

State of South Dakota

EIGHTY-EIGHTH SESSION
LEGISLATIVE ASSEMBLY, 2013

400U0297

HOUSE BILL NO. 1056

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

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

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

3 Section 1. That § 51A-6A-17 be amended to read as follows:

4 51A-6A-17. Except with the written consent of the director, no person may serve as a board
5 member, officer, or key employee of a trust company who has been convicted of any felony or
6 any crime involving fraud, dishonesty, or a breach of trust. Any trust company who willfully
7 violates this prohibition is subject to a civil penalty of one thousand dollars for each day the
8 violation continues. A civil penalty imposed pursuant to this section for a single violation may
9 not exceed fifty thousand dollars. Any civil penalty imposed by the director under this section
10 is subject to review by the commission in accordance with chapter 1-26.

11 As part of any application to obtain authority to transact business as a private trust company,
12 the applicant shall obtain and provide for each proposed incorporator, organizer, board member,
13 manager, officer, and key employee of the proposed company, as applicable, the results of an
14 independent criminal background investigation acceptable to the director, and independent
15 credit report from a consumer reporting agency as described in 15 U.S.C. 1681a(p) as of January



1 1, 2010, and a report of ongoing or pending litigation.

2 As part of any application to obtain authority to transact trust company business as a public
3 trust company, each proposed incorporator, organizer, board member, manager, officer, and key
4 employee, as applicable, shall submit to a state and federal criminal background investigation
5 by means of fingerprint checks by the Division of Criminal Investigation and the Federal Bureau
6 of Investigation. Upon application, the division shall submit completed fingerprint cards to the
7 Division of Criminal Investigation for purposes of conducting both the state and federal criminal
8 background investigation. Upon completion of the criminal background check, the Division of
9 Criminal Investigation shall forward to the division all information obtained as a result of the
10 criminal background investigation. For any person described above who is not a citizen of the
11 United States, the director may conduct an international background investigation or require the
12 applicant or person to obtain and provide the results of an international background
13 investigation acceptable to the director. The applicant shall also obtain and provide the results
14 of an independent credit report from a consumer reporting agency as described in 15 U.S.C.
15 1681a(p) as of January 1, 2010, and a report of ongoing or pending litigation for each person
16 as described above.

17 Prior to beginning employment with any trust company, each potential director, manager,
18 member, officer, or key employee shall undergo the same investigation process as required
19 above for new applicants. At the discretion of the director, any person subject to the
20 requirements of this section may enter into service on a temporary basis pending receipt of
21 results from the criminal background investigation. For purposes of this section, a key employee
22 does not include an employee whose primary responsibilities are limited to clerical or support
23 duties, and officer does not include any person who is not involved in the ongoing policy
24 making or management of the trust company.

1 Any trust company shall immediately notify the division of any material change in the
2 background of any person subject to the background investigation process as described above.

3 The division may require a fingerprint-based state, federal, and international criminal
4 background investigation, as applicable, for any director, officer, or employee, who is the
5 subject of an investigation by the division. Failure to submit to or cooperate with the criminal
6 background investigation is grounds for the denial of an application or may result in the
7 revocation of a trust company's authority to transact trust company business.

8 The applicant or trust company, as the case may be, shall pay any fees or costs associated
9 with the fingerprinting, background investigations, or reports required by this section. A person
10 who has undergone a state, federal, or international background investigation required by this
11 section, may, at the discretion of the director, be allowed to fulfill this requirement for future
12 trust company employment by sworn affidavit stating that there have been no material changes
13 to the person's background.

14 Section 2. That chapter 51A-6A be amended by adding thereto a NEW SECTION to read
15 as follows:

16 Upon liquidation, abandonment of trust powers, or resignation from all duties exercised
17 pursuant to § 51A-6A-29, the pledge required by § 51A-6A-19.2 shall be made available for the
18 reasonable satisfaction of claims involving trust company accounts. Any surplus remaining after
19 the satisfaction of all such claims and costs incurred by the division shall be returned to the trust
20 company. Unless the division has reason to believe that claims are forthcoming, the division
21 shall release any pledge no later than twelve months from the date all affected accounts are
22 moved to a successor trustee, custodian, or administrator.

23 Section 3. That § 51A-6A-19 be amended to read as follows:

24 51A-6A-19. For purposes of this section, the capital of a trust company is the total of the

1 aggregate par value of its outstanding shares of capital stock or ownership units, its surplus, and
2 its undivided profits. The minimum capital of a trust company is two hundred thousand dollars.
3 The director may require that the trust company have more capital than the amount specified if
4 the director determines that the amount and character of the anticipated business of the trust
5 company and the safety of the customers so require. This chapter recognizes that capital for a
6 trust company serves a different purpose than does capital for a bank. It is not intended that
7 capital requirements for trust companies be judged by the same standards as banks. Basic
8 protection for fiduciary clients of a trust company shall be provided by the purchase of a fidelity
9 bond and a director's and officer's liability insurance policy. The bond and insurance shall be
10 in an amount of not less than one million dollars each. The bond and insurance required to be
11 secured by a trust company shall provide that any bonding or insurance company providing the
12 bond or insurance coverage shall give at least ~~ninety~~ sixty days notice of cancellation or renewal
13 of the bond or insurance policy to the trust company and to the director. Except as may be
14 provided elsewhere in this chapter, no trust company may reduce voluntarily its capital stock
15 or ownership units or surplus below the amount required in this section.

16 Section 4. That § 51A-6A-21 be amended to read as follows:

17 51A-6A-21. The shares of stock and ownership units of any trust company are personal
18 property and shall be transferred on the books of the trust company in such manner as the
19 bylaws or operating regulations of the trust company may direct. No stock or ownership units
20 may be transferred on the books of the trust company when the trust company is in a failing
21 condition, or when its capital is impaired, except upon approval of the director. If a transfer of
22 shares of stock of any trust company, or holding company that owns a majority of the
23 outstanding shares of a trust company, occurs which results through direct or indirect ownership
24 by a stockholder or an affiliated group of stockholders of ten percent or more of the outstanding

1 stock of the trust company, or holding company that owns a majority of the outstanding shares
2 of a trust company, and if additional shares of stock of the trust company are transferred to such
3 stockholders ~~or~~, affiliated group of stockholders, or holding company, the president or other
4 chief executive officer of the trust company shall report the transfer to the director within ten
5 days after transfer of the shares of stock on the books of the trust company.

6 Section 5. That chapter 51A-6A be amended by adding thereto a NEW SECTION to read
7 as follows:

8 Any trust company shall immediately notify the division of any material omission from the
9 application or any material change in the facts reported in an application, either of which could
10 have led to an unfavorable finding with respect to the criteria established in § 51A-6A-5. Failure
11 to so notify the division of the material omission from the application or the existence of the
12 material change in facts as reported in the application, either of which could have led to an
13 unfavorable finding with respect to the criteria established in § 51A-6A-5, may subject the trust
14 company to revocation proceedings or other regulatory action as provided in this title. The
15 director shall give notice of the revocation or other regulatory action to the president or other
16 managing officer of the trust company, and any revocation action shall thereupon proceed
17 according to § 51A-6A-38.

18 Section 6. That § 51A-6A-47 be amended to read as follows:

19 51A-6A-47. A person acquiring control through direct or indirect ownership by an owner
20 or an affiliated group of owners shall give the director at least sixty days prior written notice of
21 any proposed trust company acquisition. If the director does not issue an order disapproving the
22 proposed acquisition within that time or extend the period during which a disapproval may be
23 issued, the proposed acquisition is approved. The period for disapproval shall be thirty days
24 after notice is received by the director and may be further extended only if the director

1 determines that any acquiring person has not furnished all the information required under
2 ~~§ 51A-6A-49~~ § 51A-6A-48 or if in the director's judgment, any material information submitted
3 is substantially inaccurate. An acquisition may be made prior to expiration of the disapproval
4 period if the director issues written notice of the director's intent not to disapprove the action.

5 If the director disapproves an acquisition, the director shall serve the acquiring person with
6 an order of disapproval. The order shall provide a statement of the basis for the disapproval.
7 Within thirty days after service of an order of disapproval, the acquiring person may request a
8 hearing on the proposed acquisition with the commission. Upon receipt of a timely request, the
9 commission shall conduct a hearing in accordance with the provisions of chapter 1-26. Any
10 disapproval by the commission of a proposed acquisition is subject to review in accordance with
11 chapter 1-26.

12 Actual expenses incurred by the director or commission in carrying out any investigation
13 that may be necessary or required by statute shall be paid by the person submitting the proposed
14 acquisition.

15 Section 7. That § 51A-6A-1 be amended to read as follows:

16 51A-6A-1. Terms used in this chapter mean:

- 17 (1) "Articles," in the case of a corporation, articles of incorporation; in the case of a
18 limited liability company, articles of organization;
- 19 (2) "Board member," in the case of a corporation, a director; in the case of a limited
20 liability company, a member of the ~~management committee~~ board of managers if
21 manager-managed or board of members if member-managed;
- 22 (3) "Client," an individual, corporation, association, or other legal entity receiving or
23 benefitting from fiduciary services provided by a trust company or bank;
- 24 (4) "Commission," the State Banking Commission;

- 1 (5) "Contracting trustee," any trust company which accepts or succeeds to any fiduciary
2 responsibility in any manner provided in this chapter;
- 3 (6) "Control," the power, directly or indirectly, to direct the management or policies of
4 a trust company or to vote twenty-five percent or more of any class of voting shares
5 of a trust company;
- 6 (7) "Director," the director of the Division of Banking;
- 7 (7A) "Fiduciary for hire," acting as a administrator, conservator, custodian, executor,
8 guardian, personal representative, or trustee, for any person, trust, or estate for
9 compensation or gain or in anticipation of compensation or gain;
- 10 (8) "Financial institution," any bank, national banking association, savings and loan
11 association, or savings bank which has its principal place of business in this state but
12 which does not have trust powers, or which has trust powers, but does not exercise
13 those trust powers;
- 14 (9) "Governing board," in the case of a corporation, the board of directors; in the case of
15 a limited liability company, the ~~management committee~~ board of managers if
16 manager-managed or board of members if member-managed;
- 17 (10) "Originating trustee," any trust company, bank, national banking association, savings
18 and loan association, or savings bank which has trust powers and its principal place
19 of business in this state and which places or transfers any fiduciary responsibility to
20 a contracting trustee in the manner provided in this chapter;
- 21 (10.1) "Out-of-state trust institution," a nondepository corporation, limited liability
22 company, or other similar entity chartered or licensed by the banking regulatory
23 agency of a state, territory, or district, other than South Dakota, to engage in the trust
24 company business in that state, territory, or district under the primary supervision of

1 such regulator.

2 (11) "Owner," in the case of a corporation, a common stockholder; in the case of a limited
3 liability company, a person who owns ownership units;

4 (12) "Person," an individual or a corporation, partnership, trust, association, joint venture,
5 pool, syndicate, sole proprietorship, or any other form of an entity;

6 (12A) "Public trust company," a trust company that engages in trust company business with
7 the general public by advertising, solicitation or other means, or a trust company that
8 engages in trust company business but does not fall within the definition of a private
9 trust company established by the commission through rules promulgated pursuant to
10 chapter 1-26. The commission shall consider the size, number of clients served and
11 the family and other relationships among the clients served, complexity, and related
12 safety and soundness issues as it establishes in rule a definition for the term private
13 trust company;

14 (13) "Trust company," a nondepository trust company incorporated or organized under the
15 laws of this state engaged in the trust company business, and any national bank which
16 has its main office in this state, and which has as its sole purpose the conduct of trust
17 business;

18 (14) "Trust company business," engaging in, or representing or offering to engage in, the
19 business of acting as a fiduciary for hire, except that no accountant, attorney, credit
20 union, insurance broker, insurance company, investment advisor, real estate broker
21 or sales agent, savings and loan association, savings bank, securities broker or dealer,
22 real estate title insurance company, or real estate escrow company ~~shall~~ may be
23 deemed to be engaged in a trust company business with respect to fiduciary services
24 customarily performed by them for compensation as a traditional incident to their

1 regular business activities. Trust company business as defined in this chapter does not
 2 constitute banking as defined in subdivision 51A-1-2(4), and may not be construed
 3 as banking for purposes of § 47-34-5;

4 (15) "Trust service office," any office, agency, or other place of business at which the
 5 powers granted to trust companies are exercised either by a trust company other than
 6 the place of business specified in a trust company's certificate of authority or within
 7 this state by an out-of-state trust institution. ~~A trust service office does not include~~
 8 ~~a trust service desk, as established in § 51A-6A-55.~~

9 Section 8. That § 51A-6A-55 be repealed.

10 ~~—51A-6A-55. Any contracting trustee and any originating trustee may enter into an agreement~~
 11 ~~which provides that the contracting trustee, without any further authorization of any kind,~~
 12 ~~succeeds to and is substituted for the originating trustee as to all fiduciary powers, rights, duties,~~
 13 ~~privileges, and liabilities with respect to all accounts for which the originating trustee serves in~~
 14 ~~any fiduciary capacity, except as may be provided in the agreement. No agreement is effective~~
 15 ~~unless notice of the agreement has been filed with the director in an application as prescribed~~
 16 ~~by the director, and the director has not disapproved the notice within thirty days. Unless the~~
 17 ~~agreement expressly provides otherwise, upon the effective date of the substitution:~~

18 ~~—(1)— The contracting trustee shall be considered the fiduciary in all writings, including~~
 19 ~~trust agreements, wills, and court orders, which pertain to the affected fiduciary~~
 20 ~~accounts;~~

21 ~~—(2)— The originating trustee is absolved from all fiduciary duties and obligations arising~~
 22 ~~under the writings and shall discontinue the exercise of any fiduciary duties with~~
 23 ~~respect to the writings, except that the originating trustee is not to be absolved or~~
 24 ~~discharged from any duty to account to clients, nor is the originating trustee absolved~~

1 from any breach of fiduciary duty or obligation occurring prior to the effective date
2 of the agreement.

3 ~~—The agreement also may authorize the contracting trustee to establish and maintain a trust
4 service desk at any office of the originating trustee at which the contracting trustee may conduct
5 any trust company business and any business incidental to trust company business and which
6 the contracting trustee may otherwise conduct at its principal place of business and to engage
7 the originating trustee as the agent of the contracting trustee, on a disclosed basis to clients, for
8 the purposes of providing administrative, advertising, and safekeeping services incident to the
9 fiduciary services provided by the contracting trustee.~~

10 ~~—Any contracting trustee also may enter into an agreement with a financial institution
11 providing that the contracting trustee may maintain a trust service desk in the offices of the
12 financial institution and which provides the financial institution, on a disclosed basis to clients,
13 may act as the agent of a contracting trustee for purposes of providing administrative services
14 and advertising incident to the fiduciary services to be performed by the contracting trustee.~~

15 Section 9. That § 51A-6A-56 be repealed.

16 ~~—51A-6A-56. Notice to the director of any agreement authorized by § 51A-6A-55 shall be
17 accompanied by certified copies of the following documents:~~

18 ~~—(1) The agreement;~~

19 ~~—(2) The written action taken by the governing board of the originating trustee or financial
20 institution approving the agreement;~~

21 ~~—(3) Any other required regulatory approvals; and~~

22 ~~—(4) An affidavit of publication of a notice of filing of application in a form prescribed by
23 the director on the same day for two consecutive weeks in the official newspaper of
24 the city or county where the principal office of the originating trustee or financial~~

1 institution is located.

2 Section 10. That § 51A-6A-57 be repealed.

3 ~~—51A-6A-57. The director may issue a notice disapproving any application filed pursuant to~~
4 ~~§ 51A-6A-55 if the director determines the agreement fails to meet a public need and does not~~
5 ~~serve the public interest. No agreement becomes effective until the parties jointly file a~~
6 ~~certificate with the director certifying that at least thirty days prior to the agreement, written~~
7 ~~notice of the substitution was sent by first class mail to each co-fiduciary, each surviving settlor~~
8 ~~of a trust, each ward of a guardianship, each person who has sole or shared power to remove the~~
9 ~~originating trustee as fiduciary, and each adult beneficiary currently receiving or entitled to~~
10 ~~receive a distribution of principal or income from a fiduciary account affected by the agreement~~
11 ~~to each person's address as shown in the originating trustee's records. An unintentional failure~~
12 ~~to give notice does not impair the validity or effect of any agreement. However, intentional~~
13 ~~failure to give notice renders the agreement null and void as to the person not receiving the~~
14 ~~notice of substitution.~~

15 ~~—Any party entitled to receive a notice may file a petition in the court having jurisdiction over~~
16 ~~the fiduciary relationship, or if none, in the circuit court in the county where the originating~~
17 ~~trustee has its principal office, seeking to remove any contracting trustee substituted or about~~
18 ~~to be substituted as a fiduciary. Unless the contracting trustee files a written consent to its~~
19 ~~removal or a written declination to act subsequent to the filing of the petition, the court, upon~~
20 ~~notice and hearing, shall determine the best interests of the petitioner and all other parties~~
21 ~~concerned and shall fashion such relief as it deems appropriate in the circumstances, including~~
22 ~~the awarding of reasonable attorney fees. The right to file a petition under this section is in~~
23 ~~addition to any other rights to remove a fiduciary provided by any other statute or rule or by the~~
24 ~~writing creating the fiduciary relationship.~~

1 Section 11. That § 51A-6A-66 be amended to read as follows:

2 51A-6A-66. An entity may be excluded from the provisions of chapters 51A-5, 51A-6, and
3 51A-6A if:

4 (1) The entity is established for the exclusive purpose of acting as a trust protector,
5 investment trust advisor, or distribution trust advisor, as defined by § 55-1B-1, or any
6 combination of such purposes;

7 (2) The entity is acting in such capacity under a trust instrument which names a South
8 Dakota trust company, a South Dakota bank with trust powers, or a national bank
9 with trust powers as trustee;

10 (3) The entity is not engaged in trust company business with the general public as a
11 public trust company or with any family as a private trust company;

12 (4) The entity does not hold itself out as being in the business of acting as a fiduciary for
13 hire as either a public or private trust company;

14 (5) The entity files an annual report with the South Dakota secretary of state and
15 provides a copy to the Division of Banking; and

16 (6) The entity agrees to be subject to examination by the Division of Banking at the
17 discretion of the director.

18 The governing documents of any such excluded entity shall limit its authorized activities to
19 the functions permitted to a trust protector, investment trust advisor, or distribution trust advisor
20 pursuant to chapter 55-1B, or any combination of such purposes, and limit the performance of
21 those functions with respect to a specifically named trust or family of trusts.

22 An entity complying with this section shall notify the director of its existence, capacity to
23 act, and the name of the trustee for the trust or family of trusts.

24 Section 12. That § 55-1-51 be amended to read as follows:

1 55-1-51. Sections 55-1-46 to 55-1-50, inclusive, are effective for all trusts in existence on
2 ~~or, created, amended, or restated~~ after July 1, 2012.

3 Section 13. That § 55-15-6 be amended to read as follows:

4 55-15-6. The unitrust amount shall be determined as follows:

5 (1) For the first three accounting periods of the trust, the unitrust amount for a current
6 valuation year of the trust ~~shall be~~ may not be less than three percent, or such higher
7 ~~percentage specified by the terms of the governing instrument or~~ nor more than five
8 ~~percent,~~ by the election of the trustee, the disinterested person, or the court, of the net
9 fair market value of the assets held in the trust on the valuation date of the current
10 valuation year;

11 (2) Beginning with the fourth accounting period of the trust, the unitrust amount for a
12 current valuation year of the trust ~~shall be~~ may not be less than three percent, or such
13 ~~higher percentage specified by the terms of the governing instrument or~~ nor more
14 ~~than five percent,~~ by the election of the trustee, the disinterested person, or the court,
15 of the average of the net fair market value of the assets held in the trust on the
16 valuation date of the current valuation year and the net fair market value of the assets
17 held in the trust on the valuation date of each prior valuation year, as defined in
18 subdivision 55-15-1(10);

19 (3) The percentage that may be elected by the trustee, the disinterested person, or the
20 court in determining the unitrust amount shall be a reasonable current return from the
21 trust, taking into account the intentions of the trustor of the trust as expressed in the
22 governing instrument, the needs of the beneficiaries, general economic conditions,
23 projected current earnings and appreciation for the trust, and projected inflation and
24 its impact on the trust. However, such election by the trustee, the disinterested

1 person, or the court in determining the unitrust amount ~~shall be~~ may not be less than
2 three percent or greater nor more than five percent;

3 (4) The unitrust amount for the current valuation year shall be proportionately reduced
4 for any distributions, in whole or in part, other than distributions of the unitrust
5 amount, and for any payments of expenses, including debts, disbursements and taxes,
6 from the trust within a current valuation year that the trustee determines to be
7 material and substantial, and shall be proportionately increased for the receipt, other
8 than a receipt that represents a return on investment, of any additional property into
9 the trust within a current valuation year;

10 (5) In the case of a short accounting period, the trustee shall prorate the unitrust amount
11 on a daily basis;

12 (6) If the net fair market value of an asset held in the trust has been incorrectly
13 determined either in a current valuation year or in a prior valuation year, the unitrust
14 amount shall be increased in the case of an undervaluation, or be decreased in the
15 case of an overvaluation, by an amount equal to the difference between the unitrust
16 amount determined based on the correct valuation of the asset and the unitrust
17 amount originally determined;

18 (7) In determining the net fair market value of the assets held in trust, the determination
19 may not include the value of any residential property or any tangible personal
20 property that, as of the first business day of the current valuation year, one or more
21 income beneficiaries of the trust have or had the right to occupy, or have or had the
22 right to possess or control, other than in a capacity as trustee, and instead the right of
23 occupancy or the right of possession or control shall be deemed to be the unitrust
24 amount with respect to the residential property or the tangible personal property; or

1 any asset specifically given to a beneficiary under the terms of the trust and the return
2 on investment on that asset, which return on investment shall be distributed to the
3 beneficiary.

4 Section 14. That § 43-6-7 be amended to read as follows:

5 43-6-7. No provision directing or authorizing accumulation of trust income is invalid. This
6 section is effective and applies to trust instruments whenever created or executed.

7 Section 15. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as
8 follows:

9 General pecuniary devises bear interest at the Category B rate of interest as provided in § 54-
10 3-16 beginning one year after the event requiring a distribution until payment, unless a contrary
11 intent is indicated by the terms of the trust.

12 Section 16. That § 55-2-15 be amended to read as follows:

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

1 a power to change the trustees within the meaning of § 55-2-17. In addition, the following apply
2 to all appointments made under this section:

3 (1) The second trust may only have as beneficiaries one or more of the beneficiaries of
4 the first trust:

5 (a) To or for whom a discretionary distribution of income or principal may be
6 made from the first trust; or

7 (b) To or for whom a distribution of income or principal may be made in the
8 future from the first trust at a time or upon the happening of an event specified
9 under the first trust; or

10 (c) Both (a) and (b);

11 (2) No restricted trustee of the first trust may exercise such authority over the first trust
12 to the extent that doing so could have the effect of:

13 (a) Benefiting the restricted trustee as a beneficiary of the first trust, unless the
14 exercise of such authority is limited by an ascertainable standard based on or
15 related to health, education, maintenance, or support; or

16 (b) Removing restrictions on discretionary distributions to a beneficiary imposed
17 by the governing instrument under which the first trust was created, except
18 that a provision in the second trust which limits distributions by an
19 ascertainable standard based on or related to the health, education,
20 maintenance, or support of any such beneficiary is permitted, or to a trust
21 established pursuant to 42 U.S.C. § 1396(p)(d)(4);

22 (3) No restricted trustee of the first trust may exercise such authority over the first trust
23 to the extent that doing so would have the effect of increasing the distributions that
24 can be made from the second trust to the restricted trustees of the first trust or to a

1 beneficiary who may change the trustees of the first trust within the meaning of § 55-
2 2-17 compared to the distributions that can be made to such trustee or beneficiary,
3 as the case may be, under the first trust, unless the exercise of such authority is
4 limited by an ascertainable standard based on or related to health, education,
5 maintenance, or support;

6 (4) The provisions of subdivisions (2) and (3) only apply to restrict the authority of a
7 trustee if either a trustee, or a beneficiary who may change the trustee, is a United
8 States citizen or domiciliary under the Internal Revenue Code, or the trust owns
9 property that would be subject to United States estate or gift taxes if owned directly
10 by such a person;

11 (5) In the case of any trust contributions which have been treated as gifts qualifying for
12 the exclusion from gift tax described in § 2503(b) of the Internal Revenue Code of
13 1986, by reason of the application of I.R.C. § 2503(c), the governing instrument for
14 the second trust shall provide that the beneficiary's remainder interest shall vest no
15 later than the date upon which such interest would have vested under the terms of the
16 governing instrument for the first trust;

17 (6) The exercise of such authority may not reduce any income interest of any income
18 beneficiary of any of the following trusts:

19 (a) A trust for which a marital deduction has been taken for federal tax purposes
20 under I.R.C. § 2056 or § 2523 or for state tax purposes under any comparable
21 provision of applicable state law;

22 (b) A charitable remainder trust under I.R.C. § 664; or

23 (c) A grantor retained annuity or unitrust trust under I.R.C. § 2702;

24 (7) The exercise of such authority does not apply to trust property subject to a presently

1 exercisable power of withdrawal held by a trust beneficiary to whom, or for the
2 benefit of whom, the trustee has authority to make distributions, unless after the
3 exercise of such authority, ~~such~~ the beneficiary's power of withdrawal is unchanged
4 with respect to the trust property;

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

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

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

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

21 This section applies to any trust ~~governed by~~ administered under the laws of this state,
22 including a trust whose governing jurisdiction is transferred to this state.

23 Section 17. That § 55-2-18 be amended to read as follows:

24 55-2-18. The exercise of the power to distribute the income or principal of the trust under

1 § 55-2-15 shall be by an instrument in writing, signed and acknowledged by the trustee and filed
2 with the records of the trust. The trustee of the first trust ~~shall~~ may notify all beneficiaries of the
3 first trust, in writing, at least twenty days prior to the effective date of the trustee's exercise of
4 the power under § 55-2-15 (applying the South Dakota Virtual Representation Statutes, §§ 55-3-
5 31 to 55-3-38, inclusive). ~~If all beneficiaries entitled to notice waive the notice requirement by~~
6 ~~a signed writing delivered to the trustee, the trustee may exercise the power under § 55-2-15~~
7 ~~immediately.~~ A copy of the proposed exercise of this authority and the second trust agreement
8 shall satisfy this notice ~~obligation~~ provision. For the purposes of this section, the term,
9 beneficiaries, means those persons who would be entitled to notice and a copy of the first trust
10 instrument under § 55-2-13.

11 Section 18. That § 55-16-2 be amended to read as follows:

12 55-16-2. For the purposes of this chapter, a trust instrument, is an instrument appointing a
13 qualified person or qualified persons for the property that is the subject of a disposition, which
14 instrument:

- 15 (1) Expressly incorporates the law of this state to govern the validity, construction, and
16 administration of the trust;
- 17 (2) Is irrevocable, but a trust instrument may not be deemed revocable on account of its
18 inclusion of one or more of the following:
- 19 (a) A transferor's power to veto a distribution from the trust;
- 20 (b) An inter vivos power of appointment, other than an inter vivos power to
21 appoint to the transferor, the transferor's creditors, the transferor's estate, or the
22 creditors of the transferor's estate, exercisable by will or other written
23 instrument of the transferor effective only upon the transferor's death;
- 24 (c) A testamentary power of appointment;

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

- 1 1986, 26 U.S.C. § 2702(c), as of January 1, 2009; ~~or~~
- 2 (j) A pour back provision that pours back to the transferor's will or revocable trust
3 all or part of the trust assets; ~~and~~
- 4 (k) The transferor's potential or actual receipt of income or principal to pay, in
5 whole or in part, income taxes due on income of the trust if the potential or
6 actual receipt of income or principal is pursuant to a provision in the trust
7 instrument that expressly provides for the payment of the taxes and if the
8 potential or actual receipt of income or principal would be the result of a
9 qualified person's acting in the qualified person's discretion or pursuant to a
10 mandatory direction in the trust instrument or acting at the direction of an
11 advisor described in § 55-16-4; or
- 12 (l) The ability, whether pursuant to discretion, direction, or the grantor's exercise
13 of a testamentary power of appointment, of a qualified person to pay, after the
14 death of the transferor, all or any part of the debts of the transferor outstanding
15 at the time of the transferor's death, the expenses of administering the
16 transferor's estate, or any estate or inheritance tax imposed on or with respect
17 to the transferor's estate; and
- 18 (3) Provides that the interest of the transferor or other beneficiary in the trust property
19 or the income ~~therefrom~~ from the trust property may not be transferred, assigned,
20 pledged, or mortgaged, whether voluntarily or involuntarily, before the qualified
21 person ~~or qualified persons~~ actually ~~distribute~~ distributes the property or income
22 ~~therefrom~~ from the property to the beneficiary, and such provision of the trust
23 instrument shall be deemed to be a restriction on the transfer of the transferor's
24 beneficial interest in the trust that is enforceable under applicable nonbankruptcy law

1 within the meaning of § 541(c)(2) of the Bankruptcy Code, 11 U.S.C. § 541(c)(2),
2 as of January 1, 2009.

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

6 Section 19. That § 55-16-15 be amended to read as follows:

7 55-16-15. Notwithstanding the provisions of §§ 55-16-9 to 55-16-14, inclusive, this chapter
8 does not apply in any respect to any person to whom at the time of transfer the transferor is
9 indebted on account of an agreement or order of court for the payment of support or alimony
10 in favor of ~~such~~ the transferor's spouse, former spouse, or children, or for a division or
11 distribution of property in favor of ~~such~~ the transferor's spouse or former spouse, to the extent
12 of ~~such~~ the debt. This exception does not apply to any claim for forced heirship or legitime.

13 Section 20. That § 55-1B-6 be amended to read as follows:

14 55-1B-6. The powers and discretions of a trust protector ~~shall be~~ are as provided in the
15 governing instrument and may be exercised or not exercised, in the best interests of the trust,
16 in the sole and absolute discretion of the trust protector and are binding on all other persons.

17 Such powers and discretion may include the following:

- 18 (1) Modify or amend the trust instrument to achieve favorable tax status or respond to
19 changes in the Internal Revenue Code, state law, or the rulings and regulations
20 thereunder;
- 21 (2) Increase or decrease the interests of any beneficiaries to the trust;
- 22 (3) Modify the terms of any power of appointment granted by the trust. However, a
23 modification or amendment may not grant a beneficial interest to any individual or
24 class of individuals not specifically provided for under the trust instrument;

- 1 (4) Remove and appoint a trustee, a fiduciary provided for in the governing trust
- 2 instrument, trust advisor, investment committee member, or distribution committee
- 3 member;
- 4 (5) Terminate the trust;
- 5 (6) Veto or direct trust distributions;
- 6 (7) Change situs or governing law of the trust, or both;
- 7 (8) Appoint a successor trust protector;
- 8 (9) Interpret terms of the trust instrument at the request of the trustee;
- 9 (10) Advise the trustee on matters concerning a beneficiary;
- 10 (11) Amend or modify the trust instrument to take advantage of laws governing restraints
- 11 on alienation, distribution of trust property, or the administration of the trust; and
- 12 (12) Provide direction regarding notification of qualified beneficiaries pursuant to § 55-2-
- 13 13.

14 The powers referenced in subdivisions (5), (6), and (11) may be granted notwithstanding the

15 provisions of §§ 55-3-24 to 55-3-28, inclusive.

16 Section 21. That § 55-1-28 be amended to read as follows:

17 55-1-28. No creditor may reach an interest of a beneficiary or of any other person who on

18 the grounds that the beneficiary or other person holds an, either alone or in conjunction with

19 another person, either or both of the following:

- 20 (1) An unconditional or conditional removal or replacement power over a trustee. This
- 21 power is power to remove a trustee; or
- 22 (2) An unconditional or conditional power to replace a trustee. The powers to remove or
- 23 replace a trustee are personal to the beneficiary and may not be exercised by the
- 24 beneficiary's creditors power holder. No court can may order, direct a beneficiary, or

1 otherwise compel a power holder to directly or indirectly exercise the power to
 2 remove or replace a trustee for the purpose of directly or indirectly satisfying, either
 3 in whole or in part, any claim or judgment against the power holder or a beneficiary.

4 The powers to remove or replace a trustee, whether exercisable alone or in conjunction with
 5 another person, are not a property interest.

6 No creditor may reach an interest of a beneficiary ~~who~~ on the grounds that the beneficiary
 7 is also a trustee or a co-trustee; and no court may foreclose against such an interest. No court
 8 may order, direct, or otherwise compel a distribution because the beneficiary is then serving as
 9 a trustee or co-trustee. ~~No court may foreclose against such an interest.~~

10 Section 22. That § 55-3-42 be amended to read as follows:

11 55-3-42. For the purposes of §§ 55-3-39 and 55-3-40, the term, state jurisdiction provision,
 12 means a provision within the trust instrument that the laws of this state govern the validity,
 13 construction, ~~and~~ or administration of a trust or that the trust is subject to the jurisdiction of this
 14 state.

15 Section 23. That § 55-1-45 be amended to read as follows:

16 55-1-45. A cause of action or claim for relief with respect to a fraudulent transfer of a
 17 settlor's assets pursuant to § 55-1-44 is extinguished unless the action under § 55-1-44 is
 18 brought by a creditor of the settlor who meets one of the following requirements:

19 (1) Is a creditor of the settlor before the settlor's assets are transferred to the trust, and the
 20 action under § 55-1-44 is brought within the later of:

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

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

24 (i) Can demonstrate that the creditor asserted a specific claim against the

1 settlor before the transfer; or

2 (ii) Files another action, other than an action under § 55-1-44, against the
3 settlor that asserts a claim based on an act or omission of the settlor that
4 occurred before the transfer, and the action described in this subsection
5 is filed within ~~three~~ two years after the transfer; or

6 (2) Becomes a creditor subsequent to the transfer into trust, and the action under § 55-1-
7 44 is brought within ~~three~~ two years after the transfer is made.

8 In any action described in § 55-1-44, the burden to prove the matter by clear and convincing
9 evidence is upon the creditor.

10 Section 24. That § 55-4-57 be amended to read as follows:

11 55-4-57. (a) ~~Any~~ A ~~judicial proceeding to contest the validity of a trust that was revocable~~
12 ~~at the settlor's death shall be commenced within the earlier of whether a revocable trust or any~~
13 ~~amendment thereto, or an irrevocable trust was validly created may not be commenced later than~~
14 the first to occur of:

15 (1) One year after the settlor's death; ~~or~~

16 (2) Sixty days after the trustee, trust advisor, trust protector, or the settlor sent the person
17 who is contesting the trust a copy of the trust instrument and a notice informing the
18 person of the trust's existence, of the trustee's name and address, and of the time
19 allowed for commencing a proceeding;

20 (3) Upon notice of entry of an order of adjudication of the trust's validity as a result of
21 a petition filed before the settlor's death by any fiduciary of the trust or the settlor of
22 a trust;

23 (4) Upon notice of entry of an order of any other adjudication of the trust's validity or the
24 date the person's right to contest was precluded by consent or other limitation;

1 (5) The last date a petition for review of a will could be filed under South Dakota law,
2 if the trust was revocable at the settlor's death and the trust was specifically referred
3 to in the settlor's last will; or

4 (6) Upon notice of entry of a court's order approving a conservator's proposal to create
5 a trust or amendment thereto if the trust or trust amendment was created pursuant to
6 and in conformity with § 29A-5-419 or 29A-5-420.

7 (b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee
8 may proceed to distribute the trust property in accordance with the terms of the trust. The trustee
9 is not subject to liability for doing so unless:

10 (1) The trustee knows of a pending proceeding contesting the validity of the trust; or

11 (2) A potential contestant has notified the trustee of a possible proceeding to contest the
12 trust and a proceeding is commenced within sixty days after the contestant sent the
13 notification.

14 (c) A beneficiary of a trust that is determined to have been invalid is liable to return any
15 distribution received for proper distribution. If the beneficiary refuses to return the distribution,
16 the beneficiary may be liable for all costs, including attorney fees, incurred for the recovery of
17 the distribution.

18 (d) Notice given by the trustee, trust protector, trust advisor or settlor under this section shall
19 be given to all beneficiaries of a trust and all heirs at law of the trust settlor.

20 (e) With respect to notices to beneficiaries and potential contestants under this section, if
21 personal service is not made, then the notice shall be mailed certified or registered mail, postage
22 prepaid, to the last known address of the person, and absent evidence to the contrary, notice to
23 the person is presumed to have been made on the date of delivery to the last known address of
24 the person, when there is proof of delivery.

- 1 (f) No trustee, trust advisor, or trust protector may incur any liability to any person or
- 2 otherwise for failure to provide any written notice discussed above.