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## DIVISION OF BANKING

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## MEMORANDUM

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NUMBER: 20-008

DATE: JUNE 23, 2011

TO: SOUTH DAKOTA TRUST COMPANIES AND BANK TRUST DEPARTMENTS

FROM: BRET AFDAHL, Director

RE: NEW LEGISLATION

The following is a summary of House Bill 1155 (HB 1155) 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 changes in HB 1155 and rules referred to below will become effective on July 1, 2011. I would encourage you to review this bill in detail at your convenience at the following link: <http://legis.state.sd.us/sessions/2011/Bills/HB1155ENR.pdf>. If you would like additional information regarding this bill or if you have any questions you may contact the South Dakota Division of Banking (Division) at 605-773-3421.

### HB 1155

The bill contains a good deal of cleanup and technical amendments to Title 55 which are briefly summarized below. In addition, HB 1155 contains several revisions to SDCL chapter 51A-6A which are discussed in detail below. The provisions of HB 1155 relating to trust law in Title 55 and were adopted to:

- Clarify and improve the liability protections of excluded fiduciaries, Sections 1 & 2;
- Change references in chapter 55-1B and 55-16 from "trustee" to "fiduciary" to take into account the various trust protector and trust advisor roles and provide the necessary flexibility to accommodate the varying situations when trust protectors act in a fiduciary capacity and when they do not, Sections 3-6,
- Provide for special purpose entities to carry out various trust protector, trust advisor, and distribution trust advisor roles in the form of an entity under certain limited circumstances, Section 7;
- Clarify how, when, and to what extent trust beneficiaries are entitled to information about a trust, Section 8;
- Allow existing trusts to be decanted into trusts with longer terms, Section 9;
- Provide independent trustees more flexibility to decant trusts while at the same time retain restrictions placed on interested trustees to prevent tax inclusion issues, Section 10;
- Limit the use of a statute of limitations defense to certain actions, Section 12;
- Provide a trustee with the authority to change the name of a trust, Section 13;
- Clarify what constitutes a majority vote of trustees, Section 14;
- Revise the requirements of a certificate of trust and what is required to be included in a certificate, Sections 15-16;

- Clarify the statute of limitations for tort creditors for purposes of asset protection in 55-16-15 as it relates to the fraudulent conveyance statute in 55-15-10, Section 17;
- Specifically provide trustees the authority to make loans to beneficiaries out of trust property in addition to the ability to advance income, Section 18;
- Update cross-references related to changes made in sections 32-37, Sections 30 & 31;
- Create a new section to clarify that the holder of a withdrawal power is not deemed to be the settlor of the trust, Section 32;
- Clarify that consideration of other resources of a beneficiary prior to making a distribution from a support trust is limited to a consideration of the resources of the settlor's spouse, Section 33;
- Revise an existing law to make it clear that a trustee of any "spendthrift trust" can pay the expenses of a beneficiary directly, Section 34;
- Make provisions dealing with fraudulent conveyances and transfers to third party trusts consistent with transfers made under South Dakota's qualified disposition statutes in chapter 55-16, Sections 35-37;
- Clarify that no common law limiting the duration of trusts applies to non-charitable purpose trusts; and
- Provide planners with flexibility to respond to changes made in the 2010 Tax Reform Act passed by Congress, Section 42.

The provisions of HB 1155 that amend Chapter 51A-6A were adopted to make the following changes.

To distinguish between public and private trust companies for purposes of the requirements placed upon their board of directors or managers. Private trust companies can operate with a board of three directors/managers and may elect board members to serve terms not to exceed three years. Public trust companies will be required to operate with a board of five directors/managers and will continue to elect the same during each calendar year. Public trust companies have until January 30, 2012 to comply with the requirement of five board members. This section was also amended to reduce the requirement of US citizenship of board members from two-thirds to one-half, Section 11.

Section 19 of the bill repeals 51A-5-18 which was duplicative language dealing with the pledging of assets by trust departments of South Dakota banks. This section was not fully in accordance with requirements and guidance of the FDIC on this topic. SDCL 55-4-11 provides guidance for all banks exercising fiduciary powers in South Dakota and is consistent with FDIC and OCC guidance.

Sections 20-29 of the bill will mandate compliance with OCC Regulation 9.18, 12 CFR 9.18, for South Dakota banks and trust companies that operate common trust funds or collective investment funds.

Finally, Sections 38 & 39 will remove the twenty year duration limit for trust company charters and will allow existing trust companies to extend their charter for an unlimited duration.