
DIVISION OF BANKING

217 ½ West Missouri, Pierre, SD 57501
605-773-3421

MEMORANDUM

NUMBER: 20-009

DATE: June 8, 2012

TO: SOUTH DAKOTA TRUST COMPANIES AND BANK TRUST DEPARTMENTS

FROM: BRET AFDAHL, Director

RE: NEW LEGISLATION

Pursuant to South Dakota Codified Law (SDCL) 51A-6A-34, South Dakota chartered trust companies are required to provide an annual report to the South Dakota Division of Banking (Division). In an effort to improve efficiencies, the forms are now available on the Division's website: <http://dlr.sd.gov/banking/default.aspx>. The completed reports, signature pages and supervisory fee must be submitted to the Division no later than January 30, 2013. Please note that trust companies created as limited liability companies are required to file an Oath of Managers for each manager; all other trust companies are required to file an Oath of Directors for directorate members. Once appointed, directors and managers are not required to complete a new Oath each year, but must submit a copy of their original Oath with the annual report.

Also included with this Memorandum is the Division's revised Bank Secrecy Act (BSA) guidance. As a reminder, Division examinations include a thorough assessment of each trust company's (both private and public) compliance with BSA monitoring and reporting requirements.

The following is a summary of House Bill 1045 (HB 1045) which was introduced by the South Dakota Department of Labor and Regulation and contains the annual work product of the Governor's Task Force on Trust Administration Review and Reform (Trust Task Force) and signed into law by Governor Dennis Daugaard. The changes in HB 1045 will become effective on July 1, 2012. Also part of the work product of the Trust Task Force were proposed changes to certain administrative rules governing trust companies. The rule amendments will be presented to the South Dakota Banking Commission and Legislative Rules Review Committee later this year (See note below). I would encourage you to review this Bill in detail at your convenience at the following link: <http://legis.state.sd.us/sessions/2012/Bills/HB1045ENR.pdf>. If you would like additional information regarding this Bill or if you have any questions, you may contact the Division at 605-773-3421.

HB 1045

The provisions of HB 1045 that amend Chapter 51A-6A were adopted to make the following changes.

Section 1 of the Bill removes the link between the amount a trust company must pledge to the Division and the amount of capital it is required to hold. Existing law restricts the required pledge to be no more than 50 percent of capital. Removing the 50 percent ratio will allow the

Division more flexibility in requiring additional pledged amounts by its trust companies without the need for requiring a corresponding increase in the capital.

What public trust companies are required to perform in South Dakota is amended to include: maintain office space in South Dakota for the purpose of providing access to records of the trust company; hold no less than two governing board meetings with a quorum physically present in South Dakota; employ, engage or contract with individuals in South Dakota to perform services in South Dakota related to the powers of the trust company and to facilitate required examinations by the Division; and to perform trust administration in South Dakota*. The grace period in SDCL 51A-6A-11.1 was maintained and will provide public trust companies chartered in South Dakota prior to July 1, 2012 until July 1, 2015 to meet the requirements of this section, Section 2.

Finally, two changes were made to SDCL 51A-6A-39. The first allows a trust company to share the Division's report of examination with the officers, directors and others acting in a fiduciary capacity for the trust company. The second change makes it clear that a trust company does not waive or destroy any privilege under state or federal law to information provided to the Division during the course of a regulatory examination, Section 3.

The Bill also contains a good deal of cleanup and technical amendments to Title 55 which are briefly summarized below. The provisions of HB 1045 relating to trust law in Title 55 were adopted to:

- Expressly provide the authority to grant a power of appointment of the second trust when decanting property from one trust to a second trust, Section 4;
- Clarify certain directed trust provisions and exemptions from liability for excluded fiduciaries, Sections 5-7;
- Provide a definition and allow for no contest provisions in all trusts, and limit the contest of trusts to specified circumstances, similar to a provision in the Uniform Probate Code which provides a framework for wills probated in South Dakota, Sections 8-13;
- Provide a limitation of liability for trustees exercising the authority to decant a trust if the beneficiaries of the trust consent or release the trustee or ratify the transaction, Section 14;
- Clarify that an investment trust advisor, including a grantor when acting as a trust advisor, may vote stock by proxy or exercise additional powers authorized by the trust, Section 15;
- Reduce the statute of limitations for creditor claims against asset protection trusts from three years to two years after a transfer has been made or six months after discovery, Section 16;
- Modify certain sections in our self-settled trust laws dealing with what is commonly referred to as our "tacking" statute, to protect a trustee from certain claw back claims and to recognize a transferor's right to remove a trust protector and appoint a new one, Sections 17-19;
- Expand the list of factors which will not spoil the third party discretionary trust for creditor protection purposes, Section 20;
- Provide liability protection for trustees relying on, in good faith, certain tax information provided by a grantor, settlor or a tax advisor or preparer for the grantor or settlor, Section 21;
- Allow documents collateral to a trust document to be considered for purposes of limiting the liability of a trustee when a trust holds closely held entity interests that are managed by someone other than the trustee, Section 22;
- Allow a grantor or settlor, in addition to the South Dakota Attorney General, to maintain an action to enforce the provisions of a charitable trust, Sections 23 & 24;

- Clarify that South Dakota law will apply to any trust administered in South Dakota, unless another jurisdiction is specifically identified in the trust, Section 25;
- Make it clear that no provision in a trust which authorizes or directs the accumulation of trust income is invalid, Section 26; and
- Expand the limitation of duties currently provided for irrevocable insurance trusts to apply to all trusts, including revocable, directed and delegated trusts, Section 27.

* The Division will amend ARSD 20:07:22:04 to require that specific administrative acts are performed in South Dakota through the rule making process as provided in SDCL 1-26. In addition, the Division will amend ARSD 20:07:22:01 to establish separate fee schedules for private and public trust companies with a minimum and maximum fee for each. The South Dakota Banking Commission will hold a public hearing on these and other proposed rules at its next meeting on August 8, 2012 in Sioux Falls, South Dakota. Please visit our website for additional details as this meeting date approaches.