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## DIVISION OF BANKING

1601 N. Harrison Avenue, Suite 1, Pierre, SD 57501  
605-773-3421

## MEMORANDUM

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NUMBER: 20-014

DATE: June 19, 2015

TO: SOUTH DAKOTA TRUST COMPANIES AND BANK TRUST DEPARTMENTS

FROM: BRET AFDAHL, Director

RE: NEW TRUST LEGISLATION

The following is a summary of House Bill 1051 (HB 1051) 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 1051 will become effective on July 1, 2015. I would encourage you to review this bill in detail at your convenience at the following link: <http://legis.sd.gov/docs/legsession/2015/Bills/HB1051P.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 9-27 – For Trust Companies and Bank Trust Departments

The following provisions of HB 1051 are technical amendments to Title 55 and Chapter 21-22 adopted to make the following changes:

- Sections 9 and 10 create a general definition of “beneficiary” that is to be used throughout Title 55, unless otherwise stated. As a result of the change, the definition of “beneficiary” in § 55-1-24 (Section 10) is no longer necessary.
- Section 11 includes form and style cleanup.
- Sections 12 and 13 split § 55-1-36 into two separate sections in the code in order to separate the two distinct concepts that are currently contained in this section. Section 12 addresses certain limitations on transfers that apply to asset protection trusts, and Section 13 deals with the payment of tax obligations from trust assets.
- Section 14 allows a governing instrument to vary the provisions of general application to trusts and trust administration, but does not allow variance from a trustee's duty to not engage in self-dealing.
- Section 15 allows for arbitration among beneficiaries if the grantor includes arbitration language in the governing document. Section 15 also makes the privacy protections established in § 21-22-8 available in arbitration proceedings.
- Section 16 clarifies the disclosure requirements of a trustee that must be made to certain beneficiaries regarding affiliated investments of trust assets. This section also provides for certain situations when disclosure is not required, such as when the trust instrument or court order expressly authorize the affiliated investment or if the trustee is directed to make the investment by a trust advisor. Finally, some grantors prefer not to notify certain beneficiaries of the existence of a trust (minors, incompetents, etc.), and this section will honor those grantor wishes by not requiring the trustee to notify such restricted parties from receiving notice of an affiliated investment.

- Section 17 adds a trust protector as a party with authority to request the court to remove a trustee.
- Section 18 raises the threshold for terminating a non-charitable trust from \$50,000 to \$150,000, if the trustee determines the trust is uneconomical. This also means that a trustee or beneficiary may petition a court to modify or terminate a trust that falls below this threshold in value as it may not provide enough assets to justify the cost to administer the trust and remaining assets.
- Sections 19 and 20 add limited liability companies to the definition of “person” in § 55-4-1, and clarify that this definition of “person” will apply to asset protection trusts established pursuant to chapter 55-16.
- Section 21 requires a creditor or claimant of a court supervised trust to show that they previously asserted a claim against the trust, which therefore entitles them to notice of court proceedings.
- Sections 22 through 26 clarify that a trustor may intervene in any court proceeding related to a court supervised trust initiated under chapter 21-22. These sections also clarify procedures related to the resolution of objections by interested parties, and allow for the waiver of notice in certain circumstances by consent of the parties.
- Section 27 clarifies that an action brought under chapter 21-22 is an action for purposes of Title 15 ensuring that the rules of civil procedure apply to all actions under chapter 21-22.

### Sections 1-8 – For Trust Companies Only

The provisions of HB 1051 that amend Chapter 51A-6A were adopted to make the following changes:

- Sections 1 and 2 delete outdated and unnecessary language.
- Section 3 clarifies that a majority of the governing board of each public trust company must be physically present in South Dakota at least twice a year for meetings.
- Section 4 deletes transition language no longer necessary.
- Section 5 makes municipal bonds and the other investment types listed in § 4-5-6.2 acceptable forms of assets that may be pledged to the Division for purposes of § 51A-6A-19.2. This pledge is required to provide security for the trust creditors of the trust company including as a priority claim the costs incurred by the Division in a receivership or liquidation of the trust company in the event the trust company should fail.
- Section 6 corrects a misspelling.
- Section 7 allows the Division to share information with other regulators if it takes action to remove or prohibit an individual from further participation in the trust industry in South Dakota.
- Section 8 requires a trust company to dissolve its charter within 30 days of merging with or selling its assets to another entity in order to prevent a company from trying to sell its charter as a separate asset of the trust company. A trust company charter is granted by the Division to a specific group to conduct business, is non-transferable, and is not a separate asset of the company.