire as either a public or private trust company with the general public and will subject itself to the full range of authorities provided to the Division in SDCL Chapter 51A-6A.

As a reminder, each SPE is required to complete and submit an SPE Notice to the Division at inception and annually thereafter. A copy of the SPE's Articles of Organization and Certificate of Organization filed with and issued by the SD SOS, respectively, is required to be submitted with the initial SPE Notice submission. A copy of the SPE's annual report filed with the SD SOS is required to be submitted with the annual SPE Notice submissions. The SPE Notice is available on the Division website: <https://dlr.sd.gov/banking/trusts/default.aspx>.