

AN ACT

ENTITLED, An Act to provide for and regulate business trusts.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. Terms used in this Act mean:

- (1) "Business trust," an unincorporated association which:
 - (a) Is created by a governing instrument under which property is or will be held, managed, administered, controlled, invested, reinvested or operated, or business or professional activities for profit are carried on or will be carried on, by a trustee or trustees for the benefit of such person or persons as are or may become entitled to a beneficial interest in the trust property, including a trust of the type known at common law as a business trust, or Massachusetts trust, or a trust qualifying as a real estate investment trust under § 856 et seq., of the United States Internal Revenue Code of 1986 [26 U.S.C. § 856 et seq.], as amended, or under any successor provision, or a trust qualifying as a real estate mortgage investment conduit under § 860D of the United States Internal Revenue Code of 1986 [26 U.S.C. § 860D], as amended, or under any successor provision; and
 - (b) Files a certificate of trust pursuant to section 10 of this Act.
- Any such association heretofore or hereafter organized shall be a business trust and a separate legal entity. A business trust may be organized to carry on any lawful business or activity, whether or not conducted for profit, or for any of the purposes referred to in subsection (a) of this subdivision (including, without limitation, for the purpose of holding or otherwise taking title to property, whether in an active or custodial capacity);
- (2) "Beneficial owner," any owner of a beneficial interest in a business trust, the fact of ownership to be determined and evidenced (whether by means of registration, the issuance

of certificates or otherwise) in conformity to the applicable provisions of the governing instrument of the business trust;

- (3) "Trustee," any person appointed as a trustee in accordance with the governing instrument of a business trust, and may include the beneficial owners or any of them;
- (4) "Person," any natural person, partnership, limited partnership, trust, estate, association, corporation, custodian, nominee, or any other individual or entity in its own or any representative capacity;
- (5) "Other business entity," any corporation, partnership (whether general or limited), limited liability company, common-law trust, foreign business trust, or any other unincorporated business, excluding a business trust;
- (6) "Governing instrument," any instrument which creates a business trust provides for the governance of the affairs of the business trust and the conduct of its business. A governing instrument:
 - (a) May provide that a person shall become a beneficial owner and shall become bound by the governing instrument if such person (or a representative authorized by such person orally, in writing or by other action such as payment for a beneficial interest) complies with the conditions for becoming a beneficial owner set forth in the governing instrument or any other writing and acquires a beneficial interest;
 - (b) May consist of one or more agreements, instruments or other writings and may include or incorporate bylaws containing provisions relating to the business of the business trust, the conduct of its affairs and its rights or powers or the rights or powers of its trustees, beneficial owners, agents or employees; and
 - (c) May contain any provision that is not inconsistent with law or with the information contained in the certificate of trust.

- (7) "Foreign business trust," any business trust formed under the laws of any state or under the laws of any foreign country or other foreign jurisdiction and denominated as such under the laws of such state or foreign country or other foreign jurisdiction;
- (8) "Independent trustee," solely with respect to a business trust that is registered as an investment company under the Investment Company Act of 1940, as amended (15 U.S.C. § 80a-1 et seq.), or any successor statute thereto (the 1940 Act), any trustee who is not an interested person of the business trust. However, the receipt of compensation for service as an independent trustee of the business trust and also for service as an independent trustee of one or more other investment companies managed by a single investment adviser (or an affiliated person of such investment adviser) does not affect the status of a trustee as an independent trustee under this Act. An independent trustee shall be deemed to be independent and disinterested for all purposes. For purposes of this definition, the terms, affiliated person and interested person, have the meanings set forth in the 1940 Act or any rule adopted thereunder.

Section 2. A contribution of a beneficial owner to the business trust may be in cash, property or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services. However, a person may become a beneficial owner of a business trust and may receive a beneficial interest in a business trust without making a contribution or being obligated to make a contribution to the business trust.

Section 3. Except as provided in the governing instrument, a beneficial owner is obligated to the business trust to perform any promise to contribute cash, property or to perform services, even if the beneficial owner is unable to perform because of death, disability or any other reason. If a beneficial owner does not make the required contribution of property or services, the beneficial owner is obligated at the option of the business trust to contribute cash equal to that portion of the agreed

value, as stated in the records of the business trust, of the contribution that has not been made. The foregoing option shall be in addition to, and not in lieu of, any other rights, including the right to specific performance, that the business trust may have against such beneficial owner under the governing instrument of applicable law.

Section 4. A governing instrument may provide that the interest of any beneficial owner who fails to make any contribution that the beneficial owner is obligated to make shall be subject to specific penalties for, or specified consequences of, such failure. Such penalty or consequence may take the form of reducing or eliminating the defaulting beneficial owner's proportionate interest in the business trust, subordinating the beneficial interest to that of nondefaulting beneficial owners, a forced sale of the beneficial interest, forfeiture of the beneficial interest, the lending by other beneficial owners of the amount necessary to meet the beneficiary's commitment, a fixing of the value of the defaulting beneficial owner's beneficial interest by appraisal or by formula and redemption or sale of the beneficial interest at such value, or any other penalty or consequence.

Section 5. Except to the extent otherwise provided in the governing instrument of the business trust, the beneficial owners are entitled to the same limitation of personal liability extended to stockholders of private corporations for profit organized under the general corporation law of the state.

Section 6. Except to the extent otherwise provided in the governing instrument of a business trust, a trustee, when acting in such capacity, is not personally liable to any person other than the business trust or a beneficial owner for any act, omission or obligation of the business trust or any trustee thereof.

Section 7. Except to the extent otherwise provided in the governing instrument of a business trust, an officer, employee, manager, or other person acting pursuant to subdivision (7) of section 25 of this Act, when acting in such capacity, is not personally liable to any person other than the business trust

or a beneficial owner for any act, omission, or obligation of the business trust or any trustee thereof.

Section 8. No obligation of a beneficial owner or trustee of a business trust to the business trust arising under the governing instrument or a separate agreement in writing, and no note, instrument or other writing evidencing any such obligation of a beneficial owner or trustee, is subject to the defense of usury, and no beneficial owner or trustee may interpose the defense of usury with respect to any such obligation in any action.

Section 9. A business trust may sue and be sued, and service of process upon one of the trustees is sufficient. A business trust may be sued for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, in the performance of their respective duties under the governing instrument of the business trust, and for any damages to persons or property resulting from the negligence of such trustees or agents acting in the performance of such respective duties. The property of a business trust is subject to attachment and execution as if it were a corporation. Notwithstanding the foregoing provisions of this section, in the event that the governing instrument of a business trust, including a business trust which is a registered investment company under the Investment Company Act of 1940, as amended (15 U.S.C. § 80a-1 et seq.), creates one or more series as provided in subdivision (2) of section 25 of this Act, and if separate and distinct records are maintained for any such series and the assets associated with any such series are held and accounted for separately from the other assets of the business trust, or any other series thereof, and if the governing instrument so provides, and notice of the limitation on liabilities of a series as referenced in this sentence is set forth in the certificate of trust of the business trust, then the debts, liabilities, obligations, and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the business trust generally or any other series thereof, and, unless otherwise provided in the governing instrument, none of the debts, liabilities, obligations, and

expenses incurred, contracted for or otherwise existing with respect to the business trust generally or any other series thereof shall be enforceable against the assets of such series.

Section 10. A trustee of a business trust may be served with process in the manner prescribed in section 11 of this Act in all civil actions or proceedings brought in the state involving or relating to the activities of the business trust or a violation by a trustee of a duty to the business trust, or any beneficial owner, whether or not the trustee is a trustee at the time suit is commenced. Every resident or nonresident of the state who accepts election or appointment or serves as a trustee of a business trust shall, by such acceptance or service, be deemed thereby to have consented to the appointment of the South Dakota trustee or registered agent of such business trust required by section 30 of this Act (or, if there is none, the secretary of state) as such person's agent upon whom service of process may be made as provided in this section. Such acceptance or service shall signify the consent of such trustee that any process if so served shall be of the same legal force and validity as if served upon such trustee within the state and such appointment of such South Dakota trustee or registered agent (or, if there is none, the secretary of state) shall be irrevocable.

Section 11. Service of process shall be effected by serving the South Dakota trustee or registered agent of such business trust required by section 30 of this Act (or, if there is none, the secretary of state) with one copy of such process in the manner provided by law for service of writs of summons. In the event service is made upon the secretary of state, the plaintiff shall pay to the secretary of state the sum of fifty dollars for the use of the state, which sum shall be taxed as part of the costs of the proceeding if the plaintiff shall prevail therein.

Section 12. In any action in which any such trustee has been served with process as provided in this Act, the time in which a defendant shall be required to appear and file a responsive pleading shall be computed as in other civil actions.

Section 13. In the governing instrument of the business trust or other writing, a trustee or

beneficial owner may consent to be subject to the nonexclusive jurisdiction of the courts of, or arbitration in, a specified jurisdiction, or the exclusive jurisdiction of the courts of the state, or the exclusivity of arbitration in a specified jurisdiction or the state, and to be served with legal process in the manner prescribed in such governing instrument of the business trust or other writing.

Section 14. Nothing in this Act limits or affects the right to serve process in any other manner now or hereafter provided by law. This section is an extension of and not a limitation upon the right otherwise existing of service of legal process upon nonresidents.

Section 15. The circuit court has jurisdiction over business trusts to the same extent as it has jurisdiction over common law trusts formed under the laws of the state.

Section 16. A partnership (whether general or limited), corporation or other nonnatural person formed or organized under the laws of any foreign country or other foreign jurisdiction or the laws of any state other than the State of South Dakota may not be deemed to be doing business in the state solely by reason of its being a trustee of a business trust.

Section 17. Except to the extent otherwise provided in the governing instrument of the business trust, a beneficial owner shall have an undivided beneficial interest in the property of the business trust and shall share in the profits and losses of the business trust in the proportion (expressed as a percentage) of the entire undivided beneficial interest in the business trust owned by such beneficial owner. The governing instrument of a business trust may provide that the business trust or the trustees, acting for and on behalf of the business trust, shall be deemed to hold beneficial ownership of any income earned on securities of the business trust issued by any business entities formed, organized, or existing under the laws of any jurisdiction, including the laws of any foreign country.

Section 18. No creditor of the beneficial owner shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the business trust.

Section 19. A beneficial owner's beneficial interest in the business trust is personal property

notwithstanding the nature of the property of the trust. Except to the extent otherwise provided in the governing instrument of a business trust, a beneficial owner has no interest in specific business trust property.

Section 20. A beneficial owner's beneficial interest in the business trust is freely transferable except to the extent otherwise provided in the governing instrument of the business trust.

Section 21. Except to the extent otherwise provided in the governing instrument of a business trust, at the time a beneficial owner becomes entitled to receive a distribution, the beneficial owner has the status of, and is entitled to all remedies available to, a creditor of the business trust with respect to the distribution. A governing instrument may provide for the establishment of record dates with respect to allocations and distributions by a business trust.

Section 22. Except to the extent otherwise provided in the governing instrument of the business trust, legal title to the property of the business trust, or any part thereof, may be held in the name of any trustee of the business trust, in its capacity as such, with the same effect as if such property were held in the name of the business trust.

Section 23. No creditor of the trustee has any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the business trust with respect to any claim against, or obligation of, such trustee in its individual capacity and not related to the business trust.

Section 24. Except to the extent otherwise provided in the governing instrument of a business trust, the business and affairs of a business trust shall be managed by or under the direction of its trustees. To the extent provided in the governing instrument of a business trust, any person (including a beneficial owner) shall be entitled to direct the trustees or other persons in the management of the business trust. Except to the extent otherwise provided in the governing instrument of a business trust, neither the power to give direction to a trustee or other persons nor the exercise thereof by any

person (including a beneficial owner) may cause such person to be a trustee. To the extent provided in the governing instrument of a business trust, neither the power to give direction to a trustee or other persons nor the exercise thereof by any person (including a beneficial owner) may cause such person to have duties (including fiduciary duties) or liabilities relating thereto to the business trust or to a beneficial owner thereof.

Section 25. A governing instrument may contain any provision relating to the management of the business and affairs of the business trust, and the rights, duties and obligations of the trustees, beneficial owners, and other persons, which is not contrary to any provision or requirement of this section and, without limitation:

- (1) May provide for classes, groups, or series of trustees or beneficial owners, or classes, groups, or series of beneficial interests, having such relative rights, powers, and duties as the governing instrument may provide, and may make provision for the future creation in the manner provided in the governing instrument of additional classes, groups, or series of trustees, beneficial owners, or beneficial interests, having such relative rights, powers, and duties as may from time to time be established, including rights, powers, and duties senior or subordinate to existing classes, groups, or series of trustees, beneficial owners, or beneficial interests;
- (2) May establish or provide for the establishment of designated series of trustees, beneficial owners, or beneficial interests having separate rights, powers, or duties with respect to specified property or obligations of the business trust or profits and losses associated with specified property or obligations, and, to the extent provided in the governing instrument, any such series may have a separate business purpose or investment objective;
- (3) May provide for the taking of any action, including the amendment of the governing instrument, the accomplishment of a merger or consolidation, the appointment of one or

more trustees, the sale, lease, exchange, transfer, pledge, or other disposition of all or any part of the assets of the business trust or the assets of any series, or the dissolution of the business trust, or may provide for the taking of any action to create under the provisions of the governing instrument a class, group, or series of beneficial interests that was not previously outstanding, in any such case without the vote or approval of any particular trustee or beneficial owner, or class, group, or series of trustees or beneficial owners;

- (4) May grant to (or withhold from) all or certain trustees or beneficial owners, or a specified class, group, or series of trustees or beneficial owners, the right to vote, separately or with any or all other classes, groups, or series of the trustees or beneficial owners, on any matter, such voting being on a per capita, number, financial interest, class, group, series, or any other basis;
- (5) May, if and to the extent that voting rights are granted under the governing instrument, set forth provisions relating to notice of the time, place, or purpose of any meeting at which any matter is to be voted on, waiver of any such notice, action by consent without a meeting, the establishment of record dates, quorum requirements, voting in person, by proxy or in any other manner, or any other matter with respect to the exercise of any such right to vote;
- (6) May provide for the present or future creation of more than one business trust, including the creation of a future business trust to which all or any part of the assets, liabilities, profits, or losses of any existing business trust will be transferred, and for the conversion of beneficial interests in an existing business trust, or series thereof, into beneficial interests in the separate business trust, or series thereof; or
- (7) May provide for the appointment, election, or engagement, either as agents or independent contractors of the business trust or as delegates of the trustees, of officers, employees,

managers, or other persons who may manage the business and affairs of the business trust and may have such titles and such relative rights, powers, and duties as the governing instrument shall provide. Except to the extent otherwise provided in the governing instrument of a business trust, the trustees shall choose and supervise such officers, managers, employees, and other persons.

Section 26. To the extent that, at law or in equity, a trustee has duties (including fiduciary duties) and liabilities relating thereto to a business trust or to a beneficial owner:

- (1) Any such trustee acting under a governing instrument is not liable to the business trust or to any such beneficial owner for the trustee's good faith reliance on the provisions of such governing instrument; and
- (2) The trustee's duties and liabilities may be expanded or restricted by provisions in a governing instrument.

Section 27. To the extent that, at law or in equity, an officer, employee, manager, or other person designated pursuant to subdivision (7) of section 25 of this Act has duties (including fiduciary duties) and liabilities relating thereto to a business trust, a beneficial owner, or a trustee:

- (1) Any such officer, employee, manager, or other person acting under a governing instrument is not liable to the business trust, any beneficial owner, or any trustee for such person's good faith reliance on the provisions of such governing instrument; and
- (2) The duties and liabilities of an officer, employee, manager, or other person acting pursuant to subdivision (7) of section 25 of this Act may be expanded or restricted by provisions in a governing instrument.

Section 28. Unless otherwise provided in the governing instrument of a business trust, on any matter that is to be voted on by the beneficial owners:

- (1) The beneficial owners may take such action without a meeting, without a prior notice and

without a vote if a consent or consents in writing, setting forth the action so taken, shall be signed by the beneficial owners having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all interests in the business trust entitled to vote thereon were present and voted; and

- (2) The beneficial owners may vote in person or by proxy.

Section 29. Unless otherwise provided in the governing instrument of a business trust, on any matter that is to be voted on by the trustees:

- (1) The trustees may take such action without a meeting, without a prior notice and without a vote if a consent or consents in writing, setting forth the action so taken, shall be signed by the trustees having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all trustees entitled to vote thereon were present and voted; and
- (2) The trustee may vote in person or by proxy.

Section 30. Every business trust shall at all times have at least one trustee which, in the case of a natural person, shall be a person who is a resident of this state or which, in all other cases, has its principal place of business in this state.

Section 31. Notwithstanding the provisions of section 30 of this Act, if a business trust is, becomes, or will become prior to or within one hundred eighty days following the first issuance of beneficial interests, a registered investment company under the Investment Company Act of 1940, as amended (15 U.S.C. §§ 80a-1 et seq.), such business trust may not be required to have a trustee who is a resident of this state or who has a principal place of business in this state if notice that the business trust is or will become an investment company as referenced in this sentence is set forth in the certificate of trust of the business trust and if and for so long as such business trust shall have and maintain in this state:

- (1) A registered office, which may, but need not be, a place of business in this state; and
- (2) A registered agent for service of process on the business trust, which agent may be either an individual resident in this state whose business office is identical with such business trust's registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with such registered office.

Section 32. Any business trust maintaining a registered office and registered agent in this state under section 30 of this Act may change the location of its registered office in this state to any other place in this state, or may change the registered agent to any other person or corporation, by filing an amendment to its certificate of trust in accordance with the applicable provisions of this section. If a business trust which is an investment company registered as aforesaid maintains a registered office and registered agent in this state, then the reference in section 43 of this Act to the "name and the business address of at least one of the trustees meeting the requirements of section 43 of this Act" shall be deemed a reference to the name and the business address of the registered agent and registered office maintained under this section, and the certificate of trust filed under this Act shall reflect such information in lieu of the information otherwise required by section 43 of this Act.

Section 33. Service of process upon a registered agent maintained by a business trust pursuant to section 31 of this Act shall be as effective as if served upon one of the trustees of the business trust pursuant to this Act.

Section 34. A trustee or registered agent of a business trust whose address, as set forth in a certificate of trust pursuant to section 43 of this Act, has changed may change such address in the certificates of trust for all business trusts for which such trustee or registered agent is appointed, to another address in the State of South Dakota by paying a fee as set forth in section 57 of this Act and filing with the secretary of state a certificate, executed by such trustee or registered agent, setting forth the names of all business trusts for which such trustee or registered agent is appointed, and the

address of such trustee or registered agent before it was changed, and further certifying as to the new address of such trustee or registered agent for each of the business trusts recited in the certificate. Upon the filing of such certificate, the secretary of state shall furnish to the trustee or registered agent a certified copy of the same under his or her hand and seal of office, and thereafter, or until further change of address, as authorized by law, the address of such trustee or registered agent in the State of South Dakota of each of the business trusts recited in the certificate shall be located at the new address of the trustee or registered agent thereof as given in the certificate. A trustee or registered agent of a business trust whose name, as set forth in a certificate of trust pursuant to section 43 of this Act, has changed may change such name in the certificates of trust for all business trusts for which such trustee or registered agent is appointed, to its new name by paying a fee as set forth in section 57 of this Act and filing with the secretary of state a certificate, executed by such trustee or registered agent, setting forth the names of all business trusts for which such trustee or registered agent is appointed, the name of such trustee or registered agent before it was changed, and further certifying as to the new name of such trustee or registered agent for each of the business trusts recited in the certificate. Upon the filing of such certificate and payment of such fee, the secretary of state shall furnish to the trustee or registered agent a certified copy of the certificate under his hand and seal of office. Filing a certificate under this section shall be deemed to be an amendment of the certificate of trust of each business trust affected thereby and no further action with respect thereto to amend its certificate of trust under section 43 of this Act shall be required. Any trustee or registered agent filing a certificate under this section shall promptly, upon such filing, deliver a copy of any such certificate to each business trust affected thereby.

Section 35. Except to the extent otherwise provided in the governing instrument of the business trust, a business trust shall have perpetual existence, and a business trust may not be terminated or revoked by a beneficial owner or other person except in accordance with the terms of its governing

instrument.

Section 36. Except to the extent otherwise provided in the governing instrument of a business trust, the death, incapacity, dissolution, termination or bankruptcy of a beneficial owner may not result in the termination or dissolution of a business trust.

Section 37. In the event that a business trust does not have perpetual existence, a business trust is dissolved and its affairs shall be wound up at the time or upon the happening of events specified in the governing instrument.

Section 38. Upon dissolution of a business trust and until the filing of a certificate of cancellation as provided in section 43 of this Act, the persons who, under the governing instrument of the business trust, are responsible for winding up the business trust's affairs may, in the name of and for and on behalf of the business trust, prosecute and defend suits, whether civil, criminal, or administrative, gradually settle and close the business trust business, dispose of and convey the business trust property, discharge or make reasonable provision for the business trust liabilities and distribute to the beneficial owners any remaining assets of the business trust.

Section 39. A business trust which has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims and obligations, known to the business trust and all claims and obligations which are known to the business trust but for which the identity of the claimant is unknown. If there are sufficient assets, such claims and obligations shall be paid in full and any such provision for payment shall be made in full. If there are insufficient assets, such claims and obligations shall be paid or provided for according to their priority and, among claims and obligations of equal priority, ratably to the extent of assets available therefor. Unless otherwise provided in the governing instrument of a business trust, any remaining assets shall be distributed to the beneficial owners. Any person, including any trustee, who under the governing instrument of the business trust is responsible for winding up a business trust's affairs who has

complied with this subsection shall not be personally liable to the claimants of the dissolved business trust by reason of such person's actions in winding up the business trust.

Section 40. Except to the extent otherwise provided in the governing instrument of the business trust, a series established in accordance with this Act may be dissolved and its affairs wound up without causing the dissolution of the business trust or any other series thereof. Unless otherwise provided in the governing instrument of the business trust, the dissolution, winding up, liquidation or termination of the business trust or any series thereof shall not affect the limitation of liability with respect to a series established in accordance with this Act. A series established in accordance with this Act is dissolved and its affairs shall be wound up at the time or upon the happening of events specified in the governing instrument of the business trust. Except to the extent otherwise provided in the governing instrument of a business trust, the death, incapacity, dissolution, termination, or bankruptcy of a beneficial owner of such series shall not result in the termination or dissolution of such series and such series may not be terminated or revoked by a beneficial owner of such series or other person except in accordance with the terms of the governing instrument of the business trust.

Section 41. Upon dissolution of a series of a business trust, the persons who under the governing instrument of the business trust are responsible for winding up such series affairs may, in the name of the business trust and for and on behalf of the business trust and such series, take all actions with respect to the series as are permitted under section 38 of this Act and shall provide for the claims and obligations of the series and distribute the assets of the series as provided under section 39 of this Act. Any person, including any trustee, who under the governing instrument is responsible for winding up such series affairs who has complied with section 39 of this Act is not personally liable to the claimants of the dissolved series by reason of such person's actions in winding up the series.

Section 42. Except to the extent otherwise provided in the governing instrument of a business trust or in this section, the laws of this state pertaining to trusts are hereby made applicable to

business trusts. However, for purposes of any tax imposed by this state or any instrumentality, agency or political subdivision of this state a business trust shall be classified as a corporation, an association, a partnership, a trust, or otherwise, as shall be determined under the United States Internal Revenue Code of 1986, as amended, or under any successor provision.

Section 43. Every business trust shall file a certificate of trust in the Office of the Secretary of State. The certificate of trust shall set forth:

- (1) The name of the business trust;
- (2) The name and the business address of at least one of the trustees meeting the requirements of this Act;
- (3) The future effective date or time (which shall be a date or time certain) of effectiveness of the certificate if it is not to be effective upon the filing of the certificate; and
- (4) Any other information the trustees determine to include therein.

A business trust is formed at the time of the filing of the initial certificate of trust in the Office of the Secretary of State or at any later date or time specified in the certificate of trust if, in either case, there has been substantial compliance with the requirements of this section.

Section 44. A certificate of trust may be amended by filing a certificate of amendment thereto in the Office of the Secretary of State. The certificate of amendment shall set forth:

- (1) The name of the business trust;
- (2) The amendment to the certificate; and
- (3) The future effective date or time (which shall be a date or time certain) of effectiveness of the certificate if it is not to be effective upon the filing of the certificate.

Except to the extent otherwise provided in the certificate of trust or in the governing instrument of a business trust, a certificate of trust may be amended at any time for any purpose as the trustees may determine. A trustee who becomes aware that any statement in a certificate of trust was false

when made or that any matter described has changed making the certificate false in any material respect shall promptly file a certificate of amendment.

Section 45. A certificate of trust may be restated by integrating into a single instrument all of the provisions of the certificate of trust which are then in effect and operative as a result of there having been theretofore filed one or more certificates of amendment pursuant to section 44 of this Act, and the certificate of trust may be amended or further amended by the filing of a restated certificate of trust. The restated certificate of trust shall be specifically designated as such in its heading and shall set forth:

- (1) The present name of the business trust, and if it has been changed, the name under which the business trust was originally formed;
- (2) The date of filing of the original certificate of trust with the secretary of state;
- (3) The information required to be included pursuant to subsection (a) of this section; and
- (4) Any other information the trustees determine to include therein.

A certificate of trust may be restated at any time for any purpose as the trustees may determine. A trustee who becomes aware that any statement in a restated certificate of trust was false when made or that any matter described has changed making the restated certificate false in any material respect shall promptly file a certificate of amendment or a restated certificate of trust.

Section 46. A certificate of trust shall be cancelled upon the completion of winding up of the business trust and its termination. A certificate of cancellation shall be filed in the Office of the Secretary of State and set forth:

- (1) The name of the business trust;
- (2) The date of filing of its certificate of trust;
- (3) The future effective date or time (which shall be a date or time certain) of cancellation if it is not to be effective upon the filing of the certificate; and

(4) Any other information the trustee determines to include therein.

Section 47. Whenever any certificate authorized to be filed with the Office of the Secretary of State under this section has been so filed and is an inaccurate record of the action therein referred to or was defectively or erroneously executed, such certificate may be corrected by filing with the Office of the Secretary of State a certificate of correction of such certificate. The certificate of correction shall specify the inaccuracy or defect to be corrected, shall set forth the portion of the certificate in corrected form and shall be executed and filed as required by this Act. In lieu of filing a certificate of correction, the certificate may be corrected by filing with the Office of the Secretary of State a corrected certificate which shall be executed and filed in accordance with this section. The corrected certificate shall be specifically designated as such in its heading, shall specify the inaccuracy or defect to be corrected and shall set forth the entire certificate in corrected form. The corrected certificate shall be effective as of the date the original certificate was filed, except as to those persons who are substantially and adversely affected by the corrections, and as to those persons the corrected certificate shall be effective from the filing date.

Section 48. If any certificate filed in accordance with this Act provides for a future effective date or time and if the transaction is terminated or amended to change the future effective date or time prior to the future effective date or time, the certificate shall be terminated or amended by the filing, prior to the future effective date or time set forth in such original certificate, of a certificate of termination or amendment of the original certificate, executed and filed in accordance with this section, which shall identify the original certificate which has been terminated or amended and shall state that the original certificate has been terminated or amended.

Section 49. Each certificate required by this section to be filed in the Office of the Secretary of State shall be executed in the following manner:

(1) A certificate of trust or a certificate of conversion must be signed by all of the trustees;

- (2) A certificate of amendment, a certificate of correction, a certificate of termination or amendment, and a restated certificate of trust must be signed by at least one of the trustees;
- (3) A certificate of cancellation must be signed by all of the trustees or as otherwise provided in the governing instrument of the business trust; and
- (4) If a business trust is filing a certificate of merger or consolidation or certificate of termination or amendment of a merger or consolidation, the certificate of merger or consolidation or certificate of termination or amendment of a merger or consolidation must be signed by all of the trustees or as otherwise provided in the governing instrument of the business trust, or if the certificate of merger or consolidation or certificate of termination or amendment of a merger or consolidation is being filed by another business entity, the certificate of merger or consolidation or certificate of termination or amendment of a merger or consolidation must be signed by a person authorized to execute such instrument on behalf of such other business entity.

Section 50. Unless otherwise provided in the governing instrument, any person may sign any certificate or amendment thereof or enter into a governing instrument or amendment thereof by any agent, including any attorney-in-fact. An authorization, including a power of attorney, to sign any certificate or amendment thereof or to enter into a governing instrument or amendment thereof need not be in writing, need not be sworn to, verified, or acknowledged and need not be filed in the Office of the Secretary of State, but if in writing, shall be retained by the business trust or a trustee or other person authorized to manage the business and affairs of the business trust.

Section 51. The execution of a certificate by a trustee constitutes an oath or affirmation, under the penalties of perjury, that, to the best of the trustee's knowledge and belief, the facts stated therein are true.

Section 52. Any certificate authorized to be filed with the Office of the Secretary of State under this section (or any judicial decree of amendment or cancellation) shall be delivered to the Office of the Secretary of State for filing. A person who executes a certificate as an agent or fiduciary need not exhibit evidence of the person's authority as a prerequisite to filing. Unless the secretary of state finds that any certificate does not conform to law, upon receipt of all filing fees required by law the secretary of state shall:

- (1) Certify that the certificate (or any judicial decree of amendment or cancellation) has been filed in the secretary of state's office by endorsing upon the filed certificate (or judicial decree) the word, filed, and the date and hour of the filing. This endorsement is conclusive of the date and time of its filing in the absence of actual fraud;
- (2) File and index the endorsed certificate (or judicial decree); and
- (3) Prepare and return to the person who filed it or the person's representative a copy of the filed certificate (or judicial decree), similarly endorsed, and shall certify such copy as a true copy of the filed certificate (or judicial decree).

Section 53. Upon the filing of a certificate of trust in the Office of the Secretary of State, or upon the future effective date or time of a certificate of trust as provided for therein, the certificate of trust shall be effective. Upon the filing of a certificate of amendment (or judicial decree of amendment), certificate of correction, corrected certificate, or restated certificate in the Office of the Secretary of State, or upon the future effective date or time of a certificate of amendment (or judicial decree of amendment) or restated certificate as provided for therein, the certificate of trust shall be amended or restated as set forth therein. Upon the filing of a certificate of cancellation (or a judicial decree thereof) or a certificate of merger or consolidation which acts as a certificate of cancellation in the Office of the Secretary of State, or upon the future effective date or time of a certificate of cancellation (or a judicial decree thereof) or a certificate of merger or consolidation which acts as a

certificate of cancellation, as provided for therein, the certificate of trust shall be canceled. Upon the filing of a certificate of termination or amendment, the original certificate identified in the certificate of termination or amendment shall be terminated or amended, as the case may be.

Section 54. Any fee set forth in section 57 of this Act shall be paid at the request of the secretary of state or at the time of the filing of a certificate of trust, a certificate of amendment, a certificate of correction, a corrected certificate, a certificate of termination or amendment, a certificate of cancellation, a certificate of merger or consolidation, or a restated certificate.

Section 55. Any signature on any certificate authorized to be filed with the secretary of state under any provision of this section may be a facsimile, a conformed signature or an electronically transmitted signature. Any such certificate may be filed by telecopy, fax, or similar electronic transmission. However, the secretary of state need not accept such filing if such certificate is illegible or otherwise unsuitable for processing.

Section 56. The fact that a certificate of trust is on file in the Office of the Secretary of State is notice that the entity formed in connection with the filing of the certificate of trust is a business trust formed under the laws of the state and is notice of all other facts set forth therein which are required to be set forth in a certificate of trust by section 43 of this Act and is notice of the limitation on liability of a series of a business trust which is permitted to be set forth in a certificate of trust.

Section 57. No documents required to be filed under this section becomes effective until the applicable fee required by this section is paid. The secretary of state may promulgate rules, pursuant to chapter 1-26, relating to the actual fee to be charged for the use of this state consistent with this section:

- (1) Upon the receipt for filing of an application for reservation of name, and application for renewal of reservation, or notice of transfer or cancellation of reservation pursuant to this Act, a fee not to exceed fifty dollars;

- (2) Upon the receipt for filing of a certificate of trust, a certificate of amendment, a certificate of cancellation or a certificate of merger or consolidation, a certificate of correction, a corrected certificate, a certificate of termination or amendment or a restated certificate, a fee not to exceed one hundred dollars;
- (3) For certifying copies of any paper on file as provided for by this section, a fee not to exceed ten dollars for each copy certified;
- (4) For issuing further copies of instruments on file, whether certified or not, a fee not to exceed one dollar per page; and
- (5) Upon the receipt for filing of a certificate under this Act, a fee not to exceed fifty dollars.

In addition to such fees, there may be collected by and paid to the secretary of state the following:

- (1) For all services described above that are requested to be completed within the same day as the day of the request, an additional fee not to exceed two hundred dollars; and
- (2) For all services described above that are requested to be completed within a twenty-four-hour period from the time of the request, an additional fee not to exceed one hundred dollars.

Section 58. The name of each business trust as set forth in its certificate of trust shall be such as to distinguish it upon the records of the Office of the Secretary of State from the name of any corporation, limited partnership, business trust, or limited liability company reserved, registered, formed, or organized under the laws of this state or qualified to do business or registered as a foreign corporation, foreign limited partnership, foreign business trust, or foreign limited liability company in this state. However, a business trust may register under any name which is not such as to distinguish it upon the records of the Office of the Secretary of State from the name of any domestic or foreign corporation, limited partnership, business trust, or limited liability company reserved, registered, formed, or organized under the laws of this state with the written consent of the other

corporation, limited partnership, business trust, or limited liability company, which written consent shall be filed with the secretary of state.

Section 59. The name of each business trust as set forth in its certificate of trust may contain the name of a beneficial owner, a trustee or any other person.

Section 60. The name of each business trust, as set forth in its certificate of trust, may contain the following words: company, association, club, foundation, fund, institute, society, union, syndicate, limited or trust (or abbreviations of like import).

Section 61. The exclusive right to the use of a name may be reserved by any person intending to form a business trust and to adopt that name or any business trust registered in this state which proposes to change its name.

Section 62. The reservation of a specified name shall be made by filing with the secretary of state an application, executed by the applicant, together with a duplicate copy, which may either be a signed or conformed copy, specifying the name to be reserved and the name and address of the applicant. If the secretary of state finds that the name is available for use by a business trust, the secretary shall reserve the name for the exclusive use of the applicant for a period of one hundred twenty days. Once having so reserved a name, the same applicant may again reserve the same name for successive one hundred twenty-day periods. The right to the exclusive use of a reserved name may be transferred to any other person by filing in the Office of the Secretary of State a notice of the transfer, executed by the applicant for whom the name was reserved, together with a duplicate copy, which may be either a signed or conformed copy, specifying the name to be transferred and the name and address of the transferee. The reservation of a specified name may be cancelled by filing with the secretary of state a notice of cancellation, executed by the applicant or transferee, together with a duplicate copy, which may be either a signed or conformed copy, specifying the name reservation to be cancelled and the name and address of the applicant or transferee. Any duplicate copy filed with

the secretary of state, as required by this section, shall be returned by the secretary of state to the person who filed it or that person's representative with a notation thereon of the action taken with respect to the original copy thereof by the secretary of state.

Section 63. Any fee set forth in section 57 of this Act shall be paid at the time of the initial reservation of any name, at the time of the renewal of any such reservation and at the time of the filing of a notice of the transfer or cancellation of any such reservation.

Section 64. Pursuant to an agreement of merger or consolidation, a business trust may merge or consolidate with or into one or more business trusts or other business entities formed or organized or existing under the laws of the state or any other state or the United States or any foreign country or other foreign jurisdiction, with such business trust or other business entity as the agreement shall provide being the surviving or resulting business trust or other business entity. Unless otherwise provided in the governing instrument of a business trust, a merger or consolidation shall be approved by each business trust which is to merge or consolidate by all of the trustees and the beneficial owners of such business trust. In connection with a merger or consolidation hereunder, rights or securities of, or interests in, a business trust or other business entity which is a constituent party to the merger or consolidation may be exchanged for or converted into cash, property, rights, or securities of, or interests in, the surviving or resulting business trust or other business entity or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights, or securities of, or interests in, a business trust or other business entity which is not the surviving or resulting business trust or other business entity in the merger or consolidation. Notwithstanding prior approval, an agreement of merger or consolidation may be terminated or amended pursuant to a provision for such termination or amendment contained in the agreement of merger or consolidation.

Section 65. If a business trust is merging or consolidating, the business trust or other business entity surviving or resulting in or from the merger or consolidation shall file a certificate of merger

or consolidation in the Office of the Secretary of State. The certificate of merger or consolidation shall state:

- (1) The name and jurisdiction of formation or organization of each of the business trust or other business entities which is to merge or consolidate;
- (2) That an agreement of merger or consolidation has been approved and executed by each of the business trusts or other business entities which is to merge or consolidate;
- (3) The name of the surviving or resulting business trust or other business entity;
- (4) The future effective date or time (which shall be a date or time certain) of the merger or consolidation if it is not to be effective upon the filing of the certificate of merger or consolidation;
- (5) That the executed agreement of merger or consolidation is on file at the principal place of business of the surviving or resulting business trust or other business entity, and shall state the address thereof;
- (6) That a copy of the agreement of merger or consolidation will be furnished by the surviving or resulting business trust or other business entity, on request and without cost, to any beneficial owner of any business trust or any person holding an interest in any other business entity which is to merge or consolidate; and
- (7) If the surviving or resulting entity is not a business trust or other business entity formed or organized or existing under the laws of the State of South Dakota, a statement that such surviving or resulting other business entity agrees that it may be served with process in the state in any action, suit, or proceeding for the enforcement of any obligation of any business trust which is to merge or consolidate, irrevocably appointing the secretary of state as its agent to accept service of process in any such action, suit, or proceeding and specifying the address to which a copy of such process shall be mailed to it by the

secretary of state. In the event of service upon the secretary of state, the plaintiff in any such action, suit, or proceeding shall furnish the secretary of state with the address specified in the certificate of merger or consolidation provided for in this section and any other address which the plaintiff may elect to furnish, together with copies of such process as required by the secretary of state, and the secretary of state shall notify such surviving or resulting other business entity thereof at all such addresses furnished by the plaintiff by letter, certified mail, return receipt requested. Such letter shall enclose a copy of the process and any other papers served upon the secretary of state. The plaintiff shall, in the event of such service, serve process and any other papers in duplicate, to notify the secretary of state that service is being made pursuant to this section, and to pay the secretary of state the sum of fifty dollars for use of the state, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff prevails therein. The secretary of state shall maintain an alphabetical record of any such process setting forth the name of the plaintiff and defendant, the title, docket number, and nature of the proceedings in which process has been served upon the secretary, the return date thereof, and the day and hour when the service was made. The secretary of state need not retain such information for a period longer than five years from the secretary's receipt of the service of process.

Section 66. Any failure to file a certificate of merger or consolidation in connection with a merger or consolidation which was effective prior to July 1, 2001, does not affect the validity or effectiveness of any such merger or consolidation.

Section 67. Unless a future effective date or time is provided in a certificate of merger or consolidation, in which event a merger or consolidation shall be effective at any such future effective date or time, a merger or consolidation shall be effective upon the filing in the Office of the Secretary of State of a certificate of merger or consolidation.

Section 68. A certificate of merger or consolidation shall act as a certificate of cancellation for a business trust which is not the surviving or resulting entity in the merger or consolidation.

Section 69. Notwithstanding anything to the contrary contained in the governing instrument of a business trust, a governing instrument of a business trust containing a specific reference to this Act may provide that an agreement of merger or consolidation approved in accordance with section 64 of this Act may:

- (1) Effect any amendment to the governing instrument of the business trust; or
- (2) Effect the adoption of a new governing instrument of the business trust if it is the surviving or resulting business trust in the merger or consolidation.

Any amendment to the governing instrument of a business trust or adoption of a new governing instrument of the business trust made pursuant to the foregoing sentence shall be effective at the effective time or date of the merger or consolidation. The provisions of this section may not be construed to limit the accomplishment of a merger or consolidation or of any of the matters referred to herein by any other means provided for in the governing instrument of a business trust or other agreement or as otherwise permitted by law, including that the governing instrument of any constituent business trust to the merger or consolidation (including a business trust formed for the purpose of consummating a merger or consolidation) shall be the governing instrument of the surviving or resulting business trust.

Section 70. When any merger or consolidation has become effective under this Act, for all purposes of the laws of the state, all of the rights, privileges, and powers of each of the business trusts and other business entities that have merged or consolidated, and all property, real, personal, and mixed, and all debts due to any of such business trusts and other business entities, as well as all other things and causes of action belonging to each of such business trusts and other business entities, shall be vested in the surviving or resulting business trust or other business entity, and shall thereafter be

the property of the surviving or resulting business trust or other business entity as they were of each of the business trusts and other business entities that have merged or consolidated. The title to any real property vested by deed or otherwise, under the laws of the state, in any of such business trusts and other business entities, may not revert or be in any way impaired by reason of this Act; but all rights of creditors and all liens upon any property of any of such business trusts and other business entities shall be preserved unimpaired, and all debts, liabilities and duties of each of the such business trusts and other business entities that have merged or consolidated shall thenceforth attach to the surviving or resulting business trust or other business entity, and may be enforced against it to the same extent as if the debts, liabilities, and duties had been incurred or contracted by it.

Section 71. A governing instrument or an agreement of merger or consolidation may provide that contractual appraisal rights with respect to a beneficial interest or another interest in a business trust shall be available for any class or group of beneficial owners or beneficial interests in connection with any amendment of a governing instrument, any merger or consolidation in which the business trust is a constituent party to the merger or consolidation or the sale of all or substantially all of the business trust's assets.

Section 72. A beneficial owner may bring an action in the circuit court in the right of a business trust to recover a judgment in its favor if trustees with authority to do so have refused to bring the action or if an effort to cause those trustees to bring the action is not likely to succeed.

Section 73. In a derivative action, the plaintiff must be a beneficial owner at the time of bringing the action and:

- (1) At the time of the transaction of which the plaintiff complains; or
- (2) Plaintiff's status as a beneficial owner had devolved upon plaintiff by operation of law or pursuant to the terms of the governing instrument of the business trust from a person who was a beneficial owner at the time of the transaction.

Section 74. In a derivative action, the complaint shall set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by the trustees, or the reasons for not making the effort.

Section 75. If a derivative action is successful, in whole or in part, or if anything is received by a business trust as a result of a judgment, compromise, or settlement of any such action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees. If anything is so received by the plaintiff, the court shall make such award of plaintiff's expenses payable out of those proceeds and direct plaintiff to remit to the business trust the remainder thereof, and if those proceeds are insufficient to reimburse plaintiff's reasonable expenses, the court may direct that any such award of plaintiff's expenses or a portion thereof be paid by the business trust.

Section 76. A beneficial owner's right to bring a derivative action may be subject to such additional standards and restrictions, if any, as are set forth in the governing instrument of the business trust, including, without limitation, the requirement that beneficial owners owning a specified beneficial interest in the business trust join in the bringing of the derivative action.

Section 77. Subject to such standards and restrictions, if any, as are set forth in the governing instrument of a business trust, a business trust may indemnify and hold harmless any trustee or beneficial owner or other person from and against any and all claims and demands whatsoever.

Section 78. The absence of a provision for indemnity in the governing instrument of a business trust may not be construed to deprive any trustee or beneficial owner or other person of any right to indemnity which is otherwise available to such person under the laws of this state.

Section 79. Except to the extent otherwise provided in the governing instrument of a business trust, a business trust may acquire, by purchase, redemption, or otherwise, any beneficial interest in the business trust held by a beneficial owner of the business trust. Except to the extent otherwise provided in the governing instrument of a business trust, any such interest so acquired by a business

trust shall be deemed canceled.

Section 80. Except to the extent otherwise provided in the governing instrument of a business trust, each beneficial owner of a business trust has the right, subject to such reasonable standards (including standards governing what information and documents are to be furnished at what time and location and at whose expense) as may be established by the trustees, to obtain from the business trust from time to time upon reasonable demand for any purpose reasonably related to the beneficial owner's interest as a beneficial owner of the business trust:

- (1) A copy of the governing instrument and certificate of trust and all amendments thereto, together with copies of any written powers of attorney pursuant to which the governing instrument and any certificate and any amendments thereto have been executed;
- (2) A current list of the name and last known business, residence, or mailing address of each beneficial owner and trustee;
- (3) Information regarding the business and financial condition of the business trust; and
- (4) Other information regarding the affairs of the business trust as is just and reasonable.

Section 81. Except to the extent otherwise provided in the governing instrument of a business trust, each trustee may examine all the information described in section 80 of this Act for any purpose reasonably related to the trustee's position as a trustee.

Section 82. Except to the extent otherwise provided in the governing instrument of a business trust, the trustees of a business trust may keep confidential from the beneficial owners, for such period of time as the trustees deem reasonable, any information that the trustees reasonably believe to be in the nature of trade secrets or other information, the disclosure of which the trustees in good faith believe is not in the best interest of the business trust or could damage the business trust or its business or which the business trust is required by law or by agreement with a third party to keep confidential.

Section 83. A business trust may maintain its records in other than a written form if such form is capable of conversion into a written form within a reasonable time.

Any demand by a beneficial owner or trustee under section 80 of this Act shall be in writing and shall state the purpose of such demand.

Section 84. Any other business entity formed or organized or existing under the laws of the State of South Dakota or any other state or the United States or any foreign country or other foreign jurisdiction may convert to a business trust by complying with section 89 of this Act and filing in the Office of the Secretary of State in accordance with this Act:

- (1) A certificate of conversion to business trust that has been executed by the trustees in accordance with this Act; and
- (2) A certificate of trust that complies with this Act and has been executed by the trustees in accordance with this Act.

Section 85. The certificate of conversion to business trust shall state:

- (1) The date on which and jurisdiction where the other business entity was first formed or organized or otherwise came into being and, if it has changed, its jurisdiction immediately prior to its conversion to a business trust;
- (2) The name of the other business entity immediately prior to the filing of the certificate of conversion to business trust;
- (3) The name of the business trust as set forth in its certificate of trust filed in accordance with section 84 of this Act; and
- (4) The future effective date or time (which shall be a date or time certain) of the conversion to a business trust if it is not to be effective upon the filing of the certificate of conversion to business trust and the certificate of trust.

Section 86. Upon the filing in the Office of the Secretary of State of the certificate of conversion

to business trust and the certificate of trust or upon the future effective date or time of the certificate of conversion to business trust and the certificate of trust, the other business entity shall be converted into a business trust and the business trust shall thereafter be subject to all of the provisions of this Act, except that notwithstanding section 43 of this Act, the existence of the business trust shall be deemed to have commenced on the date the other business entity commenced its existence in the jurisdiction in which the other business entity was first formed or organized or otherwise came into being.

Section 87. The conversion of any other business entity into a business trust may not be deemed to affect any obligations or liabilities of the other business entity incurred prior to its conversion to a business trust, or the personal liability of any person incurred prior to such conversion.

Section 88. When any conversion has become effective under this Act, for all purposes of the laws of the State of South Dakota, all of the rights, privileges, and powers of the other business entity that has converted, and all property, real, personal, and mixed, and all debts due to such other business entity, as well as all other things and causes of action belonging to such other business entity, shall remain vested in the business trust to which such other business entity has converted and shall be the property of such business trust. The title to any real property vested by deed or otherwise in such other business entity may not revert or be in any way impaired by reason of this Act; but all rights of creditors and all liens upon any property of such other business entity shall be preserved unimpaired, and all debts, liabilities, and duties of the other business entity that has converted shall remain attached to the business trust to which such other business entity has converted, and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it in its capacity as a business trust. The rights, privileges, powers, and interests in property of the other business entity, as well as the debts, liabilities, and duties of the other business entity, may not be deemed as a consequence of the conversion, to have been transferred to the business trust to which

such other business entity has converted for any purpose of the laws of the State of South Dakota.

Section 89. Unless otherwise agreed, or as required under applicable non-South Dakota law, the converting other business entity is not required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion may not be deemed to constitute a dissolution of such other business entity and shall constitute a continuation of the existence of the converting other business entity in the form of a business trust. When the other business entity has been converted to a business trust pursuant to this Act, the business trust shall, for all purposes of the laws of the State of South Dakota, be deemed to be the same entity as the converting other business entity.

Section 90. Prior to filing a certificate of conversion to business trust with the Office of the Secretary of State, the conversion shall be approved in the manner provided for by the document, instrument, agreement, or other writing, as the case may be, governing the internal affairs of the other business entity and the conduct of its business or by applicable law, as appropriate, and a governing instrument shall be approved by the same authorization required to approve the conversion.

Section 91. The provisions of this Act may not be construed to limit the accomplishment of a change in the law governing, or the domicile of, an other business entity to the State of South Dakota by any other means provided for in an agreement governing the internal affairs of the other business entity or as otherwise permitted by law, including by the amendment of an agreement governing the internal affairs of the other business entity.

Section 92. In connection with a conversion pursuant to this Act, rights or securities of, or interests in, the other business entity which is to be converted to a business trust may be exchanged for or converted into cash, property, rights, or securities of, or interests in, such business trust or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights, or securities of, or interests in, another business trust or other business entity.

Section 93. A business trust may convert to an other business entity formed or organized under

the laws of the State of South Dakota, upon the authorization of such conversion in accordance with this section. If the governing instrument specifies the manner of authorizing a conversion of the business trust, the conversion shall be authorized as specified in the governing instrument. If the governing instrument does not specify the manner of authorizing a conversion of the business trust and does not prohibit a conversion of the business trust, the conversion shall be authorized in the same manner as is specified in the governing instrument for authorizing a merger or consolidation that involves the business trust as a constituent party to the merger or consolidation. If the governing instrument does not specify the manner of authorizing a conversion of the business trust or a merger or consolidation that involves the business trust as a constituent party and does not prohibit a conversion of the business trust, the conversion shall be authorized by the approval by all of the beneficial owners and all of the trustees. When the conversion of a business trust has become effective, the business trust shall file a certificate of cancellation in the Office of the Secretary of State in accordance with this Act. Unless otherwise agreed, the conversion of a business trust to an other business entity pursuant to this section shall not require such business trust to wind up its affairs under sections 35 to 41, inclusive, of this Act or pay its liabilities and distribute its assets under sections 35 to 41, inclusive, of this Act. In connection with a conversion of a business trust to an other business entity pursuant to this section, rights or securities of, or interests in, the business trust which is to be converted may be exchanged for or converted into cash, property, rights, or securities of, or interests in the other business entity into which the business trust is being converted or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights, or securities of, or interests in, any other business entity.

Section 94. All provisions of this section may be altered from time to time or repealed and all rights of business trusts, trustees, beneficial owners, and other persons are subject to this reservation.

Section 95. The rule that statutes in derogation of the common law are to be strictly construed

shall have no application to this section.

It is the policy of this section to give maximum effect to the principle of freedom of contract and to the enforceability of governing instruments.

Section 96. Sections 1 to 95, inclusive, of this Act may be cited as the South Dakota Business Trust Act.

Section 97. The laws of the state, territory, possession, or other jurisdiction or country under which a foreign business trust is organized govern its organization and internal affairs and the liability of its beneficial owners and trustees. A foreign business trust may not be denied registration by reason of any difference between those laws and the laws of the state.

Section 98. Before doing business in the state, a foreign business trust shall register with the secretary of state. In order to register, a foreign business trust shall submit to the secretary of state:

- (1) A copy executed by a trustee or other authorized person of an application for registration as a foreign business trust, setting forth:
 - (a) The name of the foreign business trust and, if different, the name under which it proposes to register and do business in the state;
 - (b) The state, territory, possession, or other jurisdiction or country where formed, the date of its formation and a statement from a trustee or other authorized person that, as of the date of filing, the foreign business trust validly exists as a business trust under the laws of the jurisdiction of its formation;
 - (c) The nature of the business or purposes to be conducted or promoted in the state;
 - (d) The address of the registered office and the name and address of the registered agent for service of process required to be maintained by sections 101 to 105, inclusive, of this Act;
 - (e) A statement that the secretary of state is appointed the agent of the trust for service

of process under the circumstances set forth in section 113 of this Act; and

- (f) The date on which the foreign business trust first did, or intends to do, business in the state.

- (2) A fee as set forth in section 118 of this Act shall be paid.

Section 99. No person may be deemed to be doing business in the state solely by reason of being a trustee or a beneficial owner of a foreign business trust.

Section 100. If the secretary of state finds that an application for registration conforms to law and all requisite fees have been paid, the secretary of state shall:

- (1) Certify that the application has been filed in the secretary of state's office by endorsing upon the original application the word, Filed, and the date and hour of the filing. This endorsement is conclusive of the date and time of its filing in the absence of actual fraud;
- (2) File and index the endorsed application.

The secretary of state shall prepare and return to the person who filed the application or the person's representative a copy of the original signed application, similarly endorsed, and shall certify such copy as a true copy of the original signed application.

Section 101. A foreign business trust may register with the secretary of state under any name (whether or not it is the name under which it is registered in the jurisdiction of its formation) that could be registered by a domestic business trust. However, a foreign business trust may register under any name which is not such as to distinguish it upon the records in the Office of the Secretary of State from the name of any domestic or foreign corporation, business trust, limited liability company, or limited partnership reserved, registered, or organized under the laws of the state with the written consent of the other corporation, business trust, limited liability company, or limited partnership, which written consent shall be filed with the secretary of state.

Section 102. Each foreign business trust shall have and maintain in the state:

- (1) A registered office which may but need not be a place of its business in the state; and
- (2) A registered agent for service of process on the foreign business trust, which agent may be either an individual resident of the state whose business office is identical with the foreign business trust's registered office, or a domestic corporation, or a domestic limited partnership, or a business trust, or a domestic limited liability company, or a foreign corporation, or a foreign limited partnership, or a foreign business trust, or a foreign limited liability company authorized to do business in the state having a business office identical with such registered office, which is generally open during normal business hours to accept service of process and otherwise perform the functions of a registered agent.

Section 103. A registered agent may change the address of the registered office of the foreign business trust for which he or she is registered agent to another address in the state by paying a fee as set forth in section 118 of this Act and filing with the secretary of state a certificate, executed by such registered agent, setting forth the names of all the foreign business trusts represented by such registered agent, and the address at which such registered agent has maintained the registered office for each of such foreign business trusts, and further certifying to the new address to which each such registered office will be changed on a given day, and at which new address such registered agent will thereafter maintain the registered office for each of the foreign business trusts recited in the certificate. Upon the filing of such certificate, the secretary of state shall furnish to the registered agent a certified copy of the same under the secretary of state's hand and seal of office, and thereafter, or until further change of address, as authorized by law, the registered office in the state of each of the foreign business trusts recited in the certificate shall be located at the new address of the registered agent thereof as given in the certificate. In the event of a change of name of any person acting as a registered agent of a foreign business trust, such registered agent shall file with the secretary of state a certificate, executed by such registered agent, setting forth the new name of such

registered agent, the name of such registered agent before it was changed, the names of all the foreign business trusts represented by such registered agent, and the address at which such registered agent has maintained the registered office for each of such foreign business trusts, and shall pay a fee as set forth in section 118 of this Act. Upon the filing of such certificate, the secretary of state shall furnish to the registered agent a certified copy of the same under the secretary of state's hand and seal of office. Filing a certificate under this section shall be deemed to be an amendment of the application of each foreign business trust affected thereby and each foreign business trust need not take any further action with respect thereto, to amend its application under section 106 of this Act. Any registered agent filing a certificate under this section shall promptly, upon such filing, deliver a copy of any such certificate to each foreign business trust affected thereby.

Section 104. The registered agent of one or more foreign business trusts may resign and appoint a successor registered agent by paying a fee as set forth in section 118 of this Act and filing a certificate with the secretary of state, stating that it resigns and the name and address of the successor registered agent. There shall be attached to such certificate a statement executed by each affected foreign business trust ratifying and approving such change of registered agent. Upon such filing, the successor registered agent shall become the registered agent of such foreign business trust as has ratified and approved such substitution and the successor registered agent's address, as stated in such certificate, shall become the address of each such foreign business trust's registered office in the state. The secretary of state shall furnish to the successor registered agent a certified copy of the certificate of resignation. Filing of such certificate of resignation shall be deemed to be an amendment of the application of each foreign business trust affected thereby and each such foreign business trust need not take any further action with respect thereto, to amend its application under section 106 of this Act.

Section 105. The registered agent of a foreign business trust may resign without appointing a

successor registered agent by paying a fee as set forth in section 118 of this Act and filing a certificate with the secretary of state stating that it resigns as registered agent for the foreign business trust identified in the certificate, but such resignation shall not become effective until one hundred twenty days after the certificate is filed. There shall be attached to such certificate an affidavit of such registered agent, if an individual, or of the president, a vice president or the secretary thereof if a corporation, that at least thirty days prior to and on or about the date of the filing of the certificate, notices were sent by certified or registered mail to the foreign business trusts for which such registered agent is resigning as registered agent, at the principal office thereof within or outside the state, if known to such registered agent or, if not, to the last known address of the attorney or other individual at whose request such registered agent was appointed for such foreign business trust, of the resignation of such registered agent. After receipt of the notice of the resignation of its registered agent, the foreign business trust for which such registered agent was acting shall obtain and designate a new registered agent, to take the place of the registered agent so resigning. If such foreign business trust fails to obtain and designate a new registered agent as aforesaid prior to the expiration of the period of one hundred twenty days after the filing by the registered agent of the certificate of resignation, such foreign business trust may not be permitted to do business in the state and its registration shall be deemed to be canceled. After the resignation of the registered agent has become effective as provided in this section and if no new registered agent has been obtained and designated in the time and manner aforesaid, service of legal process against the foreign business trust for which the resigned registered agent had been acting shall thereafter be upon the secretary of state in accordance with section 115 of this Act.

Section 106. If any statement in the application for registration of a foreign business trust was false when made or any arrangements or other facts described have changed, making the application false in any respect, the foreign business trust shall promptly file in the Office of the Secretary of State

a certificate, executed by a trustee or other authorized person, correcting such statement, together with a fee as set forth in section 118 of this Act.

Section 107. A foreign business trust may cancel its registration by filing with the secretary of state a certificate of cancellation, executed by a trustee or other authorized person, together with a fee as set forth in section 118 of this Act. A cancellation does not terminate the authority of the secretary of state to accept service of process on the foreign business trust with respect to causes of action arising out of the doing of business in the state.

Section 108. A foreign business trust doing business in the state may not maintain any action, suit, or proceeding in the state until it has registered in the state, and has paid to the state all fees and penalties for the years or parts thereof, during which it did business in the state without having registered.

Section 109. The failure of a foreign business trust to register in the state does not:

- (1) Impair the validity of any contract or act of the foreign business trust;
- (2) Impair the right of any other party to the contract to maintain any action, suit, or proceeding on the contract; or
- (3) Prevent the foreign business trust from defending any action, suit or proceeding in any court of the state.

Section 110. A beneficial owner or a trustee of a foreign business trust is not liable for the obligations of the foreign business trust solely by reason of the business trust's having done business in the state without registration.

Section 111. The circuit court shall have jurisdiction to enjoin any foreign business trust, or any agent thereof, from doing any business in the state if such foreign business trust has failed to register under this section or if such foreign business trust has secured a certificate of the secretary of state on the basis of false or misleading representations. The attorney general shall, upon the attorney

general's own motion or upon the relation of proper parties, proceed for this purpose by complaint in any county in which such foreign business trust is doing or has done business.

Section 112. Section 51 of this Act is also applicable to foreign business trusts as if they were domestic business trusts.

Section 113. Service of legal process upon any foreign business trust shall be made by delivering a copy personally to any trustee of the foreign business trust in the state or the registered agent of the foreign business trust in the state, or by leaving it at the dwelling house or usual place of abode in the state of any such trustee or registered agent (if the registered agent be an individual), or at the registered office or other place of business of the foreign business trust in the state. If the registered agent be a corporation, service of process upon it as such may be made by serving, in the state, a copy thereof on the president, vice president, secretary, assistant secretary, or any director of the corporate registered agent. Service by copy left at the dwelling house or usual place of abode of any trustee or registered agent, or at the registered office or other place of business of the foreign business trust in the state, to be effective, must be delivered thereat at least six days before the return date of the process, and in the presence of an adult person, and the officer serving the process shall distinctly state the manner of service in the officer's return thereto. Process returnable forthwith must be delivered personally to the trustee or registered agent.

Section 114. In case the officer whose duty it is to serve legal process cannot by due diligence serve the process in any manner provided for by section 113 of this Act, the process against the foreign business trust may be served upon the secretary of state, and such service shall be as effectual for all intents and purposes as if made in any of the ways provided for in section 113 of this Act. In the event service is effected through the secretary of state in accordance with this section, the secretary of state shall forthwith notify the foreign business trust by letter, certified mail, return receipt requested, directed to the foreign business trust at its last registered office. Such letter shall

enclose a copy of the process and any other papers served on the secretary of state pursuant to this section. The plaintiff shall, in the event of such service, serve process and any other papers in duplicate, notify the secretary of state that service is being effected pursuant to this section, and to pay to the secretary of state the sum of fifty dollars for the use of the state, which sum shall be taxed as a part of the costs in the proceeding if the plaintiff shall prevail therein. The secretary of state shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and defendant, the title, docket number, and nature of the proceeding in which process has been served upon the secretary of state, the fact that service has been effected pursuant to this section, the return date thereof and the day and hour when the service was made. The secretary of state need not retain such information for a period longer than five years from receipt of the service of process.

Section 115. Any foreign business trust which does business in the state without having registered under this Act shall be deemed to have thereby appointed and constituted the secretary of state its agent for the acceptance of legal process in any civil action, suit, or proceeding against it in any state or federal court in the state arising or growing out of any business done by it within the state. The doing of business in the state by such foreign business trust shall be a signification of the agreement of such foreign business trust that any such process when so served shall be of the same legal force and validity as if served upon an authorized manager or agent personally within the state.

Section 116. Whenever the words, doing business, the doing of business, or business done in this state, by any such foreign business trust are used in this section, they mean the course or practice of carrying on any business activities in the state.

Section 117. In the event of service upon the secretary of state, the secretary of state shall forthwith notify the foreign business trust thereof by letter, certified mail, return receipt requested, directed to the foreign business trust at the address furnished to the secretary of state by the plaintiff in such action, suit, or proceeding. Such letter shall enclose a copy of the process and any other

papers served upon the secretary of state. The plaintiff shall, in the event of such service, serve process and any other papers in duplicate, notify the secretary of state that service is being made pursuant to this section, and pay to the secretary of state the sum of fifty dollars for the use of the state, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The secretary of state shall maintain an alphabetical record of any such process setting forth the name of the plaintiff and defendant, the title, docket number, and nature of the proceeding in which process has been served upon the secretary of state, the return date thereof, and the day and hour when the service was made. The secretary of state need not retain such information for a period longer than five years from receipt of the service of process.

Section 118. No document required to be filed under this Act shall be effective until the applicable fee required by this section is paid. The following fees shall be paid to and collected by the secretary of state for the use of the state:

- (1) Upon receipt for filing of an application for registration as a foreign business trust, a certificate, or a certificate of cancellation, a fee not to exceed fifty dollars; and
- (2) Upon the receipt for filing of a certificate, a fee not to exceed fifty dollars.

Section 119. This Act applies to all business trusts of the type described in this Act now existing or hereafter created and all such business trusts existing on July 1, 2001, desiring to continue operations must have registered under the provisions of this Act by filing in the office of the secretary of state a declaration of trust and paying a fee of fifty dollars prior to September 30, 2001.

Section 120. No person may transact or conduct any business, within this state, under any business trust without first complying with the provisions and requirements of this Act. A violation of this section is a Class 1 misdemeanor.

Section 121. Sections 97 to 120, inclusive, of this Act, may be cited as the South Dakota Foreign Business Trust Act.

Section 122. That chapter 47-14 be repealed.

An Act to provide for and regulate business trusts.

I certify that the attached Act
originated in the

SENATE as Bill No. 81

Secretary of the Senate

President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 81

File No. _____

Chapter No. _____

Received at this Executive Office
this ____ day of _____ ,

20__ at _____ M.

By _____
for the Governor

The attached Act is hereby
approved this _____ day of
_____, A.D., 20__

Governor

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____, 20__
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State