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## DIVISION OF BANKING

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## MEMORANDUM

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NUMBER: 20-028

DATE: June 10, 2021

TO: SOUTH DAKOTA TRUST COMPANIES AND BANK TRUST DEPARTMENTS

FROM: BRET AFDAHL, Director

RE: NEW TRUST LEGISLATION

The following is a summary of Senate Bill 8, Senate Bill 9, and Senate Bill 78 (Bills). The Bills were introduced and signed into law by Governor Kristi Noem. The Bills will become effective on July 1, 2021. I would encourage you to review the Bills in detail at your convenience at the following link: [2021 South Dakota Bills \(sdlegislature.gov\)](https://sdlegislature.gov).

If you would like additional information regarding the Bills, or if you have any questions, please do not hesitate to contact the South Dakota Division of Banking at 605-773-3421.

### **Senate Bill 8**

Senate Bill 8 cleans up various cross-references and makes certain form and style updates to enhance readability in SDCL Title 51A and SDCL Chapter 55-13. Changes made by Senate Bill 8 include the following:

- Updates a cross-reference in the bank code to the new registered agent act in SDCL Chapter 59-11.
- Updates cross-references in SDCL 51A-7-26 as the previously referenced 51A-7-26 was repealed.
- Replaces cross reference for credit service fee changes to new statute in SDCL 54-11-12.
- Removes references to SDCL 55-13-12 as it is a reserved section.

### **Senate Bill 9**

South Dakota law currently provides three chapters in SDCL Title 51A that deal with bank trust departments and trust companies. One of those chapters, SDCL Chapter 51A-6, has gone unused for many years and leads to some confusion regarding its application. The objective of Senate Bill 9 is to reduce confusion and redundancy by repealing SDCL Chapter 51A-6, removing references to trust companies in SDCL Chapter 51A-5, and cleaning up SDCL Chapter 51A-6A.

### **Changes in SDCL Chapter 51A-5 Bank Trust Departments (Section 1-12):**

- Removes certain references to trust companies.
- Updates and clarifies various cross-references.
- Repeals unused and outdated trust service office structure.

### Repeal of SDCL Chapter 51A-6 Trust Companies (Sections 13-27)

- This chapter of law has gone largely unused since adoption in 1976.
- Provided for the creation of trust companies by banks and bank holding companies only.
- Very little supervisory structure, operating guidance, or restrictions were provided.
- Two relevant provisions in this chapter will be carried forward in sections 29 & 30.

### Updates to SDCL Chapter 51A-6A Creation of Trust Companies (Sections 28-32)

- Updates reference in regulated lender definition.
- A new section applying corporate and LLC law to trust companies.
- A new section limiting trust company activity.
- Repeals section previously used to convert non-depository banks to trust companies as the last non-depository bank converted to a SDCL Chapter 51A-6A trust company in 2012.

### **Senate Bill 78**

The following provisions of Senate Bill 78 amend SDCL Title 55, and were adopted to make the following changes:

- Section 1. Trust modification is currently outlined in detail in SDCL Title 55. This amendment changes the phrase "consent of all of the beneficiaries" to "written agreement entered into by all the beneficiaries" because most other states' laws use similar language. Thus, with the amendment, trust modifications under this section will be governed by contract principles. Judicial modification is also permitted.
- Section 2. This amendment changes two musts to shalls because shall is more recognizable as mandating a particular action. A 13-word phrase is also deleted because the procedures referred to are set forth in greater detail in other sections and this section does not intend to limit or restrict those provisions.
- Section 3. This corrects a typographical error.
- Section 4. This adds a cross-reference to the "virtual representation" statutes relating to notice.
- Section 5. This ensures that notice of a petition for privacy is served on all the interested parties.
- Sections 6-7. These sections provide that a trust governed by South Dakota laws cannot be undone by the laws of another state, adding emphasis to the recently issued South Dakota Supreme Court decision, *Matter of Cleopatra Cameron Gift Trust* (SD 2019), which applied the same principles.
- Section 8. This section provides that a trust which permits a trust protector or trust director with the power to remove and place a trustee may also appoint a co-trustee.
- Section 9. Existing law requires at least one trust investment advisor to serve in a fiduciary capacity. This amendment applies the same rule to trust distribution advisors.
- Section 10. This section mimics boilerplate language in many trust instruments which speak to the responsibilities of a successor trustee taking over a trust from a prior trustee. The section explains that the successor trustee need not investigate the prior trustee's administration of the trust unless the trust instrument requires it.

- Section 11. This section clarifies and confirms that after a trustee has resigned or been removed, they no longer have a duty to defend a lawsuit brought against the trust.
- Section 12. This section confirms common law trust doctrine regarding a person holding a power of appointment (the power to direct property during lifetime or at death and typically held by a trust beneficiary). The common law rule is that an individual with such a power need not exercise it in a fiduciary capacity unless the trust instrument provides for that treatment. This section statutorily adopts that same rule.
- Sections 13-14. These sections provide a way in which a trustee of a trust can achieve certainty in regard to various proposals regarding trust administration by seeking the approval of interested parties. The amendment ensures that if a trust protector is acting, that the trust protector is also involved.
- Section 15. A directed trust structure involves a trustee who is directed on one or more areas of traditional trustee responsibility. (See also supra section 9.) The liability for those decisions properly falls on the decision maker and only upon the trustee to the extent that the trustee fails to act as directed. This section confirms that a tax filing recommendation which the trustee complies with is treated in the same manner.
- Section 16. This section confirms that an "asset protection trust" (described in SDCL Chapter 55-16) may include a provision which allows the settlor to exchange property of their own with property of the trust with an equivalent value. This power is often helpful in both permitting property exchanges and in ensuring a desired income taxation classification of the trust (known as "grantor trust" treatment).