



# State of South Dakota

EIGHTY-SEVENTH SESSION  
LEGISLATIVE ASSEMBLY, 2012

400T0318

## HOUSE EDUCATION ENGROSSED NO. **HB 1006** - 1/23/2012

Introduced by: The Committee on Education at the request of the Department of Education

1 FOR AN ACT ENTITLED, An Act to revise certain outdated and obsolete provisions regarding  
2 the Department of Education.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 13-3-48 be amended to read as follows:

5 13-3-48. The secretary of the Department of Education shall prepare and submit for approval  
6 of the South Dakota Board of Education ~~academic~~ a standards revision cycle and content  
7 standards ~~in language arts, mathematics, social studies, and science~~ for kindergarten through  
8 grade twelve. ~~Each school district shall adopt and implement clearly defined and measurable~~  
9 ~~course guidelines so as to meet the state academic content standards.~~

10 Section 2. That § 13-3-51 be amended to read as follows:

11 13-3-51. The secretary of the Department of Education shall establish a uniform system for  
12 the gathering and reporting of educational data for the keeping of adequate educational and  
13 financial records and for the evaluation of educational progress. Any school district or school  
14 seeking state accreditation shall submit enrollment data, personnel data, and shall verify all state  
15 and federal standards for accreditation and approval of schools, including those related to safety



1 and educational equity of the school district or school by October fifteenth of each year. ~~Any~~  
2 ~~school district with an average daily membership as defined in § 13-13-10.1 of greater than five~~  
3 ~~thousand in the previous school fiscal year has an additional seven days to submit the required~~  
4 ~~data.~~ If the due date falls on a weekend or state holiday, the due date is the next business day  
5 following the scheduled due date. An annual written evaluation of the educational progress in  
6 the state and in each school district shall be submitted to the Legislature and shall be made  
7 available in each school district to the general public. The South Dakota Board of Education  
8 may promulgate rules pursuant to chapter 1-26 to further define the data required pursuant to  
9 this section.

10 Section 3. That § 13-5-14 be amended to read as follows:

11 13-5-14. For the purposes of this title, a school district which overlaps boundaries of a  
12 county is considered to be in that county where the majority of the children belonging to ~~said~~  
13 the district reside as determined by the official school census fall submission of student  
14 enrollment data, and when once established as ~~provided herein said,~~ the district shall so remain  
15 until the boundaries thereof shall be changed under other provisions of this title, ~~provided, that,~~  
16 However, any disputes arising under the provisions of § 13-5-1 or 13-5-2, or this section, shall  
17 be determined by the South Dakota Board of Education.

18 Section 4. That § 13-5-17 be amended to read as follows:

19 13-5-17. ~~Such~~ Each school district name and number and a description of ~~its~~ the district's  
20 boundaries shall be recorded ~~in a book to be kept for the purpose~~ in the office of the secretary  
21 of the Department of Education. The secretary shall refuse to record as the name of any district  
22 a name which has been previously chosen and recorded by another district in the same county.

23 Section 5. That § 13-6-2 be amended to read as follows:

24 13-6-2. It is the policy of the State Legislature:

1 (1) That school districts exist for the purpose of operating a school or schools to provide  
2 the people of each local community adequate opportunity to avail themselves of a  
3 free public elementary; and secondary education program. Each school district should  
4 operate a school or schools providing for elementary ~~education, and each school~~  
5 ~~district through its elected school board or by vote of the voters shall decide whether~~  
6 ~~or not~~ and secondary education programs shall be offered;

7 (2) That it is essential for all children and youth in the state to have access to an adequate  
8 educational program in a public school and since many existing school districts do  
9 not contain sufficient taxable property to provide educational opportunities equal in  
10 comparison with the educational opportunities available in many other school  
11 districts in the state, the state board is ~~hereby charged with the responsibility~~  
12 responsible for school district reorganization which will enable each school district  
13 to offer an educational program of sufficient scope and quality to adequately expand  
14 and develop the interests and abilities of its people; and

15 (3) That each proposed school district shall meet the requirements and standards for  
16 school districts as ~~herein provided by this chapter~~ and shall contain sufficient human  
17 and material resources to support an education program which will meet the current  
18 minimum requirements for accreditation as adopted by the South Dakota Board of  
19 Education.

20 Section 6. That § 13-6-59 be amended to read as follows:

21 13-6-59. ~~When~~ If a joint school district is created, the county officials shall comply with the  
22 orders and directives of the board of county commissioners of the county having jurisdiction  
23 over the school district so created. A school district shall be considered to be under the  
24 jurisdiction of the board of county commissioners of the county where the major portion of the

1 children listed on the ~~school census~~ fall submission of student enrollment data of the school  
2 district area are located.

3 Section 7. That § 13-13-37 be amended to read as follows:

4 13-13-37. Each school district shall submit its final financial report to the secretary of the  
5 Department of Education before August first for the school fiscal year ending June thirtieth of  
6 that year. The final financial report shall detail total expenditures and total revenues.

7 The financial report shall be submitted on forms prescribed by the secretary. The provisions  
8 of this section are subject to the provisions of § 13-8-44. The total general fund expenditures  
9 may not include any capital outlay fund expenditures as defined in § 13-16-6, except for any  
10 school district that receives money under ~~Public Law 81-874 § 3(d)2(B)~~ Title VIII of the  
11 Elementary and Secondary Education Act. However, no school district that receives money  
12 under ~~Public Law 81-874 § 3(d)2(B)~~ Title VIII of the Elementary and Secondary Education Act  
13 may expend general fund money for new construction.

14 Section 8. That § 13-13-39 be amended to read as follows:

15 13-13-39. The Department of Education shall apportion the foundation program funds to  
16 each eligible school district and shall prepare such a list of apportionments ~~in triplicate. One~~  
17 ~~copy shall be filed with the state auditor as a voucher, one copy to each school district, and one~~  
18 ~~copy shall be retained in the files of the department~~ to be posted publically in electronic format.

19 The state auditor shall issue the warrant to each school district when the apportionment  
20 voucher is presented for the total amount of the foundation program funds each school district  
21 is to receive, subject to any reduction necessitated by the issuance of a warrant to the health and  
22 educational facilities authority as provided below.

23 If the Department of Education receives written notice from the Health and Educational  
24 Facilities Authority of a pledge of foundation program funds or other amounts under Title 13

1 by a school district pursuant to a lease, resolution, certificate, or other arrangement with the  
2 authority or any bond, certificate, note, or other obligation issued to or in connection with a  
3 program sponsored by the Health and Educational Facilities Authority for school districts in  
4 anticipation of funds under Title 13, the Department of Education shall deduct from amounts  
5 otherwise due to a school district for the current month and the next two succeeding months  
6 under the apportionment of foundation program funds or other amounts under Title 13 an  
7 amount sufficient to pay rentals, bonds, notes, certificates, or other amounts then due but unpaid  
8 and the amount so deducted shall be paid to the authority or any financial institution designated  
9 by the authority acting as a fiduciary in connection therewith, all as specified by the authority.  
10 A record of the amount so pledged as security or otherwise payable to the authority shall be filed  
11 with the state auditor.

12 The state auditor shall issue a warrant to the authority for the deducted amount specified by  
13 the Health and Educational Facilities Authority as ~~above~~ provided by this section. No pledge  
14 by a school district of foundation program funds or other amounts under Title 13 for any other  
15 purpose may be permitted and if made is voidable at the election of the Health and Educational  
16 Facilities Authority.

17 Section 9. That § 13-16-2 be amended to read as follows:

18 13-16-2. All school district funds shall be placed in ~~either the general fund, capital outlay~~  
19 ~~fund, special education fund, public service enterprise fund, trust or agency fund~~ funds as  
20 defined in § 4-4-4, ~~bond redemption fund, or 874 fund as hereinafter defined.~~

21 Section 10. That § 13-16-19 be amended to read as follows:

22 13-16-19. The school board shall prescribe policies and procedures governing the  
23 stewardship of ~~trust and~~ agency funds consistent with provisions of this title. The school board  
24 may designate an employee of the school district to be in charge of each ~~trust or~~ agency fund.

1 The employee designated, if other than the business manager, shall be placed under surety bond  
2 in the amount which it is estimated will be in the hands of such employee at any one time during  
3 the school fiscal year. The school district shall pay the premium on such surety bond.

4 Section 11. That § 13-16-20 be amended to read as follows:

5 13-16-20. The employee in charge of ~~a trust or~~ an agency fund may issue checks for  
6 disbursements from the fund. Unless required by the school board, such disbursements ~~shall do~~  
7 not require prior approval by the board nor signature of the presiding officer of the board or the  
8 business manager. The employee designated shall keep accurate records of all receipts,  
9 expenditures, and balances of the ~~trust or~~ agency fund; issue receipts in duplicate for all money  
10 received, except money received from the sale of printed serial number admission tickets;  
11 approve the expenditures, and pay all claims upon the presentation of an itemized verified claim.  
12 A memorandum record shall be kept on file for sale of all serially numbered tickets by events,  
13 which record shall be signed by the person selling such tickets. However, the employee may  
14 destroy any record ~~which~~ that the records destruction board, acting pursuant to § 1-27-19,  
15 declares to have no further administrative, legal, fiscal, research, or historical value.

16 Section 12. That § 13-16-21 be amended to read as follows:

17 13-16-21. The employee of the school district designated by the board to be in charge of a  
18 ~~trust or~~ an agency fund shall monthly and annually submit reports to the school board. The fund  
19 shall be audited as part of the regular audit of the school district.

20 Section 13. That § 13-16-26 be amended to read as follows:

21 13-16-26. All or any part of a surplus of any school district fund, except the capital outlay  
22 fund provided by §§ 13-16-6 to 13-16-9, inclusive, and the special education fund provided by  
23 § 13-37-16 may be transferred to any other school district fund. Only a school district with a  
24 plan for reorganization that has been approved by the voters pursuant to § 13-6-47 after July 1,

1 2007 may transfer within twelve months before the effective date of the reorganization all or any  
2 part of a surplus in the capital outlay fund to the general fund. Any unused portion of money that  
3 has been transferred into the special education fund may be transferred from the special  
4 education fund within the current fiscal year to the fund from which it originated. All or any part  
5 of any school district fund may be loaned to any other school district fund for a term not to  
6 exceed twenty-four months.

7 Section 14. That § 13-16-26.3 be amended to read as follows:

8 13-16-26.3. Notwithstanding any other provision of this chapter, if two or more school  
9 districts consolidate, for one year after the effective date of the consolidation pursuant to § 13-6-  
10 61, the newly formed school district may transfer any money from its general fund to its capital  
11 outlay fund. However, any funds transferred pursuant to this section may only be spent for  
12 one-time costs related to the consolidation. Any funds transferred to the capital outlay fund, but  
13 not lawfully obligated within one year of the date of the consolidation, shall revert to the school  
14 district's general fund. The Department of Education shall promulgate rules pursuant to chapter  
15 1-26 to require the necessary information and establish procedures necessary to implement this  
16 section.

17 Section 15. That § 13-39-1.2 be amended to read as follows:

18 13-39-1.2. Terms used in this chapter, mean:

- 19 (1) ~~"Adult vocational education," the training provided to upgrade or update the~~  
20 ~~occupational skills of persons who are preparing to, or have already, entered an~~  
21 ~~occupation~~ "Career and technical education," a contextual education model that  
22 employs career clusters and programs of study in preparing highly skilled students  
23 for success in postsecondary education and in-demand careers;  
24 (2) "Career clusters," a distinct grouping of occupations and industries based on the

1           knowledge and skills they require;

2       (3)   "Center board," the governing body of a multidistrict, career and technical academy;

3       ~~(3)~~(4) " Department," the Department of Education;

4       (5)   "Director," the person at the Department of Education responsible for the  
5           administration of career and technical education;

6       ~~(4)~~(6) "Facilities," buildings, rooms, property, and permanent equipment, including  
7           vehicles, used to provide vocational education;

8       ~~(5)~~(7) "LEA," a local education agency limited to public school districts and the legal  
9           entities that a school district is authorized to establish;

10      ~~(6)~~(8) "Multidistrict, career and technical academy," an educational entity designed to  
11           provide career and technical education and academic courses that prepare youth for  
12           a wide range of careers that require varying levels of education;

13      ~~(7)~~(9) "Multi-use facility," a structure or part of a structure for student or faculty use as a  
14           lounge area, cafeteria, classroom, or large group area not operated as a student union  
15           building in which student fees are charged and utilized to pay for construction and  
16           maintenance of a facility under the direct or indirect control of the students;

17      ~~(8)~~(10)       "Participating district," a school district which has voting representation on a  
18           center board;

19      ~~(9)~~(11)       "Postsecondary technical institute," a public nonprofit school legally  
20           authorized to provide public postsecondary technical education which does not  
21           culminate in a baccalaureate degree at that school;

22      ~~(10)~~(12)       "Secretary," the state secretary of education;

23      ~~(11)~~(13)       "State board," the South Dakota Board of Education;

24      ~~(12)~~ "Vocational education," ~~organized programs at the secondary, postsecondary, or adult~~

1 ~~levels directly related to the preparation of individuals for paid or unpaid~~  
2 ~~employment, or for the additional preparation for a career requiring other than a~~  
3 ~~baccalaureate or advanced degree.~~

4 Section 16. That § 13-39-8 be amended to read as follows:

5 13-39-8. Notwithstanding the provisions of § 13-15-2, the general control and supervision  
6 over ~~vocational~~ career and technical education as provided in this chapter is the duty of the  
7 director under the direction of the secretary of education.

8 Section 17. That § 13-39-9 be amended to read as follows:

9 13-39-9. The director has general control and supervision over all ~~vocational~~ career and  
10 technical education in all public secondary schools, public postsecondary institutions not under  
11 the control of the Board of Regents and all other ~~vocational~~ career and technical education  
12 functions assigned to ~~him~~ the director by the secretary of education.

13 Section 18. That § 13-39-12 be amended to read as follows:

14 13-39-12. The secretary of education may cooperate with federal agencies in the  
15 administration of any acts of Congress relating to ~~vocational~~ career and technical education.

16 Section 19. That § 13-39-13 be amended to read as follows:

17 13-39-13. The secretary of education may enter into contracts and agreements with any  
18 agency of the United States government or any agency of the state government or its political  
19 subdivisions for the purpose of ~~vocational~~ career and technical education, to receive grants of  
20 federal funds for ~~vocational~~ career and technical education and to expend those funds under  
21 rules ~~adopted~~ promulgated by the South Dakota Board of Education pursuant to chapter 1-26.

22 Section 20. That § 13-39-19 be amended to read as follows:

23 13-39-19. The secretary of education may distribute funds appropriated to ~~him~~ the  
24 department by the Legislature or granted by any federal agency to the state in accordance with

1 chapter 4-8B, for ~~vocational~~ career and technical education in public secondary and  
2 postsecondary technical institutes in the state in accordance with a state plan or plans adopted  
3 by the South Dakota Board of Education. The aid disbursed to the different schools of the state  
4 and all expenses incurred in the administration of the provisions of any federal acts relating to  
5 ~~vocational~~ career and technical education shall be paid out of the funds of the secretary  
6 appropriated for that purpose and from the federal funds allotted to the State of South Dakota  
7 for similar purposes. The state treasurer is the custodian of all money paid to the state from  
8 federal appropriations for the purpose of ~~vocational~~ career and technical education; and shall  
9 disburse the funds on warrants issued by the state auditor upon vouchers approved by the  
10 director. The secretary of education shall authorize the director to submit vouchers to the state  
11 auditor for the amount payable as state and federal aid to each school approved under the  
12 provisions of this chapter. Upon receipt of the vouchers, the state auditor shall draw warrants  
13 on the state treasury in favor of the treasurer of the public secondary and postsecondary  
14 technical institute for the sum approved by the secretary.

15 Section 21. That § 13-39-21 be amended to read as follows:

16 13-39-21. The director shall prescribe a uniform system for gathering and reporting  
17 ~~vocational~~ career and technical education data.

18 Section 22. That § 13-39-26 be amended to read as follows:

19 13-39-26. The provisions of this chapter do not apply to ~~private business schools or private~~  
20 ~~vocational institutions~~ nonpublic secondary or postsecondary technical institutions except that  
21 the secretary of education and LEAs may enter into ~~contracts~~ agreements with these schools and  
22 institutions to provide ~~vocational~~ career and technical education.

23 Section 23. That § 13-39-27 be amended to read as follows:

24 13-39-27. For the purposes of providing ~~vocational~~ career and technical education, all LEAs

1 of this state may establish, in cooperation with the ~~division, a vocational department, classes or~~  
2 ~~facilities for vocational education~~ department, career and technical education programs by career  
3 clusters, as provided in this chapter, under terms and conditions agreed upon. Any LEA board  
4 may enter into any agreement to provide ~~vocational~~ career and technical education. An  
5 agreement made pursuant to this section is not subject to the limitation of the tuition law. An  
6 LEA may expend its money for ~~vocational~~ career and technical education.

7 Section 24. That § 13-39-29 be amended to read as follows:

8 13-39-29. The secretary of education, through the director, may receive, acquire, have  
9 charge of, and operate all properties for the purposes authorized in this chapter. The secretary  
10 may acquire by gift, subject to the provisions of § 5-24-12, or purchase real and personal  
11 property for the use of ~~vocational~~ career and technical education and may dispose of or transfer  
12 the same whenever the purposes of this chapter are benefited. The secretary may not purchase,  
13 lease, sell, encumber, or alienate any real property without the consent and prior approval of the  
14 Legislature.

15 Section 25. That § 13-39-35.1 be amended to read as follows:

16 13-39-35.1. If the Legislature approves the petition by passing a joint resolution, an LEA  
17 may operate a postsecondary technical institute. If an LEA begins to operate a postsecondary  
18 technical institute without the approval required by this section, that school is ineligible for state  
19 ~~vocational~~ career and technical education money. ~~Adult vocational education programs are~~  
20 ~~exempt from the provisions of this section.~~

21 Section 26. That § 13-39-37 be amended to read as follows:

22 13-39-37. The South Dakota Board of Education may ~~adopt~~ promulgate rules, pursuant to  
23 chapter 1-26, to be administered by the director, governing the operation and maintenance of  
24 postsecondary technical institutes which will afford the people of the state, insofar as

1 practicable, an equal opportunity to acquire a public technical education. The rules may provide  
2 for the following:

- 3 (1) Curriculum and standards of instruction and scholarship;
- 4 (2) Attendance requirements, age limits of trainees, eligibility for attendance, and tuition  
5 payments and other charges;
- 6 (3) Apportionment and distribution of funds made available to the board for carrying out  
7 the purposes of §§ 13-39-34 to 13-39-39, inclusive;
- 8 (4) Transportation requirements and payments;
- 9 (5) General administrative matters;
- 10 (6) The submission of the annual budget of the postsecondary technical institute which  
11 shall include, but is not limited to, a description of programs, a list of staff positions,  
12 and the amount for supplies and operating expenses associated with the programs  
13 offered. The rules shall require the budget to include all operating costs of programs,  
14 including those costs ineligible for reimbursement from federal and state funds, shall  
15 state the procedure for amending and filing it with the Department of Education and  
16 shall provide that failure to comply with the rules may result in withholding of  
17 payments from federal and state funds;
- 18 (7) The submission of plans of LEAs for new construction or major renovation of  
19 facilities eligible for reimbursement. The rules regarding these plans shall provide a  
20 requirement that the LEA, by a written resolution, declare the LEA committed to  
21 begin construction if the budget of the state board provides the matching funds;
- 22 (8) The promotion and coordination of ~~vocational~~ career and technical education; and
- 23 (9) ~~The duplication of programs~~ prevention of unwarranted duplication of programs.

24 Section 27. That § 13-39-38 be amended to read as follows:

1 13-39-38. The secretary of education shall apportion and distribute funds made available for  
2 postsecondary technical institutes through a formula approved by the South Dakota Board of  
3 Education to the LEAs having jurisdiction over postsecondary technical institutes to assist in  
4 maintaining and operating those schools. The use of the funds are subject to rules ~~adopted~~  
5 promulgated by the state board pursuant to subdivision § 13-39-37(3) and in accordance with  
6 the approved state plan for ~~vocational~~ career and technical education.

7 Section 28. That § 13-39-41 be amended to read as follows:

8 13-39-41. The school boards of two or more school districts may submit to the South Dakota  
9 Board of Education a proposed plan to establish a multidistrict, career and technical academy.  
10 The proposal shall be consistent with the state plan for ~~vocational~~ career and technical education  
11 and shall meet the rules as ~~adopted~~ promulgated by the state board pursuant to chapter 1-26.

12 Section 29. That § 13-39-56 be amended to read as follows:

13 13-39-56. The secretary of education shall apportion and distribute funds made available to  
14 multidistrict, career and technical academies to assist in defraying instructional costs. The use  
15 of these funds is subject to the state plans for ~~vocational~~ career and technical education and to  
16 rules ~~adopted~~ promulgated by the South Dakota Board of Education pursuant to chapter 1-26.

17 Section 30. That § 13-39-57 be amended to read as follows:

18 13-39-57. Funds distributed to the multidistrict, career and technical academies under the  
19 provisions of § 13-39-56 are to be paid out of money appropriated to the division and from  
20 federal funds allotted to the State of South Dakota for the purposes of ~~vocational~~ career and  
21 technical education.

22 Section 31. That § 13-39-69 be amended to read as follows:

23 13-39-69. There is created a separate trust fund on behalf of the secretary of education to be  
24 on deposit with the state treasurer, such fund to be designated the ~~vocational-education~~

1 ~~postsecondary technical institutes~~ facilities fund. The fund ~~established hereby~~ shall consist of  
 2 all appropriations by the State Legislature specifically designated for deposit ~~therein~~ in the fund  
 3 and any other moneys designated for deposit ~~therein~~ in the fund, including any investment  
 4 earnings ~~thereon~~. The treasurer may create subfunds or accounts within the trust fund created  
 5 under this section as the treasurer considers necessary. Any earnings from the investment of  
 6 such fund may be transferred annually by the state treasurer to the tuition subaccount established  
 7 by § 13-39-70.

8 Section 32. That § 13-39-70 be amended to read as follows:

9 13-39-70. There is hereby created within the ~~vocational education~~ postsecondary technical  
 10 institutes facilities fund a tuition subaccount. The secretary may determine and require that all  
 11 or any portion of the tuition and other student fees payable to an LEA shall be deposited in the  
 12 subaccount. No moneys may be disbursed from the tuition subaccount for any purpose other  
 13 than to pay lease rentals or other amounts due and owing in connection with:

- 14 (1) Any facility originally leased to the board of regents but now utilized for ~~vocational~~  
 15 career and technical education so long as such facility is on the campus of a  
 16 postsecondary technical institute; and
- 17 (2) Any lease-purchase agreement authorized under §§ 13-39-66 and 13-39-67 unless  
 18 ~~and until~~ the health and educational facilities authority files with the state treasurer  
 19 a certification that it has on deposit or there has otherwise been appropriated  
 20 sufficient moneys to pay all amounts due or to become due within the next three  
 21 months on all such lease-purchase agreements.

22 No lease rentals on facilities described in subsection (1) ~~shall~~ may be paid unless the  
 23 secretary of education has approved the assumption of the former board of regents' lease  
 24 obligations by the tuition subaccount. Thereafter, the state treasurer shall retain in the ~~vocational~~

1 ~~education~~ postsecondary technical institutes facilities fund for future repair and improvement  
2 as authorized by the Legislature such amounts, not to exceed ten percent thereof, as the secretary  
3 shall direct.

4 Section 33. That § 13-39-71 be amended to read as follows:

5 13-39-71. All or any portion of the lease-purchase obligations under or in connection with  
6 any lease-purchase agreement authorized under §§ 13-39-66 and 13-39-67 may be paid or  
7 discharged out of moneys available from the investment earnings on the ~~vocational education~~  
8 postsecondary technical institutes trust fund or from any amounts on deposit in the tuition  
9 subaccount of such fund upon the determination by the secretary of education to pledge or  
10 otherwise transfer such amounts to the health and educational facilities authority.

11 Section 34. That § 13-39-72 be amended to read as follows:

12 13-39-72. An LEA operating an approved postsecondary ~~vocational school~~ technical  
13 institute may award an associate in applied sciences degree. The state board may promulgate  
14 rules pursuant to chapter 1-26 providing for approval of programs in postsecondary ~~vocational~~  
15 ~~education schools~~ technical institutes leading to an associate in applied science degree. In  
16 approving any program, the state board shall consider curriculum, required hours, quality of  
17 instruction, minimum standards for entry into the programs, and standards for program  
18 completion.

19 Section 35. That § 13-42-15 be amended to read as follows:

20 13-42-15. Upon concluding the hearing, the secretary of the Department of Education or the  
21 secretary's representative shall make a decision within thirty days from the date of the hearing.  
22 In case of suspension or revocation, the secretary of the Department of Education shall fix the  
23 date at which the suspension or revocation becomes effective and, in case of suspension, the  
24 duration ~~thereof~~ of the suspension. A notice of the suspension or revocation shall be given in

1 writing to the teacher or administrator and to the school board by which the teacher or  
2 administrator is employed. ~~The teacher or administrator shall, within ten days of receipt of the~~  
3 ~~notice, surrender the individual's original teaching certificate to the Department of Education.~~

4 Section 36. That § 13-42-29 be amended to read as follows:

5 13-42-29. ~~Effective July 1, 2005, all~~ Each school ~~administrators~~ administrator whose  
6 preparation does not meet certification standards established in ~~ARSD 24:16:09~~ by the South  
7 Dakota Board of Education shall submit to the Department of Education a professional  
8 development plan to meet the alternative certification requirements established by the South  
9 Dakota Board of Education.

# State of South Dakota

EIGHTY-SEVENTH SESSION  
LEGISLATIVE ASSEMBLY, 2012

400T0182

## HOUSE JUDICIARY ENGROSSED NO. **HB 1045** 1/23/2012

Introduced by: The Committee on Judiciary at the request of the Department of Labor and Regulation

1 FOR AN ACT ENTITLED, An Act to revise various trust provisions.

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 Section 1. That § 51A-6A-19.2 be amended to read as follows:

4 51A-6A-19.2. Any trust company authorized by this title, shall, before transacting any such  
5 business; pledge to the division and maintain at all times investments for the security of the trust  
6 creditors of the trust company including as a priority claim costs incurred by the division in a  
7 receivership or liquidation of the trust company in the event it should fail. The amount of the  
8 pledge shall be determined by the director in an amount deemed appropriate to defray such  
9 costs, but may not be less than a market value of one hundred thousand dollars, and may not  
10 exceed five hundred thousand dollars for a private trust company or one million dollars for a  
11 public trust company. All investments pledged to the division shall be held at a depository  
12 institution in this state and all costs associated with pledging and holding such investments are  
13 the responsibility of the trust company. ~~The amount of the pledge may not exceed fifty percent~~  
14 ~~of the trust company's capital.~~



1 The investments pledged to the division shall be of the same nature and quality as those  
2 required for public funds as provided in §§ 4-5-6 and 4-5-6.1.

3 The commission may promulgate rules pursuant to chapter 1-26 to establish additional  
4 investment guidelines or investment options for purposes of the pledge required by this section.

5 In the event of a receivership of a trust company, the director may, without regard to  
6 priorities, preferences, or adverse claims, reduce the pledged investments to cash and, as soon  
7 as practicable, utilize the cash to defray the costs associated with the receivership.

8 Income from such investments shall belong to and be paid to the trust company as long as  
9 it continues to conduct its business in the ordinary course and so long as authorized by the  
10 director.

11 The proposed effective date of an order requiring an existing trust company to increase its  
12 pledge ~~must~~ shall be stated in the order as on or after the thirty-first day after the date of the  
13 proposed order. Unless the trust company requests a hearing before the commission in writing  
14 before the effective date of the proposed order, the order becomes effective and is final. Any  
15 hearing before the commission shall be held pursuant to chapter 1-26.

16 Section 2. That § 51A-6A-11.1 be amended to read as follows:

17 51A-6A-11.1. A public trust company ~~chartered in South Dakota, after June 30, 2010, shall~~  
18 ~~establish office premises in South Dakota that would establish jurisdiction over a trust for which~~  
19 ~~the trust company would be a qualified person under § 55-3-39~~ shall:

- 20 (1) Maintain office space in South Dakota for trust company business and for the storage  
21 of, and access to, trust company records required by § 51A-6A-30;  
22 (2) Hold no less than two governing board meetings with a quorum physically present  
23 in South Dakota annually;  
24 (3) Employ, engage, or contract with at least one trust officer or key employee to provide

1 services for the trust company in South Dakota related to the powers of the company  
2 in § 51A-6A-29 and to facilitate the examinations required by § 51A-6A-31; and

3 (4) Perform trust administration in South Dakota.

4 ~~Public~~ Each public trust companies company chartered in South Dakota prior to July 1, ~~2010~~  
5 2012, shall meet the requirements of this section no later than July 1, 2015, unless the director  
6 grants an extension of up to twenty-four months upon a showing of good faith effort. A public  
7 trust company seeking an extension of time shall include in its application to the director the  
8 reasons for any delay and a detailed time line for expected compliance with this section.

9 The commission may promulgate rules pursuant to chapter 1-26 to establish additional  
10 guidelines regarding what constitutes trust administration in South Dakota for purposes of this  
11 section.

12 Section 3. That § 51A-6A-39 be amended to read as follows:

13 51A-6A-39. All information the director generates in making an investigation or  
14 examination of a state trust company is confidential. All confidential information ~~is the property~~  
15 ~~of the state and is not subject to disclosure except upon the written approval of the director~~ shall  
16 remain the property of the division and shall be furnished to the trust company for its  
17 confidential use. Under no circumstances may a trust company disclose a report or any  
18 supporting documentation to anyone, other than directors and officers of the trust company or  
19 anyone acting in a fiduciary capacity for the trust company, without written permission from the  
20 director.

21 The director shall give ten days' prior written notice of intent to disclose confidential  
22 information to the affected trust company. Any trust company which receives a notice may  
23 object to the disclosure of the confidential information and shall be afforded the right to a  
24 hearing in accordance with the provisions of chapter 1-26. If a trust company requests a hearing,

1 the director may not reveal confidential information prior to the conclusion of the hearing and  
2 a ruling. Disclosure of confidential information shall be made only to formal regulatory bodies  
3 which clearly have a need for the confidential information. Prior to dissemination of any  
4 confidential information, the director shall require a written agreement not to reveal the  
5 confidential information by the party receiving the confidential information. In no event may  
6 the director disclose confidential information to the general public, any competitor, or any  
7 potential competitor of a trust company.

8 The submission of any information to the division in the course of any investigation or  
9 examination may not be construed as waiving, destroying, or otherwise affecting any privilege  
10 any person may claim with respect to the information under South Dakota law or federal law.

11 Section 4. That § 55-2-15 be amended to read as follows:

12 55-2-15. Unless the terms of the governing instrument expressly provide otherwise, if a  
13 trustee has discretion under the terms of a governing instrument to make a distribution of  
14 income or principal to or for the benefit of one or more beneficiaries of a trust (the "first trust"),  
15 whether or not restricted by any standard, then the trustee may instead exercise such discretion  
16 by appointing part or all of the income or principal subject to the discretion in favor of a trustee  
17 of a second trust (the "second trust") under a governing instrument separate from the governing  
18 instrument of the first trust. Before exercising its discretion to appoint and distribute assets to  
19 a second trust, the trustee of the first trust shall determine whether the appointment is necessary  
20 or desirable after taking into account the purposes of the first trust, the terms and conditions of  
21 the second trust, and the consequences of the distribution. For the purposes of this section, a  
22 trustee of the first trust is a restricted trustee if either the trustee is a beneficiary of the first trust  
23 or if a beneficiary of the first trust has a power to change the trustees within the meaning of  
24 § 55-2-17. In addition, the following apply to all appointments made under this section:

- 1       (1)    The second trust may only have as beneficiaries one or more of the beneficiaries of  
2            the first trust:
- 3            (a)    To or for whom a discretionary distribution of income or principal may be  
4                    made from the first trust; or
- 5            (b)    To or for whom a distribution of income or principal may be made in the  
6                    future from the first trust at a time or upon the happening of an event specified  
7                    under the first trust;
- 8       (2)    No restricted trustee of the first trust may exercise such authority over the first trust  
9            to the extent that doing so could have the effect of:
- 10           (a)    Benefiting the restricted trustee as a beneficiary of the first trust, unless the  
11                    exercise of such authority is limited by an ascertainable standard based on or  
12                    related to health, education, maintenance, or support; or
- 13           (b)    Removing restrictions on discretionary distributions to a beneficiary imposed  
14                    by the governing instrument under which the first trust was created, except  
15                    that a provision in the second trust which limits distributions by an  
16                    ascertainable standard based on or related to the health, education,  
17                    maintenance, or support of any such beneficiary is permitted;
- 18       (3)    No restricted trustee of the first trust may exercise such authority over the first trust  
19            to the extent that doing so would have the effect of increasing the distributions that  
20            can be made from the second trust to the restricted trustees of the first trust or to a  
21            beneficiary who may change the trustees of the first trust within the meaning of § 55-  
22            2-17 compared to the distributions that can be made to such trustee or beneficiary,  
23            as the case may be, under the first trust, unless the exercise of such authority is  
24            limited by an ascertainable standard based on or related to health, education,

- 1 maintenance, or support;
- 2 (4) The provisions of subdivisions (2) and (3) only apply to restrict the authority of a
- 3 trustee if either a trustee, or a beneficiary who may change the trustee, is a United
- 4 States citizen or domiciliary under the Internal Revenue Code, or the trust owns
- 5 property that would be subject to United States estate or gift taxes if owned directly
- 6 by such a person;
- 7 (5) In the case of any trust contributions which have been treated as gifts qualifying for
- 8 the exclusion from gift tax described in § 2503(b) of the Internal Revenue Code of
- 9 1986, by reason of the application of I.R.C. § 2503(c), the governing instrument for
- 10 the second trust shall provide that the beneficiary's remainder interest shall vest no
- 11 later than the date upon which such interest would have vested under the terms of the
- 12 governing instrument for the first trust;
- 13 (6) The exercise of such authority may not reduce any income interest of any income
- 14 beneficiary of any of the following trusts:
- 15 (a) A trust for which a marital deduction has been taken for federal tax purposes
- 16 under I.R.C. § 2056 or § 2523 or for state tax purposes under any comparable
- 17 provision of applicable state law;
- 18 (b) A charitable remainder trust under I.R.C. § 664; or
- 19 (c) A grantor retained annuity trust under I.R.C. § 2702;
- 20 (7) The exercise of such authority does not apply to trust property subject to a presently
- 21 exercisable power of withdrawal held by a trust beneficiary to whom, or for the
- 22 benefit of whom, the trustee has authority to make distributions, unless after the
- 23 exercise of such authority, such beneficiary's power of withdrawal is unchanged with
- 24 respect to the trust property;

1 (8) The exercise of such authority is not prohibited by a spendthrift clause or by a  
2 provision in the governing instrument that prohibits amendment or revocation of the  
3 trust;

4 (9) Any appointment made by a trustee shall be considered a distribution by the trustee  
5 pursuant to the trustee's distribution powers and authority; and

6 (10) If the trustee's distribution discretion is not subject to a standard, or if the trustee's  
7 distribution discretion is subject to a standard that does not create a support interest,  
8 then the court may review the trustee's determination or any related appointment only  
9 pursuant to § 55-1-43. Any other court review of the trustee's determination or any  
10 related appointment may be made only pursuant to § 55-1-42.

11 Notwithstanding the foregoing provisions of this section, the governing instrument of the  
12 second trust may grant a power of appointment to one or more of the beneficiaries of the second  
13 trust who are beneficiaries of the first trust. The power of appointment may include the power  
14 to appoint trust property to the holder of the power of appointment, the holder's creditors, the  
15 holder's estate, the creditors of the holder's estate, or any other person, whether or not that  
16 person is a trust beneficiary.

17 This section applies to any trust governed by the laws of this state, including a trust whose  
18 governing jurisdiction is transferred to this state.

19 Section 5. That § 55-1B-2 be amended to read as follows:

20 55-1B-2. An excluded fiduciary is not liable, either individually or as a fiduciary, for any  
21 of the following:

22 (1) Any loss that results from compliance with a direction of the trust advisor, custodial  
23 account owner, or authorized designee of a custodial account owner, including any  
24 loss from the trust advisor breaching fiduciary responsibilities or acting beyond the

1 trust advisor's scope of authority;

2 (2) Any loss that results from a failure to take any action proposed by an excluded  
3 fiduciary that requires a prior authorization of the trust advisor if that excluded  
4 fiduciary timely sought but failed to obtain that authorization;

5 (3) Any loss that results from any action or inaction, except for gross negligence or  
6 willful misconduct, when an excluded fiduciary is required, pursuant to the trust  
7 agreement or any other reason, to assume the role of trust advisor, trust protector,  
8 investment trust advisor, or distribution trust advisor.

9 Any excluded fiduciary is also relieved from any obligation to review or evaluate any  
10 direction from a distribution trust advisor or to perform investment or suitability reviews,  
11 inquiries, or investigations or to make recommendations or evaluations with respect to any  
12 investments to the extent the trust advisor, custodial account owner, or authorized designee of  
13 a custodial account owner had authority to direct the acquisition, disposition, or retention of any  
14 such investment. If the excluded fiduciary offers such communication to the trust advisor, trust  
15 protector, investment trust advisor, or distribution trust advisor or any investment person  
16 selected by the investment trust advisor, such action may not be deemed to constitute an  
17 undertaking by the excluded fiduciary to monitor or otherwise participate in actions within the  
18 scope of the advisor's authority or to constitute any duty to do so.

19 Any excluded fiduciary is also relieved of any duty to communicate with or warn or apprise  
20 any beneficiary or third party concerning instances in which the excluded fiduciary would or  
21 might have exercised the excluded fiduciary's own discretion in a manner different from the  
22 manner directed by the trust advisor, trust protector, investment trust advisor, or distribution  
23 trust advisor.

24 Absent ~~clear and convincing evidence to the contrary~~ provisions in the governing

1 instrument, the actions of the excluded fiduciary (such as any communications with the trust  
2 advisor and others and carrying out, recording, and reporting actions taken at the trust advisor's  
3 direction) pertaining to matters within the scope of authority of the trust advisor, trust protector,  
4 investment trust advisor, or distribution trust advisor (~~such as confirming that the advisor's~~  
5 ~~directions have been carried out and recording and reporting actions taken at the advisor's~~  
6 ~~direction~~) shall be presumed deemed to be administrative actions taken by the excluded  
7 fiduciary solely to allow the excluded fiduciary to perform those duties assigned to the excluded  
8 fiduciary under the governing instrument, and such administrative actions may not be deemed  
9 to constitute an undertaking by the excluded fiduciary to monitor ~~or otherwise~~, participate in,  
10 or otherwise take any fiduciary responsibility for actions within the scope of authority of the  
11 trust advisor, trust protector, investment trust advisor, or distribution trust advisor.

12 Nothing in subdivision (2) imposes an obligation or liability with respect to a custodian of  
13 a custodial account.

14 Section 6. That § 55-1B-10 be amended to read as follows:

15 55-1B-10. The powers and discretions of an investment trust advisor shall be provided in  
16 the trust instrument and may be exercised or not exercised, in the best interests of the trust, in  
17 the sole and absolute discretion of the investment trust advisor and are binding on any other  
18 person and any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the  
19 ~~document governing instrument~~ document governing instrument provide otherwise, the investment trust advisor has the power  
20 to perform the following:

- 21 (1) Direct the trustee with respect to the retention, purchase, sale, or encumbrance of  
22 trust property and the investment and reinvestment of principal and income of the  
23 trust;
- 24 (2) Vote proxies for securities held in trust; ~~and~~

1 (3) Select one or more investment advisers, managers, or counselors, including the  
2 trustee, and delegate to them any of its powers; and

3 (4) Direct the trustee with respect to any additional powers and discretions over  
4 investment and management of trust assets provided in the governing instrument.

5 Section 7. That § 55-1B-11 be amended to read as follows:

6 55-1B-11. The powers and discretions of a distribution trust advisor over any discretionary  
7 distributions of income or principal, including distributions pursuant to an ascertainable  
8 standard or other criteria and appointments pursuant to § 55-2-15, shall be provided in the trust  
9 instrument and may be exercised or not exercised, in the best interests of the trust, in the sole  
10 and absolute discretion of the distribution trust advisor and are binding on any other person and  
11 any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the document  
12 provide otherwise, the distribution trust advisor shall direct the trustee with regard to all  
13 discretionary distributions to beneficiaries and may direct appointments pursuant to § 55-2-15.  
14 The distribution trust advisor may also provide direction regarding notification of qualified  
15 beneficiaries pursuant to § 55-2-13.

16 Section 8. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as  
17 follows:

18 For purposes of sections 8 to 13, inclusive, of this Act, a no contest clause is a provision or  
19 clause in a trust, that penalizes a qualified beneficiary for contesting a trust or instituting other  
20 proceedings at law or equity relating to the trust estate, excluding proceedings related to trust  
21 administration. Except as provided in sections 9 to 13, inclusive, of this Act, a no contest clause  
22 shall be enforced unless probable cause exists for instituting the proceeding on the grounds of:

23 (1) Fraud;

24 (2) Duress;

- 1 (3) Revocation;
- 2 (4) Lack of contractual capacity;
- 3 (5) Undue influence;
- 4 (6) Mistake;
- 5 (7) Forgery; or
- 6 (8) Irregularity in the execution of the trust document.

7 Section 9. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as  
8 follows:

9 A no contest clause shall be construed to carry out the settlor's intent. Except to the extent  
10 the no contest clause in the trust is vague or ambiguous, extrinsic evidence is not admissible to  
11 establish the settlor's intent concerning the no contest clause. The provisions of this section do  
12 not prohibit such evidence from being admitted for any other purpose authorized by law.

13 Section 10. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as  
14 follows:

15 A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, in  
16 good faith and based upon probable cause, contests a provision that benefits any of the  
17 following persons:

- 18 (1) A person who drafted or transcribed the instrument;
- 19 (2) A person who gave directions to the drafter of the instrument concerning dispositive  
20 or other substantive contents of the provisions or who directed the drafter to include  
21 the no contest clause in the instrument. However, this subdivision does not apply if  
22 the settlor affirmatively instructed the drafter to include the contents of the provision  
23 or the no contest clause; or
- 24 (3) A person who acted as a witness to the instrument.

1 Section 11. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as  
2 follows:

3 Notwithstanding anything to the contrary in sections 8 to 13, inclusive, of this Act, a no  
4 contest clause is enforceable against a beneficiary to the extent the beneficiary elects to contest  
5 or otherwise challenge the settlor's signature whereby such a challenge does not in any manner  
6 constitute good, probable, or reasonable cause if the settlor's signature was witnessed by  
7 nonrelative witnesses or a duly qualified nonrelative notary public or both.

8 Section 12. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as  
9 follows:

10 The court may award attorneys fees and costs to the prevailing party in an action involving  
11 the enforceability of a no contest provision.

12 Section 13. Sections 8 to 12, inclusive, of this Act, are effective for all trusts in existence  
13 on or created after July 1, 2012.

14 Section 14. That § 55-4-31 be amended to read as follows:

15 55-4-31. Any A trustee is not liable to a beneficiary, as defined under this title or Title 29A,  
16 for breach of a trust affected by this chapter may, if of full legal capacity and acting upon full  
17 information, by written instrument delivered to the trustee relieve the trustee as to such  
18 beneficiary from any or all of the duties, restrictions, and liabilities which would otherwise be  
19 imposed on the trustee by this chapter, except as to the duties, restrictions, and liabilities  
20 imposed by §§ 55-4-10 to 55-4-12, inclusive, if the beneficiary consented to the conduct  
21 constituting the breach, released the trustee from liability for the breach, or ratified the  
22 transaction constituting the breach, unless:

- 23 (1) The consent, release, or ratifications of the beneficiary were induced by improper  
24 conduct of the trustee; or

1       (2) At the time of the consent, release, or ratification, the beneficiary did not have  
2             knowledge of the beneficiary's rights or of the material facts relating to the breach.

3       Any such beneficiary may release the trustee from liability to such beneficiary for past  
4       violations of any of the provisions of this chapter. No consideration is required for the consent,  
5       release, or ratification to be valid.

6       Section 15. That § 55-16-5 be amended to read as follows:

7       55-16-5. Any individual may serve as an investment trust advisor described in subdivision  
8       55-1B-1(6), notwithstanding that such individual is the transferor of the qualified disposition,  
9       but such an individual may not otherwise serve as a fiduciary of a trust that is a qualified  
10       disposition except with respect to the retention of the veto right permitted by subdivision 55-16-  
11       2(2). While serving as an advisor of the trust, the individual may have all powers authorized by  
12       statute or by the trust instrument, including the power to vote by proxy any stock owned by the  
13       trust.

14       Section 16. That § 55-16-10 be amended to read as follows:

15       55-16-10. A cause of action or claim for relief with respect to a fraudulent transfer of a  
16       settlor's assets under § 55-16-9 is extinguished unless the action under § 55-16-9 is brought by  
17       a creditor of the settlor who meets one of the following requirements:

18       (1) Is a creditor of the settlor before the settlor's assets are transferred to the trust, and the  
19             action under § 55-16-9 is brought within the later of:

20             (a) ~~Three~~ Two years after the transfer is made; or

21             (b) ~~One year~~ Six months after the transfer is or reasonably could have been  
22             discovered by the creditor if the creditor:

23                     (i) Can demonstrate that the creditor asserted a specific claim against the  
24                     settlor before the transfer; or

1 (ii) Files another action, other than an action under § 55-16-9, against the  
2 settlor that asserts a claim based on an act or omission of the settlor that  
3 occurred before the transfer, and the action described in this sub-  
4 subsection is filed within ~~three~~ two years after the transfer; or

5 (2) Becomes a creditor subsequent to the transfer into trust, and the action under § 55-  
6 16-9 is brought within ~~three~~ two years after the transfer is made.

7 In any action described in § 55-16-9, the burden to prove the matter by clear and convincing  
8 evidence is upon the creditor.

9 Section 17. That § 55-16-11 be amended to read as follows:

10 55-16-11. A qualified disposition that is made by means of a disposition by a transferor who  
11 is a trustee is deemed to have been made as of the time, whether before, on, or after July 1,  
12 2005, the property that is the subject of the qualified disposition was originally transferred to  
13 the transferor, or any predecessor trustee, making the qualified disposition in a form that meets  
14 the requirements of subdivisions 55-16-2(2) and (3). Further, the provisions of this section apply  
15 to determine the date the transfer is deemed to have been made, notwithstanding that the original  
16 transfer was to a trust originally within or outside of the jurisdiction of South Dakota.

17 Section 18. That § 55-16-12 be amended to read as follows:

18 55-16-12. Notwithstanding any law to the contrary, a creditor, including a creditor whose  
19 claim arose before or after a qualified disposition, or any other person has only such rights with  
20 respect to a qualified disposition as are provided in §§ 55-16-9 to 55-16-16, inclusive, and no  
21 such creditor nor any other person has any claim or cause of action against the trustee, or  
22 advisor, described in § 55-16-4, of a trust that is the subject of a qualified disposition, or against  
23 any person involved in the counseling, drafting, preparation, execution, or funding of a trust that  
24 is the subject of a qualified disposition. In addition to the provisions of § 55-1-43, at no time is

1 a qualified person, as defined in § 55-16-3, personally liable to a creditor of a transferor or any  
2 other person for distributions made by the qualified person, before the creditor or person notified  
3 the qualified person, in writing, that a claim or cause of action existed. This applies regardless  
4 of whether the distributions are made to or for the benefit of the transferor or a beneficiary  
5 during the period in which a creditor or other person could make a claim as provided in § 55-16-  
6 10.

7 Section 19. That § 55-16-2 be amended to read as follows:

8 55-16-2. For the purposes of this chapter, a trust instrument, is an instrument appointing a  
9 qualified person for the property that is the subject of a disposition, which instrument:

- 10 (1) Expressly incorporates the law of this state to govern the validity, construction, and  
11 administration of the trust;
- 12 (2) Is irrevocable, but a trust instrument may not be deemed revocable on account of its  
13 inclusion of one or more of the following:
- 14 (a) A transferor's power to veto a distribution from the trust;
- 15 (b) An inter vivos power of appointment, other than an inter vivos power to  
16 appoint to the transferor, the transferor's creditors, the transferor's estate, or the  
17 creditors of the transferor's estate, exercisable by will or other written  
18 instrument of the transferor effective only upon the transferor's death;
- 19 (c) A testamentary power of appointment;
- 20 (d) The transferor's potential or actual receipt of income, including rights to such  
21 income retained in the trust instrument;
- 22 (e) The transferor's potential or actual receipt of income or principal from a  
23 charitable remainder unitrust or charitable remainder annuity trust as such  
24 terms are defined in § 664 of the Internal Revenue Code of 1986, 26 U.S.C.

- 1                   § 664, as of January 1, 2009;
- 2           (f)    The transferor's receipt each year of a percentage of the value as determined
- 3                   from time to time pursuant to the trust instrument, but not exceeding the
- 4                   amount that may be defined as income under § 643(b) of the Internal Revenue
- 5                   Code of 1986, 26 U.S.C. § 643(b), as of January 1, 2009;
- 6           (g)    The transferor's potential or actual receipt or use of principal if such potential
- 7                   or actual receipt or use of principal would be the result of a qualified person
- 8                   or qualified persons, including a qualified person or qualified persons acting
- 9                   at the direction of a trust advisor described in this section, acting either in such
- 10                  qualified person's or qualified persons' sole discretion or pursuant to an
- 11                  ascertainable standard contained in the trust instrument;
- 12           (h)    The transferor's right to remove a trustee, protector, or trust advisor and to
- 13                  appoint a new trustee, protector, or trust advisor, other than a ~~person~~ trustee
- 14                  who is a related or subordinate party with respect to the transferor within the
- 15                  meaning of § 672(c) of the Internal Revenue Code of 1986, 26 U.S.C.
- 16                  § 672(c), as of January 1, 2009;
- 17           (i)    The transferor's potential or actual use of real property held under a qualified
- 18                  personal residence trust within the meaning of such term as described in
- 19                  § 2702(c) of the Internal Revenue Code of 1986, 26 U.S.C. § 2702(c), as of
- 20                  January 1, 2009; or
- 21           (j)    A pour back provision that pours back to the transferor's will or revocable trust
- 22                  all or part of the trust assets; and
- 23    (3)    Provides that the interest of the transferor or other beneficiary in the trust property
- 24                  or the income therefrom may not be transferred, assigned, pledged, or mortgaged,

1           whether voluntarily or involuntarily, before the qualified person or qualified persons  
2           actually distribute the property or income therefrom to the beneficiary, and such  
3           provision of the trust instrument shall be deemed to be a restriction on the transfer  
4           of the transferor's beneficial interest in the trust that is enforceable under applicable  
5           nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code, 11  
6           U.S.C. § 541(c)(2), as of January 1, 2009;

7           ~~(4)~~ A disposition by a trustee that is not a qualified person to a trustee that is a qualified  
8           person may not be treated as other than a qualified disposition solely because the trust  
9           instrument fails to meet the requirements of subdivision (1) of this section.

10          Section 20. That § 55-1-32 be amended to read as follows:

11          55-1-32. In the event that a party challenges a settlor or a beneficiary's influence over a trust,  
12          none of the following factors, alone or in combination, may be considered dominion and control  
13          over a trust:

- 14          (1)    The settlor or a beneficiary serving as a trustee or a co-trustee as described in § 55-1-  
15                28;
- 16          (2)    The settlor or a beneficiary holds an unrestricted power to remove or replace a  
17                trustee;
- 18          (3)    The settlor or a beneficiary is a trust administrator, a general partner of a partnership,  
19                a manager of a limited liability company, an officer of a corporation, or any other  
20                managerial function of any other type of entity, and part or all of the trust property  
21                consists of an interest in the entity;
- 22          (4)    A person related by blood or adoption to the settlor or a beneficiary is appointed as  
23                trustee;
- 24          (5)    The settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or friend

1 is appointed as trustee;

2 (6) A business associate is appointed as a trustee;

3 (7) A beneficiary holds any power of appointment over any or all of the trust property;

4 (8) The settlor holds a power to substitute property of equivalent value;

5 (9) The trustee may loan trust property to the settlor for less than a full and adequate rate  
6 of interest or without adequate security;

7 (10) The distribution language provides any discretion; ~~or~~

8 (11) The trust has only one beneficiary eligible for current distributions; or

9 (12) The beneficiary serving as a trust advisor for investments under subdivision 55-1B-  
10 1(6).

11 Section 21. That chapter 55-2 be amended by adding thereto a NEW SECTION to read as  
12 follows:

13 An excluded fiduciary as defined in § 55-1B-1 who receives tax information regarding an  
14 asset or entity owned by the trust, any trustee of a trust that holds an asset or entity owned by  
15 the trust but who does not manage the asset or entity, and any trustee who receives tax  
16 information from the settlor, the settlor's agents, or other individuals regarding matters that have  
17 tax implications to the trust or trust beneficiaries, may rely, without liability, on tax information  
18 it receives in any of the above situations. By way of example, if a trustee holds in trust a limited  
19 liability company interest but does not manage the limited liability company, the trustee may  
20 rely, without limitation, on any tax information received from the manager of the limited  
21 liability company or its accountant or agents.

22 The tax information that a trustee may rely on in the above situations may include the  
23 following:

24 (1) The accuracy of any information reported on a tax return;

- 1 (2) A copy of a tax return provided by the tax return preparer or the taxpayer filing the  
2 return;
- 3 (3) The representation of another fiduciary or tax advisor who filed or prepared a tax  
4 return as to the amount of any item reported on that return;
- 5 (4) The settlor's representation whether or not a gift or generation skipping transfer tax  
6 form has ever been filed as well as how much of the respective exemptions have been  
7 utilized; or
- 8 (5) The direction from the grantor's or settlor's tax advisors based upon any contribution  
9 or distribution, or both, for the appropriate tax filings.

10 An entity, for purposes of this section, shall be defined as set out in subdivisions  
11 47-34A-101(6) and 47-34A-101(13).

12 This section applies to any trust in existence on or created on or after July 1, 2012.

13 Section 22. That § 55-5-9 be amended to read as follows:

14 55-5-9. The trustee shall, within a reasonable time after the acceptance of the trusteeship,  
15 review trust assets and make and implement decisions concerning the retention and disposition  
16 of original pre-existing investments in order to conform to the provisions of this section. The  
17 trustee's decision to retain or dispose of an asset may properly be influenced by the asset's  
18 special relationship or value to the purposes of the trust or to some or all of the beneficiaries,  
19 consistent with the trustee's duty of impartiality.

20 If a trust owns an interest in a closely held entity, and the trust agreement, or other document  
21 signed by the settlor or signed by a majority of the current income or principal beneficiaries, if  
22 the settlor is deceased, provides that the trustee has no duty to inquire or review the activities  
23 of the closely held entity, no trustee is liable to a beneficiary to the extent that the trustee acted  
24 in reliance on the provisions of the trust or court order.

1 For purposes of this section, the term, closely held entity, means any entity in which the  
2 following persons in aggregate own at least twenty percent of the entity:

- 3 (1) The settlor;
- 4 (2) The settlor's grandparents or their descendants;
- 5 (3) The settlor's spouse; or
- 6 (4) Any trust created by anyone of the aforementioned persons.

7 If a trust was in existence on or before July 1, 2012, and a collateral document relieved the  
8 trustee of the duty to inquire or review the activities of a closely held entity as provided in this  
9 section, then the trustee may elect to have this section apply upon providing sixty days written  
10 notice of the election to the settlor or to the current income or principal beneficiaries if the  
11 settlor is deceased.

12 Section 23. That § 55-9-3 be amended to read as follows:

13 55-9-3. Such trust shall be liberally construed by the courts so that the intentions of the  
14 donor thereof shall be carried out whenever possible, and no such trust shall fail solely because  
15 the donor has imperfectly outlined the purpose and object of such charity or the method of  
16 administration.

17 A grantor may maintain an action to enforce a charitable trust under this section and may  
18 designate in writing a person or persons, whether or not born at the time of such designation,  
19 to enforce a charitable trust under this section. In any such action, the attorney general shall be  
20 provided notice as provided in § 21-22-18.

21 Section 24. That § 55-9-5 be amended to read as follows:

22 55-9-5. ~~The~~ Except as otherwise set forth in § 55-9-3, the attorney general shall represent  
23 the beneficiaries in all cases arising under this chapter, and ~~it shall be his duty to~~ the attorney  
24 general shall enforce such trusts by proper proceedings in the courts.

1 Section 25. That chapter 55-3 be amended by adding thereto a NEW SECTION to read as  
2 follows:

3 Except as otherwise expressly provided by the terms of a governing instrument specifically  
4 addressing the governing law for trust administration or by court order, the laws of South  
5 Dakota shall govern the administration of a trust while the trust is administered in South Dakota.

6 Section 26. That chapter 43-6 be amended by adding thereto a NEW SECTION to read as  
7 follows:

8 No provision directing or authorizing accumulation of trust income is invalid.

9 Section 27. That § 55-5-17 be amended to read as follows:

10 55-5-17. (a) Unless otherwise ~~directed~~ required by the terms of the trust instrument or court  
11 order, no trustee of ~~an irrevocable~~ a trust, with respect to acquiring, retaining, or disposing of  
12 a contract of insurance or holding one or more insurance contracts upon the life of the settlor,  
13 or the lives of the settlor and the settlor's spouse, has the following duties:

- 14 (1) To determine whether any such contract is or remains a proper investment;
- 15 (2) To investigate the financial strength or changes in the financial strength of the life  
16 insurance company;
- 17 (3) To make a determination of whether to exercise any policy options available under  
18 any such contract;
- 19 (4) To make a determination of whether to diversify any such contract relative to one  
20 another or to other assets, if any, administered by the trustee; or
- 21 (5) To inquire about changes in the health or financial condition of the insured or  
22 insured's relative to any such contract.

23 A trustee of a revocable or an irrevocable trust, or of either a directed trust pursuant  
24 to chapter 55-1B or a delegated trust pursuant to § 55-5-16, is not liable to the

1 beneficiaries of the trust or to any other party for any loss arising from the absence  
2 of those duties upon the trustee.

3 (b) The trustee of a trust described under subsection (a) of this section which was established  
4 prior to the effective date of this section, shall notify the settlor in writing that, unless the settlor  
5 provides written notice to the contrary to the trustee within sixty days of the trustee's notice, the  
6 provisions of subsection (a) of this section shall apply to the trust. Subsection (a) of this section  
7 does not apply if, within sixty days of the trustee's notice, the settlor notifies the trustee that  
8 subsection (a) does not apply.

# State of South Dakota

EIGHTY-SEVENTH SESSION  
LEGISLATIVE ASSEMBLY, 2012

338T0401

HOUSE STATE AFFAIRS

ENGROSSED NO. **HB 1073** - 1/23/2012

Introduced by: Representatives Gosch, Abdallah, Dennert, Fargen, Feinstein, Gibson, Hunt, Lust, Schrempp, Sly, Turbiville, Van Gerpen, Vanneman, Verchio, and Willadsen and Senators Johnston, Cutler, Fryslie, Hundstad, Krebs, Lederman, Olson (Russell), Putnam, Tieszen, and Vehle

1 FOR AN ACT ENTITLED, An Act to prohibit certain indemnity provisions in motor carrier  
2 transportation contracts.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. Terms used in this Act mean:

- 5 (1) "Affiliate," any employee or agent of a promisee, or any independent contractor who  
6 is directly responsible to a promisee other than a motor carrier that is a party to a  
7 motor carrier transportation contract with the promisee or an employee or agent of  
8 such motor carrier or an independent contractor directly responsible to such motor  
9 carrier;
- 10 (2) "Motor carrier transportation contract," a contract or agreement between a motor  
11 carrier and a promisee covering the transportation of property for hire by the motor  
12 carrier; the motor carrier's entrance on property for the purpose of loading, unloading,  
13 or transporting property for hire; or any service of the motor carrier that is incidental



1 to these activities, including the storage of property;

2 (3) "Promisee," any person who enters into a motor carrier transportation contract with  
3 a motor carrier.

4 Section 2. Notwithstanding any other law, no provision of a motor carrier transportation  
5 contract, and no covenant or agreement collateral to or affecting a motor carrier transportation  
6 contract, may require the motor carrier to indemnify, hold harmless, or defend the promisee or  
7 affiliate, or have the effect of indemnifying, holding harmless, or defending the promisee or  
8 affiliate from or against any liability for loss or damage resulting from the negligence,  
9 intentional acts, or omissions of the promisee or affiliate. Any provision of any contract or  
10 agreement entered into after the effective date of this Act that violates this Act is void and  
11 unenforceable.

12 Section 3. This Act does not apply to the Uniform Intermodal Interchange and Facilities  
13 Access Agreement administered by the Intermodal Association of North America or any other  
14 agreement providing for the interchange, use, or possession of intermodal chassis, containers,  
15 or other intermodal equipment.