
DIVISION OF BANKING

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MEMORANDUM

NUMBER: 20-005

DATE: 06/12/09

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 127 (SB 127) which was introduced by the Governor's Task Force on Trust Administration Review and Reform and signed into law by Governor Rounds. The changes in SB 127 will become effective on July 1, 2009. I would encourage you to review this bill in detail at your convenience at the following link: <http://legis.state.sd.us/sessions/2009/Bills/SB127ENR.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.

SB127

The bill is designed to continue South Dakota's favored position as a situs for private family trusts. The bill contains a lot of cleanup and very technical amendments to Title 55 which I will not cover in detail in this memo. The major provisions of the bill will:

Remove the requirement that the governing board of each South Dakota trust company be elected within the first 120 days of each calendar year. SB 127, section 1. Going forward, the election of each governing board may occur at any regular annual meeting of owners.

Provide additional protection to a discretionary trustee in the event a creditor attempts, through a court order, to force the trustee to make a discretionary distribution. SB 127, section 11.

Establish a gross negligence or willful misconduct standard for excluded fiduciaries when the excluded fiduciary assumes the role of trust advisor, trust protector, investment trust advisor or distribution trust advisor according to terms of the trust agreement or for other reasons. SB 127, section 13. Excluded fiduciary is defined elsewhere but in general is a fiduciary that is excluded from exercising certain powers by a trust instrument.

Clarify a trustee's obligations, among other things, to notify qualified beneficiaries of the existence of a trust and to distinguish between revocable and irrevocable trust. SB 127, section 16. This section also establishes requirements for trust advisors, trust protectors, or other fiduciaries to keep excluded fiduciaries reasonably informed about the administration of a trust and other material information.

Add a new section to chapter 55-3 to provide authority to remove a trustee by a settler, settlor's agent, a cotrustee, or a qualified beneficiary. Specific grounds for removal are provided. SB 127, section 23.

Add new sections to chapter 55-4 which allow a trustee to provide a certificate of trust instead of a trust instrument when a request is made by someone other than a beneficiary. SB 127, sections 24 through 29, inclusive.

Clarify South Dakota's prudent investor rule to make it clear that the review of a prudent investor involves a course of conduct and not a review of the resulting performance. The amendments will also limit a prudent investor's liability in situations when the investor is ordered to invest in or hold certain assets by a trust instrument or a court. SB 127, sections 30 and 31.

Provide a limitation of liability for a trustee for a trust that holds an interest in a closely held business and imposes no duty on the trustee to review the activities of the closely held business. SB 127, section 32.