

HB1046 - An Act to revise various trust and trust company provisions.

Summary

HB1046 represents the annual work product of the Governor's Task Force on Trust Administration Review and Reform (Trust Task Force), which dates back to 1997. The Trust Task Force was created by then Governor Janklow and was carried forward by Governors Rounds and Daugaard. Governor Daugaard also served as a Co-Chair of the Trust Task Force for several years. Currently chaired by Representative Mark Mickelson, the Trust Task Force has 21 members, and meets several times each year to discuss amendments to Title 55 and Chapters 21-22 and 51A-6A, in an effort to keep South Dakota as the top trust jurisdiction in the country.

The Trust Task Force is a unique cooperative effort between industry, regulators, and state government leaders. Of the 21 members, 16 are trust practitioners including estate planning attorneys, trust officers, and trust company and trust department leaders. A member of the South Dakota Banking Commission represents the banking industry, and Secretary of Labor and Regulation Marcia Hultman, Liza Clark from the Governor's Office, and the Director of Banking Bret Afdahl are Ex-Officio members.

The first three sections of HB1046 are amendments to provisions in Chapter 51A-6A and relate to the regulation and supervision of our state chartered trust companies. The remaining sections of HB1046 are technical amendments to Title 55 and Chapter 21-22 dealing with various trust provisions and the repeal of Chapter 43-10 which is no longer necessary.

Section 1

Deletes unnecessary language.

Section 2

Clarifies existing law to require trust company applicants to pay for the publication of notice that is required as part of the process of being approved to conduct business in South Dakota. The entire application fee paid by trust company applicants goes to the general fund and therefore cannot be used by the Division of Banking to offset the cost of publication.

Section 3

Clarifies the criteria for naming a trust company to include a requirement that each trust company must include the word "trust" in its name. Other businesses are prohibited from using the word "trust" in their name if it could create confusion. It will help avoid confusion in the market if all trust companies use the word "trust" in their name.

Section 4

Deletes a cross-reference to chapter 43-10, which is repealed by Section 26 of this bill. A full explanation for this repeal is included below under Section 26.

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Section 5

Deletes a cross-reference to chapter 43-10 and requires express trusts dealing with real property to be in writing. This requirement is one of two concepts from chapter 43-10 that are being carried forward.

Section 6

Creates a new section to protect third-party purchasers from express trusts that they are unaware of at the time of a purchase. This protection is the other concept from chapter 43-10 that is being carried forward.

Sections 7

Creates a new section that clarifies that South Dakota has not adopted the Uniform Trust Code requirement of exclusive benefit. This distinction will allow grantors to prohibit their assets from being invested in morally objectionable businesses as they see fit without the risk of future beneficiaries arguing that beneficiary interests were harmed by such grantor decisions/directives.

Sections 8-11

Creates a voluntary process for the registration of trusts and a sample form that can be used. For various reasons, individuals from all over the world are looking to bring their trusts to the United States. Some foreign jurisdictions require evidence that a trust will be subject to another jurisdiction before it can be transferred. Section 8 requires information from the trustee in this state that is looking to register a trust. Section 9 requires the trustee to acknowledge its trusteeship and to submit to the court in South Dakota for any proceedings related to the trust. Section 10 deals with confidentiality and provides a process to cancel the registration and Section 11 provides a sample form that can be used.

Section 12

Creates a new section that allows a trustee to appoint a co-trustee unless prohibited by the governing document.

Sections 13

Creates a process to better equip trustees to defend illiquid trusts against various actions. Current law does not require trustees to defend against actions and claims, but if they chose to do so with an illiquid trust, the trustee would be forced to expend their own funds or their company's funds. This section creates a process for the grantor or beneficiaries to provide additional security to indemnify the trustee for defending the trust.

Section 14

Clarifies that directed trusts created prior to July 1, 1997 are afforded the protections of chapter 55-1B. South Dakota adopted directed trusts in 1997 but other jurisdictions recognized this concept prior to South Dakota and this amendment will clarify that the provisions of South Dakota law apply to directed trusts administered in South Dakota that were created prior to July 1, 1997.

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Sections 15

Clarifies that an individual may serve as a trust advisor and trust protector at the same time to provide greater flexibility to grantors and estate planners in the event of a death, resignation or removal.

Section 16

Clarifies how and when a grantor, trust advisor, or trust protector may restrict the flow of information to a beneficiary or beneficiaries. For various reasons, certain grantors do not want a beneficiary or class of beneficiaries to know of the existence of a trust or certain details about a trust. An example is that a grantor may not want a minor beneficiary to know that he or she is named in a trust that contains a large sum of money.

Section 17

Modifies the current process of modifying, or decanting, an existing trust into a new trust to take into account new tax law or other changes without the need to retitle all trust assets. Under current law, when a new trust is created and assets from the old trust are transferred or decanted into the new trust, all assets must be retitled. In some cases, this process is costly and time consuming with little direct benefit to the trust beneficiaries.

Section 18

Clarifies that court affirmation of a non-judicial modification or termination of a trust is a voluntary option and not a requirement.

Section 19

Modifies the current prohibition on trustee loans to trust beneficiaries if provided for in the governing instrument, a court order, consent of all qualified beneficiaries, or by instruction of a trust protector.

Section 20

Provides trustees, grantors and other the option of seeking court approval of the validity of a trust prior to the death of the settlor. This concept already exists in chapter 21-22 for court supervised trusts and the goal is to head off costly litigation from beneficiaries, especially in the situation of an unequal distribution plan by a settlor.

Section 21

Seeks to clarify that the statute of limitations in our asset protection chapter, 55-16, governs situations of fraudulent transfers to South Dakota trusts, and not the statute of limitation in another state. This clarification is intended to aid courts from other states that are asked to review transfers and seek to understand the standard that applies to trusts situated in South Dakota.

Sections 22

Clarifies the definition of "beneficiary" for purposes of chapter 21-22. This definition is important for purposes of who can bring a trust into court for a challenge or court supervision. This definition was implicated in a recent South Dakota Supreme Court decision, *Schwan v. Burgdorf et al*, 2016 SD 45, and additional clarification is necessary.

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Sections 23

Clarifies that the court file related to litigation of a court supervised trust is provided confidential treatment similar to other trust related documents listed in this section. The Schwan case ended in a published decision that disclosed vast amounts of information that was thought to already protected by this section.

Sections 24

Seeks to clarify the standard for filing claims or objecting to a final accounting of a trust. The additional language will make clear that the final accounting in a court supervised trust is conclusive after approved by a court, even if it was not contested prior to approval.

Sections 25

The rules of civil procedure were recently referenced in chapter 21-22 to govern proceedings under that chapter. This section seeks to preserve certain limitations on information sharing provided to parties in certain trust matters while still applying the rules of civil procedure to this chapter.

Sections 26

Clarifies that South Dakota law governs the actions of South Dakota trustees as they relate to assets held in trusts that are situated and administered in South Dakota. Trustees in South Dakota interact with individuals from other jurisdictions through the process of creating and administering trusts in South Dakota and this language is intended to clarify that South Dakota law governs those situations.

Section 27

Repeals chapter 43-10, which addresses real property trusts. This chapter was adopted by the Dakota Territory in 1877 and was codified and recodified upon and after statehood. With the exception of one section being repealed in 2007, this chapter is untouched since adoption except for codification in 1877 and recodifications in 1903, 1919, and 1939. This chapter has been largely forgotten by practitioners and is ambiguous and contrary in some places to current trust law in South Dakota. Two concepts from this chapter are being carried forward in other sections in this bill: Section 5 will amend existing trust law to require express trusts relating to real property be in writing, and Section 6 will protect third-party purchasers from the existence of an express trust of which they are not aware.

Section 28

Repeals a cross reference to chapter 43-10.

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