SUBJECT: Affiliated Entities
NUMBER: 5:38

1. Purpose

This policy and its procedures set forth the requirements for current and future affiliated entities of the University. These requirements include accounting and financial controls, organizational principles, and compliance standards that ensure the University’s values and mission are upheld, while still preserving the separateness of the affiliated entity.

2. Definitions

a. Affiliated Entity: a nonprofit entity with a legal existence separate from the University that is organized and/or operated for the bona fide purpose of supporting the University, its activities, and its mission, through the receipt of gifts and donations and/or the provision of services. The entity must also be created by the University, receive significant support from the University, or have a formally established relationship with the University.

b. Gift or Donation: An item of value or an amount of money freely given with no expectation of anything of significant value in return, other than recognition and disposition of the gift or donation in accordance with the donor’s wishes. A gift or donation generally does not require performance of specific duties, a commitment of University resources, a defined period of performance or plan of work, or the return of unused funds. Funds from government entities should not be treated as a gift or donation.

c. Reserve Powers: Power retained by the University to authorize transactions between an affiliated entity and a third party for the benefit of the University that, if authorized, would encumber, pose significant risk to, or otherwise demand performance by, the University.

3. Policy

a. Establishing Affiliated Entity Status

i. Affiliated entity status is conveyed solely by the approval of the SDBOR. The University may establish an entity with the intention that it obtain affiliated status. All entities with agreements with the University that comply with SDBOR Policy 5:9 on the date of adoption of this policy shall retain their affiliated entity status, but such entities shall otherwise be required to comply with this policy.
ii. In order to obtain affiliated status, an affiliation and/or custodial agreement must be drafted between the University and the entity that memorializes the nature and purpose of their relationship and ensures the entity’s conformance with all SDBOR and University policies, including the obligations specified below and those given in SDBOR Policy 5:9, as applicable. The agreement must be reviewed and approved by the SDBOR General Counsel.

iii. If the entity conducted business prior to seeking affiliated status, the entity shall be subject to a compliance and financial audit conducted by an independent certified public accounting firm that is either approved by, or meets the criteria set by, the SDBOR Executive Director.

iv. The entity must be organized and maintained as a South Dakota nonprofit corporation in good standing, and must apply for, receive, and maintain 501(c)(3) federal tax-exempt status.

v. The entity must have at least one (1) University representative on its governing board with full voting rights. The representative shall be appointed by the University President.

vi. The entity’s charter, articles of incorporation and bylaws must provide for the distribution of assets to the University, the SDBOR, or the State upon dissolution of the entity. All affiliated entities established after the creation of this policy must account for the Reserve Powers provision of this policy in their articles of incorporation and bylaws.

b. Maintaining Affiliated Entity Status

i. The affiliated entity must employ sound fiscal and accounting procedures that follow generally accepted accounting principles. In keeping with this requirement, the affiliated entity must create an annual budget in such detail as reflective of its scope of operation, as well as an accounting of all funds held on the behalf of the University, both of which it must supply annually on or before September 1 of the following year to the University’s Vice President for Finance and Administration and the SDBOR General Counsel.

ii. The affiliated entity must maintain a separate account for all gifts and donations it receives or assets it holds that are intended for the benefit of the University and/or for the advancement of the University’s mission. However, such funds and assets may be pooled with other assets for investment purposes. All gifts, donations, and assets received by the entity and intended for the University or its mission shall be reported by the entity to the SDBOR and University on a calendar-year basis, on or before September 1 of the following year.

iii. The affiliated entity must be subject to annual financial audit by an independent certified public accounting firm that is either approved by, or meets the criteria set by, the University’s Vice President for Finance and Administration. The affiliated entity must also authorize the University and the SDBOR, separately, the right to inspect the affiliated entity’s records and to audit the affiliated entity’s accounts.
iv. The officers, employees, and agents of the affiliated entity must adhere to the highest ethical standards, including the adoption of a conflict of interest policy that aligns with all applicable federal and state laws, and SDBOR and University policies and prohibits lobbying or participating in political campaigns.

v. The affiliated entity must maintain a separate corporate and institutional form from the University by regularly holding meetings, maintaining minutes of meetings, and representing itself in all concerns as a separate legal entity from the SDBOR and the University. All transactions between the affiliated entity and the University not in furtherance of the University’s educational mission shall be conducted as ordinary, arms-length business transactions.

vi. The affiliated entity must hold harmless the State of South Dakota, its officers, agents and employees, from and against any and all actions, suits, damages, liability or other proceedings not arising solely from acts or omissions of the State. The affiliated entity must also maintain minimum general liability, automotive, and property insurance at limits established by the University’s Vice President for Finance and Administration.

vii. All material aspects of an affiliated entity must be reported to the University, including changes to the entity’s litigation, liability, and financial profile, as well as any significant business dealings.

viii. Any amendments to the affiliate and/or custodial agreement must be agreed to in writing by the University and entity, and must receive SDBOR approval to be effective.

ix. The Reserve Powers of the University under this policy must be adhered to by the affiliated entity.

c. By virtue of its affiliated status, the entity is eligible for the following benefits at the discretion of the University:

i. The receipt of certain University-provided services as consideration for the activities of the affiliated entity on behalf of and for the benefit of the University; and

ii. The use of any University logo/trademark, or derivative thereof, in the name, logo, signage or marketing of the affiliated entity.

d. The University’s representative(s) on the governing board of the affiliated entity shall have the following responsibilities to the University:

i. Keep the University’s Vice President for Finance and Administration informed of the affiliated entity’s activities on a regular basis;

ii. Communicate the University’s position and advocate its interests with the affiliated entity;

iii. Receive on behalf of the University all required accountings and other reports required by the affiliate agreement or this policy, which include, but are not limited to, copies of all entity filings required to maintain its nonprofit and tax exempt status, Form 990s, a
list of the governing board’s membership, and approved minutes of all regular and special meetings of the governing board;

iv. Closely monitor the affiliated entity for compliance with SDBOR and University policies, and ensure its actions on behalf of the University align with the University’s mission; and

v. Facilitate the University’s exercise of its Reserve Powers.

e. University Reserve Powers shall apply to the following transactions:

i. All real property and real property interests intended to be conveyed to, or used by or on the behalf of, the University;

ii. Any purported gift or donation that would encumber, or otherwise demand the performance of, the University, its officers and/or employees;

iii. Dissolving the affiliated entity or selling, leasing or disposing of substantially all of its assets; and

iv. Incurring any liability for which the University could be directly responsible.

f. Terminating Affiliated Entity Status:

i. Affiliated entity status is terminable at the sole discretion of the University or the SDBOR.

ii. Once terminated, the entity must

1. Cease the use of, and return or forfeit, where applicable and practical, all tangible and intangible benefits provided to it by the University under this policy or in the affiliate and/or custodial agreement; and

2. Distribute all remaining funds and assets it has received that are intended for the benefit of the University and/or for the advancement of the University’s mission, in a manner that most closely accords with the donor or benefactor’s intent.

4. Procedures

a. Any proposal for affiliate relationship requires sponsorship by a University-recognized organization, officer or employee.

b. Prior to any substantive planning, the University’s Office of General Counsel and the Office of Finance and Administration should be consulted so that they may provide a baseline assessment of the financial and legal implications and feasibility of the proposed affiliation.

c. After the above consultation, any entity seeking affiliated status or those seeking to create an affiliated entity must develop a detailed concept plan justifying the proposed affiliation. This
plan must provide the objectives, mission, governance structure, risk assessment (for the University and the entity), funding sources proposed and committed, the extent of the connections proposed between the entity and the University, and a thorough explanation of the manner in which the affiliated relationship will benefit the University and further its mission. In order for the concept plan to advance to the University President, it must receive the approval of the appropriate Vice President. Should the President approve the concept plan, the Office of General Counsel shall draft an affiliation agreement for consideration by the SDBOR and the SDBOR General Counsel.

d. Exercising Reserve Powers

i. Prior to voting on any action by the affiliated entity’s governing board that invokes the University’s Reserve Powers, the University’s representative(s) must notify the University President and provide a detailed explanation of the transaction in all material respects.

ii. No affiliated entity or representatives thereof may authorize an action invoking the Reserved Rights of the University unless the University President has received the above notice, explanation, and approved said transaction.

iii. The University President shall ascertain whether SDBOR approval is required for the transaction, in accordance with SDBOR Policy 5:3.

iv. Where another University official has been delegated contracting authority for the type of contract the affiliated entity seeks to enter with the third party pursuant to University Policy 5:3, the University President shall consult with the particular official before rendering a decision.

v. Where SDBOR approval is required, no affiliated entity may authorize the action absent formal SDBOR approval. In all other respects, no affiliated entity may authorize the action absent the formal approval of the University President.

5. Responsible Administrator

The Vice President for Finance and Administration, or designee, is responsible for the annual and ad hoc review of this policy and procedure. The University President is responsible for approval of, and modifications to, this policy.

SOURCE: Approved by President on 12/03/2019.