
DIVISION OF BANKING

217 ½ West Missouri, Pierre, SD 57501
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MEMORANDUM

NUMBER: 20-002

DATE: 06/06/08

TO: SOUTH DAKOTA TRUST COMPANIES

FROM: BRET AFDAHL, Division Counsel and Trust Examiner

RE: NEW LEGISLATION

The 2008 legislative session was an active one for changes in South Dakota trust law. The following is a summary of the bills followed by the Division during this session. If you would like to read the text of any bills discussed in this memo, please go to <http://legis.state.sd.us/sessions/2008/index.aspx> and type in the bill number and hit "Get Bill(s)." Please view or download the enrolled version of the bill at the bottom of the page. If you would like additional information regarding any of these bills or have any questions you may contact the Division at 605-773-3421.

Senate Bill 85 (SB 85):

Senate Bill 85 revises the procedure for the approval of trust company applications. Senate Bill 85 was companion legislation to Senate Bill 17, dealing with the reform of banking laws applicable to state chartered banks. Taken together, Senate Bills 17 and 85 standardize the procedures whereby state chartered trust company applications for new charters, additional locations, or changes in location will be considered and determined by the Director of the Division of Banking (Director). Only in the circumstances of a contested application will the Banking Commission become involved in an application to establish a trust company in South Dakota.

As of July 1, 2008, all applications to: establish a trust company in South Dakota; establish a trust service office in this state or another state; or to change the location of a trust company office in South Dakota will be determined by the Director. See SB 85 sections 3, 4, 5, 10, 11 and SB 17, section 7. The Division is in the process of updating our application forms to reflect these changes.

The bill also reduced the required number of organizers from five to three. This change was made to reflect a change made during the 2007 legislative session which reduced the required number of board members from five to three. See SB 85, section 5.

The authority to require more capital from a trust company applicant was shifted from the Commission to the Director in order to remain consistent with the objective of removing the Commission from the application approval process, unless a contest should arise. See SB 85 section 8.

The most important substantive change this year, and the one that will require your immediate attention, will increase the insurance requirements for trust companies in South

Dakota. As of July 1, 2008, or as soon thereafter as possible, each trust company will be required to obtain both a fidelity bond and directors and officers liability insurance policy. The bond and the insurance must be in an amount not less than one million dollars each. It is strongly recommended that each director's and officers liability insurance policy contain an errors and omissions rider. See SB 85, section 8.

Senate Bill 84 (SB 84):

Senate Bill 84 originated from the Governor's Trust Task Force on Trust Administration and Reform. The bill is designed to continue South Dakota's favored position as a situs for private family trusts. The major provisions of the bill will:

1. Allow so-called noncharitable special purpose trusts to extend beyond the current statutory limit of 21 years. An example would be a trust for the care of a dog, horse or some other type of property the trust-maker wants to maintain into the future by means of a special trust set up for that purpose. Like other trusts in South Dakota, a special purpose trust could be established in perpetuity if the trust-maker desires;
2. Provide for the classification of trust interests. The language in trust instruments is sometimes unclear or ambiguous as to nature of the beneficiary's interest in future trust distributions. As a result, it may be unclear whether so-called "spendthrift" or "asset protection" provisions in a trust, which protect the trust assets from creditors of the beneficiary, will provide the protection that the trust-maker originally intended. The bill clarifies and provides classification of the trust interest to provide legal guidelines in this area to allow the trust to carry out the intent of the trust-maker
3. Make a technical correction to allow trusts already in existence to elect to make distributions under the Revised Uniform Principal and Interest Act, which was adopted during the 2007 legislative session and became effective July 1, 2007; and
4. Set forth a statute of limitations under various circumstances limiting the time within which a creditor may bring a claim alleging that the creation of the trust was a fraudulent conveyance.