
DIVISION OF BANKING

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MEMORANDUM

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TO: SOUTH DAKOTA TRUST COMPANIES AND BANK TRUST DEPARTMENTS

FROM: BRET AFDAHL, Division Counsel and Trust Examiner

RE: NEW LEGISLATION

The following is a summary of Senate Bill 103 (SB 103) which was introduced on behalf of the Governor's Task Force on Trust Administration Review and Reform and signed into law by Governor Mike Rounds. The changes in SB 103 and rules referred to below will become effective on July 1, 2010. I would encourage you to review this bill in detail at your convenience at the following link: <http://legis.state.sd.us/sessions/2010/Bills/SB103SFV.pdf>. If you would like additional information regarding this bill or if you have any questions you may contact the South Dakota Division of Banking (Division) at 605-773-3421.

SB103

The bill contains a good deal of cleanup and technical amendments to Title 55 which are briefly summarized below. In addition, SB 103 contains the most comprehensive and substantive revisions to SDCL chapter 51A-6A since that chapter was implemented in 1995. The changes to chapter 51A-6A and how those changes will impact South Dakota chartered trust companies are discussed in detail below. The provisions of SB 103 relating to trust law in Title 55 and trust estates in Title 22 were adopted to:

- Address trusts created before 7-2-02 and the notice required to beneficiaries when directed by a settlor, Section 1;
- Clarify that chapter 55-3 applies to all trusts and not only third party trusts, Section 2,
- Clarify that a settlor of a trust may elect to have a trust governed by the laws and courts of another state, Section 3;
- More clearly state that annual trust accountings are only required to be sent to beneficiaries eligible to receive distributions, Section 4;
- Simplify our existing principal and income act with respect to retirement plans and IRA's, Section 5;
- Simplify and update the rules relating to the use of a certificate of trust and combine the existing forms into one uniform document, Sections 6-10;
- Establish limits for contests of revocable trusts similar to the limits for the contest of wills, Section 11;
- Establish procedures for creditor claims against revocable trusts similar to those for probates, Section 12;

- Amend South Dakota’s prudent investor rule to clarify that a trustee may rely on a trust instrument or court order with respect to the retention of certain assets and to provide more protection for a trustee who does rely on such an instrument or court order, Sections 13-14;
- Modify the default obligations of a trustee with respect to Irrevocable Life Insurance Trusts by removing certain due diligence burdens and costs in instances where a settlor directs the retention of or has already purchased the insurance policy to be held in trust, unless otherwise directed by the trust instrument or court order, Section 15;
- Update existing law to accommodate informal probates which do not involve a court order, Sections 24-25;
- Amend South Dakota’s curative statute to provide finality to court orders and decrees that settle trust accounts or direct distributions, Section 26;
- Correct an erroneous statutory reference, Section 27; and
- Allow a transferor of qualified dispositions to retain the ability to direct investments of the trust, Section 28.

The provisions of SB 103 that amend Chapter 51A-6A were adopted to make the following changes.

SB 103 establishes a definition for the terms “public trust company” and “fiduciary for hire” and amends the definition of the term “trust company business”. The distinction between doing trust business with the public and with family groups will be made through the definitions of the trust company type and not in the definition of trust company business directly, Sections 16-17. In May 2010, the Banking Commission has adopted a definition for the term “private trust company” which can be viewed at the following link on page 11, see ARSD 20:07:22:03: http://www.state.sd.us/drr2/reg/bank/commission/rule_changes.pdf.

Section 18 of the bill also establishes requirements for each public trust company’s presence in South Dakota and provides a phase-in period for existing trust companies. This requirement is tied to the existing standard in SDCL 55-3-39 as it relates to trust situs in South Dakota. The Banking Commission adopted a rule which defines the term “trust administration” for purposes of SB 103, section 18 and SDCL 55-3-39. This definition provides a list of processes or activities that may be done in South Dakota to comply with the situs requirement. The Division is required to review each trust company for compliance which will most likely take place as part of regular examinations. See link to rules above, pages 11-12, ARSD 20:07:22:04. The Banking Commission also amended the record keeping rule for trust companies in ARSD 20:07:05:32 to provide additional guidance regarding the types of records that must be kept, the holding period for each type of record, and the flexibility to retain the identified records in either hard copy or electronic format.

This legislation also amends existing statute, SDCL 51A-6A-17, which prohibits participation in any trust company by individuals with specific types of criminal convictions. This statute, after the amendment, will require: criminal background investigations; credit reports; and litigation reports for certain individuals associated with all new trust company applications and for new hires of existing companies, Section 19. These processes are structured differently for private trust company applicants and private trust companies, which will require a name-based criminal background investigation, in addition to a credit report and litigation report for the identified individuals. Public trust company applicants and public trust companies must have all identified individuals undergo a fingerprint-based criminal background investigation in addition to a credit report and litigation report. All trust companies are required to immediately notify the Division of any material change to the background of any individual that would otherwise be subject to this

process. All costs associated with these processes are to be paid by the applicant or trust company as applicable.

The bill also provides the Director of the Division (Director) with the authority to require additional regulatory capital of existing trust companies and provides specific evaluation criteria, a notice requirement, and the right of an appeal to the Banking Commission upon the issuance of an order from the Director, Section 20. The process of issuing this type an order would most likely result from the findings of a regulatory examination which identifies certain growth, risk, or other factors that require additional capital to ensure the continued safety and soundness of the trust company.

In Sections 21 & 23, the legislation will remove South Dakota trust companies from the existing pledge statute which applies to all banks that exercise trust powers in South Dakota, and provides a new pledge section specific to South Dakota trust companies. This section clarifies that any pledge to the Division must maintain at all times a market value of not less than \$100,000 and provides the Director with the authority to increase the pledge requirement of any trust company to no more than \$500,000 for a private trust company or \$1,000,000 for a public trust company. All pledged assets must be held at a depository institution in South Dakota and must be of the same nature and quality as those required for public deposits as provided in SDCL 4-5-6 and 4-5-6.1. The process for increasing a trust company's pledge would be similar to that for an increase in capital as described above, to include a right of hearing in front of the South Dakota Banking Commission.

Finally, the Director is granted the authority to remove and prohibit a director, officer, or employee of a trust company from further participation in the industry for specified forms of wrongdoing, subject to approval of the Banking Commission. This amendment in Section 22 of the bill adds a reference to SDCL 51A-6A-46.1 to include 51A-2-22, which is the existing removal and prohibition authority vested with the Director for state chartered banks. This removal authority includes a right of a hearing pursuant to SDCL chapter 1-26.