
DIVISION OF BANKING

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MEMORANDUM

NUMBER: 20-015

DATE: July 8, 2016

TO: SOUTH DAKOTA TRUST COMPANIES AND BANK TRUST DEPARTMENTS

FROM: BRET AFDAHL, Director

RE: NEW TRUST LEGISLATION

This Memorandum supersedes and replaces Memorandum 20-015 issued on June 17, 2016.

The following is a summary of House Bill 1039 (HB 1039) which was introduced on behalf of the Governor's Task Force on Trust Administration Review and Reform and signed into law by Governor Dennis Daugaard. The amendments to existing law and new laws established in HB 1039 became effective on July 1, 2016. I would encourage you to review this bill in detail at your convenience at the following link:

<http://sdlegislature.gov/docs/legsession/2016/Bills/HB1039ENR.pdf>. If you would like additional information regarding this bill, or if you have any questions, please do not hesitate to contact the South Dakota Division of Banking (Division) at 605-773-3421.

Sections 9-42 – **For Trust Companies and Bank Trust Departments**

The following provisions of HB 1039 are technical amendments to Title 55 and Chapter 21-22 adopted to make the following changes:

- Sections 9 through 13 clarify the definition of the term “power of appointment” and make clear that the right to withdraw a power of appointment is included. These sections also clarify that a discretionary power granted to a trustee to pay taxes owed does not create a property right to any of the assets held in trust.
- Section 14 specifically allows for the creation of a valid and enforceable trust even if the trust does not receive or contain trust assets at the time of creation or from time to time after creation. This language is in response to a Social Security Administration invalidation of a South Dakota trust agreement and related federal court decision.
- Sections 15 and 18 create a new “family advisor” to allow individuals to serve as non-fiduciary advisors to carry out certain functions related to the administration of trusts in South Dakota.
- Section 16 clarifies the burden of proof in any action to hold an excluded fiduciary liable.

- Section 17 adds additional powers to a trust protector to add beneficiaries or charities to a trust if the governing instrument provides for the additional classes of beneficiaries or charities.
- Section 19 will specifically allow a court to create a trust for the benefit of an individual. This type of trust is most commonly created for an individual with a disability.
- Section 20 is related to the amendments made in sections 10-14 above and clarifies that a trustee is a general agent for a trust and the property in the trust. Therefore, the trustee can, through its actions, bind the trust and the property in the trust.
- Section 21 corrects a typographical error.
- Section 22 establishes the burden of proof for trust reformations by petition of a trustee or beneficiary to a court.
- Section 23 clarifies that South Dakota law governs the administration of a trust while the trust is administered in South Dakota, unless expressly prohibited by the governing instrument or a court order.
- Section 24 provides that the recording of a deed, financing statement, or bill of sale is considered notice to a creditor when the document is filed with the appropriate public filing office.
- Section 25 allows real property held in trust to be transferred out of the trust for the purpose of mortgaging the real property and then to be transferred back into the trust without affecting the original date of transfer of the real property into the trust.
- Section 26 establishes the burden of proof for actions against a trustee, advisor or preparer of a qualified disposition trust.
- Section 27 updates a cross-reference.
- Section 28 clarifies the privacy provisions for trusts.
- Sections 29 through 42 create a new special spousal trust to allow spouses to hold property as community property. This change would allow a surviving spouse to receive a 100% step up in basis on property held in this type of trust transferred to the surviving spouse upon the death of the other spouse.

Sections 1-8 – For Trust Companies Only

The provisions of HB 1039 that amend Chapter 51A-6A were adopted to make the following changes:

- Section 1 deletes outdated language.
- Section 2 adds the names and addresses of private family trust company board members to the list of information that is treated as confidential.
- Section 3 makes a distinction between public and private trust companies for purposes of the list of organizers that must be included in the application notice. Currently, both public and private trust companies must list 3 organizers while this section would allow private trust companies to list one organizer. South Dakota corporate and LLC code requires only a single organizer (See 47-1A-201 & 47-34A-202.1).

- Section 4 clarifies the requirement that public trust companies must hold two of their four quarterly board meetings in South Dakota with a quorum physically present. Outdated language is also being deleted.
- Section 5 defines office space for purposes of 51A-6A-11.1. The term office space is used in 51A-6A-11.1 but will now be defined to require separate office space, display of the company name, charter and certificate of authority, and to provide access to hard copy and electronic records in the required office space.
- Section 6 provides a process for public trust companies to apply to the Director for acceptance of office space that does not meet the requirements of Section 6. This section will also allow the Director to require additional office space if certain conditions are met.
- Section 7 will treat trust company board meetings held via teleconference or video conference as in-person meetings. This present in-person treatment was adopted in the South Dakota corporate code in 2005 (See 47-1A-820). Please note, as provided in the language of Section 7 and the last paragraph of SDCL 51A-6A-15, this change has no impact on the requirement for all public trust companies to hold two meetings with a majority of board members physically present in South Dakota as required by SDCL 51A-6A-11.1.
- Section 8 clarifies the application of the trust service office requirement and guidance issued by the Division earlier this year related to interstate trust activity. This language will provide some certainty to private trust companies while at the same time will allow the Division to continue to raise the issue and identify risks related to this issue through the examination process.