

**RULES
OF
DEPARTMENT OF COMMERCE AND INSURANCE
DIVISION OF INSURANCE**

**CHAPTER 0780-01-46
REGULATIONS ON CUSTODIAL AGREEMENTS AND
THE USE OF CLEARING CORPORATIONS**

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0780-01-46-.01 DEFINITIONS.

When used in this Chapter, the term:

- (1) "Agent" means a national bank, state bank, federal home loan bank, trust company or broker/dealer that maintains an account in its name in a clearing corporation or that is a member of the Federal Reserve System and through which a custodian participates in a clearing corporation, including the Treasury/Reserve Automated Debt Entry Securities System (TRADES) or Treasury Direct systems, except that with respect to securities issued by institutions organized or existing under the laws of a foreign country or securities used to meet the deposit requirements pursuant to the laws of a foreign country as a condition of doing business therein, "agent" may include a corporation that is organized or existing under the laws of a foreign country and that is legally qualified under those laws to accept custody of securities.
- (2) "Clearing corporation" means a clearing corporation as defined in Section 8-102(a)(5) of the Uniform Commercial Code, as adopted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, as amended from time to time, that is organized for the purpose of effecting transactions in securities by computerized book-entry, except that with respect to securities issued by institutions organized or existing under the laws of a foreign country or securities used to meet the deposit requirements pursuant to the laws of a foreign country as a condition of doing business therein, "clearing corporation" may include a corporation that is organized or existing under the laws of a foreign country and which is legally qualified under those laws to effect transactions in securities by computerized book-entry. Clearing corporation also includes "Treasury/Reserve Automated Debt Entry Securities System" and "Treasury Direct" book-entry securities systems established pursuant to 31 U.S.C. § 3100 *et seq.*, 12 U.S.C. pt. 391 and 5 U.S.C. pt. 301.
- (3) "Custodian" means:
 - (a) A national bank, state bank, federal home loan bank or trust company that shall at all times during which it acts as a custodian pursuant to this Chapter be no less than adequately capitalized as determined by the standards adopted by the regulator charged with establishing standards for, and assessing, the institution's solvency and that is regulated by either federal or state banking laws or the Federal Home Loan Bank Act, as amended, or is a member of the Federal Reserve System and that is legally qualified to accept custody of securities in accordance with the standards set forth below, except that with respect to securities issued by institutions organized or existing under the laws of a foreign country, or securities used to meet the deposit requirements pursuant to the laws of a foreign country as a condition of doing business therein, "custodian" may include a bank or trust company incorporated or organized

(Rule 0780-01-46-.01, continued)

under the laws of a country other than the United States that is regulated as such by that country's government or an agency thereof that shall at all times during which it acts as a custodian pursuant to this Chapter be no less than adequately capitalized as determined by the standards adopted by international banking authorities and that is legally qualified to accept custody of securities; or

- (b) A broker/dealer that shall be registered with and subject to jurisdiction of the Securities and Exchange Commission, maintains membership in the Securities Investor Protection Corporation, and has a tangible net worth equal to or greater than two hundred fifty million dollars (\$250,000,000).
- (4) "Custodied securities" means securities held by the custodian or its agent or in a clearing corporation, including the Treasury/Reserve Automated Debt Equity Securities System (TRADES) or Treasury Direct systems.
- (5) "Tangible net worth" means shareholders equity, less intangible assets, as reported in the broker/dealer's most recent Annual or Transition Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (SEC Form 10-K) filed with the Securities and Exchange Commission, or as determined by the most recent audited financial statement that broker/dealers file with the Securities and Exchange Commission pursuant to Exchange Act Rule 17a-5.
- (6) "Treasury/Reserve Automated Debt Entry Securities System" ("TRADES") and "Treasury Direct" mean the book entry securities systems established pursuant to 31 U.S.C. § 3100 *et seq.*, 12 U.S.C. pt. 391 and 5 U.S.C. pt. 301. The operation of TRADES and Treasury Direct are subject to 31 C.F.R. pt. 357 *et seq.*
- (7) "Security" has the same meaning as that defined in Section 8-102(a)(15), as adopted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, of the Uniform Commercial Code, as amended from time to time.
- (8) "Securities' certificate" has the same meaning as that defined in Section 8-102(a)(16), as adopted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, of the Uniform Commercial Code, as amended from time to time.

Authority: Acts 2012, ch. 680 and T.C.A. § 56-3-901, *et seq.*, T.C.A. § 56-2-301 and T.C.A. § 56-2-104.

Administrative History: Original rule filed October 27, 1980; effective December 11, 1980. Repeal and new rule filed April 28, 2005; effective July 12, 2005. Emergency rule filed June 29, 2012; effective through December 26, 2012. Emergency rule filed November 27, 2012; effective through May 26, 2013. Repeal and new rule filed February 25, 2013; effective May 26, 2013.

0780-01-46-.02 CUSTODY AGREEMENT; REQUIREMENTS.

- (1) An insurance company may, by written agreement with a custodian, provide for the custody of its securities with that custodian. The securities that are the subject of the agreement may be held by the custodian or its agent or in a clearing corporation.
- (2) The agreement shall be in writing and shall be authorized by a resolution of the board of directors of the insurance company or of an authorized committee of the board. The terms of the agreement shall comply with the following:
 - (a) Securities' certificates held by the custodian shall be held separate from the securities' certificates of the custodian and of all of its other customers.

(Rule 0780-01-46-.02, continued)

- (b) Securities held indirectly by the custodian and securities in a clearing corporation shall be separately identified on the custodian's official records as being owned by the insurance company. The records shall identify which securities are held by the custodian or by its agent and which securities are in a clearing corporation. If the securities are in a clearing corporation, the records shall also identify where the securities are and, if in a clearing corporation, the name of the clearing corporation and if through an agent, the name of the agent.
- (c) All custodied securities that are registered shall be registered in the name of the company or in the name of a nominee of the company or in the name of the custodian or its nominee or, if in a clearing corporation, in the name of the clearing corporation or its nominee.
- (d) Custodied securities shall be held subject to the instructions of the insurance company and shall be withdrawable upon the demand of the insurance company except that custodied securities used to meet the deposit requirements set forth in TCA §§ 56-2-104, 56-3-904 and 56-3-905 of this Insurance Law shall, to the extent required by those sections, be under the control of the Department of Commerce and Insurance and shall not be withdrawn by the insurance company without the approval of the Department of Commerce and Insurance.
- (e) The custodian shall be required to send or cause to be sent to the insurance company a confirmation of all transfers of custodied securities to or from the account of the insurance company. In addition, the custodian shall be required to furnish no less than monthly the insurance company with reports of holdings of custodied securities at times and containing information reasonably requested by the insurance company. The custodian's trust committee's annual reports of its review of the insurer's trust accounts shall also be provided to the insurer. Reports and verifications may be transmitted in electronic or paper form.
- (f) During the course of the custodian's regular business hours, an officer or employee of the insurance company, an independent accountant selected by the insurance company and a representative of an appropriate regulatory body shall be entitled to examine, on the premises of the custodian, the custodian's records relating to custodied securities, but only upon furnishing the custodian with written instructions to that effect from an appropriate officer of the insurance company.
- (g) The custodian and its agents shall be required to send to the insurance company:
 - 1. All reports which they receive from a clearing corporation on their respective systems of internal accounting control, and
 - 2. Reports prepared by outside auditors on the custodian's or its agent's internal accounting control of the custodied securities that the insurance company may reasonably request.
- (h) The custodian shall maintain records sufficient to determine and verify information relating to custodied securities that may be reported in the insurance company's annual statement and supporting schedules and information required in an audit of the financial statements of the insurance company.
- (i) The custodian shall provide, upon written request from an appropriate officer of the insurance company, the appropriate affidavits, substantially in the form of Forms A, B or C as found in Appendices A, B, and C of this regulation, with respect to custodied securities.

(Rule 0780-01-46-.02, continued)

- (j) A national bank, state bank, federal home loan bank or trust company shall secure and maintain insurance protection in an adequate amount covering the bank's or trust company's duties and activities as custodian for the insurer's assets, and shall state in the custody agreement that protection is in compliance with the requirements of the custodian's banking regulator. A broker/dealer shall secure and maintain insurance protection for each insurance company's custodied securities in excess of that provided by the Securities Investor Protection Corporation in an amount equal to or greater than the market value of each respective insurance company's custodied securities. The commissioner may determine whether the type of insurance is appropriate and the amount of coverage is adequate.
- (k) The custodian shall be obligated to indemnify the insurance company for any loss of custodied securities occasioned by the negligence or dishonesty of the custodian's officers or employees, or burglary, robbery, holdup, theft, or mysterious disappearance, including loss by damage or destruction.
- (l) In the event that there is a loss of custodied securities for which the custodian shall be obligated to indemnify the insurance company as provided in subparagraph (k) above, the custodian shall promptly replace the securities or the value thereof and the value of any loss of rights or privileges resulting from the loss of securities.
- (m) The agreement may provide that the custodian will not be liable for a failure to take an action required under the agreement in the event and to the extent that the taking of the action is prevented or delayed by war (whether declared or not and including existing wars), revolution, insurrection, riot, civil commotion, act of God, accident, fire, explosion, stoppage of labor, strikes or other differences with employees, laws, regulations, orders or other acts of any governmental authority, or any other cause whatever beyond its reasonable control.
- (n) In the event that the custodian gains entry in a clearing corporation through an agent, there shall be an agreement between the custodian and the agent under which the agent shall be subject to the same liability for loss of custodied securities as the custodian. However, if the agent shall be subject to regulation under the laws of a jurisdiction that is different from the jurisdiction the laws of which regulate the custodian, the Commissioner of Insurance of the state of domicile of the insurance company may accept a standard of liability applicable to the agent that is different from the standard of liability applicable to the custodian.
- (o) The custodian shall provide written notification to the insurer's domiciliary commissioner if the custodial agreement with the insurer has been terminated or if 100% of the account assets in any one custody account have been withdrawn. This notification shall be remitted to the insurance commissioner within three (3) business days of the receipt by the custodian of the insurer's written notice of termination or within three (3) business days of the withdrawal of 100% of the account assets.

Authority: Acts 2012, ch. 680 and T.C.A. § 56-3-901, et seq., T.C.A. § 56-2-301 and T.C.A. § 56-2-104.
Administrative History: Original rule filed October 27, 1980; effective December 11, 1980. Repeal and new rule filed April 28, 2005; effective July 12, 2005. Emergency rule filed June 29, 2012; effective through December 26, 2012. Emergency rule filed November 27, 2012; effective through May 26, 2013. Repeal and new rule filed February 25, 2013; effective May 26, 2013.

0780-01-46-.03 DEPOSIT WITH AFFILIATES; REQUIREMENTS.

- (1) Nothing in this Chapter shall prevent an insurance company from depositing securities with another insurance company with which the depositing insurance company is affiliated, provided that the securities are deposited pursuant to a written agreement authorized by the board of directors of the depositing insurance company or an authorized committee thereof and that the receiving insurance company is organized under the laws of one of the states of the United States of America or of the District of Columbia. If the respective states of domicile of the depositing and receiving insurance companies are not the same, the depositing insurance company shall have given notice of the deposit to the insurance commissioner in the state of its domicile and the insurance commissioner shall not have objected to it within thirty (30) days of the receipt of the notice.
- (2) The terms of the agreement shall comply with the following:
 - (a) The insurance company receiving the deposit shall maintain records adequate to identify and verify the securities belonging to the depositing insurance company.
 - (b) The receiving insurance company shall allow representatives of an appropriate regulatory body to examine records relating to securities held subject to the agreement.
 - (c) The depositing insurance company may authorize the receiving insurance company:
 1. To hold the securities of the depositing insurance company in bulk, in certificates issued in the name of the receiving insurance company or its nominee, and to commingle them with securities owned by other affiliates of the receiving insurance company, and
 2. To provide for the securities to be held by a custodian, including the custodian of securities of the receiving insurance company or in a clearing corporation.

Authority: Acts 2012, ch. 680 and T.C.A. § 56-3-901, et seq., T.C.A. § 56-2-301 and T.C.A. § 56-2-104.
Administrative History: Original rule filed October 27, 1980; effective December 11, 1980. Repeal and new rule filed April 28, 2005; effective July 12, 2005. Emergency rule filed June 29, 2012; effective through December 26, 2012. Emergency rule filed November 27, 2012; effective through May 26, 2013. Repeal and new rule filed February 25, 2013; effective May 26, 2013.

0780-01-46-.04 REPEALED.

Authority: T.C.A. §§ 56-2-117 and 56-3-112. **Administrative History:** Original rule filed October 27, 1980; effective December 11, 1980. Repeal and new rule filed April 28, 2005; effective July 12, 2005. Emergency rule filed June 29, 2012; effective through December 29, 2012. Emergency rule filed November 27, 2012; effective through May 26, 2013. Repeal filed February 25, 2013 effective May 26, 2013.

(Rule 0780-01-46, Appendix A)

APPENDIX A

FORM A

CUSTODIAN AFFIDAVIT

[For use by a custodian where securities entrusted to its care have not been redeposited elsewhere.]

STATE OF _____)
) ss.
COUNTY OF _____)

_____, being duly sworn deposes and says that he or she is _____ of _____, a corporation organized under and pursuant to the laws of the _____ with the principal place of business at _____ (hereinafter called the "corporation");

That his or her duties involve supervision of activities as custodian and records relating thereto;

That the corporation is custodian for certain securities of _____ having a place of business at _____ (hereinafter called the "insurance company") pursuant to an agreement between the corporation and the insurance company;

That the schedule attached hereto is a true and complete statement of securities (other than those caused to be deposited with The Depository Trust Company or like entity or a Federal Reserve Bank under the TRADES or Treasury Direct systems) which were in the custody of the corporation for the account of the insurance company as of the close of business on _____; that, unless otherwise indicated on the schedule, the next maturing and all subsequent coupons were then either attached to coupon bonds or in the process of collection; and that, unless otherwise shown on the schedule, all such securities were in bearer form or in registered form in the name of the insurance company or its nominee or of the corporation or its nominee, or were in the process of being registered in such form;

That the corporation as custodian has the responsibility for the safekeeping of such securities as that responsibility is specifically set forth in the agreement between the corporation as custodian and the insurance company; and

That, to the best of his or her knowledge and belief, unless otherwise shown on the schedule, the securities were the property of the insurance company and were free of all liens, claims or encumbrances whatsoever.

Subscribed and sworn to
before me this _____ day
of _____, 20____

Vice President [or other authorized officer] (L.S.)

(Rule 0780-01-46, Appendix B)

APPENDIX B
FORM B
CUSTODIAN AFFIDAVIT

(For use in instances where a custodian corporation maintains securities on deposit with The Depository Trust Company or like entity.)

STATE OF _____)
) ss.
COUNTY OF _____)

_____, being duly sworn deposes and says that he or she is _____ of _____, a corporation organized under and pursuant to the laws of the _____ with the principal place of business at _____ (hereinafter called the "corporation"):

That his or her duties involve supervision of activities of the corporation as custodian and records relating thereto;

That the corporation is custodian for certain securities of _____ having a place of business at _____ (hereinafter called the "insurance company") pursuant to an agreement between the corporation and the insurance company;

That the corporation has caused certain of such securities to be deposited with _____ and that the schedule attached hereto is a true and complete statement of the securities of the insurance company of which the corporation was custodian as of the close of business on _____, and which were so deposited on such date;

That the corporation as custodian has the responsibility for the safekeeping of the securities both in the possession of the corporation or deposited with _____ as is specifically set forth in the agreement between the corporation as custodian and the insurance company; and

That, to the best of his or her knowledge and belief, unless otherwise shown on the schedule, the securities were the property of the insurance company and were free of all liens, claims or encumbrances whatsoever.

Subscribed and sworn to
before me this _____ day
of _____, 20_____

_____(L.S.)
Vice President [or other authorized officer]

