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# South Dakota Trust Law Online Handbook

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# South Dakota Trust Law Online Handbook

This publication contains some selected South Dakota statutes and administrative rules relating to trust law and private trust companies. The text of all statutes is complete through the 2018 (93rd) legislative Session. The text of the administrative rules is complete through rules published in the South Dakota register dated August 1, 2017.

This deskbook was created to provide you with an accurate compilation of South Dakota statutory trust law; however, this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. Attorneys using this publication to address a specific legal matter may wish to research original source material. The source material for the publication can be found by going to [http://sdlegislature.gov/Statutes/Codified\\_Laws/default.aspx](http://sdlegislature.gov/Statutes/Codified_Laws/default.aspx)

### About Sterling Trustees

Sterling Trustees is South Dakota-chartered trust company located in Sioux Falls, South Dakota. By working independently, the firm allows its clients to avoid the extra costs and conflicts of interest associated with large financial institutions. Sterling Trustees' main goal is to keep assets safe while remaining objective. Sterling currently administers over \$3.3 billion of assets across 300 trusts and 120 families.

For more information, please visit <https://sterlingtrustees.com>

With favorable trust laws, legislative awareness, a responsive judiciary, and a business-friendly regulatory climate, South Dakota is recognized by professional advisors, industry publications, and wealthy families as the nation's top jurisdiction for trust situs. In fact, more trust companies have set up shop in South Dakota than any other state, servicing billions of dollars of private wealth annually.

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# TITLE 10 - Taxation

## CHAPTER 10-43 INCOME TAX ON BANKS AND FINANCIAL CORPORATIONS

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**10-43-1. Definition of terms.** Terms used in this chapter mean:

- (1) “Corporation,” joint stock companies, limited partnerships, limited liability companies, and associations organized for pecuniary profit;
  - (a) “Domestic corporation,” any corporation organized under the laws of this state;
  - (b) “Foreign corporation,” any corporation other than a domestic corporation;
- (1A) “Credit card bank,” any financial institution that is subject to the tax imposed by this chapter that:
  - (a) Derives the majority of its income apportioned to this state from the use of credit cards, including income derived from fees, transactional costs, interest, and penalties, and also has total assets over ten billion dollars; or
  - (b) Was subject to the tax imposed by this chapter before July 1, 2013, and ninety-five percent of its tax receipts were historically distributed to the state general fund pursuant to § 10-43-76 before July 1, 2013.
- (2) “Depository,” any bank with deposits insured under the Federal Deposit Insurance Act, any institution with accounts insured by the federal savings and loan insurance corporation, or any thrift or home financing institution which is a member of a federal home loan bank; any other bank or thrift institution, incorporated or organized under the laws of any state, which is engaged in the business of receiving deposits; or any company, organized or created under the laws of a foreign country, which maintains or owns a branch or subsidiary in the United States receiving deposits;
- (3) “Dividend,” any distribution made by a corporation out of its earnings or profits to its shareholders or members, whether in cash or in other property of the corporation;
- (4) “Financial institution,” any banking institution, production credit association, or savings and loan association organized under the laws of the United States and located or doing business in this state; any bank, savings and loan association, mutual saving bank, or trust company, organized under the laws of this state or of any other state, district, territory, or country, doing business within this state; any person licensed in this state pursuant to chapter 54-4, the installment repayment small loan and consumer finance law; and any person in the business of buying loans, notes, or other evidences of debt except those persons registered as broker-dealers pursuant to chapter 47-31B; and persons in the business of making installment repayment and open-end loans which may be unsecured or secured by real or personal property, which loans are in an aggregate amount exceeding five hundred dollars, which are repaid in two or more installment payments or one lump sum payment extending over a time exceeding thirty days from the day the loan was made except where the loan is made by the person selling the property, incidental to the sale of the property and where the seller is primarily in the business of selling such real or personal property or except where the loan is made to a related corporation and the primary business of these related corporations is the production and sale of tangible personal property or where the loan is made in the form of an advance to secure the production of equipment to be obtained by the lender or to finance a joint venture between the lender and others which has been formed to produce and sell tangible personal property;
- (5) “Fiscal year,” an accounting period of twelve months, ending on the last day of any month other than December;
- (6) “Foreign country,” any jurisdiction other than one embraced within the United States. “United States,” when used in a geographical sense, includes the states, the District of Columbia, and the possessions of the United States;
- (7) “Income year,” the calendar year or the fiscal year upon which the net income is computed;
- (8) “Individual,” a natural person;

(9) "Paid," for the purposes of the deductions means paid or accrued or paid or incurred, and the terms paid or incurred and paid or accrued are construed according to the accounting method used for computing net income; received, for the purpose of the computation of net income means received or accrued, and the term received or accrued is construed according to the accounting method used for computing net income;

(10) "Person," includes individuals, firms, associations, limited liability companies, corporations, estates, fiduciaries, and all entities from which income tax may be due. In no event shall a pass-through entity owned in whole or in part, directly or indirectly, by a financial institution subject to tax under this chapter, and formed primarily to facilitate the securitization of assets, be treated as a person for the purpose of subdivision 10-43-1(4);

(11) "Related corporation," a corporation associated with another as its parent or subsidiary, or in a brother-sister relation;

(12) "Taxable income," all net income;

(13) "Taxpayer," includes any person, corporation, or fiduciary who is subject to a tax imposed by this chapter;

(14) "Tax year," the calendar year, or the fiscal year ending during a calendar year, used for computing net income.

**Source:** SDC 1939, § 57.2601; SL 1939, ch 263, §§ 1, 2; SDC Supp 1960, §§ 57.30A01, 57.30A02; SL 1977, ch 96, §§ 1, 20, 21; SL 1982, ch 106; SL 1984, ch 83; SL 1989, ch 30, § 31; SL 1994, ch 91; SL 2000, ch 58, § 2; SL 2003, ch 59, § 1; SL 2004, ch 278, § 58; SL 2013, ch 53, § 1; SL 2016, ch 62, § 1.

**10-43-2. Tax imposed on financial institutions.** An annual tax is hereby imposed on each financial institution doing business in this state or licensed to do business in this state during any part of its tax year.

**Source:** SL 1939, ch 263, §§ 3, 4; SDC Supp 1960, §§ 57.30A03, 57.30A04; SDCL § 10-43-3; SL 1977, ch 96, § 2; SL 2016, ch 62, § 2.

**10-43-2.1. Repealed by SL 2016, ch 62, § 3.**

**10-43-3. Repealed by SL 1977, ch 96, § 20.**

**10-43-4. Time of liability for tax—Rate of tax—Minimum.** The liability for the tax imposed by this chapter shall arise upon the first day of each tax year and shall be based upon the net income assignable to this state at the rate of six percent on net income of four hundred million dollars or less; at the rate of five percent on net income exceeding four hundred million dollars but equal to or less than four hundred twenty-five million dollars; at the rate of four percent on the net income exceeding four hundred twenty-five million dollars but equal to or less than four hundred fifty million dollars; at the rate of three percent on the net income exceeding four hundred fifty million dollars but equal to or less than four hundred seventy-five million dollars; at the rate of two percent on the net income exceeding four hundred seventy-five million dollars but equal to or less than five hundred million dollars; at the rate of one percent on the net income exceeding five hundred million dollars but equal to or less than six hundred million dollars; at the rate of one-half of one percent on the net income exceeding six hundred million dollars but equal to or less than one billion two hundred million dollars; and at the rate of one-quarter of one percent on the net income exceeding one billion two hundred million dollars. The tax payable under this section may be no less than two hundred dollars.

**Source:** SL 1939, ch 263, §§ 5, 8; SL 1941, ch 356, § 1; SL 1943, ch 300; SL 1957, ch 467; SDC Supp 1960, §§ 57.30A05, 57.30A08; SL 1969, ch 266, § 1; SL 1976, ch 96, § 1; SL 1977, ch 97; SL 1979, ch 82, § 1; SL 1991, ch 97; SL 2000, ch 58, § 1; SL 2016, ch 62, § 4.

**10-43-5. Income tax in lieu of other taxes.** The tax referred to in this chapter is in lieu of all other taxes, state, county, and local, except taxes upon the institutions' real property, taxes upon the institutions' leased sites, taxes upon tangible personal property and products transferred electronically not normally used in extension of credit or acceptance of deposits and the retail sales tax or the use tax on tangible personal property and any product transferred electronically. However, tangible personal property and any product transferred electronically acquired by the financial institution through a foreclosure proceeding are exempt from such other taxes.

**Source:** SL 1939, ch 263, §§ 8, 10; SL 1943, ch 300; SDC Supp 1960, §§ 57.30A08, 57.30A10; SL 1977, ch 96, § 3; SL 1983, ch 356, § 6; SL 2008, ch 37, § 102; SL 2008, ch 51, § 68; SL 2016, ch 62, § 5.

**10-43-6 to 10-43-10. Repealed by SL 1977, ch 96, § 20.**

**10-43-10.1. Net income defined. Net income,** in the case of a financial institution, is taxable income as defined in the United States Internal Revenue Code, as defined by § 10-1-47, and reportable for federal income tax purposes for the taxable year, but subject to the adjustments as provided in §§ 10-43-10.2 and 10-43-10.3. If a financial institution has elected to file its federal tax return pursuant to 26 USC § 1362(a) of the United States Internal Revenue Code, as defined by § 10-1-47, net income shall be computed in the same manner and in the same amount as if that institution had continued to file its federal tax return without making the election and the financial institution shall continue to be treated as a separate corporation for the purposes of this chapter. If a financial institution is organized as a limited liability company, the limited liability company shall be treated as a separate corporation for the purpose of this chapter.

**Source:** SL 1977, ch 96, § 4; SL 1978, ch 83, § 5; SL 1979, ch 82, § 3; SL 1981, ch 98; SL 1982, ch 95, § 3; SL 1983, ch 82, § 1; SL 1984, ch 70, § 1; SL 1985, ch 83, § 1; SL 1986, ch 98, § 1; SL 1987, ch 95; SL 1988, ch 103, § 1; SL 1989, ch 101, § 1; SL 1990, ch 83, § 1; SL 1991, ch 98, § 1; SL 1992, ch 68, § 1; SL 1993, ch 95, § 1; SL 1994, ch 92, § 1; SL 1995, ch 65, § 1; SL 1996, ch 79, § 1; SL 1997, ch 64, § 1; SL 1997, ch 65, § 1; SL 1998, ch 68, § 1; SL 1999, ch 56, § 1; SL 2000, ch 59, § 1; SL 2001, ch 53, § 1; SL 2002, ch 59, § 1; SL 2003, ch 60, § 1; SL 2004, ch 90, § 1; SL 2004, ch 289, § 3; SL 2005, ch 67, § 1; SL 2006, ch 45, § 1; SL 2007, ch 54, § 1; SL 2008, ch 46, § 3; SL 2009, ch 39, § 9; SL 2010, ch 45, § 9; SL 2011, ch 48, § 9; SL 2012, ch 59, § 9; SL 2013, ch 42, § 9; SL 2014, ch 54, § 9; SL 2015, ch 62, § 9; SL 2016, ch 54, § 10.

**10-43-10.2. Additions to taxable income.** Added to taxable income are:

(1) Interest or dividend income derived from obligations or securities of states or political subdivisions or authorities thereof not included in taxable income as determined under the Internal Revenue Code;

(2) All income taxes paid or accrued, as the case may be, during the tax year under the provisions of chapter 10-43 or under the provisions of any income tax, or franchise or privilege taxes measured by income levied by any other state or political subdivision to the extent that such taxes were deducted to determine federal taxable income;

(3) Bad debt deductions in excess of credits actually ascertained to be worthless and charged off within the tax year;

(4) Any amount subsequently received on account of a bad debt previously charged off as a deduction for tax purposes;

(5) Any amount received as a refund of federal income taxes during the tax year if that amount was previously deducted in determining net income;

(6) Dividends received from other corporations to the extent that such dividends have been deducted from net income as determined under the Internal Revenue Code; and

(7) Any capital loss from liquidating sales within the twelve-month period beginning on the date

on which a financial institution adopts a plan of complete liquidation if all of the assets of the financial institution are distributed in complete liquidation less assets retained to meet claims within the twelve-month period, or from the distribution of property in complete liquidation of the financial institution which is subject to federal corporate income taxes pursuant to § 336 of the Internal Revenue Code.

**Source:** SL 1977, ch 96, § 4(1); SL 1978, ch 83, § 1; SL 1987, ch 96, §§ 1, 5; SL 2014, ch 60, § 1, eff. Jan. 1, 2015.

**10-43-10.3. Subtractions from taxable income.** Subtracted from taxable income are:

- (1) Dividends received from financial institutions subject to taxation under this chapter to the extent such dividends were included in taxable income as determined under the Internal Revenue Code;
- (2) Taxes imposed upon the financial institution within the tax year, under the Internal Revenue Code excluding any taxes imposed under 26 USC § 1374 and 26 USC § 1375;
- (3) Any interest expense described in §§ 291(e)(1)(B) and 265(b) of the Internal Revenue Code, which interest expense shall be deductible;
- (4) Any capital gain from liquidating sales within the twelve-month period beginning on the date on which a financial institution adopts a plan of complete liquidation if all of the assets of the financial institution are distributed in complete liquidation less assets retained to meet claims within the twelve-month period, or from the distribution of property in complete liquidation of the financial institution which is subject to federal corporate income taxes pursuant to § 336 of the Internal Revenue Code;
- (5) Any adjustment to taxable income due to a change in the method used to compute the federal bad debt deduction where the adjustment has already been included in taxable income for purposes of the tax imposed by this chapter;
- (6) For those financial institutions making an election pursuant to 26 USC § 1362(a) of the United States Internal Revenue Code, as defined by § 10-1-47, imputed federal income taxes in an amount equal to the taxes that would have been paid on net income as defined in § 10-43-10.1 had the financial institution continued to file its federal tax return without making an election to file pursuant to 26 USC § 1362(a); and
- (7) For those financial institutions organized as limited liability companies, imputed federal income taxes in an amount equal to the taxes that would have been paid on net income as defined in § 10-43-10.1 had the financial institution elected to file as a subchapter C corporation under the Internal Revenue Code.

**Source:** SL 1977, ch 96, § 4 (2); SL 1978, ch 83, § 2; SL 1985, ch 84; SL 1987, ch 96, §§ 2-4; SL 1988, ch 104; SL 1997, ch 64, § 2; SL 2004, ch 289, § 4; SL 2014, ch 60, § 2, eff. Jan. 1, 2015; SL 2015, ch 62, § 11; SL 2016, ch 54, § 11; SL 2016, ch 62, § 6.

**10-43-10.4. Carryback of net operating losses not deductible.** No carryback of net operating losses may be deducted from net income for state tax purposes.

**Source:** SL 1982, ch 108; SL 2014, ch 60, § 3, eff. Jan. 1, 2015; SL 2016, ch 62, § 7.

**10-43-10.5. Carryforward of net operating losses deductible.** A deduction may be made for a carryforward of a net operating loss. The deduction is limited to the seven tax years immediately following the tax year of the loss. Net income may not be less than zero prior to making the adjustments provided for in §§ 10-43-10.2 and 10-43-10.3 because of a deduction taken for losses not incurred during the tax year for which the return is being filed.

The provisions of this section only apply to net operating losses incurred on or after January 1, 2015.

**Source:** SL 2014, ch 60, § 4, eff. Jan. 1, 2015; SL 2016, ch 62, § 8.

**10-43-11. Repealed by SL 1978, ch 83, § 3.**

**10-43-12 to 10-43-22. Repealed by SL 1977, ch 96, § 20.**

**10-43-22.1. Tax limited to income from business within state—Formula for net income apportionment.** Financial institutions engaged in business within and without the state shall be taxed only on such business as is properly apportioned to this state. All net income shall be apportioned to this state by multiplying the net income by a fraction, the numerator of which is the property factor, plus the payroll factor plus the receipts factor, the denominator of which is three.

**Source:** SL 1935, ch 205, § 15-a; SDC 1939, § 57.2707; SDCL, § 10-43-22; SL 1977, ch 96, § 5.

**10-43-23. Repealed by SL 1977, ch 96, § 20.**

**10-43-23.1. Property factor.** The property factor used in § 10-43-22.1 is a fraction, the numerator of which is the average value of the financial institution's real and tangible property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the financial institution's real and tangible personal property owned or rented and used everywhere during the tax period.

**Source:** SL 1977, ch 96, § 6; SL 2014, ch 61, § 1, eff. Jan. 1, 2015.

**10-43-23.2. Valuation of property owned or rented—Net annual rental rate.** Property owned by the financial institution is valued at its original cost. Property rented by the financial institution is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental received by the financial institution from subrentals.

**Source:** SL 1977, ch 96, § 7.

**10-43-23.3. Average value determination.** The average value of property shall be determined by averaging the values at the beginning and ending of the tax period if reasonably required to reflect properly the average value of the financial institution's property.

**Source:** SL 1977, ch 96, § 8.

**10-43-24. Repealed by SL 1977, ch 96, § 20.**

**10-43-24.1. Payroll factor.** The payroll factor used in § 10-43-22.1 is a fraction, the numerator of which is the total amount paid in this state during the tax period by the financial institution for compensation, and the denominator of which is the total compensation paid everywhere during the tax period. Compensation does not include any payment to any independent contractor or any other person not classified as an employee.

**Source:** SL 1977, ch 96, § 9; SL 2014, ch 61, § 2, eff. Jan. 1, 2015; SL 2016, ch 62, § 9.

**10-43-24.2. Compensation paid in state.** Compensation is paid in this state if:

- (1) The individual's service is performed entirely within this state;
- (2) The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or
- (3) Some of the individual's service is performed in the state and:
  - (a) The base of operations, or if there is no base of operations, the place from which the individual's service is directed or controlled, is in this state; or
  - (b) The base of operations or place from which the individual's service is directed or controlled is not in any state in which some part of the individual's service is performed, but the individual's residence is in this state.

**Source:** SL 1977, ch 96, § 10 (1), (2); SL 2014, ch 61, § 3, eff. Jan. 1, 2015.

**10-43-24.3. Repealed by SL 2014, ch 61, § 4, eff. Jan. 1, 2015.**

**10-43-25. Repealed by SL 1977, ch 96, § 20.**

**10-43-25.1. Receipts factor.** The receipts factor used in § 10-43-22.1 is a fraction, the numerator of which is the total receipts of the financial institution in the state during the tax period, and the denominator of which is the total receipts of the financial institution everywhere during the tax period.

**Source:** SL 1977, ch 96, § 11; SL 2014, ch 61, § 5, eff. Jan. 1, 2015.

**10-43-25.2. Interest, fees, and penalties in nature of interest, discount, and net gain from loans included in numerator.** Interest, fees and penalties in the nature of interest, discount, and net gain from loans, including federal funds sold and acceptances, and other installment obligations shall be included in the numerator specified in § 10-43-25.1 as follows:

(1) The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the receipts described in this subdivision are included in the numerator of the receipts factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, the receipts described in this subdivision shall be included in the numerator of the receipts factor if the borrower's billing address is located in this state;

(2) The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans not secured by real property if the borrower's billing address is located in this state;

(3) The numerator of the receipts factor includes net gains (but not less than zero) from the sale of loans secured by real property multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subdivision (1) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property;

(4) The numerator of the receipts factor includes net gains (but not less than zero) from the sale of loans not secured by real property multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subdivision (2) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property;

(5) The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from credit card receivables and receipts from fees charged to card holders, such as annual fees, if the billing address of the card holder is in this state; and

(6) The numerator of the receipts factor includes net gains (but not less than zero) from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subdivision (5) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

**Source:** SL 1977, ch 96, § 12; SL 2014, ch 61, § 6, eff. Jan. 1, 2015.

**10-43-25.3. Fees, commissions, service charges, and other receipts included in numerator.** Fees, other than those described in § 10-43-25.2, commissions, service charges, and other receipts from the rendering of financial or fiduciary services shall be included in the numerator specified in § 10-43-25.1 if the service is principally performed in South Dakota unless the fees, commissions, service charges, and other receipts are affiliated service income as provided in § 10-43-25.8.

**Source:** SL 1977, ch 96, § 13; SL 1996, ch 80, § 1; SL 2014, ch 61, § 7, eff. Jan. 1, 2015.

**10-43-25.4. Rental property receipts included in numerator.** Receipts from the rental of real or tangible personal property shall be included in the numerator specified in § 10-43-25.1 if the property is principally located in South Dakota.

**Source:** SL 1977, ch 96, § 14; SL 2014, ch 61, § 8, eff. Jan. 1, 2015.

**10-43-25.5. Interest, dividends, and net gains from securities transactions included in numerator.** Interest, dividends, and net gains from transactions in securities, including stocks, bonds, and all other money markets instruments, shall be included in the numerator specified in § 10-43-25.1 if the financial institution's principal place of business is in South Dakota.

**Source:** SL 1977, ch 96, § 15; SL 2014, ch 61, § 9, eff. Jan. 1, 2015.

**10-43-25.6. Receipts from securities used to maintain reserves against deposits included in numerator.** Notwithstanding the provisions of § 10-43-25.5, receipts from securities used to maintain reserves against deposits to meet federal and state reserve requirements shall be included in the numerator specified in § 10-43-25.1 based on the ratio that the deposits in South Dakota bear to total deposits everywhere during the tax period.

**Source:** SL 1977, ch 96, § 15 (1); SL 2014, ch 61, § 10, eff. Jan. 1, 2015.

**10-43-25.7. Receipts from securities held or pledged for public or trust funds included in numerator.** Receipts from securities owned by a financial institution but held or pledged to secure public or trust funds shall be included in the numerator specified in § 10-43-25.1 if the financial institution's office where the deposits are maintained is in South Dakota.

**Source:** SL 1977, ch 96, §§ 15 (2), 20; SL 2014, ch 61, § 11, eff. Jan. 1, 2015.

**10-43-25.8. Affiliated service income included in numerator.** Affiliated service income shall be included in the numerator specified in § 10-43-25.1 only if the income relates to:

- (1) Loans secured primarily by real property or tangible personal property located in this state;
- (2) Loans made to customers located in this state, which are not secured by real property or tangible personal property; or
- (3) Credit card receivables from customers in this state.

**Source:** SL 1996, ch 80, § 2; SL 2014, ch 61, § 12, eff. Jan. 1, 2015.

**10-43-25.9. Affiliated service income defined.** For the purposes of §§ 10-43-25.3 and 10-43-25.8, affiliated service income means fees, commissions, service charges, and other receipts from the production or servicing of loans or credit card receivables by a nondepository financial institution for another nondepository financial institution, if each nondepository financial institution is in the same affiliated group for purposes of filing a consolidated federal corporate income tax return.

**Source:** SL 1996, ch 80, § 3; SL 2014, ch 61, § 13, eff. Jan. 1, 2015.

**10-43-26 to 10-43-29. Repealed by SL 1977, ch 96, § 20.**

**10-43-29.1. Alternative apportionment methods.** If the apportionment methods included in §§ 10-43-22.1 to 10-43-25.9, inclusive, do not fairly represent the financial institution's net income in this state, the financial institution may petition for, or the secretary may require with respect to all or any part of the taxpayer's business activity:

- (1) Separate accounting;
- (2) The exclusion of any one or more of the factors;
- (3) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (4) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's taxable income.

The secretary shall promulgate rules pursuant to chapter 1-26 within six months of any decision to use any of the alternative apportionment methods provided under this section.

**Source:** SL 1935, ch 205, § 15-a; SDC 1939, § 57.2707; SDCL § 10-43-29; SL 1977, ch 96, § 16; SL 1987, ch 82, § 19; SL 2013, ch 54, § 1; SL 2013, ch 55, § 1.

**10-43-30. Time for filing annual return and paying tax—Penalty and interest for delinquency.** Each taxpayer shall file a return for the tax year, and pay any tax imposed by this chapter, within fifteen days after the taxpayer's federal income tax return is due.

Any return not filed by the due date or tax not paid by the due date is delinquent and bears penalty and interest as provided in § 10-59-6.

**Source:** SDC 1939, § 57.2701; SL 1977, ch 96, § 17; SL 1983, ch 80, § 1; SL 1985, ch 85; SL 1988, ch 105; SL 1993, ch 96, § 11; SL 2003, ch 272 (Ex. Ord. 03-1), § 82; SL 2008, ch 50, § 1; SL 2011, ch 1 (Ex. Ord. 11-1), § 161, eff. Apr. 12, 2011; SL 2016, ch 62, § 10.

**10-43-30.1. Extension of time to file return—Conditions—Interest.** Any taxpayer shall receive an extension of time to file the return required by this chapter to a day not later than six months from the day the return was originally due, if the taxpayer:

- (1) Files for an extension of time to file the taxpayer's federal income tax return;
- (2) Files a copy of the federal income tax return extension request with the Department of Revenue on or before the day the return was originally due; and
- (3) Makes a reasonable estimate of the amount of tax due and pays that amount with or prior to the request for extension of time to file.

If the time for filing the return is extended at the request of the taxpayer, and the amount of tax due exceeds the reasonable estimate paid pursuant to subdivision (3), interest, but not penalty, shall be added to the difference at the same rate as provided for in § 10-59-6 from the time the return was originally due until the additional taxes due are paid.

**Source:** SL 1987, ch 97; SL 2008, ch 50, § 2; SL 2011, ch 1 (Ex. Ord. 11-1), § 161, eff. Apr. 12, 2011; SL 2016, ch 62, § 11.

**10-43-31, 10-43-32. Repealed by SL 2016, ch 62, §§ 12, 13.**

**10-43-33. Repealed by SL 1977, ch 96, § 20.**

**10-43-34. Final return on dissolution.** Before a corporation may be dissolved and its assets distributed, the corporation shall make a return for any settlement of the tax for any income earned in the income year up to its final date of dissolution.

**Source:** SL 1935, ch 205, § 15; SDC 1939, § 57.2713; SL 2008, ch 37, § 103; SL 2016, ch 62, § 14.

**10-43-35. Repealed by SL 1977, ch 96, § 20.**

**10-43-36. Consolidated report of related corporations.** Any related corporation required to report under this chapter and owned or controlled either directly or indirectly by another corporation may petition the secretary of revenue, or may be required by the secretary of revenue, to make a consolidated report with related corporations that are required to report under this chapter showing the combined net income, such assets of the corporation as are required for the purpose of this chapter, and such other information as the secretary of revenue may require by rule promulgated pursuant to chapter 1-26.

**Source:** SDC 1939, § 57.2714; SL 1977, ch 96, § 18; SL 1987, ch 82, § 20; SL 2000, ch 58, § 3; SL 2003, ch 272 (Ex. Ord. 03-1), § 82; SL 2011, ch 1 (Ex. Ord. 11-1), § 161, eff. Apr. 12, 2011; SL 2013, ch 54, § 2.

**10-43-37. Repealed by SL 1978, ch 83, § 4.**

**10-43-38 to 10-43-42. Repealed by SL 1977, ch 96, § 20.**

**10-43-42.1. Administration of chapter by secretary of revenue—Promulgation of rules.** The provisions of this chapter shall be administered by the secretary of revenue and the secretary may

promulgate rules, pursuant to chapter 1-26, concerning:

- (1) The procedure for filing tax returns and payment of the tax;
- (2) The type of accounting to be used;
- (3) The definition and deductibility of net federal income taxes;
- (4) The application of the tax and exemptions; and
- (5) The records to be retained by the taxpayer.

**Source:** SL 1977, ch 96, § 19; SL 1987, ch 82, § 21; SL 2003, ch 272 (Ex. Ord. 03-1), § 82; SL 2011, ch 1 (Ex. Ord. 11-1), § 161, eff. Apr. 12, 2011; SL 2016, ch 62, § 15.

**10-43-43. Repealed by SL 1977, ch 96, § 20.**

**10-43-43.1. Records kept by taxpayers—Inspection by secretary—Out-of-state records.** Each person subject to tax under this chapter shall make and keep for a period of six years after federal taxable income has been finally determined by the United States any records as required by the secretary of revenue or otherwise necessary for the administration of this chapter. The records shall, at all times during business hours of the day, be subject to inspection by the secretary to determine the amount of tax due.

If in the normal conduct of the business, the required records are maintained and kept at an office outside the State of South Dakota, it shall be a sufficient compliance with this section if the records are made available for audit and examination by the Department of Revenue at the office outside of South Dakota.

**Source:** SL 1976, ch 96, § 2; SL 2003, ch 272 (Ex. Ord. 03-1), § 82; SL 2011, ch 1 (Ex. Ord. 11-1), § 161, eff. Apr. 12, 2011; SL 2016, ch 62, § 16.

**10-43-44, 10-43-45. Repealed by SL 1977, ch 96, § 20.**

**10-43-46. False or fraudulent return or information with intent to evade legal requirements as misdemeanor—Civil penalty.** Any person, corporation, or any officer or employee of a corporation, or member or employee of any partnership, who, with intent to evade any of the requirements of this chapter or any lawful requirements of the secretary of revenue pursuant to this chapter, makes a false or fraudulent return or statement or supplies false or fraudulent information is guilty of a Class 1 misdemeanor. In addition, the person, corporation, officer, employee, or member is liable for a civil penalty of not more than five thousand dollars, to be recovered by the attorney general, in the name of the state. The civil penalty is in addition to all other penalties in this chapter.

**Source:** SDC 1939, § 57.9922; SL 1982, ch 86, § 31; SL 2003, ch 272 (Ex. Ord. 03-1), § 82; SL 2008, ch 37, § 104; SL 2011, ch 1 (Ex. Ord. 11-1), § 161, eff. Apr. 12, 2011.

**10-43-47. Repealed by SL 1977, ch 96, § 20.**

**10-43-48. Repealed by SL 1978, ch 70, § 6.**

**10-43-49. Repealed by SL 1977, ch 96, § 20.**

**10-43-50. Repealed by SL 2016, ch 63, § 4.**

**10-43-50.1. Supplementary return required for taxable income increase due to federal adjustment—Payment of additional tax and interest.** A taxpayer who has filed a return with the department for a specific tax year and subsequently has a change or correction to the taxpayer's net income, as a result of audit or adjustment by the United States, that increases the taxpayer's taxable income in this state, shall report the change or correction in writing to the secretary. The report shall be in the form of a supplementary return and shall be filed within one hundred twenty days of the final adjustment by the United States. Any additional tax due and applicable interest shall be paid at the time of filing the supplementary return. The provisions of this section apply notwithstanding the limitation period for collection of taxes provided under § 10-59-16.

**Source:** SL 2016, ch 63, § 1.

**10-43-50.2. Supplementary return for taxable income decrease due to federal adjustment—Refund for overpayment.** A taxpayer who has filed a return with the department for a specific tax year and subsequently has a change or correction to the taxpayer's net income, as a result of audit or adjustment by the United States, that decreases the taxpayer's taxable income in this state, may report the change or correction in writing to the secretary. The report shall be in the form of a supplementary return and shall be filed within one hundred twenty days of the final adjustment by the United States. Any refund for overpayment of tax, penalty, or interest shall be made pursuant to §§ 10-59-22, 10-59-22.1, 10-59-23, and 10-59-24. The provisions of this section apply notwithstanding §§ 10-59-17 and 10-59-19.

No court has jurisdiction of a suit to recover the taxes, penalties, or interest unless the taxpayer seeking the recovery of the tax complies with the provisions of this section.

**Source:** SL 2016, ch 63, § 2.

**10-43-50.3. Failure to file supplementary return—Secretary's determination of additional tax—Interest and penalties.** If a taxpayer fails to file a supplementary return as required by § 10-43-50.1, the secretary may determine the amount of additional tax due, if any, based on information available to the secretary. The secretary's determination of additional tax due, together with interest and penalty as provided in § 10-59-6, shall be made within six years after the time the supplementary return was due.

The secretary may also impose a penalty of five thousand dollars or ten percent of the additional tax due, whichever is greater, for failure to timely file a supplementary return and pay any additional tax and applicable interest as required by § 10-43-50.1. This penalty is in addition to all other penalties provided by law and shall be deposited in the state general fund.

**Source:** SL 2016, ch 63, § 3.

**10-43-51, 10-43-51.1. Repealed by SL 2016, ch 63, §§ 5, 6.**

**10-43-52, 10-43-53. Superseded.**

**10-43-54. Payments credited first to penalty and interest.** All payments received must be credited first, to the penalty and interest accrued, and then to the tax due.

**Source:** SL 1935, ch 205, § 27, subdiv 5; SDC 1939, § 57.2803 (5).

**10-43-55. Repealed by SL 2016, ch 63, § 7.**

**10-43-56 to 10-43-59. Repealed by SL 1977, ch 96, § 20.**

**10-43-60. Repealed by SL 2016, ch 63, § 8.**

**10-43-61. Repealed by SL 1977, ch 96, § 20.**

**10-43-62 to 10-43-67. Repealed by SL 2016, ch 62, §§ 17 to 22.**

**10-43-68. Repealed by SL 1977, ch 96, § 20.**

**10-43-69 to 10-43-72. Repealed by SL 2016, ch 62, §§ 23 to 26.**

**10-43-73. Tax payment as condition precedent to doing business—Injunction against continuation in business by delinquent taxpayer.** The payment of the tax levied by this chapter is, in addition to all other licenses and taxes imposed by the laws of this state, a condition precedent to the engaging or continuing to engage in a business or occupation within this state. Default in the payment of taxes as provided in this chapter constitutes cause for injunction in any court of competent jurisdiction upon application of the secretary of revenue for an order and judgment restraining and enjoining any delinquent taxpayer from engaging or continuing to engage in an occupation or business within this state.

**Source:** SDC 1939, § 57.2904; SL 2003, ch 272 (Ex. Ord. 03-1), § 82; SL 2008, ch 37, § 115; SL 2011, ch 1 (Ex. Ord. 11-1), § 161, eff. Apr. 12, 2011.

**10-43-74. Repealed by SL 1982, ch 86, § 32.**

**10-43-75. Repealed by SL 1977, ch 96, § 20.**

**10-43-75.1. Repealed by SL 2016, ch 62, § 27.**

**10-43-76. Percentage of proceeds retained by state—Payment of remainder to counties—Branch office remittances kept separate.** Upon the receipt of the funds referred to in this chapter, the secretary of revenue shall deposit ninety-five percent of the taxes paid by credit card banks and twenty-six and two-thirds percent of all other revenue to the general fund. The secretary of revenue shall remit the remainder, on or before February first of each year, to the county treasurer of the county wherein is situated the bank or financial institution remitting the tax. However, the remittance of tax from all branch banks, branch offices, or branches of other financial institutions subject to this tax shall be separated from the remittance of the parent bank or financial institution and shall be remitted to the county treasurer of the county in which the branch bank, branch office, or financial institution is located.

**Source:** SL 1957, ch 468; SDC Supp 1960, § 57.30A11; SL 1969, ch 266, § 2; SL 1979, ch 82, § 2; SL 1983, ch 80, § 2; SL 2003, ch 272 (Ex. Ord. 03-1), § 82; SL 2005, ch 67, § 5; SL 2011, ch 1 (Ex. Ord. 11-1), § 161, eff. Apr. 12, 2011; SL 2013, ch 53, § 2.

**10-43-77. Apportionment of funds among taxing subdivisions.** The county treasurer upon receipt of the funds, remitted to the county pursuant to § 10-43-76, shall apportion and distribute the funds between the taxing subdivisions in the same proportion as the real property taxes levied in each taxing subdivision in the previous year as determined and certified by the secretary of revenue.

**Source:** SL 1957, ch 468; SDC Supp 1960, § 57.30A11; SL 1978, ch 72, § 5; SL 1991, ch 99; SL 2003, ch 272 (Ex. Ord. 03-1), § 82; SL 2005, ch 68, § 1; SL 2011, ch 1 (Ex. Ord. 11-1), § 161, eff. Apr. 12, 2011; SL 2016, ch 62, § 28.

**10-43-78. Repealed by SL 2016, ch 62, § 29.**

**10-43-79 to 10-43-81. Repealed by SL 1997, ch 66, §§ 1 to 3.**

**10-43-82. Repealed by SL 2016, ch 62, § 30.**

**10-43-83 to 10-43-87. Repealed by SL 1997, ch 66, §§ 5 to 10.**

**10-43-88. Financial institution authorized to engage in trust business.** For the purpose of this section and §§ 10-43-89 and 10-43-90, financial institution means a financial institution defined in subdivision § 10-43-1(4) but is one which is authorized to engage in the trust business and has not been authorized to accept deposits by the director, comptroller of the currency, or the office of thrift supervision and is not a related corporation of a depository institution subject to the tax imposed by this chapter.

**Source:** SL 1995, ch 268, § 86; SL 1997, ch 272, § 17.

**10-43-89. Tax on financial institutions engaging in trust business.** There is hereby imposed an annual minimum tax upon the financial institutions defined in § 10-43-88. This tax is the tax otherwise computed according to chapter 10-43 or the tax provided in § 10-43-90, whichever is greater.

**Source:** SL 1995, ch 268, § 87.

**10-43-90. Determining minimum tax imposed upon financial institutions engaged in the trust business.** If a financial institution as described in § 10-43-88 has been authorized to engage in the trust business in South Dakota for fewer than twelve months, the annual minimum tax is five hundred dollars; for more than twelve months, but fewer than twenty-four months the annual minimum tax is two thousand dollars; for more than twenty-four months, but fewer than thirty-six months the annual minimum tax is five thousand dollars; for thirty-six months, but fewer than forty-eight months the annual minimum tax is ten thousand dollars; and for forty-eight months or more, the annual minimum tax is twenty-five thousand dollars.

**Source:** SL 1995, ch 268, § 88; SL 1997, ch 272, § 2.

## TITLE 21 - Judicial Remedies

**10-43-91. Tax on trustee of extended term trust.** Any corporation, limited liability company, partnership, or other business entity which serves as a trustee or co-trustee for an extended term trust, which trust has a situs for state income tax purposes in the State of South Dakota, is subject to the South Dakota income tax on banks and financial corporations as set forth in chapter 10-43 and if the trustee has not been authorized to accept deposits by the South Dakota director of banking, the comptroller of the currency, the Office of Thrift Supervision, or the Federal Deposit Insurance Corporation, the trustee is deemed to be a financial institution as described in § 10-43-88 and is subject to the minimum tax set forth in § 10-43-90.

**Source:** SL 1997, ch 272, § 4.

**10-43-92. Extended term trust defined.** As used in § 10-43-91, the term, extended term trust, means any trust which has no limitation on duration which would require the trust to cease and terminate on a date not later than twenty-one years beyond any life in being. Extended term trusts may not include any trust subject to the Employee Retirement Income Security Act of 1974, as amended and in effect on January 1, 2016.

**Source:** SL 1997, ch 272, § 3; SL 2016, ch 62, § 31.

**10-43-93. Repealed by SL 2009, ch 39, § 13.**

**10-43-94. Entities exempt from payment of tax.** The State of South Dakota, any political subdivision of the state, and any quasi-governmental organization created by an executive order of the State of South Dakota and any subsidiary of such organization; any nonprofit United States Treasury Community Development Financial Institution, Small Business Administration Certified Development Company, or Regional Revolving Loan Fund; or any commercial club, chamber of commerce, or industrial development corporation formed pursuant to § 9-12-11 or 9-27-37 is exempt from the payment of this tax.

**Source:** SL 2005, ch 257, § 7.

### CHAPTER 21-22 - ADMINISTRATION OF TRUST ESTATES

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- CHAPTER 21-24 DECLARATORY JUDGMENT**
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**21-22-1. Definition of terms.** Terms used in this chapter mean:

- (1) "Beneficiary," any person beneficially interested in the trust, as defined in subdivision 551-24(1) or who has a direct financial interest in the trust, including a creditor or claimant with any rights or claimed rights against the trust estate if the creditor or claimant demonstrates a previously asserted specific claim against the trust estate;
- (2) "Court trust," any trust which is established or confirmed by the judgment, decree, or order of any court of record of this state or any foreign jurisdiction;
- (3) "Fiduciary," a trustee, custodian, enforcer, trust advisor, trust protector, or trust committee, as named in the governing instrument or order of court, regardless of whether such person is acting in a fiduciary or nonfiduciary capacity;
- (4) "Other trust," any trust which is not a court trust;
- (5) "Supervision," the supervision of the circuit court over the administration of a trust as provided in this chapter;
- (6) "Trustee," the trustee or trustees of any trust which may be supervised under this chapter.

**Source:** Supreme Court Rule 237, 1939; SDC 1939 & Supp 1960, § 33.2601; SL 2010, ch 232, § 24; SL 2014, ch 226, § 6; SL 2015, ch 240, § 21; SL 2017, ch 204, § 23.

**21-22-2. Application of chapter and §§ 55-3-24 to 55-3-48.** This chapter applies to all trusts if any part of the trust estate has its situs within this state or if the trustee or a beneficiary resides in this state, except as otherwise specifically provided by statute or rule of court, the intent being to exclude therefrom such trusts as a statutory assignment for the benefit of creditors, probate administrations, conservatorships, and all other trusts as to which specific provision is made for court supervision. The provisions of §§ 55-3-24 to 55-3-48, inclusive, are applicable to actions or proceedings relating to trusts supervised or administered under this chapter.

**Source:** SDC 1939 & Supp 1960, § 33.2602; SL 1993, ch 213, § 98; SL 2000, ch 229, § 19; SL 2016, ch 231, § 27.

**21-22-3. Inventory and documents filed by court trustee—Contents.** Within thirty days after entering upon his or her duties, any trustee under a court trust shall, if a resident of this state or if any of the trust estate has its situs in this state, file in the office of the clerk of the circuit court of the county specified in § 21-22-5 an inventory of all the trust estate, a copy of any personal representative's instrument of distribution, a copy of any recorded personal representative's deed of distribution, a duly certified copy of any other court order or clerk's statement establishing or confirming the trust, a true and correct copy of the governing instrument and all amendments and modifications made thereto, if any, on which the trust is based, a statement showing the names, residences and post office addresses of all persons, including conservators or other trustees interested in the trust, so far as known to the trustee, and the ages of such of them as are minors. Such inventory shall show a list and description of all the trust property, an estimate by the trustee of the value of each item, the encumbrances, if any, on each item, and all claims against the trust estate with the amount of each claim and the name and post office address of the claimant. Such inventory and such statement shall be duly verified by the trustee.

**Source:** SDC 1939 & Supp 1960, § 33.2603; SL 1993, ch 213, § 99; SL 2010, ch 232, § 25; SL 2014, ch 226, § 7

**21-22-4. Appointment by nonresident trustee of agent to receive process.** With the papers required by § 21-22-3 the trustee shall also file, if not a resident of this state, an appointment of a resident of this state as his agent for the service of process and of all papers relative to the administration of such trust.

**Source:** Supreme Court Rule, Part 3, Rule 2, September, 1923; Supreme Court Rule 239, 1939; SDC 1939 & Supp 1960, § 33.2603.

**21-22-5. County in which trustee's inventory and attached papers filed.** The papers provided in §§ 21-22-3 and 21-22-4 shall be filed in the office of the clerk of the circuit court of the county where the trust estate or some part thereof has its situs, or if none of the trust estate has its situs in this state, in a county where a beneficiary resides, and if no beneficiary resides in this state, then in the county where the trustee resides.

**Source:** Supreme Court Rule, Part 3, Rule 1, September, 1923; Supreme Court Rule 239, 1939; SDC 1939 & Supp 1960, § 33.2603.

**21-22-6. Commencement of supervision by court.** Immediately upon the filing of the papers required by §§ 21-22-3 and 21-22-4, supervision by the court shall be deemed to commence.

**Source:** Supreme Court Rule 239, 1939; SDC 1939 & Supp 1960, § 33.2603.

**21-22-7. Petition, hearing and order dispensing with court supervision.** At any time after the filing of the papers required by §§ 21-22-3 and 21-22-4 a fiduciary, the trustor, or any beneficiary under such court trust, if the fiduciary, trustor, or beneficiary considers court supervision unnecessary or impractical and involving unnecessary burden and expense, may petition the court to dispense with the supervision. Upon the petition being filed, the court shall fix the time and place for hearing, unless the conditions of § 21-22-21 have been met, and cause notice thereof to be given as provided pursuant to this chapter. Upon the hearing the supervision may not be dispensed with if any fiduciary, trustor, or any beneficiary with a substantial interest in the trust objects to dispensing therewith. If there is no objection and the court is satisfied that supervision is impractical or unnecessary and would involve unnecessary burden and expense, an order may be entered dispensing with the supervision.

**Source:** Supreme Court Rule 240, 1939; SDC 1939 & Supp 1960, § 33.2604; SL 2014, ch 226, § 8; SL 2015, ch 240, § 22.

**21-22-7.1. Notice of entry of order—Requirements.** Notice of entry as required by § 15-26A-6 shall require only that notice that an order has been entered has been served. Absent a court order to the contrary, there is no requirement that the order be attached to the notice of entry.

**Source:** SL 2002, ch 100, § 7.

**21-22-8. Petition, hearing, and order resuming court supervision.** At any time during the existence of the trust, after supervision has been dispensed with pursuant to § 21-22-7, any fiduciary, trustor, or beneficiary may petition for a resumption of the supervision in which event the court shall, upon notice as provided pursuant to this chapter, conduct a hearing and the supervision shall be resumed unless good cause to the contrary is shown.

**Source:** Supreme Court Rule 240, 1939; SDC 1939 & Supp 1960, § 33.2604; SL 2014, ch 226, § 9; SL 2015, ch 240, § 23.

**21-22-9. Petition, hearing, and order for court supervision of other trust—Information.** Any fiduciary, trustor, or beneficiary of any other trust may, if the trustee is a resident of this state or if any of the trust estate has its situs in this state, at any time petition the circuit court, the county where such petition is to be filed to be determined the same as in the case of a court trust, to exercise supervision. Upon the petition being filed, the court shall fix a time and place for hearing thereon, unless notice and a hearing are waived in writing by all fiduciaries and beneficiaries, and notice shall be given as provided pursuant to this chapter, and, upon such hearing, enter an order assuming supervision unless good cause to the contrary is shown. Thereupon the trustee shall within thirty days, file the information required pursuant to § 21-22-3 by a trustee under a court trust, and, at all times thereafter, the court shall have the same powers as over a court trust. If the petition for court supervision includes the information required pursuant to § 21-22-3, the fiduciary, trustor, or beneficiary may, in the same petition, request court action as to any matter relevant to the administration of the trust, including the termination of court supervision. Upon the hearing on the petition, the court shall enter an order assuming supervision unless good cause to the contrary is shown. The court shall make such order approving the relief requested by the petition, give such directions to a fiduciary as the court shall determine, or resolve objections filed by an interested party pursuant to § 21-22-16.

**Source:** SDC 1939 & Supp 1960, § 33.2605; SL 2002, ch 100, § 8; SL 2004, ch 312, § 10; SL 2014, ch 226, § 10; SL 2015, ch 240, § 24.

**21-22-10. Fixing terms of trustee's bond—Amount and conditions—Sureties—Time of filing—New bond.** Unless the trustee is exempted by the terms of the instrument creating the trust from furnishing a bond or unless the instrument itself provides the amount and condition of such bond, the trustee shall, upon commencement of court supervision, petition the court to fix the amount and conditions of bond unless the conditions of § 21-22-21 have been met. The court shall then fix a time and place for hearing and direct notice thereof to be given as provided in this chapter. The bond shall be conditioned that the trustee will faithfully perform the trustee's trust and duly account for all money and property received, and the amount of the bond shall be fixed by the court in a sum which in the opinion of the court shall be sufficient to protect the interest of the beneficiaries. The bond shall be either with a corporate surety or with at least two personal sureties to be approved by the court who are residents and freeholders of this state and who together are worth in excess of all their liabilities and property exempt from execution, at least the amount of the bond. The trustee shall file the bond within ten days after entry of the order requiring that the bond be filed. If it appears that the proper administration of the trust requires that a new bond be given, the court may require such new bond.

**Source:** Supreme Court Rule, Part 3, Rule 9, September, 1923; Supreme Court Rule 248, 1939; SDC 1939, § 33.2612; Supreme Court Rule adopted Feb. 11, 1952; SL 2014, ch 226, § 11.

**21-22-11. Bond required despite terms of trust instrument.** When the instrument creating the trust exempts the trustee from furnishing a bond or limits the amount thereof, or the court shall determine that the bond ordered to be filed is insufficient, the court may if it concludes that a bond be necessary or that a bond of a larger amount is necessary, require the furnishing of such bond.

**Source:** Supreme Court Rule, Part 3, Rule 9, September, 1923; Supreme Court Rule 248, 1939; SDC 1939, § 33.2612; Supreme Court Rule adopted February 11, 1952.

**21-22-12. Appointment of successor on death, resignation, or removal of trustee—Temporary trustee.** In case of the death, resignation, or removal of the trustee, unless the instrument creating the trust names the successor, such successor shall be appointed by the court upon hearing and notice as provided in this chapter. In case of necessity the court may appoint a temporary trustee pending a permanent appointment.

**Source:** Supreme Court Rule, Part 3, Rule 10, September, 1923; Supreme Court Rule 249, 1939; SDC 1939 & Supp 1960, § 33.2613.

**21-22-13. Petitions relevant to trust administration—Hearing—Order.** The trustor, a fiduciary, or a beneficiary of any trust under court supervision may at any time petition the court for its action as to any matter relevant to the administration of the trust, including particularly the requiring of special reports from a fiduciary, the exercise of any discretion vested in a fiduciary, and as to any matter as to which courts of equity have heretofore exercised jurisdiction over fiduciaries. Upon the filing of the petition the court shall fix a time and place for hearing unless the conditions of § 21-22-21 have been met and cause notice to be given as required by this chapter. Upon the hearing the court shall make such order, give such directions to a fiduciary as the court shall determine, or resolve objections filed by an interested party pursuant to § 21-22-16.

**Source:** SDC 1939 & Supp 1960, § 33.2607; SL 2002, ch 100, § 9; SL 2014, ch 226, § 12; SL 2015, ch 240, § 25.

**21-22-14. Annual verified report of trustee—Optional calendar year basis.** Within one hundred twenty days after the expiration of each year from the commencement of court supervision over a trust, the trustee shall file a verified report showing in detail its receipts, disbursements, and acts during the year.

The trustee may at its election make its annual report during the first four months of any year covering its administration during the preceding year ending December thirty-first.

**Source:** Supreme Court Rule, Part 3, Rule 3, adopted September, 1923; Supreme Court Rule 242, 1939;

SDC 1939 & Supp 1960, § 33.2606; SL 2006, ch 243, § 12.

**21-22-15. Final report of trustee—Contents.** When the trust estate has been disposed of or the provisions of the instrument creating the trust have been complied with, the trustee must file his final report duly verified by him and which may by reference incorporate therein previous reports made and which, supplementing such previous reports, must contain a complete and itemized statement of all the receipts and disbursements of the trustee and all of his acts with relation to the trust.

**Source:** Supreme Court Rule, Part 3, Rule 4, September, 1923; Supreme Court Rule 244, 1939; SDC 1939 & Supp 1960, § 33.2608.

**21-22-16. Objections to report of fiduciary or beneficiary—Adjournment of hearing—Order.** If any objection is made to any report or petition filed by a fiduciary or beneficiary, the objection shall be filed in writing and be made at or prior to the hearing on the report or petition. If the initial hearing does not resolve all objections, the court shall adjourn the hearing to a specified time and place to resolve all issues of fact and all issues of law. Following the initial hearing, the court may enter any order it deems appropriate, which order may:

- (1) Resolve any issues the court deems proper if all matters included in the petition, which are not objected to at the initial hearing, are approved;
- (2) Determine the scope of discovery; and
- (3) Set a schedule for further proceedings for the prompt resolution of the matter.

**Source:** Supreme Court Rule, Part 3, Rule 7, September, 1923; Supreme Court Rule 245, 1939; SDC 1939 & Supp 1960, § 33.2609; SL 2015, ch 240, § 26.

**21-22-17. Contents of notice of hearings—Trustee's account attached.** Notice of all hearings on all reports of the trustee and on all petitions filed shall be given as provided in this chapter. The court shall fix the time and place of the hearing. Notice of the time and place of the hearing, along with the nature of the hearing, shall be given as provided in this chapter. When the hearing is on an account of the trustee a copy of the account shall be served with the notice.

**Source:** Supreme Court Rule, Part 3, Rule 7, September, 1923; Supreme Court Rule 246, 1939; SDC 1939, § 33.2610; Supreme Court Rule adopted November 4, 1941; Supreme Court Rule adopted October 14, 1957; SL 2006, ch 243, § 7.

**21-22-18. Parties served with notice—Personal, mail, or electronic service.** The notice provided by § 21-22-17 shall be served upon fiduciaries, beneficiaries, and attorneys of record, except as otherwise provided in chapter 55-18. Notice shall be served personally, by mail, postage prepaid, addressed to each person at the last known post office address as shown by the records and files in the proceeding, or electronically in accordance with § 15-6-5(d) and applicable local rules, at least fourteen days prior to the hearing unless the court for good cause shown directs a shorter period.

**Source:** SDC 1939, § 33.2610; Supreme Court Rule adopted November 4, 1941; Supreme Court Rule adopted October 14, 1957; SL 1982, ch 174, § 2; SL 1998, ch 282, § 38; SL 2014, ch 226, § 13; SL 2017, ch 208, § 27.

**21-22-19. Publication of notice in lieu of personal service.** When the number of persons to be served is large and the expense of service provided by § 21-22-18 would be burdensome, the court may, if it deems advisable, order, in lieu of service as provided in § 21-22-18, that such notice be published once each week for three successive weeks in a legal newspaper of the county prior to such hearing.

**Source:** Supreme Court Rule 246, 1939; SDC 1939, § 33.2610; Supreme Court Rule adopted November 4, 1941; Supreme Court Rule adopted October 14, 1957.

**21-22-20. Proof of service by affidavit.** Proof of the service of notices or other papers in the manner provided by this chapter shall be made by affidavit of the person making the same, such affidavit to be filed

in the office of the clerk of courts.

**Source:** Supreme Court Rule, Part 3, Rule 12, September, 1923; Supreme Court Rule 251, 1939; SDC 1939 & Supp 1960, § 33.2615.

**21-22-21. Notice dispensed with by consent of parties.** If all beneficiaries of the trust join in a petition or report, or signify in writing their approval thereof, the notice required by § 21-22-17 may be dispensed with and the hearing may be had at any time.

**Source:** Supreme Court Rule adopted November 4, 1941; Supreme Court Rule adopted October 14, 1957; SDC Supp 1960, § 33.2610.

**21-22-22. Testimony and examination of reports—Questions considered.** At all hearings the court shall take testimony in the same manner as at hearings on other proceedings and shall examine all reports and accounts filed, regardless of whether or not objections are made thereto, and shall also consider and pass upon all acts of a fiduciary, regardless of whether any question is raised with reference thereto.

**Source:** Supreme Court Rule, Part 3, Rule 8, September, 1923; Supreme Court Rule 247, 1939; SDC 1939 & Supp 1960, § 33.2611; SL 2014, ch 226, § 14.

**21-22-23. Examination of trustee's reports by court.** No order approving a report or account of the trustee in whole or in part shall be made by the court until it shall have made a detailed examination of the items and satisfied itself sufficiently to render its own judgment thereon, that the report is in all things true and complete, and the acts done have been in compliance with the trust and for the advantage and best interests thereof.

**Source:** Supreme Court Rule 247, 1939; SDC 1939 & Supp 1960, § 33.2611; SL 1981, ch 168, § 1.

**21-22-24. Referee or accountant appointed to assist in examination of reports—Report confidential.** If the report or account or other proceeding is of such length as to require assistance for the court, the court may in its discretion appoint a disinterested referee or employ an accountant or investigator at the expense of the trust to examine the same and report to the court thereon independently. Such report may be held by the court as confidential and for its own information, if the court so elects.

**Source:** Supreme Court Rule 247, 1939; SDC 1939 & Supp 1960, § 33.2611.

**21-22-25. Attendance of witnesses and production of evidence at investigations and hearings.** Upon any such examinations or hearings on reports the court, or the referee or the accountant or agent whom it may appoint, may require the attendance of witnesses and the production of documents and other evidence and make such inquiry and investigations as are necessary to pass upon the report or other act correctly.

**Source:** Supreme Court Rule 247, 1939; SDC 1939 & Supp 1960, § 33.2611.

**21-22-26. Fiduciary's liability for failure to comply—Forfeiture of compensation—Fiduciary's acts not invalidated.** Any fiduciary who fails or neglects to comply with the provisions of this chapter is subject to removal by the court and is liable to any beneficiary for all damages sustained by the beneficiary resulting from such noncompliance and shall also forfeit all right to compensation as the fiduciary during the period of such noncompliance unless it is shown, to the satisfaction of the court fixing such compensation, that such failure to comply was inadvertent and not intentional and was with reasonable excuse and that the fiduciary has performed his or her duties diligently, faithfully, and efficiently. Failure or neglect as to such compliance does not invalidate any act of the fiduciary.

**Source:** Supreme Court Rule 250, 1939; SDC 1939 & Supp 1960, § 33.2614; SL 2014, ch 226, § 15.

**21-22-27. Prior settlement and distribution decrees validated—Assertion of vested rights.** All decrees of any court of this state made prior to January 1, 2010, settling accounts of trustees or distributing in whole or in part trust estates are hereby legalized, cured, and validated, notwithstanding any defects, omissions, or irregularities in the form of the petition, account, or the notice of the application therefor or in the manner, form, or method of giving or serving such notice.

If a person has a vested right in any real or personal property by reason of a defect, omission, or

irregularity referred to in this section, and if no action or proceeding to enforce such right was commenced prior to July 1, 2011, such right shall be forever barred. No action or proceeding brought involving real property shall be of any force or effect, or maintainable in a court of this state, unless prior to July 1, 2011, there was recorded in the office of the register of deeds of the county in which the real property affected is situated, a notice of the pendency of such action, in accordance with chapter 15-10.

**Source:** SL 1983, ch 222, § 1; SL 1992, ch 307, § 6; SL 2010, ch 232, § 26.

**21-22-28. Protection of privacy—Sealing and availability of documents.** The privacy of those who have established a court trust or other trust shall be protected in any court proceeding concerning the trust. Upon the filing of any petition, the instrument on which the trust is based, briefs, and the entire court file including a trust's inventory, statement filed by any fiduciary, annual verified report of a fiduciary, final report of a fiduciary, and all petitions relevant to trust administration and all court orders thereon shall be sealed upon filing and may not be made a part of the public record of the proceeding, but are available to the court, to the trustor, to any fiduciary, to any beneficiary, to their attorneys, and to such other interested persons as the court may order upon a showing of the need.

**Source:** SL 1998, ch 282, § 30; SL 2002, ch 100, § 1; SL 2014, ch 226, § 16; SL 2016, ch 231, § 28; SL 2017, ch 204, § 24.

**21-22-29. Repealed by SL 2002, ch 100, § 2.**

**21-22-30. Court approval of trustee's accounting is conclusive—Accounting defined.** An accounting by a trustee of a court supervised trust and the final approval thereof by a court, whether or not such accounting is contested, is conclusive against all persons in any way interested in the trust, and the trustee, absent fraud, intentional misrepresentation, or material omission, shall be released and discharged from any and all liability as to all matters set forth in the accounting. For purposes of this section, the term, accounting, means any annual, interim, or final report or other statement provided by a trustee reflecting all transactions, receipts, and disbursements during the reporting period and a list of assets as of the end of the period covered by the report or statement.

**Source:** SL 2000, ch 229, § 3; SL 2017, ch 204, § 25.

**21-22-31. Rules of civil procedure applicable.** A proceeding brought pursuant to this chapter is considered an action for purposes of title 15. Unless specifically provided to the contrary in this chapter or unless inconsistent with its provisions, the rules of civil procedure, including the rules concerning vacation of orders and appellate review, apply to all trusts governed by this chapter. If a conflict between chapter 15-6 and title 55, the provisions of title 55 shall be controlling.

**Source:** SL 2015, ch 240, § 27; SL 2017, ch 204, § 26.

**21-22-32. Title 55 governs actions of trustee as party to transaction.** Notwithstanding the application of the principles of conflict of laws to the terms of a transaction involving a trust, whether a purchase of property by, or a sale of property to, a trust administered by a qualified person in South Dakota, as defined in § 55-3-41, the laws of this state as set forth in title 55 shall govern the actions of the trustee as a party thereto. South Dakota shall be considered the situs of the transaction.

**Source:** SL 2017, ch 204, § 27.

**21-24-1. Power of courts to provide declaratory relief—Form and effect of declarations.** Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

**Source:** SL 1925, ch 214, § 1; SDC 1939 & Supp 1960, § 37.0101.

**21-24-2. Person including business associations and public agencies.** The word, person, wherever used in this chapter shall be construed to mean any person, partnership, joint stock company,

unincorporated association, or society, or municipal, public or other corporation of any character whatsoever.

**Source:** SL 1925, ch 214, § 13; SDC 1939 & Supp 1960, § 37.0113.

**21-24-3. Construction and determination of validity of written instruments, legislative acts, and franchises.** Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

**Source:** SL 1925, ch 214, § 2; SDC 1939 & Supp 1960, § 37.0102.

**21-24-4. Contract construed before or after breach.** A contract may be construed either before or after there has been a breach thereof.

**Source:** SL 1925, ch 214, § 3; SDC 1939 & Supp 1960, § 37.0103.

**21-24-5. Determination of rights under trust or decedent's estate.** Any person interested as or through a personal representative, trustee, conservator, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust, or of the estate of a decedent, minor, protected person, or insolvent, may have a declaration of rights or legal relations in respect thereto:

- (1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;
- (2) To direct the personal representatives or trustees to do or abstain from doing any particular act in their fiduciary capacity;
- (3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

**Source:** SDC 1939 & Supp 1960, § 37.0104; SL 1993, ch 213, § 100.

**21-24-6. Declaratory relief powers not limited by specific enumeration.** The enumeration in §§ 21-24-3 to 21-24-5, inclusive, does not limit or restrict the exercise of the general powers conferred in § 21-24-1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

**Source:** SL 1925, ch 214, § 5; SDC 1939 & Supp 1960, § 37.0105.

**21-24-7. Parties to be joined in action for declaratory relief.** When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

**Source:** SL 1925, ch 214, § 11; SDC 1939 & Supp 1960, § 37.0111.

**21-24-8. Municipality joined in proceeding involving ordinance or franchise—Attorney general joined when constitutional question involved.** In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

**Source:** SL 1925, ch 214, § 11; SDC 1939 & Supp 1960, § 37.0111.

**21-24-9. Trial of issues of fact.** When a proceeding under this chapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

**Source:** SL 1925, ch 214, § 9; SDC 1939 & Supp 1960, § 37.0109.

**21-24-10. Judgment refused where controversy would not be terminated.** The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered,

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would not terminate the uncertainty or controversy giving rise to the proceeding.

**Source:** SL 1925, ch 214, § 6; SDC 1939 & Supp 1960, § 37.0106.

**21-24-11. Award of costs. In any proceeding under this chapter the court may make such award of costs as may seem equitable and just.**

**Source:** SL 1925, ch 214, § 10; SDC 1939 & Supp 1960, § 37.0110.

**21-24-12. Further relief after declaratory judgment—Application and order to show cause.** Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

**Source:** SL 1925, ch 214, § 8; SDC 1939 & Supp 1960, § 37.0108.

**21-24-13. Review of declaratory orders and judgments.** All orders, judgments, and decrees under this chapter may be reviewed as other orders, judgments, and decrees.

**Source:** SL 1925, ch 214, § 7; SDC 1939 & Supp 1960, § 37.0107.

**21-24-14. Chapter declared remedial—Liberal construction.** This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

**Source:** SL 1925, ch 214, § 12; SDC 1939 & Supp 1960, § 37.0112.

**21-24-15. Severability of provisions.** The several sections and provisions of this chapter except §§ 21-24-1 and 21-24-3 are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the chapter invalid or inoperative.

**Source:** SL 1925, ch 214, § 14; SDC 1939 & Supp 1960, § 37.0114.

**21-24-16. Citation of chapter.** This chapter may be cited as the Uniform Declaratory Judgments Act.

**Source:** SL 1925, ch 214, § 16; SDC 1939 & Supp 1960, § 37.0115.

### CHAPTER 29A-2 INTESTATE SUCCESSION AND WILLS

29A-2-801 Disclaimer of property interest.

29A-3-912 Private agreements among successors to decedent binding on personal representative.

29A-3-1101 Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.

29A-6-110 Payment from trust account to trustee, personal representative, heirs or beneficiary.

**29A-2-801. Disclaimer of property interest.** (a) Any person who may be entitled to receive any property or beneficial interest, vested or otherwise, under any will of or by intestate succession from a decedent, or as a surviving joint tenant of a decedent, or under the terms of an inter vivos trust or other lifetime transfer, or as the beneficiary of any life insurance policy, of any retirement plan or of any other contract, shall have the right to disclaim irrevocably the whole or any part of such property or beneficial interest.

(b) If a disclaimer of an interest receivable under a will or by intestate succession is made in writing and filed with the clerk of the court in which the estate is or was pending, (i) if of a present interest, not later than nine months after the date of death of the testator or intestate from whom such interest is receivable, then that disclaimer is retroactive to the decedent's death and the interest so disclaimed passes as if the person disclaiming had predeceased the decedent, and (ii) if of a future interest, not later than nine months after the event determining that the taker is finally ascertained and the taker's interest is indefeasibly vested, then that disclaimer is retroactive to the determining event and the disclaimed interest passes as if the person disclaiming had predeceased that event.

(c) If a disclaimer of an interest receivable by the surviving joint tenant of a decedent is made in writing and filed with the clerk of the court in which the joint tenancy or estate proceeding is pending not later than nine months after the decedent's death, then that disclaimer is retroactive to the decedent's death and the joint interest so disclaimed passes as if the surviving joint tenant had predeceased the decedent.

(d) If the disclaimer of an interest receivable as beneficiary of a life insurance policy, of a retirement plan, or of any other contract is made in writing and filed with the clerk of the court in which the estate is pending, or if no estate is pending, with the insurer, employer, or other issuer of the contract, not later than nine months after the date of death of the decedent from whom such interest is receivable, then that disclaimer is retroactive to the decedent's death and the interest so disclaimed passes in the same manner as if the person disclaiming had predeceased the decedent.

(e) If the disclaimer of an interest receivable under an inter vivos trust or lifetime transfer is made in writing and delivered to the then acting trustee of the trust or to the donor or the personal representative of the donor's estate, (i) if of a present interest, not later than nine months after the day on which the transfer creating the interest in the donee was made, then that disclaimer is retroactive to the date of the creation of the interest and the interest so disclaimed passes as if the person so disclaiming had predeceased the creation of the interest, and (ii) if of a future interest, not later than nine months after the event determining that the taker is finally ascertained and the taker's interest is indefeasibly vested, then that disclaimer is retroactive to the determining event and the disclaimed interest passes as if the person disclaiming had predeceased that event.

(f) The time for making a disclaimer shall not in any case expire until nine months after the day on which the person entitled to make the disclaimer attains the age of twenty-one.

(g) Nothing in this section shall prevent a testator from providing in a will or a settlor from providing in a trust for the making of disclaimers and for the disposition of disclaimed property in a manner different from the provisions hereof.

(h) The right and means provided in this section for the making of a disclaimer are not exclusive but are in addition to every other right and means of a person to make a disclaimer. Nothing in this section shall prevent the making of a disclaimer in any lawful manner.

(i) A disclaimer not made within the time limits prescribed by this section shall be construed as an assignment of the interest disclaimed to the persons who would be entitled to take had the disclaimer been timely made.

(j) The right and procedure provided in this section for the making of a disclaimer is available to and exercisable by a conservator, a personal representative, a trustee, or an agent acting on a person's behalf within the authority of a power of attorney. A disclaimer by a conservator shall be subject to the requirements of § 29A-5-420. A disclaimer by a personal representative shall be exercised in the best interests of the estate and only following entry of an appropriate order by the court having jurisdiction. A disclaimer by a trustee shall be exercised in the best interests of the trust estate.

(k) The right to disclaim property or an interest therein is barred by, and any attempted disclaimer shall be invalidated by:

- (1) An assignment, conveyance, encumbrance, pledge, or transfer of property or interest, or a contract therefore;
- (2) A written waiver of the right to disclaim;
- (3) An acceptance of the property or interest or benefit thereunder; or
- (4) A sale of the property or interest under judicial sale made before the disclaimer is effected.

The right to disclaim exists notwithstanding any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction. The disclaimer or the written waiver of the right to disclaim is binding on the disclaimant or person waiving and all persons claiming through or under the disclaimant or person waiving.

(l) Whenever a disclaimer affects any interest in real estate, a certified copy of the disclaimer may be recorded at anytime in the office of the register of deeds in each county wherein any such real estate is located. Failure to so record such a disclaimer does not affect the validity of the disclaimer.

**Source:** SL 1995, ch 167, § 2-801; SL 1999, ch 144, § 1; SL 2002, ch 100, § 3.

**29A-3-912. Private agreements among successors to decedent binding on personal representative.**

Subject to the right of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to the obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.

**Source:** SL 1994, ch 232, § 3-912.

**29A-3-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.**

A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any governing instrument, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest.

**Source:** SL 1994, ch 232, § 3-1101.

**29A-6-110. Payment from trust account to trustee, personal representative, heirs or beneficiary.**

Any trust account may be paid, on request, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as trustee or beneficiary. Payment may be made, on request, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees.

**Source:** SL 1987, ch 208, § 10; SL 1992, ch 88, § 11; SL 1993, ch 94, § 5; SDCL 30-23-52; SL 1995, ch 167, § 172.

# TITLE 43 - Property

## CHAPTER 43-5 RESTRAINTS ON ALIENATION ON PROPERTY

43-5-8 Rule against perpetuities not in force.

## CHAPTER 43-6 ACCUMULATIONS OF INCOME OF PROPERTY

43-6-7 Accumulation of trust income.

## CHAPTER 43-30B TRUST FOR UNLOCATED OR UNIDENTIFIED MINERAL INTEREST

### OWNERS

43-30B-1 Petition for creation of trust.

43-30B-2 Required showing.

43-30B-3 Declaration of trust in favor of unlocated or unidentified mineral owner—Appointment of trustee.

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## CHAPTER 43-5 RESTRAINTS ON ALIENATION OF PROPERTY

43-5-8 Rule against perpetuities not in force.

**43-5-8. Rule against perpetuities not in force.** The common-law rule against perpetuities is not in force in this state.

**Source:** SL 1983, ch 304, § 4.

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

**Source:** SL 2012, ch 233, § 26; SL 2013, ch 239, § 14.

**43-30B-1. Petition for creation of trust.** Any person or entity who holds an interest in a particular tract of land may petition the court in the county where the land is located to declare a trust in favor of an owner of a mineral interest in the particular tract of land if the location or identity of the owner cannot be determined.

**Source:** SL 2013, ch 223, § 1; SL 2017, ch 189, § 1.

**43-30B-2. Required showing.** If the petitioner can demonstrate that the creation of a trust is in the best interest of the owner and that the petitioner cannot, after due diligence, locate or identify the owner, the court may create a trust, as provided for in § 43-30B-1.

**Source:** SL 2013, ch 223, § 2; SL 2017, ch 189, § 2.

**43-30B-3. Declaration of trust in favor of unlocated or unidentified mineral owner—Appointment of trustee.** If the court determines the petitioner meets the burdens provided for in § 43-30B-2, the court shall declare a trust in favor of the unlocated or unidentified mineral owner, shall appoint the county treasurer or another person or entity as trustee of the trust, and shall authorize the trustee to execute and deliver a mineral lease, a ratification, a division order, or any other related document or instrument on such terms and conditions as the court may approve. The county treasurer may decline to act as the trustee and in such event the court shall appoint an alternate trustee. The court may issue other appropriate orders upon request of the petitioner or trustee.

**Source:** SL 2013, ch 223, § 3; SL 2017, ch 189, § 3.

**43-30B-4. Administration of trust. Except as otherwise provided in this chapter, the trustee shall administer the trust in compliance with title 55.** The trustee may engage agents to assist in the administration of the trust. Trustee fees, agent fees, and any other administrative costs must be reasonable and may be paid from the trust upon approval by the court. All bonuses, rental payments, royalties, and other income shall be paid to the trustee until the trust is terminated. If the county treasurer or other county official or employee is the trustee, the trustee's fee shall be paid to the general fund of the county. A county official acting as trustee shall account for, keep, and invest the funds in the same manner as other county funds. If the bonuses, rental payments, royalties, and other income paid to the trust are not sufficient to pay trustee fees, agent fees, and any other administrative costs paid by the trustee, the petitioner shall indemnify the fund for such costs and expenses.

**Source:** SL 2013, ch 223, § 4; SL 2015, ch 222, § 1; SL 2017, ch 189, § 4.

**43-30B-5. Termination of trust—Distribution of trust moneys.** A trust in favor of an unlocatable or unidentifiable mineral owner shall remain in force until an order of the court is entered, after such notice as may be required by the court, finding that an owner has appeared and been identified. The court shall fix the date upon which the owner is deemed to have owned the interest. The court shall determine the division of the remaining funds of the trust, provide for the payment of fees and expenses to dissolve and distribute the trust, and determine any other matters raised by the petitioner, owner, or trustee.

**Source:** SL 2013, ch 223, § 5; SL 2017, ch 189, § 5.

**43-30B-6. Actions not use of mineral interest under chapter 43-30A.** No act taken by or upon the permission of a trustee, petitioner, or court under this chapter shall be considered use of a mineral interest under chapter 43-30A.

**Source:** SL 2013, ch 223, § 6; SL 2017, ch 189, § 6.

**TITLE 51A - Banks and Banking**

**43-30B-7. Repealed by SL 2017, ch 189, § 7.**

**43-5-8. Rule against perpetuities not in force.** The common-law rule against perpetuities is not in force in this state.

**Source:** SL 1983, ch 304, § 4.

**CHAPTER 51A-5 TRUST BUSINESS OF BANKS**

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- 51A-5-1.1 Powers of banks engaging in trust business.
- 51A-5-1.2 "Trust business" defined.
- 51A-5-2 Bank as trustee or custodian for retirement benefit plans.
- 51A-5-3 Fiduciary authority of bank authorized by charter to exercise trust powers.
- 51A-5-4 Deposit required to do trust business—Amount and form of deposit—Disposition of income.
- 51A-5-5 Deposit available for satisfaction of claims upon liquidation, abandonment of trust powers, or resignation from fiduciary positions.
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- 51A-5-7 Foreign bank or trust company to comply with requirements to act as fiduciary in state—Violation as misdemeanor.
- 51A-5-8 Reciprocal privileges extended to foreign bank or trust company acting as fiduciary.
- 51A-5-9 Filing with Office of the Secretary of State by foreign bank or trust company acting as fiduciary—Designation as agent to receive process—Service of process.
- 51A-5-10 Establishment of place of business not permitted or prohibited by filing requirements.
- 51A-5-11 Investment powers of trust company.
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| 51A-6A-32   | Examination of fiduciary affairs of officers or employees—Examination of affiliated companies or corporations.  | 51A-6A-52   | Fiduciary capacity of successor trust company.   |
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- 51A-6A-67 Trust company receivership and liquidation captive insurance company fund.

**51A-5-1. Use of “trust” in name restricted—Exercise of trust powers restricted—Misdemeanor.** No person may assume or use the word “trust” in such person’s name in any manner which infers or suggests that the person has authority to transact such business unless the person is authorized to transact trust business pursuant to this title. A violation of this paragraph is a Class 2 misdemeanor.

No bank may exercise trust powers unless it is so authorized by its articles of incorporation and approved by the director and it has qualified by making the deposit required by § 51A-5-4. Any person who exercises trust powers in violation of this section is guilty of a Class 2 misdemeanor.

**Source:** SDC 1939, §§ 6.0504, 6.9906; SDCL § 51-7-1; SL 1969, ch 11, § 5.1; SL 1970, ch 265, § 35; SL 1975, ch 291; SL 1980, ch 24, § 86; SL 1988, ch 377, § 109; SL 1990, ch 158, § 5; SL 1990, ch 158, § 5; SDCL § 51-19-1; SL 1994, ch 364, § 1; SL 2008, ch 258, § 1.

**51A-5-1.1. Powers of banks engaging in trust business.** Banks engaging in the trust business pursuant to this chapter have all powers necessary and incidental to carrying on the trust business, including:

(1) Acting as agent, custodian, or attorney-in-fact for any person, and, in such capacity, taking and holding property on deposit for safekeeping and acting as general or special agent or attorney-in-fact in the acquisition, management, sale, assignment, transfer, encumbrance, conveyance, or other disposition of property, in the collection or disbursement of income from or principal of property and, generally in any matter incidental to any of the foregoing;

(2) Acting as registrar or transfer agent for any corporation, partnership, association, municipality, state, or public authority, and in such capacity, receiving and disbursing money, transferring, registering, and countersigning certificates of stock, bonds or other evidences of indebtedness or securities and performing any and all acts which may be incidental thereto;

(3) Acting as trustee or fiduciary under any mortgage or bond issued by a person;

(4) Acting as trustee or fiduciary under any trust established by a person;

(5) Acting as fiduciary, assignee for the benefit of creditors, receiver or trustee under or pursuant to the order or direction of any court or public official of competent jurisdiction;

(6) Acting as fiduciary, guardian, conservator, assignee, or receiver of the estate of any person and as executor of the last will and testament or administrator, fiduciary or personal representative of the estate of any deceased person when appointed by a court or public official of competent jurisdiction;

(7) Establishing and maintaining common trust funds or collective investment funds pursuant to the provisions of §§ 55-6-1 to 55-6-7, inclusive; or

(8) Acting in any fiduciary capacity and performing any act as a fiduciary which a trust company organized under chapter 51A-6 may perform.

**Source:** SL 1995, ch 268, § 85; SL 2011, ch 212, § 20.

**51A-5-1.2. “Trust business” defined.** Trust business is engaging in, or holding out to the public as willing to engage in, the business of acting as a fiduciary for hire, except that no abstractor, accountant, attorney, credit union, insurance broker, insurance company, investment advisor, real estate broker or sales agent, savings and loan association, savings bank, securities broker or dealer, real estate title insurance company or real estate escrow company shall be deemed to be engaged in a trust business with respect to fiduciary services customarily performed by them for compensation as a traditional incident to their regular business activities.

**Source:** SL 1995, ch 268, § 85A.

**51A-5-2. Bank as trustee or custodian for retirement benefit plans.** Pursuant to rules of the commission and the terms of Public Law 93-406, the Employees Retirement Income Security Act of 1974 and the Self-employed Individuals Tax Retirement Act of 1962, a bank may act as trustee or custodian for individual retirement accounts, HR 10 Keogh accounts or both such accounts, or any other pension, profit-sharing, money purchase, or other retirement benefit plan.

**Source:** SDCL, § 51-19-1 as added by SL 1975, ch 291; SL 1981, ch 346, § 40; SL 1988, ch 377, § 110; SDCL, § 51-19-1.1.

**51A-5-3. Fiduciary authority of bank authorized by charter to exercise trust powers.** A bank authorized to exercise trust powers may act as fiduciary in any capacity, including, but without limitation, registrar or transfer agent, fiscal agent or attorney in fact, and as having the power to receive and apply sinking funds.

**Source:** SL 1911, ch 255, § 17; RC 1919, § 9047; SDC 1939, § 6.0501 (1) to (4), (6); SDCL, §§ 51-7-4 to 51-7-8; SL 1969, ch 11, § 5.2; SL 1988, ch 377, § 111; SDCL, § 51-19-2.

**51A-5-4. Deposit required to do trust business—Amount and form of deposit—Disposition of income.** Any bank empowered by its articles of incorporation to do trust business, shall, before transacting any such business, deposit and keep on deposit with the division evidences of indebtedness acceptable to the director which are payable to bearer or recorded in the name of the division and which constitute readily marketable legal investments for funds held by a bank as fiduciary in the amount of one hundred thousand dollars. Such deposit shall be for the security of the trust creditors of such bank or trust company, and shall be in bonds or notes and mortgages on real property within this state worth double the amount secured thereby, or insured by the federal housing administration, or bonds of the United States, or any state of the United States that has not defaulted on its principal or interest within ten years, or any organized county or township or first or second class municipality or school district in this state or some other state, and upon which there has been no default in payment of interest or principal. Income from such securities shall belong to and be paid the bank or trust company as long as it continues to conduct its business in the ordinary course and so long as authorized by the director.

**Source:** SDC 1939, § 6.0502; SDCL § 51-7-2; SL 1969, ch 11, § 5.3; SL 1970, ch 265, § 36; SL 1988, ch 377, § 112; SDCL § 51-19-3; SL 1992, ch 60, § 2; SL 1994, ch 364, § 2; SL 2010, ch 232, § 23.

**51A-5-5. Deposit available for satisfaction of claims upon liquidation, abandonment of trust powers, or resignation from fiduciary positions.** Upon liquidation, abandonment of trust powers, or resignation from all fiduciary positions, the deposit shall be made available for the reasonable satisfaction of claims involving fiduciary accounts. Any surplus remaining after the satisfaction of all such claims shall be returned to the bank or trust company.

**Source:** SL 1969, ch 11, § 5.3; SDCL, § 51-19-4; SL 1995, ch 268, § 66.

**51A-5-6. National banks' authority to engage in trust business—Examination of trust business—Acceptance of federal examination.** It is lawful for any national bank to engage in trust business in this state to the extent authorized by the laws of the United States, without incorporating or organizing under the laws of this state, but a national bank shall otherwise comply with and be subject to all laws of this state which are applicable to state banks engaged in trust business including such examinations as may be deemed necessary, except that the authority of the commission and the director shall apply to their trust business only. The director may accept in lieu of an examination conducted under the director's direction, any report of examination conducted by the appropriate federal regulatory agency.

**Source:** SL 1915, ch 105; RC 1919, § 8985; SL 1929, ch 76; SDC 1939, § 6.0503; SDCL, § 51-7-3; SL 1969, ch 11, § 5.4; SL 1970, ch 265, § 37; SL 1988, ch 377, § 113; SDCL, § 51-19-5; SL 2004, ch 289, § 10.

**51A-5-7. Foreign bank or trust company to comply with requirements to act as fiduciary in state—Violation as misdemeanor.** No bank or trust company organized and doing business under the laws of any state or territory of the United States of America, or of the District of Columbia, other than South Dakota, or a national bank doing business in any other state, territory, or district, may act in a fiduciary capacity in this state, except pursuant to the provisions of §§ 51A-5-8 to 51A-5-10, inclusive. A violation of this section is a Class 2 misdemeanor.

**Source:** SL 1973, ch 292, § 4; SL 1990, ch 158, § 28; SDCL, § 51-19-5.1; SL 1995, ch 268, § 67; SL 1997, ch 272, § 5.

**51A-5-8. Reciprocal privileges extended to foreign bank or trust company acting as fiduciary.** A

bank or trust company organized and doing trust business under the laws of any state or territory of the United States of America, including the District of Columbia, other than South Dakota, and a national bank, duly authorized so to act, may be appointed and may serve in this state as trustee, whether of a corporation or personal trust, personal representative, guardian, conservator, or committee for an incompetent person, or in any other fiduciary capacity, whether the appointment is by will, deed, court order, or decree, or otherwise, when and to the extent that the state, territory, or district in which the bank or trust company is organized or has its principal place of business grants authority to serve in like fiduciary capacities to a bank or trust company organized and doing business under the laws of this state.

**Source:** SL 1973, ch 292, § 1; SL 1988, ch 377, § 114; SDCL § 51-19-5.2; SL 1995, ch 268, § 68; SL 1997, ch 272, § 6.

**51A-5-9. Filing with Office of the Secretary of State by foreign bank or trust company acting as fiduciary—Designation as agent to receive process—Service of process.** Before qualifying or serving in this state in any fiduciary capacity, as defined in § 51A-5-8, the bank or trust company shall file in the Office of the Secretary of State of South Dakota, a copy of its charter certified by its secretary under its corporate seal, and a power of attorney designating the secretary of state or the secretary of state's successor in office as the person upon whom all notices and processes issued by any court of this state may be served in any action or proceeding relating to any trust, estate, or matter within this state in respect of which the bank or trust company is acting in any fiduciary capacity with like effect as personal service on the bank or trust company. The power of attorney is irrevocable so long as any liability remains outstanding against the bank or trust company in this state. Service of process under this section may be made in the manner provided in § 47-1A-1510.

**Source:** SL 1973, ch 292, § 2; SDCL, § 51-19-5.3; SL 1995, ch 268, § 69; SL 1997, ch 272, § 7; SL 2005, ch 202, § 22.

**51A-5-10. Establishment of place of business not permitted or prohibited by filing requirements.** The provisions of §§ 51A-5-7 to 51A-5-9, inclusive, may not be construed to prohibit, permit, or affect in any other way, the right of a bank or trust company, organized and doing business under the laws of any other state, territory, or district than South Dakota, including a national bank doing business in any other state, to establish in this state a place of business, branch office, or agency for the conduct of business as a fiduciary.

**Source:** SL 1973, ch 292, § 3; SDCL, § 51-19-5.4; SL 1995, ch 268, § 70; SL 1997, ch 272, § 8.

**51A-5-11. Investment powers of trust company.** A bank exercising trust powers shall have the same investment powers as an individual fiduciary under like circumstances.

**Source:** SL 1969, ch 11, § 5.5; SL 1970, ch 265, § 38; SDCL, § 51-19-6.

**51A-5-12. Voting of bank shares by cotrustee.** Shares of its own stock held by a bank and one or more persons as trustees may be voted on by such other person or persons, as trustees, in the same manner as if he or they were the sole trustee.

**Source:** SL 1970, ch 265, § 39; SDCL, § 51-19-6.1.

**51A-5-13. Segregation of assets held by bank as fiduciary.** A bank holding any asset as fiduciary, shall:

- (1) Segregate all such assets from any other assets of the bank and from the assets of other trusts, except as may be expressly provided otherwise by law or by the writing creating the trust.
- (2) Record such assets in a separate set of books maintained for fiduciary activities.

**Source:** SL 1969, ch 11, § 5.6; SL 1975, ch 292, §§ 1, 2; SDCL, § 51-19-7.

**51A-5-14. Deposit of federally guaranteed securities with federal reserve bank.** Any bank or trust company, when holding securities as custodian for a fiduciary may deposit, or arrange for the deposit, with the federal reserve bank in its district of any securities the principal and interest of which the United States

or any department, agency, or instrumentality of the United States has agreed to pay, or has guaranteed payment, to be credited to one or more accounts on the books of the federal reserve bank in the name of the bank or trust company. Any account used for this purpose shall be designated as a fiduciary or safekeeping account, and other similar securities may be credited. A bank or trust company depositing securities with a federal reserve bank is subject to such rules and regulations with respect to the making and maintenance of such deposit, as, in the case of state chartered institutions, the commission, and, in the case of national banking associations, the comptroller of the currency, may from time to time issue.

**Source:** SDCL, § 51-19-7 as added by SL 1975, ch 292, § 1; SL 1988, ch 377, § 115; SDCL, § 51-19-7.1; SL 1995, ch 268, § 71; SL 1997, ch 272, § 9.

**51A-5-15. Records of depositor to show ownership of securities—Transfers by book entries.** The records of the bank or trust company shall at all times show the ownership of the securities held in such account. Ownership of, and other interests in, the securities credited to such account may be transferred by entries on the books of said federal reserve bank without physical delivery of any securities.

**Source:** SDCL, § 51-19-7 as added by SL 1975, ch 292, § 1; SDCL, § 51-19-7.2; SL 1995, ch 268, § 72; SL 1997, ch 272, § 10.

**51A-5-16. Duty of custodian to certify deposited securities to fiduciary—Duty of fiduciary.** A bank or trust company acting as custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by the bank or trust company with the federal reserve bank for the account of the fiduciary. A fiduciary shall, on demand by any party to which it must account or on demand by the attorney for the party, certify in writing to the party the securities deposited by the fiduciary with the federal reserve bank for its account as the fiduciary.

**Source:** SDCL, § 51-19-7 as added by SL 1975, ch 292, § 1; SDCL, § 51-19-7.3; SL 1995, ch 268, § 73; SL 1997, ch 272, § 11.

**51A-5-17. Application of provisions to fiduciaries and custodians whenever appointed.** Sections 51A-5-14 to 51A-5-16, inclusive, shall apply to all fiduciaries, and custodians for fiduciaries, acting as of July 1, 1975, or who thereafter may act regardless of the date of the instrument or court order by which they are appointed.

**Source:** SDCL, § 51-19-7 as added by SL 1975, ch 292, § 2; SDCL, § 51-19-7.4.

**51A-5-18. Repealed by SL 2011, ch 212, § 19.**

**51A-5-19. Oath or bond not required of bank to qualify as fiduciary.** No oath or bond shall be required of a bank to qualify upon appointment as a fiduciary unless the instrument creating a fiduciary position expressly provides otherwise.

**Source:** SL 1969, ch 11, § 5.8; SDCL, § 51-19-9.

**51A-5-20. Nominees used by bank acting as fiduciary or cofiduciary.** Any bank, when acting as a fiduciary or a cofiduciary with others, or as an agent for other fiduciaries, may, with the consent of its cofiduciary or cofiduciaries, if any, who are hereby authorized to give such consent, or the fiduciaries for whom it is acting, cause any investment held in any such capacity to be registered and held in the name of a nominee or nominees of such bank. Such bank shall be liable for the acts of any such nominee with respect to any investment so registered. The records of such bank shall at all times show the trust for which any such investment is held and the securities shall be in the possession and control of such bank and be kept separate and apart from the assets of such bank.

**Source:** SL 1969, ch 11, § 5.9; SDCL, § 51-19-10.

**51A-5-21. Deposit in clearing corporation of securities held as fiduciary or custodian.** Any fiduciary holding securities in its fiduciary capacity, any bank or trust company holding securities as a custodian or managing agent, and any bank or trust company holding securities as custodian for a fiduciary is authorized to deposit or arrange for the deposit of the securities in a clearing corporation as defined in subdivision 57A-8-102(5).

**Source:** SL 1978, ch 357, § 1; SDCL § 51-19-10.1; SL 1995, ch 268, § 74; SL 1997, ch 272, § 12; SL 2015, ch 239, § 5.

**51A-5-22. Ownership of stock in clearing corporation not required for deposit of securities by fiduciary or custodian.** Sections 51A-5-21 to 51A-5-24, inclusive, shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank or trust company holding securities as a custodian, managing agent or custodian for a fiduciary, regardless of the date of the agreement, instrument, or court order by which it is appointed and regardless of whether or not such fiduciary, custodian, managing agent, or custodian for a fiduciary owns capital stock of such clearing corporation.

**Source:** SL 1978, ch 357, § 4; SDCL, § 51-19-10.2.

**51A-5-23. Holding in bulk of securities deposited in clearing corporation—Merger of certificates.** Securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination.

**Source:** SL 1978, ch 357, § 2; SDCL, § 51-19-10.3.

**51A-5-24. Records of securities deposited in clearing corporation—Transfer by book entry—Certification to interested party of securities held.** The records of the fiduciary and the records of the bank or trust company acting as custodian, as managing agent or as custodian for a fiduciary shall at all times show the name of the party for whose account the securities are so deposited. Title to the securities may be transferred by bookkeeping entry on the books of the clearing corporation without physical delivery of certificates representing the securities. A bank or trust company so depositing securities pursuant to § 51A-5-23 is subject to the rules as, in the case of state chartered institutions, the commission and, in the case of national banking associations, the comptroller of the currency may from time to time issue. A bank or trust company acting as custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by the bank or trust company in the clearing corporation for the account of the fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of the fiduciary's account or on demand by the attorney for the party, certify in writing to the party the securities deposited by the fiduciary in the clearing corporation for its account as the fiduciary.

**Source:** SL 1978, ch 357, § 3; SL 1988, ch 377, § 116; SDCL, 51-19-10.4; SL 1995, ch 268, § 75; SL 1997, ch 272, § 13.

**51A-5-25. Approval or ratification of acceptance or relinquishment of fiduciary accounts by board of directors or committee.** No bank shall accept or voluntarily relinquish a fiduciary account without the approval or ratification of the board of directors, or a committee of officers or directors designated by the board for that purpose, but the board or the committee may prescribe general rules governing acceptance or relinquishment of fiduciary accounts, and action taken by an officer in accordance with these rules is sufficient approval.

**Source:** SL 1969, ch 11, § 5.10; SDCL, § 51-19-11.

**51A-5-26. Supervision of investment of fiduciary funds by committee designated by board of directors.** The board of directors shall designate one or more committees of not less than three qualified officers or directors to supervise the investment of fiduciary funds. No investment shall be made, retained, or disposed of without the approval of a committee. At least once each calendar year a committee shall review all assets of each fiduciary account and shall determine their current value, safety, and suitability and whether the investments should be modified or retained.

**Source:** SL 1969, ch 11, § 5.10; SDCL, § 51-19-12.

**51A-5-27. Reports of committees designated to supervise fiduciary accounts.** The committees provided for in §§ 51A-5-25 and 51A-5-26 shall keep minutes of their meetings, and shall fully report to the board of directors at least once in each calendar quarter all action taken since their previous report.

**Source:** SL 1969, ch 11, § 5.10; SDCL, § 51-19-13.

**51A-5-28. Trust service office defined.** Trust service office means a state or national bank or trust company offering trust services to the public under the auspices of another state or national bank or trust company which is the vendor of the trust service and which vendor has complied with the trust provisions of this title.

**Source:** SDCL, § 51-15-1(14); SL 1988, ch 377, § 1; SDCL, § 51-19-13.1; SL 1995, ch 268, § 76; SL 1997, ch 272, § 14.

**51A-5-29. Trust service office—Approvals for establishment.** Any state bank or trust company exercising trust powers may, with the approval of the director, or the comptroller of the currency, in the case of a national bank or trust company, establish and maintain a trust service office at any office in this state of a state or national bank, if the establishment thereof has been approved by the board of directors of the state or national bank at a meeting called for that purpose, and by the director or comptroller.

**Source:** SL 1984, ch 314, § 2; SL 1988, ch 377, § 117; SDCL, § 51-19-14; SL 1995, ch 268, § 77; SL 1997, ch 272, § 15.

**51A-5-30. Trust service office—Business allowed.** Upon establishment of a trust service office, the bank or trust company may conduct at the trust service office any trust business and business incidental thereto which it is permitted to conduct at its principal office, but may not accept deposits except as incidental to the trust business.

**Source:** SL 1984, ch 314, § 3; SDCL, § 51-19-15; SL 1995, ch 268, § 78; SL 1997, ch 272, § 16.

**51A-5-31. Trust service office—Agreement between institutions—Filing—Notice—Contents—Substitution as fiduciary.** If the state or national bank at which a trust service office is to be established has previously exercised trust powers, the bank and the institution establishing the trust service office shall enter into an agreement respecting those fiduciary powers to which the trust service office shall succeed and shall file the agreement with the director. The trust service office shall cause a notice of the filing, in a form prescribed by the director, to be published as the director may determine. After filing and publication, the state or national bank establishing the trust service office shall, as of the date the office first opens for business, without further authorization of any kind, succeed to and be substituted for that institution as to all fiduciary powers, rights, duties, privileges, and liabilities of the bank in its capacity as fiduciary for all estates, trusts, guardianships, conservatorships, and other fiduciary relationships of which the bank is then serving as fiduciary, except as may be otherwise specified in the agreement between the trust service office and the state or national bank. The trust service office shall also be deemed named as fiduciary in all writings, including wills, trusts, court orders, and similar documents and instruments naming the state or national bank as fiduciary, signed before the date the trust service office first opened for business, unless expressly negated by the writing or otherwise specified in the agreement between the trust service office and the state or national bank establishing the same. On the effective date of the substitution, the state or national bank shall be released and absolved from all future fiduciary duties and obligations under such writings and shall discontinue its exercise of trust powers on all matters not specifically retained by the agreement. Nothing in this section discharges other applicable statutes, nor does it absolve a state or national bank exercising trust powers from liabilities arising out of any breach of fiduciary duty or obligation occurring prior to the date the trust service office first opens for business at the bank. Nothing in this section affects the authority, duties, or obligations of a bank with respect to relationships which may be established without trust powers, including escrow arrangements, whether the relationships arise before or after the establishment of the trust service office.

**Source:** SL 1984, ch 314, § 4; SL 1988, ch 377, § 118; SDCL, § 51-19-16; SL 1993, ch 213, § 249.

**51A-5-32. Trust service office—Persons to whom notice required—Denial of substitution.** Not less than sixty days prior to the effective date of a proposed substitution, the parties shall send written notice thereof to each cofiduciary, each surviving settlor of a trust, each ward under guardianship or conservatorship, each person who alone or in conjunction with others has the power to remove the fiduciary being substituted and each adult beneficiary currently receiving or entitled to receive a distribution of principal or income from a trust or estate with respect to which such substitution is to be effected. Such substitution may be denied without cause upon petition by the cofiduciary, by a beneficiary of a trust or

estate, by the settlor of a trust or on behalf of a ward under guardianship or conservatorship if the trust company bank files a written consent to its removal or a written declination to act, or if the court having jurisdiction over the fiduciary relations, upon notice and hearing, approves the petition as in the best interests of the petitioner and all other parties interested therein.

**Source:** SL 1984, ch 314, § 5; SDCL, § 51-19-17; SL 1993, ch 213, § 250.

**51A-6-1. Definition of terms.** Terms used in this chapter, unless the context otherwise requires, shall mean:

(1) “Main office,” with respect to a trust company or an affiliated bank, the place designated in the articles of incorporation or articles of association of such trust company or affiliated bank which is its principal place of business;

(2) “Trust company,” any corporation which is incorporated under the laws of this state, and any national bank which has its main office in this state, and which has as its sole purpose the conduct of trust business;

(3) “Trust office,” with respect to a trust company, an office, including the main office, of such trust company maintained for the purpose of conducting its business.

**Source:** SL 1976, ch 304, § 1 (1), (4), (5); SDCL, § 51-19A-1.

**51A-6-2. Organization of trust company by bank.** A trust company may be organized by any of the following:

(1) A bank having its main office in this state, provided that such bank shall hold at least fifty percent of the outstanding voting stock of such trust company;

(2) A bank holding company as defined in the United States Bank Holding Company Act of 1956, provided that such bank holding company shall hold at least fifty percent of the outstanding voting stock of such trust company.

A trust company may be incorporated under the laws of this state or under the laws of the United States. The name of a trust company may include the word, trust. To the extent not inconsistent with the provisions of this chapter, any trust company incorporated under the laws of this state shall be subject to the laws of this state generally applicable to state banks engaged in the trust company business. A trust company formed under the laws of the United States shall, to the extent provided by the laws of the United States, be subject to the laws of this state applicable to trust companies incorporated under the laws of this state.

**Source:** SL 1976, ch 304, § 2 (1); SDCL, § 51-19A-2; SL 1994, ch 364, § 3.

**51A-6-3. Repealed by SL 1994, ch 364, § 4.**

**51A-6-4. Contents of articles.** The articles of a trust company shall state:

(1) That the corporation or limited liability company is formed for the purpose of engaging in the business of a trust company;

(2) The period for which such trust company is organized, not exceeding twenty years.

**Source:** SL 1976, ch 304, §§ 2, 4; SDCL, § 51-19A-4; SL 1994, ch 364, § 5; SL 1995, ch 268, § 78A.

**51A-6-5. Name of trust company.** The name of such trust company shall be different from the name of any other bank or trust company having its principal office in this state.

**Source:** SL 1976, ch 304, §§ 2, 4; SDCL, § 51-19A-5; SL 1994, ch 364, § 6.

**51A-6-6. Corporation laws applied.** All provisions of law applicable to corporations and limited liability

companies generally shall be applicable to trust companies, except where inconsistent with this chapter and the provisions of this title, in which case this chapter and the provisions of this title shall govern.

**Source:** SL 1976, ch 304, § 3; SDCL, § 51-19A-6; SL 1995, ch 268, § 78B.

**51A-6-7. Repealed by SL 1994, ch 364, § 7.**

**51A-6-8 to 51A-6-11. Repealed by SL 1995, ch 268, §§ 80 to 83.**

**51A-6-12. Permissible business of trust company.** The only permissible business of a trust company is to engage in trust company business and such business as is incidental thereto.

**Source:** SL 1976, ch 304, § 6; SDCL, § 51-19A-12; SL 1995, ch 268, § 79.

**51A-6-13. Repealed by SL 1995, ch 268, § 84.**

**51A-6-14. Fiduciary capacity defined.** As used in this chapter, unless the context otherwise requires, “fiduciary capacity” means a capacity resulting from a bank undertaking to act alone or jointly with others primarily for the benefit of another in all matters connected with its undertaking and includes the capacities of trustee, including trustee of a common trust fund, personal representative, registrar, or transfer agent with respect to stocks, bonds, or other evidences of indebtedness of any corporation, association, municipality, state or public authority, conservator, receiver, escrow agent, agent for the investment of money, attorney-in-fact, and any other similar capacity.

**Source:** SL 1976, ch 304, § 1 (3); SDCL, § 51-19A-14; SL 1995, ch 167, § 187.

**51A-6-15. Application for substitution for affiliated bank in fiduciary capacity—Joinder by banks—Ex parte.** Upon any trust company’s being duly authorized to commence the business for which it is organized, such trust company may file an application in the circuit court in which its main office is located requesting that it be substituted, except as may be expressly excluded in such application, in every fiduciary capacity for any affiliated bank specified in the application, and such specified affiliated bank shall join in such application. Such application may be made ex parte and need not list the fiduciary capacities in which substitution is made.

**Source:** SL 1976, ch 304, § 9; SL 1988, ch 377, § 122; SDCL, § 51-19A-15.

**51A-6-16. Court order substituting trust company for affiliated bank—Filing of copies.** Upon finding that the trust company has been duly authorized to commence the business for which it is organized in this state, or by the comptroller of the currency if the trust company is affiliated with a national bank, and that it has made the deposit required by § 51A-5-4, the circuit court shall enter an order substituting the trust company in every fiduciary capacity for a specified affiliated bank, except as may be otherwise specified in the application. Upon entry of the order, the trust company shall, without further act, be substituted in every such fiduciary capacity, and the substitution may be evidenced by filing a copy of the order with the register of deeds in any county of this state.

**Source:** SL 1976, ch 304, § 9; SL 1984, ch 315; SL 1988, ch 377, § 123; SDCL § 51-19A-16; SL 2008, ch 258, § 2.

**51A-6-17. Fiduciary designation of bank as designation of substituted trust company—Exception.** Each designation in a will or other instrument heretofore or hereafter executed of a bank as fiduciary shall be deemed a designation of the trust company substituted for such bank pursuant to this chapter except if such will or other instrument is executed after such substitution and expressly negates the application of this section. Any grant in any such will or other instrument of any discretionary power shall be deemed conferred upon the trust company deemed designated as the fiduciary pursuant to this chapter.

**Source:** SL 1976, ch 304, § 10; SDCL, § 51-19A-17.

**51A-6-18. Delivery of fiduciary assets by bank to trust company.** Upon substitution pursuant to this chapter, the bank shall deliver to the trust company all assets held by the bank as fiduciary, except assets

held for accounts with respect to which there has been no substitution pursuant to this chapter, and upon such substitution all such assets shall become the property of the trust company, to be held by it as fiduciary, without the necessity of any instrument of transfer or conveyance.

**Source:** SL 1976, ch 304, § 11; SDCL, § 51-19A-18.

**51A-6-19. Joint accounting for period when substitution made.** A bank shall account jointly with the trust company which has been substituted as fiduciary for such bank pursuant to this chapter for the accounting period during which the trust company is initially so substituted.

**Source:** SL 1976, ch 304, § 11; SDCL, § 51-19A-19.

**51A-6-20. Merger or consolidation of trust company with national banking association—Notice to director—Vote and resolution of stockholders—Filing of certificate.** Any trust company, after giving the director prior written notice, may, upon a vote of the holders of at least two-thirds of its capital stock, merge or consolidate with a national banking association, as provided by federal law, by causing a certificate to be filed with the division setting forth the resolution of the stockholders of the trust company and that the resolution has been duly adopted by the holders of at least two-thirds of the capital stock of the company.

**Source:** SL 1986, ch 401, § 1; SL 1988, ch 377, § 124; SDCL, § 51-19A-20.

**51A-6-21. Effect of merger or consolidation—Rights and obligations of resulting national bank and trust company—Termination and surrender of charter of merging or consolidating trust company.** If a trust company has merged or consolidated with a national bank, the resulting national bank and trust company shall be considered the same business and corporate entity as the former bank and trust company and as a continuation thereof, and the ownership and title to all properties and assets and the obligations and liabilities of the merging or consolidating trust company shall automatically pass to and become the properties and assets and the obligations and liabilities of the resulting national bank and trust company and shall be deemed to be transferred to and vested in the resulting national bank and trust company without any deed or other transfer. Such resulting national bank and trust company, by virtue of such consolidation or merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises and interests, including appointments, designations, and nominations and all other rights and interests as trustee, personal representative, registrar of stocks and bonds, conservator, assignee, receiver and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such merging or consolidating trust company at the time of such merger or consolidation. Upon the merger or consolidation, the charter of the merging or consolidating trust company shall automatically terminate and shall be surrendered to the division.

**Source:** SL 1986, ch 401, § 2; SDCL § 51-19A-21; SL 1993, ch 213, § 251.

**51A-6-22. Rights of dissenting stockholder—Receipt of cash value of shares—Appraisal.** The owner of shares of a trust company which were voted against a merger or consolidation with a national bank shall be entitled to receive, from the assets of such trust company, the value of such stock in cash, when the merger or consolidation becomes effective, upon written demand made to the resulting national bank and trust company at any time within thirty days after the effective date of the merger or consolidation, accompanied by the surrender of the stock certificates. The value of such shares shall be determined, as of the date of the shareholders’ meeting approving the merger or consolidation, by three appraisers, one to be selected by the owners of the shares voting against the merger or consolidation, one by the board of directors of the resulting national bank and trust company, and the third by the two so chosen. If the appraisal is not completed within sixty days after the merger or consolidation becomes effective, the division shall cause an appraisal to be made and such appraisal shall then govern. The expenses of appraisal shall be paid by the resulting national bank and trust company.

**Source:** SL 1986, ch 401, § 3; SDCL, § 51-19A-22.

**51A-6-23. Transferred to § 51A-6A-67.**

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

- (1) "Articles," in the case of a corporation, articles of incorporation; in the case of a limited liability company, articles of organization;
- (2) "Board member," in the case of a corporation, a director; in the case of a limited liability company, a member of the board of managers if manager-managed or board of members if member-managed;
- (3) "Client," an individual, corporation, association, or other legal entity receiving or benefitting from fiduciary services provided by a trust company or bank;
- (4) "Commission," the State Banking Commission;
- (5) "Control," the power, directly or indirectly, to direct the management or policies of a trust company or to vote twenty-five percent or more of any class of voting shares of a trust company;
- (6) "Director," the director of the Division of Banking;
- (7) "Fiduciary for hire," acting as an administrator, conservator, custodian, executor, guardian, personal representative, or trustee, for any person, trust, or estate for compensation or gain or in anticipation of compensation or gain;
- (8) "Financial institution," any bank, national banking association, savings and loan association, or savings bank which has its principal place of business in this state but which does not have trust powers, or which has trust powers, but does not exercise those trust powers;
- (9) "Governing board," in the case of a corporation, the board of directors; in the case of a limited liability company, the board of managers if manager-managed or board of members if member-managed;
- (10) "Out-of-state trust institution," a nondepository corporation, limited liability company, or other similar entity chartered or licensed by the banking regulatory agency of a state, territory, or district, other than South Dakota, to engage in the trust company business in that state, territory, or district under the primary supervision of such regulator;
- (11) "Owner," in the case of a corporation, a common stockholder; in the case of a limited liability company, a person who owns ownership units;
- (12) "Person," an individual or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, or any other form of an entity;
- (12A) "Public trust company," a trust company that engages in trust company business with the general public by advertising, solicitation, or other means, or a trust company that engages in trust company business but does not fall within the definition of a private trust company established by the commission through rules promulgated pursuant to chapter 1-26. The commission shall consider the size, number of clients served and the family and other relationships among the clients served, complexity, and related safety and soundness issues as it establishes in rule a definition for the term private trust company;
- (13) "Trust company," a nondepository trust company incorporated or organized under the laws of this state engaged in the trust company business;
- (14) "Trust company business," engaging in, or representing or offering to engage in, the business of acting as a fiduciary for hire, except that no accountant, attorney, credit union, insurance broker, insurance company, investment advisor, real estate broker or sales agent, savings and loan association, savings bank, securities broker or dealer, real estate title insurance company, or real estate escrow company may be deemed to be engaged in a trust company business with respect to fiduciary services customarily performed by them for compensation as a traditional incident to their regular business activities. Trust company business as defined in this chapter does not constitute banking as defined in subdivision 51A-1-2(4);
- (15) "Trust service office," any office, agency, or other place of business at which the powers granted to trust companies are exercised either by a trust company other than the place of business specified in a trust company's certificate of authority or within this state by an out-of-state trust institution.

**Source:** SL 1995, ch 268, § 1; SL 2005, ch 260, §§ 12, 13; SL 2010, ch 232, §§ 16, 17; SL 2013, ch 239, § 7; SL 2015, ch 240, § 1; SL 2016, ch 231, § 1; SL 2017, ch 204, § 1.

**51A-6A-2. Confidential information.** For the purposes of this chapter, confidential information includes the names of stockholders or owners, names and addresses of the members of a private trust company's governing board, ownership information, capital contributions, addresses, business affiliations, state and commission findings through any examination or inquiry of any kind, and any information required to be reported or filed with the director or the commission, and any information or agreement relating to any merger, consolidation, or transfer.

**Source:** SL 1995, ch 268, § 1A; SL 2015, ch 240, § 2; SL 2016, ch 231, § 2.

**51A-6A-3. "Community" defined.** For the purposes of this chapter, community shall be broadly construed and shall include geographic or market based parameters, or both.

**Source:** SL 1995, ch 268, § 1B.

**51A-6A-4. Application for incorporation—Approval procedure—Emergency procedure.** No trust company may be incorporated or organized under the laws of this state or transact trust company business in this state until the application for its incorporation or organization and application or authority to do business and the location of its principal office have been submitted to and approved under the same procedure for bank applications as provided in § 51A-2-16, except that conditions for considering an application involving a trust company shall be as set forth in § 51A-6A-5. The director shall prescribe the form for making an application and any application submitted shall contain such information as required. The applicant may, with approval of the director, designate confidential information. Any costs associated with the public notice required in § 51A-2-16 shall be paid by the applicant, in addition to the application fee required in § 51A-6A-6.

If upon the dissolution or insolvency of any trust company, it is the opinion of the director that by reason of the loss of services in the community, an emergency exists which may result in serious inconvenience or losses to customers or it is in the public interest of the community, the director may accept and approve an application for incorporation or organization and an application for authority to do business without prior notice. Upon approval of an application by the director for authority to do business of a successor trust company, the director may call a special meeting of the commission and submit the application to the commission for its review and confirmation.

**Source:** SL 1995, ch 268, § 2; SL 2006, ch 243, § 3; SL 2008, ch 258, § 3; SL 2017, ch 204, § 2.

**51A-6A-5. Considerations in ruling on application-Proceedings on application.** In ruling on an application required under this chapter, the director or the commission, as the case may be, shall consider the following:

- (1) The financial standing, general business experience, and character of the organizers or incorporators of the applicant;
- (2) The character, qualifications, and experience of the officers of the applicant;
- (3) The applicant's ability to serve the community or clients as described in the application; and
- (4) The prospects for success of the proposed trust company.

In any hearing on the application before the commission, the director shall submit to the commission for its consideration the director's findings with respect to the above conditions together with all other pertinent information in the director's possession. If the director or the commission, as the case may be, determines any of these conditions unfavorable to the applicant, then the application shall be disapproved, but if not, then the application shall be approved. Any proceeding before the commission on an application shall be held in conformance with chapter 1-26.

**Source:** SL 1995, ch 268, § 3; SL 2008, ch 258, § 4.

**51A-6A-5.1. Notice to division of material omission in application or change in facts reported in**

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

**Source:** SL 2013, ch 239, § 5.

**51A-6A-6. Application fee.** All applications for charters under this chapter shall include a five thousand dollar application fee which is nonrefundable. This fee shall be remitted by the Division of Banking to the state general fund.

**Source:** SL 1995, ch 268, § 4; SL 1998, ch 282, § 33.

**51A-6A-6.1. Repealed by SL 1998, ch 282, § 34.**

**51A-6A-7. Organization of public and private trust companies—Submission and approval of articles—Required information.** Any three or more persons may organize a public trust company and make and file articles as provided by the laws of this state. Any one or more persons may organize a private trust company and make and file articles as provided by the laws of this state. No trust company may be organized or incorporated to engage in business as such until the articles have been submitted and approved in accordance with § 51A-6A-4. The name selected for the trust company shall include the word, trust, and may not be the name of any other trust company doing business in the state. The director shall accept or reject the name. However, the approval of a trust company name by the director may not supersede any person's rights pursuant to state or federal trademark law. The articles, in addition to any other information required by law, shall state:

- (1) That the corporation or limited liability company is formed for the purpose of engaging in the trust company business; and
- (2) The period for which such corporation or limited liability company is organized, which may be perpetual.

The articles may contain any other provisions as are consistent with law. The articles shall be subscribed by one or more of the organizers of the proposed trust company and shall be acknowledged by them. The full amount of the capital required by § 51A-6A-19 shall be subscribed before the articles are filed.

**Source:** SL 1995, ch 268, § 5; SL 2008, ch 258, § 5; SL 2011, ch 212, § 38; SL 2016, ch 231, § 3; SL 2017, ch 204, § 3.

**51A-6A-8. Amendment of articles—Extension of existence.** Prior to the expiration of the period for which it was incorporated or organized a trust company may, with the approval of at least a majority of the capital stock or ownership units of such trust company, amend its articles to extend its existence for an additional period, which may be perpetual.

**Source:** SL 1995, ch 268, § 5A; SL 2011, ch 212, § 39.

**51A-6A-9. Starting date of trust company existence—Commencement of business.** The existence of any trust company shall date from the filing of its articles from which time it shall have and may exercise the incidental powers conferred by law upon corporations or limited liability companies, as applicable. However, no trust company may transact any business except the election of officers, the taking and approving of their official bonds, the receipts of payment upon stock subscriptions, and other business incidental to its organization, until it has secured the required approval and the authorization of the director to commence business.

**Source:** SL 1995, ch 268, § 6; SL 2008, ch 258, § 6.

**51A-6A-10. Statement of payment of capital—Certificate of organization.** When the capital of any trust company is paid in, the president or cashier shall transmit to the director a verified statement showing the names and addresses of all owners, the amount of stock or units each subscribed, and the amount paid in by each. The director shall review each trust company as to the amount of money paid in for capital, surplus, and undivided profits; by whom the amounts were paid, the amount of capital stock or units owned in good faith by each owner, and whether the trust company has complied with the provisions of law. If the director determines that the trust company has been organized as provided by law, has complied with the provisions of law, and has secured the required approval, the director shall issue a certificate showing that the trust company has been organized and its capital paid in as required by law and that the trust company is authorized to transact trust business as provided by law.

**Source:** SL 1995, ch 268, § 7; SL 2008, ch 258, § 7.

**51A-6A-11. Authority to transact business required—Violation as misdemeanor.** No individual, firm, or corporation may advertise, publish, or otherwise promulgate that they are engaged in the trust company business, or transact trust company business, without having first obtained authority from the director. Any individual or member of any firm or officer of any corporation violating this section shall be guilty of an unclassified misdemeanor, and upon conviction shall be punished by a fine not exceeding five thousand dollars.

**Source:** SL 1995, ch 268, § 8.

**51A-6A-11.1. Public trust companies to maintain office and perform trust administration in South Dakota.** A public trust company shall:

- (1) Maintain office space in South Dakota for trust company business and for the storage of, and access to, trust company records required by § 51A-6A-30;
- (2) Hold no less than two quarterly governing board meetings with a majority physically present in South Dakota each calendar year;
- (3) Employ, engage, or contract with at least one trust officer or key employee to provide services for the trust company in South Dakota related to the powers of the company in § 51A-6A-29 and to facilitate the examinations required by § 51A-6A-31; and
- (4) Perform trust administration in South Dakota.

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

**Source:** SL 2010, ch 232, § 18; SL 2012, ch 233, § 2; SL 2015, ch 240, § 3; SL 2016, ch 231, § 4.

**51A-6A-11.2. Office space requirements.** For purposes of § 51A-6A-11.1, office space in South Dakota for each public trust company shall:

- (1) Be in premises distinct and divided from the office space of any other entity;
- (2) Have the name, charter, and certificate of authority of the trust company prominently displayed;
- (3) Have access to premises in or adjacent to the office space sufficient to facilitate onsite examinations by the division;
- (4) To the extent the trust company maintains hard copies of any documents required to be maintained pursuant to § 51A-6A-30, have a secure fireproof file cabinet that contains all such hard copies; and
- (5) To the extent the trust company maintains any record electronically, have a secure computer terminal or other secure electronic device that provides access to such records, including account information, as necessary to facilitate an efficient and effective examination.

For public trust companies chartered in South Dakota prior to July 1, 2016, the division shall determine full compliance with the provisions of this section at the first regular examination after June 30, 2018.

**Source:** SL 2016, ch 231, § 5.

**51A-6A-11.3. Approval of other office space requirements.** Upon application by a trust company, the director may approve office space that does not meet the requirements of § 51A-6A-11.2 if the director determines the nature and degree of risks presented by the trust company are low based upon a review of the size, nature, and number of accounts administered by the trust company, the structure and business plan of the trust company approved by the division, and the number of employees or persons performing services for the trust company in South Dakota.

If the size, risk profile, or rate of growth of a trust company changes, or if a trust company's office space is insufficient to facilitate onsite examinations by the division, the director may impose additional office space requirements.

**Source:** SL 2016, ch 231, § 6.

**51A-6A-12. List of owners—Annual submission to director—Verification of list.** Every trust company shall keep a full and correct list of names and addresses of all of its owners and the number of shares owned by each. This list of owners shall be kept and maintained in the office where its business is transacted, and during the business hours of the trust company, the list is subject to the inspection of all owners. The president or cashier of any trust company shall submit to the director on or before the thirty-first day of January of each year a list of owners as of the first day of the calendar year. The president or cashier shall verify the correctness of the list under oath.

**Source:** SL 1995, ch 268, § 9.

**51A-6A-13. Governing board—Membership—Election—Vacancies.** The business of any trust company shall be managed and controlled by its governing board and includes the authority to provide for bonus payments, in addition to ordinary compensation, for any of its officers and employees. The governing board of a private trust company shall consist of not less than three nor more than twelve members, all of whom shall be elected by the owners of the trust company at any regular annual meeting, with terms not to exceed three years. The governing board of a public trust company shall consist of not less than five nor more than twelve members, all of whom shall be elected by the owners of the trust company at any regular meeting held during each calendar year. If the number of board members elected is less than twelve, the number of board members may be increased so long as the total number does not exceed twelve. If the number is increased, the first additional board members may be elected at a special meeting of the owners. The board members shall be elected and any vacancies filled in the manner as provided in the provisions regarding general corporations or limited liability companies, as applicable. At all times one of the directors shall be a resident of this state and at least one-half of the directors shall be citizens of the United States. Any board member of any trust company who becomes indebted to the trust company on any judgment forfeits the position of board member, and the vacancy shall be filled as provided by law.

**Source:** SL 1995, ch 268, § 10; SL 1998, ch 282, § 32; SL 2006, ch 243, § 11; SL 2007, ch 276, § 1; SL 2009, ch 252, § 1; SL 2011, ch 212, § 11; SL 2015, ch 240, § 4.

**51A-6A-14. Officers of governing board—Bond required.** The governing board may elect a chairperson, a president, one or more vice presidents, a secretary, and a cashier. The office of president and cashier may not be filled by the same person. The officers shall hold their offices for a term not to exceed one year and until their successors are elected and qualified. The governing board shall require all officers and employees having the care or handling of the funds of the trust company to give a good and sufficient bond to be executed by an approved corporate surety authorized to do business in this state. The amount and form of the bond shall be approved by the governing board and the director, and it shall be held by the director. The costs of the bonds shall be paid by the trust company. Any officer who becomes indebted to the trust company on any judgment shall forfeit the office and the governing board shall fill the vacancy.

**Source:** SL 1995, ch 268, § 11.

**51A-6A-15. Meetings of governing board—Examination and audit of books and records.** The governing board shall hold at least four regular meetings each year, at least one of which shall be held during each calendar quarter. Unless otherwise provided in the trust company's organizational documents, the governing board or an authorized committee may conduct, or permit any member to participate in, a regular or special meeting through the use of any means of communication by which all members participating may simultaneously hear each other during the meeting. A member participating in a meeting by this means is considered present in person at the meeting. The governing board or an auditor selected by them shall make a thorough examination of the books, records, funds, and securities held by the trust company at each of the quarterly meetings. The result of the examination shall be recorded in detail. If the governing board selects an auditor, the auditor's findings shall be reported directly to the governing board. In lieu of the required four quarterly examinations, the governing board may accept one annual audit by a certified public accountant or an independent auditor approved by the director.

The provisions of this section do not alter, amend, or change the requirement of a public trust company to hold no less than two quarterly governing board meetings with a majority physically present in South Dakota each calendar year pursuant to § 51A-6A-11.1.

**Source:** SL 1995, ch 268, § 12; SL 2016, ch 231, § 7.

**51A-6A-16. Oath of board members.** Each board member shall take and subscribe an oath that the member will administer the affairs of the trust company diligently and honestly and that the member will not knowingly or willfully permit any of the laws relating to trust companies to be violated.

**Source:** SL 1995, ch 268, § 14.

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

As part of any application to obtain authority to transact business as a private trust company, the applicant shall obtain and provide for each proposed incorporator, organizer, board member, manager, officer, and key employee of the proposed company, as applicable, the results of an independent criminal background investigation acceptable to the director, and independent credit report from a consumer reporting agency as described in 15 U.S.C. 1681a(p) as of January 1, 2010, and a report of ongoing or pending litigation.

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

Prior to beginning employment with any trust company, each potential director, manager, member, officer, or key employee shall undergo the same investigation process as required above for new applicants. At the discretion of the director, any person subject to the requirements of this section may enter into service on a

temporary basis pending receipt of results from the criminal background investigation. For purposes of this section, a key employee does not include an employee whose primary responsibilities are limited to clerical or support duties, and officer does not include any person who is not involved in the ongoing policy making or management of the trust company.

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

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

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

**Source:** SL 1995, ch 268, § 15; SL 2010, ch 232, § 19; SL 2012, ch 252, § 16; SL 2013, ch 239, § 1.

**51A-6A-18. Repealed by SL 2002, ch 220, § 1.**

**51A-6A-19. Determining capital—Minimum—Purpose of capital—Fidelity bond and liability insurance policy.** For purposes of this section, the capital of a trust company is the total of the aggregate par value of its outstanding shares of capital stock or ownership units, its surplus, and its undivided profits. The minimum capital of a trust company is two hundred thousand dollars. The director may require that the trust company have more capital than the amount specified if the director determines that the amount and character of the anticipated business of the trust company and the safety of the customers so require. This chapter recognizes that capital for a trust company serves a different purpose than does capital for a bank. It is not intended that capital requirements for trust companies be judged by the same standards as banks. Basic protection for fiduciary clients of a trust company shall be provided by the purchase of a fidelity bond and a director's and officer's liability insurance policy. The bond and insurance shall be in an amount of not less than one million dollars each. The trust company shall give notice of cancellation or nonrenewal of the bond or insurance policy to the director within ten days of the receipt of cancellation or nonrenewal. Except as may be provided elsewhere in this chapter, no trust company may reduce voluntarily its capital stock or ownership units or surplus below the amount required in this section.

**Source:** SL 1995, ch 268, § 17; SL 2002, ch 220, § 2; SL 2006, ch 243, § 2; SL 2008, ch 258, § 8; SL 2013, ch 239, § 3.

**51A-6A-19.1. Additional capital requirements—Safety and soundness factors to be considered—Effective date of order—Hearing.** The director may require additional capital for an existing trust company if the director finds the condition and operations of an existing trust company requires additional capital consistent with the safety and soundness of the trust company. The safety and soundness factors to be considered by the director in the exercise of such discretion include:

- (1) The nature and type of business conducted;
- (2) The nature and degree of liquidity in assets held in a corporate capacity;
- (3) The amount of fiduciary assets under management or administration;
- (4) The type of fiduciary assets held and the depository of such assets;
- (5) The complexity of fiduciary duties and degree of discretion undertaken;
- (6) The competence and experience of management;
- (7) The extent and adequacy of internal controls;

(8) The presence or absence of annual unqualified audits by an independent certified public accountant;

(9) The reasonableness of business plans for retaining or acquiring additional capital;

(10) The existence and adequacy of insurance obtained or held by the trust company for the purpose of protecting its clients, beneficiaries, and grantors; and

(11) Any other factor deemed relevant by the director.

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

**Source:** SL 2010, ch 232, § 20.

**51A-6A-19.2. Investments pledged to division for security of trust creditors of trust company—Income from investments—Effective date of order requiring pledge increase—Hearing.** Before any trust company authorized by this title transacts any such business, the trust company shall pledge to the division and maintain at all times investments for the security of the trust creditors of the trust company including as a priority claim costs incurred by the division in a receivership or liquidation of the trust company in the event it should fail. The amount of the pledge shall be determined by the director in an amount deemed appropriate to defray such costs, but may not be less than a market value of one hundred thousand dollars, and may not exceed five hundred thousand dollars for a private trust company or one million dollars for a public trust company. All investments pledged to the division shall be held at a depository institution in this state and all costs associated with pledging and holding such investments are the responsibility of the trust company.

The investments pledged to the division shall be of the same nature and quality as those required for public funds as provided in §§ 4-5-6, 4-5-6.1, and 4-5-6.2.

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

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

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

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

**Source:** SL 2010, ch 232, § 21; SL 2012, ch 233, § 1; SL 2015, ch 240, § 5.

**51A-6A-19.3. Pledge available to satisfy claims upon liquidation, abandonment of trust powers, or resignation.** Upon liquidation, abandonment of trust powers, or resignation from all duties exercised pursuant to § 51A-6A-29, the pledge required by § 51A-6A-19. 2 shall be made available for the reasonable satisfaction of claims involving trust company accounts. Any surplus remaining after the satisfaction of all such claims and costs incurred by the division shall be returned to the trust company. Unless the division has reason to believe that claims are forthcoming, the division shall release any pledge no later than twelve months from the date all affected accounts are moved to a successor trustee, custodian, or administrator.

**Source:** SL 2013, ch 239, § 2.

**51A-6A-20. Payment of subscriptions—Reduction of common stock.** All subscriptions to the stock or ownership units shall be paid in cash. If a trust company in corporate form reduces its common stock and issues preferred stock in lieu of the reduction, it may reduce the par value of the common stock in the proportion that the total amount of capital stock is reduced, but when the preferred stock is retired the par value of the common shares shall be restored.

**Source:** SL 1995, ch 268, § 18; SL 2012, ch 252, § 17.

**51A-6A-21. Transferring stock and ownership units.** The shares of stock and ownership units of any trust company are personal property and shall be transferred on the books of the trust company in such manner as the bylaws or operating regulations of the trust company may direct. No stock or ownership units may be transferred on the books of the trust company when the trust company is in a failing condition, or when its capital is impaired, except upon approval of the director. If a transfer of shares of stock of any trust company, or holding company that owns a majority of the outstanding shares of a trust company, occurs which results through direct or indirect ownership by a stockholder or an affiliated group of stockholders of ten percent or more of the outstanding stock of the trust company, or holding company that owns a majority of the outstanding shares of a trust company, and if additional shares of stock of the trust company are transferred to such stockholders, affiliated group of stockholders, or holding company, the president or other chief executive officer of the trust company shall report the transfer to the director within ten days after transfer of the shares of stock on the books of the trust company.

**Source:** SL 1995, ch 268, § 19; SL 2013, ch 239, § 4.

**51A-6A-22. Increasing capital stock or ownership units.** The capital stock or ownership units of any trust company may be increased. The president and cashier shall forward a verified statement to the director showing the amount of the increase, the names and addresses of the subscribers, the amount subscribed by each, and that the same had been paid in full to the trust company. The date and amount of the increase also shall be certified to the secretary of state.

**Source:** SL 1995, ch 268, § 20.

**51A-6A-23. Registration of capital stock or ownership units.** If the director determines that the capital stock of any trust company is impaired, the director shall notify the trust company to restore the capital stock or ownership units within ninety days of receipt of the notice. Within fifteen days of receipt of the notice, the governing board of the trust company shall levy an assessment on the owners sufficient to restore the capital stock or ownership units. The trust company, with its governing board's approval, may reduce its capital stock or ownership units to the extent of the impairment, if such reduction will not reduce the capital below the amount required by this chapter.

**Source:** SL 1995, ch 268, § 21.

**51A-6A-24. Issuance of preferred stock.** Any trust company in corporate form may issue preferred stock of one or more classes in such amounts as are approved by the director. The holders of two-thirds of the common stock of the trust company shall approve the issuance at a meeting held for that purpose. Notice shall be given by registered mail to each stockholder at least five days before the date of the meeting. No issue of preferred stock is valid until the par value of all stock so issued is paid in. No preferred stock may be retired unless the common stock is increased in an amount equal to the amount of the preferred stock retired.

**Source:** SL 1995, ch 268, § 22; SL 2012, ch 252, § 18.

**51A-6A-25. Rights and liability of preferred stockholders—Dividends.** The holders of preferred stock are not liable for assessments to restore any impairment in the capital stock of a trust company. The holders of preferred stock are entitled to receive cumulative dividends, have voting and conversion rights, and have control of management, as may be provided in the articles of incorporation and upon the written approval of the director. The preferred stock shall be retired as provided in the articles of incorporation.

No dividends may be declared or paid on common stock until all cumulative dividends, if any, on the

preferred stock have been paid, and if the trust company is dissolved or placed in liquidation, no payments may be made to the holders of common stock until the holders of the preferred stock first have been paid in full for any sums due upon the preferred stock.

**Source:** SL 1995, ch 268, § 23.

**51A-6A-26. Issuance of convertible or nonconvertible capital notes or debentures.** In accordance with normal business considerations and upon approval of owners owning two-thirds of the voting stock or ownership units of the trust company, the trust company may issue convertible or nonconvertible capital notes or debentures in such amounts pursuant to terms and conditions as approved by the director. However, the principal amount of capital notes or debentures outstanding at any time may not exceed an amount equal to one hundred percent of the trust company's paid-in capital stock or ownership units plus fifty percent of the amount of its unimpaired surplus fund. Capital notes or debentures that are by their terms expressly subordinated to the prior payment in full of all liabilities of the trust company are part of the unimpaired capital funds of the trust company.

**Source:** SL 1995, ch 268, § 24; SL 2015, ch 239, § 6.

**51A-6A-27. Source of dividends.** No trust company, during the time it continues in business, may permit to be withdrawn, in the form of dividends, any portion of its capital required pursuant to § 51A-6A-19. The current dividends of any trust company shall be paid from undivided profits after deducting losses, to be ascertained by generally accepted accounting principles at the time of making the dividend.

**Source:** SL 1995, ch 268, § 25; SL 2015, ch 240, § 6.

**51A-6A-28. Dividends from undivided profits.** The governing board of any trust company may declare dividends from undivided profits, provided that the trust company is in compliance with the capital requirements pursuant to § 51A-6A-19.

**Source:** SL 1995, ch 268, § 26.

**51A-6A-29. Powers of trust company.** A trust company may exercise the following powers necessary or incidental to carrying on a trust company business, including:

- (1) Act as agent, custodian, or attorney-in-fact for any person, and, in such capacity, take and hold property on deposit for safekeeping and act as general or special agent or attorney-in-fact in the acquisition, management, sale, assignment, transfer, encumbrance, conveyance, or other disposition of property, in the collection or disbursement of income from or principal of property, and generally in any matter incidental to any of the foregoing;
- (2) Act as registrar or transfer agent for any corporation, partnership, association, limited liability company, municipality, state, or public authority, and in such capacity, receive and disburse money, transfer, register, and countersign certificates of stock, bonds, or other evidences of indebtedness or securities, and perform any acts which may be incidental thereto;
- (3) Act as trustee or fiduciary under any mortgage or bond issued by a person;
- (4) Act as trustee or fiduciary under any trust established by a person;
- (5) Act as fiduciary, assignee for the benefit of creditors, receiver, or trustee under or pursuant to the order or direction of any court or public official of competent jurisdiction;
- (6) Act as fiduciary, guardian, conservator, assignee, or receiver of the estate of any person and as executor of the last will and testament or administrator, fiduciary, or personal representative of the estate of any deceased person when appointed by a court or public official of competent jurisdiction;
- (7) Establish and maintain common trust funds or collective investment funds pursuant to the provisions of chapter 55-6; or
- (8) Act in any fiduciary capacity and perform any act as a fiduciary which a South Dakota bank with trust powers may perform in the exercise of those trust powers.

**Source:** SL 1995, ch 268, § 27; SL 2011, ch 212, § 21; SL 2014, ch 226, § 1.

**51A-6A-30. Retention of records—Promulgation of rules—Reproduction of records—Duty of confidentiality.** A trust company shall retain its business records in accordance with the provisions of this section. Each trust company shall retain permanently the minute books of meetings of its owners and governing board, its capital stock and ownership unit ledger and capital stock or ownership unit certificate ledger or stubs, its general ledger or the record kept in lieu of a general ledger, its daily statements of condition, and all records which the director shall, in accordance with the provisions of this section, require to be retained permanently. All other records of a trust company shall be retained for such periods as the commission prescribes. The commission shall promulgate rules pursuant to chapter 1-26 classifying all records kept by trust companies, prescribing the period for which records of each class shall be retained, and requiring a record of destruction of records as the commission deems advisable. The periods may be permanent or for a term of years. Before adoption, amendment, or revocation of the rules the commission shall consider:

- (1) Actions and administrative proceedings in which the production of trust company records might be necessary or desirable;
- (2) State and federal statutes of limitation applicable to such actions or proceedings;
- (3) The availability of information contained in trust company records from other sources; and
- (4) Any other matters as the commission considers pertinent to the interest of customers and owners of trust companies and of the people of this state having the records available.

Any trust company may destroy any record which has been retained for the period prescribed, in accordance with the terms of this section for retention of records of its class, and is, after it has destroyed a record, under no duty to produce the record.

Instead of retention of the original records, any trust company may cause any of its records in its custody, including those held by it as a fiduciary, to be photographed or otherwise reproduced to permanent form. Any photograph or reproduction has the same force and effect as the original and may be admitted in evidence equally with the original.

Any trust company may cause any transactions, information, and data occurring in the regular course of its operations to be recorded and maintained by electronic means. When the electronic records of the transactions, information, and data are converted to writing, the writings shall constitute the original records of the transactions, information, and data and have the force and effect of the original records.

Nothing in this section may be construed to affect any duty of a trust company to preserve the confidentiality of its records.

**Source:** SL 1995, ch 268, § 28.

**51A-6A-31. Periodic examination of trust company—Report of examination—Cooperative, coordinating and information-sharing agreements among agencies.** The director shall examine each trust company at least once every thirty-six months or more frequently if the director considers it necessary to make a full and careful examination and inquiry into the condition of the affairs of the trust company. For purposes of the examination, the director may administer oaths and examine under oath the board members, officers, employees, and agents of any trust company. The examination shall be reduced to writing by the person making it, and the person's reports shall contain a full, true, and careful statement of the condition of the trust company. The director, in lieu of making a direct examination and inquiry at the trust company office, may examine the trust company in whole or in part by examining the trust company records or documents off-site. For an examination conducted wholly or partially off-site, the director may require production of any records or documents of the trust company at the director's office. The director shall provide a copy of the written examination report to the governing board of the trust company. Neither the director nor any employee of the Division of Banking may have any ownership interest in a trust company.

The director may examine an out-of-state trust institution's trust service offices either on- or off-site to

determine whether such offices are being operated in compliance with the laws of this state and in accordance with safe and sound practices.

The director may enter into cooperative, coordinating, and information-sharing agreements with any other supervisory agency or any organization affiliated with or representing one or more supervisory agencies with respect to the periodic examination or other supervision of any trust company or out-of-state trust institution, and the director may accept such agency's or organization's report of examination or investigation in lieu of conducting an examination or investigation.

**Source:** SL 1995, ch 268, § 29; SL 2006, ch 243, § 1.

**51A-6A-32. Examination of fiduciary affairs of officers or employees—Examination of affiliated companies or corporations.** If upon the examination of any trust company, the director considers it necessary, the director may examine the fiduciary affairs of any officer or employee of any trust company; and upon similar determination, the director may examine any investment company or holding company or corporation that is affiliated with any trust company as to matters relevant to the safety and soundness of the trust company. Determinations by the director pursuant to this section are subject to review by the commission pursuant to chapter 1-26.

**Source:** SL 1995, ch 268, § 30; SL 2014, ch 226, § 3.

**51A-6A-33. Examination expenses paid by trust companies—Fees.** The expense of every examination, together with the expense of administering the applicable laws, including salaries, travel expenses, supplies, and equipment, shall be paid by the trust companies of the state. A fee shall be imposed upon a trust company consistent with § 51A-2-36.

**Source:** SL 1995, ch 268, § 31.

**51A-6A-34. Annual report of trust company to director—Form of report—Request for additional reports.** Each trust company shall make at least one report to the director during each year, at a time determined by the director. The director may require additional reports from each trust company if the director considers it advisable. The form of all the reports shall be prescribed by the director. If the director considers it necessary, the director may call upon any trust company for a report of its condition upon any given day. A copy of each request made by the director for a statement from all trust companies doing business under this chapter shall be mailed to each trust company. The copy of the request shall be considered to be legal notice to a trust company.

**Source:** SL 1995, ch 268, § 32.

**51A-6A-35. Authority of trust company revoked upon obstruction or interference with, or refusal to submit to, examination of director.** If any officer of any trust company refuses to submit the books, records, papers, and instruments of the trust company to the examination and inspection of the director or in any manner obstruct or interfere with the examination and investigation of the trust company or refuse to be examined on oath concerning any of the affairs of the trust company, the director may revoke the authority of the trust company to transact business, and with the concurrence of the attorney general, may institute proceedings for the appointment of a receiver for the trust company.

**Source:** SL 1995, ch 268, § 33.

**51A-6A-36. Service of notice of charges—Contents of notice—Temporary cease and desist order.** If the director determines that any trust company is engaging or has engaged, or the director has reasonable cause to believe that the trust company is about to engage, in an unsafe or unsound practice in conducting the business of the trust company, or if the director determines that any trust company is violating or has violated, or the director has reasonable cause to believe that the trust company is about to violate a law, rule, or order of the director or the commission, the director may issue and serve upon the trust company a notice of charges. The notice shall contain a statement of the facts constituting any alleged unsafe or unsound practice or any alleged violation and shall state the time and place at which a hearing will be held by the commission to determine whether an order to cease and desist should be issued by the commission against the trust company. The hearing shall be fixed for a date not earlier than thirty days nor later than

sixty days after service of the notice. The hearing shall be conducted pursuant to chapter 1-26. Any determination by the director or the commission under this section is subject to review under chapter 1-26.

Unless the trust company appears at the hearing, the trust company is considered to have consented to the issuance of the cease and desist order. In the event of such consent, or if upon the record made at the hearing, the commission finds that any unsafe or unsound practice or violation specified in the notice of charges has been established, the commission may issue and serve upon the trust company an order to cease and desist from any such practice or violation. The order may, by provisions which may be mandatory or otherwise, require the trust company and its board members, officers, employees, and agents to cease and desist from the practice or violation and to take affirmative action to correct the conditions resulting from the practice or violation. A cease and desist order becomes effective at the time specified in the order, and remains effective and enforceable as provided in the order, except to such extent as it is stayed, modified, terminated, or set aside by action of the commission.

If the director determines that any unsafe or unsound practice or violation specified in the notice of charges served upon the trust company, or the continuation of the practice or violation, is likely to cause insolvency or substantial dissipation of assets or earnings of the trust company, or is likely to otherwise seriously prejudice the interests of its customers, the director may issue a temporary order requiring the trust company to cease and desist from the practice or violation. The order is effective upon service upon the trust company and shall remain effective and enforceable pending the completion of the proceedings pursuant to the notice and until the commission dismisses the charges specified in the notice, or if a cease and desist order is issued against the trust company, until the effective date of the order.

**Source:** SL 1995, ch 268, § 34.

**51A-6A-37. Revocation of franchise for failure to comply with lawful requirements.** Any trust company which refuses or neglects to comply with any requirement lawfully made upon it by the director for a period of ninety days after demand in writing is made forfeits its franchise, and the director shall thereupon revoke its authority to transact business. The director shall give notice of the revocation to the president or other managing officer of the trust company. The attorney general, upon the request of the director, then shall begin action for the appointment of a receiver for the trust company and to dissolve the trust company.

**Source:** SL 1995, ch 268, § 35.

**51A-6A-38. Hearing on revocation of trust authority.** A trust company subject to revocation of trust authority shall be afforded the right to a hearing in accordance with the provisions of chapter 1-26. Any revocation of authority to transact trust business is subject to review in accordance with chapter 1-26.

**Source:** SL 1995, ch 268, § 36.

**51A-6A-39. Confidentiality of information generated by examination—Disclosure—Hearing.** All information the director generates in making an investigation or examination of a state trust company is confidential. All confidential information shall remain the property of the division and shall be furnished to the trust company for its confidential use. Under no circumstances may a trust company disclose a report or any supporting documentation to anyone, other than directors and officers of the trust company or anyone acting in a fiduciary capacity for the trust company, without written permission from the director.

The director shall give ten days' prior written notice of intent to disclose confidential information to the affected trust company. Any trust company which receives a notice may object to the disclosure of the confidential information and shall be afforded the right to a hearing in accordance with the provisions of chapter 1-26. If a trust company requests a hearing, the director may not reveal confidential information prior to the conclusion of the hearing and a ruling. Disclosure of confidential information shall be made only to formal regulatory bodies which clearly have a need for the confidential information. Prior to dissemination of any confidential information, the director shall require a written agreement not to reveal the confidential information by the party receiving the confidential information. In no event may the director disclose confidential information to the general public, any competitor, or any potential competitor of a trust company.

The submission of any information to the division in the course of any investigation or examination may not be construed as waiving, destroying, or otherwise affecting any privilege any person may claim with

respect to the information under South Dakota law or federal law.

**Source:** SL 1995, ch 268, § 37; SL 2008, ch 258, § 9; SL 2012, ch 233, § 3.

**51A-6A-40. Correction of unsafe or unsound condition or operation—Appointment of special assistant—Appeal of appointment.** If the director determines that the business of any trust company is being conducted in an unsafe or unsound manner, the director may appoint a special assistant who shall immediately take charge of the operation of the trust company for the purpose of correcting any unsafe or unsound condition or operation. After appointment, the special assistant shall continue to serve under the direction of the director for a period of time as the director determines is reasonable and necessary or until relieved by order of the commission or of a court of competent jurisdiction. The special assistant's salary, which shall be determined by the director, and expenses shall be borne by the trust company under supervision. After an appointment of a special assistant, a trust company may, within thirty days from the date of the notice of the appointment, appeal in writing to the commission. If a trust company appeals, the commission shall fix a date for a hearing which shall be within thirty days from the date of the appeal. The hearing shall be conducted in accordance with the provisions of chapter 1-26. The commission shall render an order as to the correctness or incorrectness of the director's decision to take over the conduct of the trust company, and the order of such commission is subject to review under chapter 1-26.

**Source:** SL 1995, ch 268, § 38.

**51A-6A-41. Insolvency defined. A trust company is insolvent if:**

(1) The actual cash market value of its assets is insufficient to pay its creditor liabilities except that for this purpose unconditional evidence of indebtedness of the United States of America may be valued, at the discretion of the director, at par, cost or fair market value, whichever is the lesser; or

(2) It is unable to meet the demands of its creditors in the usual and customary manner.

**Source:** SL 1995, ch 268, § 39.

**51A-6A-42. Director to take charge of insolvent trust company—Appointment of special assistant.** If it appears upon the examination of any trust company or from any report made to the director that any trust company is insolvent, the director shall take charge of the trust company and all of its property and assets. In so doing the director may appoint a special assistant to take charge temporarily of the affairs of the insolvent trust company until a receiver is appointed. The assistant shall qualify, give bond, and receive compensation the same as the regular examiner, but the compensation shall be paid by the insolvent trust company, or in case of the appointment of a receiver, allowed by the court as costs in the case. No trust company may continue in the charge of a special assistant for a longer period than six months.

**Source:** SL 1995, ch 268, § 40; SL 2012, ch 252, § 19.

**51A-6A-43. Plan for reorganization of insolvent trust company.** The owners of any insolvent trust company and its creditors may formulate a plan for the reorganization of the trust company while the trust company is in the charge of the director or a special assistant or a receiver at any time before a dividend has been paid. The creditors of the insolvent trust company may formulate a plan for the reorganization of the trust company. If the plan is subscribed to in writing by creditors having not less than eighty percent of the known claims against the trust company, a copy of the plan is filed with the director, and the director approves the plan, the plan is legal, valid, and binding upon all creditors of the insolvent trust company to the same extent and with the same effect as if all of the creditors had joined in the execution of the plan.

**Source:** SL 1995, ch 268, § 41; SL 2015, ch 239, § 7.

**51A-6A-44. Appointment of receiver—Bond—Qualifications—Report—Removal.** When the director takes charge of any trust company, the director shall ascertain its actual condition as soon as possible by making a thorough investigation into its affairs and condition. If the director is satisfied that the trust company cannot resume business or liquidate its indebtedness to the satisfaction of its creditors, the director shall appoint a receiver and require the receiver to give such bond as the director considers proper. The director also shall fix reasonable compensation for the receiver, but the compensation for the receiver is subject to the approval of the circuit court of the county in which the trust company is located upon the

application of any party in interest.

Any receiver shall have had at least five years of experience with financial institutions. However, upon written application made within thirty days after the findings of insolvency, the director shall appoint as receiver any person whom the holders of more than sixty percent of the claims against the trust company agree upon in writing. The creditors may also agree upon the compensation and charges to be paid the receiver. Any receiver so appointed shall make a complete report to the director covering the receiver's acts and proceedings as a receiver. The director may remove for cause any receiver and appoint the receiver's successor.

**Source:** SL 1995, ch 268, § 42; SL 2005, ch 260, § 10.

**51A-6A-45. Powers and duties of receiver—Order of payment of liabilities.** The receiver, under the direction of the director, shall take charge of any insolvent trust company and all of its assets and property and liquidate the affairs and business for the benefit of clients, creditors, and owners. The receiver may sell or compound all bad and doubtful debts and sell all the property of the trust company upon such terms as the circuit court of the county in which the trust company is located approves. The receiver shall pay over all moneys received to the creditors of the trust company as ordered by the director. In distributing assets of an insolvent trust company in payment of its liabilities, the order of payment, if its assets are insufficient to pay in full all of its liabilities, shall be by category as follows:

- (1) The costs and expenses of the receivership and real and personal property taxes assessed against the trust company pursuant to applicable law;
- (2) Claims which are secured or given priority by applicable law;
- (3) Claims of unsecured creditors;
- (4) All other claims exclusive of claims on capital notes and debentures; and
- (5) Claims on capital notes and debentures.

If the assets are insufficient for the payment in full of all claims within a category, the claims shall be paid in the order provided by other applicable law or, in the absence of such applicable law, pro rata.

**Source:** SL 1995, ch 268, § 43.

**51A-6A-45.1. Liability of receiver.** No receiver, appointed pursuant to § 51A-6A-44, is liable to any person for good faith compliance with any law, statute, rule, or judgment, decree, or order of a court. Nor is any receiver liable to any person for any action taken or omitted unless a court finds that the receiver acted or failed to act as a result of misfeasance, bad faith, gross negligence, or reckless disregard of duty.

**Source:** SL 2005, ch 260, § 11.

**51A-6A-46. Periodic examination of trust company in the hands of a receiver.** At least once each six months the director shall examine each trust company in the hands of a receiver and shall file a copy of the examination report with the clerk of the circuit court of the county in which the trust company is located. Each receiver shall submit the records and affairs of the trust company to an examination by the director.

**Source:** SL 1995, ch 268, § 44.

**51A-6A-46.1. Suspension, liquidation, order against unsound practice, removal of director or officer, or injunction.** In addition to the powers granted to the director and the commission in §§ 51A-6A-35 to 51A-6A-46, inclusive, the powers granted to the director and commission pursuant to §§ 51A-15-11 to 51A-15-44, inclusive, 51A-2-22, and 51A-2-25 to 51A-2-27, inclusive, may be utilized by the director and the commission with regard to trust companies. The powers granted by §§ 51A-15-11 to 51A-15-44, inclusive, 51A-2-22, and 51A-2-25 to 51A-2-27, inclusive, may be used by the director and the commission in

connection with a trust company as a supplement to or as an independent alternative to the powers granted in §§ 51A-6A-35 to 51A-6A-46, inclusive.

**Source:** SL 2004, ch 312, § 4; SL 2010, ch 232, § 22.

**51A-6A-46.2. Disclosure of confidential information in certain actions.** The provisions of §§ 51A-6A-2 and 51A-6A-39 do not apply to the disclosure of information by the director or the commission in connection with the institution and prosecution of an action against an individual pursuant to the provisions of § 51A-2-22 or against a trust company pursuant to the provisions of §§ 51A-15-11 to 51A-15-44, inclusive, or 51A-2-25 to 51A-2-27, inclusive, or 51A-6A-35 to 51A-6A-46, inclusive. Disclosure of confidential information may be made only to formal governmental regulatory bodies which have a need for the confidential information.

**Source:** SL 2004, ch 312, § 5; SL 2015, ch 240, § 7.

**51A-6A-47. Acquisition of trust company—Notice to director—Approval—Order of disapproval—Hearing.** A person acquiring control through direct or indirect ownership by an owner or an affiliated group of owners shall give the director at least sixty days prior written notice of any proposed trust company acquisition. If the director does not issue an order disapproving the proposed acquisition within that time or extend the period during which a disapproval may be issued, the proposed acquisition is approved. The period for disapproval shall be thirty days after notice is received by the director and may be further extended only if the director determines that any acquiring person has not furnished all the information required under § 51A-6A-48 or if in the director's judgment, any material information submitted is substantially inaccurate. An acquisition may be made prior to expiration of the disapproval period if the director issues written notice of the director's intent not to disapprove the action.

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

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

**Source:** SL 1995, ch 268, § 45; SL 2013, ch 239, § 6.

**51A-6A-48. Contents of notice of proposed acquisition.** A notice of a proposed trust company acquisition shall contain, in the form prescribed by the director, the following information:

- (1) The identity, personal history, business background, and experience of any person by whom or on whose behalf the acquisition is to be made, including the person's material business activities and affiliations during the past five years and a description of any material pending legal or administrative proceedings in which the person is a party and any criminal indictment or conviction of the person by a state or federal court;
- (2) A statement of the assets and liabilities of any person by whom or on whose behalf the acquisition is to be made, as of the end of the fiscal year for each of the five fiscal years immediately preceding the date of the notice, together with related statements of income and source and application of funds for each of the fiscal years then concluded and an interim statement of the assets and liabilities for any person, together with related statements of income and source and application of funds, as of a date not more than ninety days prior to the date of the notice;
- (3) The terms and conditions of the proposed acquisition and the manner in which the acquisition is to be made;

(4) The identity, source, and amount of the funds or other considerations used or to be used in making the acquisition and, if any part of these funds or other considerations has been or is to be borrowed or otherwise obtained for the purpose of making the acquisition, a description of the transaction, the names of the parties to the transaction, and any arrangements, agreements, or understandings with such persons;

(5) Any plans or proposals which any acquiring person making the acquisition may have to liquidate the trust company, to sell its assets or merge it with any company, or to make any other major change in its business or corporate structure or management;

(6) The identification of any person employed, retained, or to be compensated by the acquiring person or by any person on the acquiring person's behalf to make solicitations or recommendations to owners for the purpose of assisting in the acquisition and a brief description of the terms of the employment, retainer, or arrangement for compensation;

(7) Copies of all invitations or tenders or advertisements making a tender offer to owners for purchase of their stock or ownership units to be used in connection with the proposed acquisition; and

(8) Any additional relevant information in such forms as the directors may require by specific request in connection with any particular notice.

**Source:** SL 1995, ch 268, § 46.

**51A-6A-49. Reason for disapproval of acquisition.** The director may disapprove any proposed acquisition if:

(1) The proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the trust business in any part of this state;

(2) The financial condition of any acquiring person is such as might jeopardize the financial stability of the trust company or prejudice the interests of the clients of the trust company;

(3) The competence, experience, or integrity of any acquiring person or of any of the proposed management personnel indicates that it would not be in the interest of the clients of the trust company or in the interest of the public to permit such person to control the trust company; or

(4) Any acquiring person neglects, fails, or refuses to furnish the director all the information required by the director.

**Source:** SL 1995, ch 268, § 47.

**51A-6A-50. Procedure for merger, consolidation, conversion, or transfer of assets and liabilities to another bank or trust company.** Before any trust company can merge, consolidate with, convert from a corporation to a limited liability company or from a limited liability company to a corporation under § 47-1A-950 or 47-1A-950.1, or transfer its assets and liabilities to another trust company or bank, it shall file with the director, certified copies of all proceedings of its governing board and owners relating to the merger, consolidation, conversion, or transfer. The owners' proceedings shall show that a majority of the owners voted in favor of the merger, consolidation, conversion, or transfer. The owners' proceedings shall contain a complete copy of the agreement made and entered into, with reference to the merger, consolidation, conversion, or transfer. Upon the filing of the owners' and governing board's proceedings, the director shall make an investigation to determine whether:

- (1) The interests of the clients, creditors, and owners of each are protected;
- (2) The merger, consolidation, conversion, or transfer is in the public interest; and
- (3) The merger, consolidation, conversion, or transfer is made for legitimate purposes.

The director's consent to or rejection of a merger, consolidation, conversion, or transfer shall be based upon the investigation. No merger, consolidation, conversion, or transfer may be made without the consent of the director. The expense of the investigation shall be paid by the persons filing the request.

**Source:** SL 1995, ch 268, § 48; SL 2012, ch 252, § 20.

**51A-6A-50.1. Proceedings to legally dissolve charter of acquired, merged, or consolidated trust company.** If a trust company has been acquired, merged, or consolidated with another trust company or financial institution, or its assets have been purchased and its liabilities assumed by another trust company or financial institution, in any instance other than an emergency, within thirty days thereafter, the directors of the trust company shall institute proceedings to legally dissolve its charter in the same manner as provided for voluntary liquidation in chapter 51A-15. However, no notice need be given pursuant to § 51A-15-3.

**Source:** SL 2015, ch 240, § 8.

**51A-6A-51. Necessity of execution or delivery of deed for merger or consolidation.** When a merger or consolidation of any trust company occurs, the successor consolidated trust company or bank becomes the owner of, and entitled to, the possession of all rights, franchises, and interests, real estate, and personal property as is covered by the merger or consolidation agreement without the necessity of the execution or delivery of a deed or other form of transfer.

**Source:** SL 1995, ch 268, § 49.

**51A-6A-52. Fiduciary capacity of successor trust company.** Upon the merger or consolidation of any trust company, the successor trust company, upon acquiring trust authority, may be appointed to act as trustee, personal representative, conservator, or any other fiduciary capacity to the same extent and with the same authority as the trust company to which it succeeds.

**Source:** SL 1995, ch 268, § 50.

**51A-6A-53. Name of trust company—Name change.** No trust company may take the name of any other trust company incorporated in the state or a name so similar to another as to be easily confused with it. No trust company may change its name until the name change has been submitted to and approved by the director. The director may refuse authority to any trust company violating this provision.

**Source:** SL 1995, ch 268, § 51.

**51A-6A-54. Approval required for changing place of business—Examination and investigation by director.** No trust company incorporated under the laws of this state may change its place of business, from one city or town to another or from one location to another within the same city or town, without the prior approval of the director. Any trust company desiring to change its place of business shall file a written application with the director in the form and containing the information as the director requires. The director shall examine and investigate the application and approve or disapprove the application. The expenses of the examination and investigation shall be paid by the trust company.

**Source:** SL 1995, ch 268, § 52; SL 2008, ch 258, § 10.

**51A-6A-55 to 51A-6A-57. Repealed by SL 2013, ch 239, §§ 8 to 10.**

**51A-6A-58. Establishment of trust service offices—Application.** After first applying for and obtaining the approval of the director, one or more trust service offices may be established and operated by a trust company incorporated under the laws of this state or by an out-of-state trust institution, if and to the extent that the state, territory, or district in which the out-of-state trust institution is chartered or licensed to engage in a trust company business grants authority for a trust company organized and doing business under the laws of this state to establish an office in that state, territory, or district. An application to establish and operate a trust service office or to relocate an existing trust service office shall be submitted and approved in the manner set forth in § 51A-6A-4.

A trust company may establish a trust service office in another state, territory, or district and may conduct

any activities at that office that are permissible for a trust company under the laws of that state, territory, or district subject to the laws of this state and subject to the rules, orders, or declaratory rules of the commission or the director.

The provisions of this section do not apply to a private trust company unless the governing board decides to establish a trust service office in another state, territory, or district.

**Source:** SL 1995, ch 268, § 56; SL 2005, ch 260, § 14; SL 2008, ch 258, § 11; SL 2016, ch 231, § 8.

**51A-6A-59, 51A-6A-60. Repealed by SL 2008, ch 258, §§ 12, 13.**

**51A-6A-61. Membership in federal reserve bank.** Any trust company may become a stockholder in and a member of the federal reserve bank of the federal reserve district where the trust company is located.

**Source:** SL 1995, ch 268, § 59.

**51A-6A-62. Depositing securities into federal reserve bank.** Any trust company when acting as fiduciary, and any trust company when holding securities as custodian for a fiduciary, may deposit, or arrange for the deposit, with the federal reserve bank in its district, of any securities the principal and interest of which the United States or any department, agency, or instrumentality of the United States has agreed to pay, or has guaranteed payment, to be credited to one or more accounts on the books of the federal reserve bank in the name of the trust company. Any account used for this purpose shall be designated as a fiduciary or safekeeping account, and other similar securities may be credited to the account. A trust company depositing securities with a federal reserve bank is subject to any rules with respect to the making and maintenance of the deposits as the director may promulgate pursuant to chapter 1-26. The records of the trust company shall always show the ownership of the securities held in the account.

**Source:** SL 1995, ch 268, § 60.

**51A-6A-63. Registering investments in name of nominee—Liability of trust company.** Any trust company, when acting in this state as a fiduciary or a co-fiduciary with others, may with the consent of its co-fiduciary or co-fiduciaries, if any, cause any investment held in any such capacity, to be registered and held in the name of a nominee or nominees of the trust company. The trust company is liable for the acts of any nominee with respect to any investment so registered.

**Source:** SL 1995, ch 268, § 61.

**51A-6A-64. Common trust funds and collective investment funds.** Any trust company qualified to act as a fiduciary in this state may establish common trust funds or collective investment funds for the purpose of furnishing investments to itself as fiduciary, or to itself and others, as co-fiduciaries. Any trust company qualified to act as fiduciary in this state may, as such fiduciary or co-fiduciary, invest funds that it lawfully holds for investment in the common trust funds or collective investment funds, if the investment is not prohibited by the instrument, judgment, decree, or order creating the fiduciary relationship. Any common trust fund or collective investment funds shall be established and maintained according to the provisions of chapter 55-6.

**Source:** SL 1995, ch 268, § 62; SL 2011, ch 212, § 22; SL 2014, ch 226, § 2.

**51A-6A-65. Conversion from state bank to trust company—Application—Investigation—Regulation.** Any state bank chartered under Title 51A which exercises only trust powers and which has never accepted deposits may make application to the director to reorganize as a trust company under chapter 51A-6A. An application for conversion from a state bank to a trust company shall consist of a letter of intent signed by a majority of the bank's board of directors together with any additional information required by the director. The stockholders of the bank shall make, execute, and acknowledge amendments to their articles of incorporation as required in order to terminate the corporation's former status as a bank and to conform its articles of incorporation to the requirements of chapter 51A-6A. Upon receipt of the application for approval of a conversion, the director shall conduct such investigation as the director deems necessary to ascertain whether:

- (1) The letter of intent and supporting items satisfy the requirements of this title;

- (2) The plan of conversion adequately protects the interests of the beneficiaries of any trusts for which the bank is a trustee; and

- (3) The requirements for a conversion under all applicable laws have been satisfied and the resulting trust company would satisfy the requirements for trust companies authorized by this title.

Upon filing and approval of such articles of amendment as provided by this title, and upon the issuance of a certificate of authority by the director as provided by this title, such corporation may transact business as a trust company and is subject to regulation as a trust company under this title.

**Source:** SL 1998, ch 282, § 43; SL 2008, ch 258, § 14.

**51A-6A-66. Exclusion of entity from chapters 51A-5, 51A-6, and 51A-6A—Governing documents—Notice to director.** An entity may be excluded from the provisions of chapters 51A-5, 51A-6, and 51A-6A if:

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

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

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

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

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

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

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

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

**Source:** SL 2011, ch 212, § 7; SL 2013, ch 239, § 11.

**51A-6A-67. Trust company receivership and liquidation captive insurance company fund.** There is hereby established in the state treasury the trust company receivership and liquidation captive insurance company fund. The Department of Labor and Regulation may enter into an agreement with a captive insurance company for the management of the fund. Money in the fund may be used to pay for trust company receivership and liquidation costs for trust companies chartered and regulated by the Division of Banking as well as administrative and reinsurance costs for the fund. Interest earned on money in the fund shall be deposited into the fund. Unexpended money and any interest that may be credited to the fund shall remain in the fund. Any money in the trust company receivership and liquidation captive insurance company fund is continuously appropriated. Any money deposited into and distributed from the fund shall be set forth in an informational budget as described in § 4-7-7.2.

**Source:** SL 2016, ch 228, § 4; SDCL § 51A-6-23.

# TITLE 55 - Fiduciaries and Trusts

## CHAPTER 55-1 CLASSIFICATION AND CREATION OF TRUSTS

|           |   |           |  |
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**55-1-1. Purposes for which trust may be created.** Except as otherwise prescribed by chapters 43-4 and 43-25 relating to transfers, a trust may be created for any purpose for which a contract may lawfully be made.

**Source:** CivC 1877, § 1293; CL 1887, § 3916; RCivC 1903, § 1612; RC 1919, § 1190; SDC 1939 § 59.0104; SL 2017, ch 204, § 4.

**55-1-2. Trusts classified.** A trust is either express or implied.

**Source:** SDC 1939, § 59.0101.

**55-1-3. Express trust defined.** An express trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another.

**Source:** SDC 1939, § 59.0101.

**55-1-4. Creation of express trust—Words or acts of trustor.** An express trust is created as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty:

- (1) An intention on the part of the trustor to create a trust; and
- (2) The subject, purpose, and beneficiary of the trust.

Any express trust that concerns real property shall also be evidenced in writing.

**Source:** SDC 1939, § 59.0105; SL 2017, ch 204, § 5.

**55-1-5. Express trust created as to trustee—Words and acts of trustee.** An express trust is created as to the trustee by any words or acts of his, indicating with reasonable certainty:

- (1) His acceptance of the trust or his acknowledgment, made upon sufficient consideration, of its existence; and
- (2) The subject, purpose, and beneficiary thereof.

**Source:** SDC 1939, § 59.0105.

**55-1-5.1. Express trust need not be for exclusive benefit of beneficiaries.** The terms of an express

trust need not be for the exclusive benefit of its beneficiaries, whether or not the beneficiaries are ascertainable.

**Source:** SL 2017, ch 204, § 7.

**55-1-6. Implied trust—Definition—Creation.** An implied trust is one which is created by operation of law. An implied trust arises in the cases described in §§ 55-1-7 to 55-1-10, inclusive.

**Source:** SDC 1939, §§ 59.0101, 59.0102.

**55-1-6.1. Implied trust may not prejudice rights of real property purchaser or encumbrancer.** No implied trust may prejudice the rights of a purchaser or encumbrancer of real property for value and without notice of the trust.

**Source:** SL 2017, ch 204, § 6.

**55-1-7. Wrongful detention creates implied trust.** One who wrongfully detains a thing is an implied trustee thereof for the benefit of the owner.

**Source:** SDC 1939, § 59.0102 (1).

**55-1-8. Implied trust resulting from fraud, accident or wrongful act.** One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act, is, unless he has some other and better right thereto, an implied trustee of the thing gained for the benefit of the person who would otherwise have had it.

**Source:** SDC 1939, § 59.0102 (2).

**55-1-9. Implied trust created by transfer of property in violation of trust.** Everyone to whom property is transferred in violation of a trust holds the same as an implied trustee under such trust, unless he purchased it in good faith and for a valuable consideration.

**Source:** SDC 1939, § 59.0102 (3).

**55-1-10. Transfer of real property to one for money paid by another—Trust presumed.** When a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.

**Source:** SDC 1939, § 59.0102 (4).

**55-1-11. Implied trust—Declaration by court of equity.** The enumeration in §§ 55-1-7 to 55-1-10, inclusive, of cases wherein an implied trust arises does not exclude or prevent the arising of an implied trust in other cases nor prevent a court of equity from establishing and declaring an implied, resulting, or constructive trust in other cases and instances pursuant to the custom and practice of such courts.

**Source:** SDC 1939, § 59.0102.

**55-1-12. Trustor, trustee, beneficiary, power of appointment, and person defined.** The person whose confidence creates a trust is called the trustor; the person in whom the confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary. As used in this title, except as specifically provided in chapters 55-13 and 55-13A, the term, beneficiary, means a person that has a present or future beneficial interest in a trust, vested or contingent. A person is not a beneficiary solely by reason of holding a power of appointment or by reason of the existence or exercise of a discretionary power described in § 55-1-36.1 with respect to the person. As used in this title, except as provided in § 55-1-26, the term, power of appointment, means a power, including a withdrawal power as defined in § 55-1-24.2, to direct the disposition of trust property, but does not include the authority of a trustee to make a distribution to a beneficiary. A power of appointment is held by the person to whom the power has been given and once granted to a person, is not capable of appropriation or of manual delivery. A power of appointment is a general power of appointment if it is exercisable in favor of the person holding the power, the person's

estate, the person's creditors, or the creditors of the person's estate, whether or not the power is also exercisable in favor of others. A power of appointment is a non-general power of appointment if it is not a general power of appointment. As used in this chapter, the term, person, has the meaning set forth in § 55-4-1.

**Source:** SDC 1939, § 59.0103; SL 1998, ch 282, § 40; SL 2015, ch 240, § 9; SL 2016, ch 231, § 9.

**55-1-13. Voluntary trustee—Assumption of relationship.** Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee within the meaning of this chapter and chapter 55-2 not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence or over whose affairs he, by such confidence, obtains any control.

**Source:** SDC 1939, § 59.0103.

**55-1-14. Interest in existing trust—Transfer by operation of law or written instrument.** An interest in an existing trust can be transferred only by operation of law or by a written instrument subscribed by the person making the transfer or by his agent.

**Source:** SDC 1939, § 59.0118.

**55-1-15. Certain trusts not terminated upon trustor's death.** A trust which provides for one or more successor beneficiaries upon the death of the trustor is not invalid, merged or terminated if:

- (1) There is a trustor who is the sole trustee and the sole beneficiary during the trustor's lifetime; or
- (2) There are two or more trustors, one or more of whom is trustee, and the beneficial interest of the trust is in one or more of the trustors during the lifetime of the trustors.

**Source:** SL 1991, ch 395, § 1.

**55-1-16 to 55-1-19. Repealed by SL 2007, ch 280, §§ 21 to 24.**

**55-1-20. Trusts for non-charitable purposes.** Subdivisions 55-1-4(2) and 55-1-5(2) notwithstanding, a purpose trust may be performed pursuant to this section and sections 3 to 20, inclusive, of this Act if the trust is for a lawful noncharitable purpose or purposes. Any property may form a part or all of the trust estate, including some, all, or an interest in some or all of the property that is the subject or purpose of a purpose trust. A governing instrument of such a trust shall be liberally construed in favor of its validity to presume against the merely precatory or honorary nature of the disposition and to carry out the trustor's intent. If necessary, extrinsic evidence is admissible to determine the trustor's intent. Neither the common law rule against perpetuities, nor any rule restricting the accumulation of income, nor any common law rule limiting the duration of noncharitable purpose trusts is in force in this state.

**Source:** SL 2006, ch 247, § 1; SL 2008, ch 257, § 1; SL 2011, ch 212, § 40.

**55-1-21. Trust for care of designated animal.** The following purpose trusts are valid:

- (1) A trust for the care of a designated animal or animals;
- (2) A trust for the care, maintenance, promotion, continuation, conservation, upkeep, protection, furtherance, or preservation of any other property; and
- (3) A trust for any other lawful noncharitable purpose or purposes.

**55-1-21.1** Except as otherwise provided in the governing instrument, a trust described in § 55-1-21(1) terminates when no living animal is covered by the trust.

**55-1-21.2** A court may reasonably reduce the amount of the property transferred to the trustee of a purpose trust if the court determines that the trust corpus substantially exceeds the amount required for the intended purposes. The court should consider allowing the trust to be administered for a reasonable period of time before undertaking a determination. The amount of the reduction, if any, passes as unexpended trust property, as set forth in section 11 of this Act.

**55-1-21.3** If the court finds that the fulfillment of the purposes are or have become impossible, inexpedient, or unlawful, the court shall make an order directing that the trust be administered in such manner as, in the judgment of the court, will, as nearly as can be, accomplish the general purposes, the objects, and intentions of the trustor.

**55-1-21.4** The purposes of a purpose trust may be enforced by an enforcer designated in the governing instrument and if no enforcer is acting pursuant to the terms of the governing instrument the court may appoint one or more enforcers and successor enforcers. No purpose trust may fail for want of an enforcer. An enforcer may petition for, consent to, waive, or object to any matter regarding a purpose trust with regard to the purpose of the trust which the enforcer represents or concerning the administration of the purpose trust. Enforcers are fiduciaries and, except as otherwise provided in the governing instrument, are entitled to reasonable compensation as determined by the trustee. An enforcer may also serve as a trust protector or a family advisor pursuant to chapter 55-1B. However, an enforcer may not serve as an enforcer while serving as a trustee or a distribution trust advisor of the same trust.

**55-1-21.5** Any trustee may petition the court for the removal of an enforcer. An enforcer may be removed if the court finds:

- (1) The enforcer committed a serious breach of the purpose enforcer's responsibilities or is unfit or unwilling to serve;
- (2) A significant and unjustified lack of cooperation or hostility between the enforcer and the trustee, trust protector, or trust advisor; or
- (3) There has been a substantial change in circumstances and removal of the enforcer would best serve the purpose or purposes of the trust. The governing instrument may provide additional procedures for the removal of an enforcer.

**55-1-21.6** Except as otherwise provided in the governing instrument, a trustee of a purpose trust is vested with full discretion in:

- (1) Interpreting the purposes of the trust consistent with the terms of the governing instrument; and
- (2) Applying, distributing, or expending principal and income to further the trust's purposes.

**55-1-21.7** If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee if required to ensure that the intended purposes are carried out or if no successor trustee is designated in the governing instrument or no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as are advisable to carry out the intent of the trustor and the purpose of sections 2 to 20, inclusive, of this Act.

**55-1-21.8** Upon termination of a purpose trust, the trustee shall distribute any remaining trust property as directed in the governing instrument. Only in the event that the governing instrument is silent shall the trustee, upon termination of a purpose trust, distribute any remaining trust property as follows:

- (1) If the trust was created in a nonresiduary clause in a testator's will and the will fails to direct the distribution of unexpended trust property, then under the residuary clause of the testator's will, and for the purposes of § 29A-2-707, the residuary clause is treated as creating a future interest under the terms of a trust; and
- (2) Otherwise, to the trustor's heirs under § 29A-2-711

**55-1-21.9** Except as ordered by the court or required by the governing instrument, no filings, reports, periodic accounting, separate maintenance of funds, appointment, or registration of a purpose trust are required.

**55-1-21.10** Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust's purposes or the benefit of a covered animal.

**Source:** SL 2006, ch 247, § 2.

**55-1-22. Provisions governing trusts for specific purposes selected by trustee and for care of animals.** Any trust provided for by §§ 55-1-20 and 55-1-21 is subject to the following provisions:

- (1) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust's purposes or for the benefit of a covered animal;
- (2) Upon termination, the trustee shall transfer the unexpended trust property in the following order:
  - (a) As directed in the trust instrument;
  - (b) If the trust was created in a non-residuary clause in the transferor's will or in a codicil to the transferor's will, then under the residuary clause in the transferor's will; and
  - (c) If no beneficiary results from the application of subsection (a) or (b) of this subdivision, then to the transferor's heirs under § 29A-2-711;
- (3) For the purposes of § 29A-2-707, the residuary clause is treated as creating a future interest under the terms of a trust;
- (4) The intended use of the principal or income may be enforced by a person designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by that person;
- (5) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee;
- (6) A court may reasonably reduce the amount of the property transferred if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subdivision (2) of this section;
- (7) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee if required to ensure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of §§ 55-1-20 to 55-1-22, inclusive.

A hybrid purpose trust which meets the description of a purpose trust in sections 2 to 13, inclusive, of this Act also includes one or more beneficiaries is valid and may be performed.

**55-1-22.1** In a hybrid purpose trust when the interests of the beneficiaries and purposes are concurrent, the trustee shall maintain not less than two separate shares, one for the beneficiaries; and a second for the purposes, and the trustee may be liable to the beneficiaries for the actual damages caused thereby, if any, for failing to do so.

**55-1-22.2** The beneficiaries' share of a hybrid purpose trust is governed by §§ 43-5-8 and 43-6-7.

**55-1-22.3** A hybrid purpose trust may:

- (1) Contain a spendthrift provision; and
- (2) Also qualify as a trust described in § 55-16-2.

**55-1-22.4** The provisions of sections 3 to 12, inclusive, of this Act apply to a hybrid purpose trust except that:

- (1) Under section 4 of this Act, except as otherwise provided in the governing instrument, a trust as described in subdivision (1) of section 3 of this Act terminates when no living animal is covered by the trust unless the trust may continue for the benefit of the beneficiaries; and

(2) Under section 5 of this Act, a court has no power to reduce the amount of trust property intended for or allocated to any beneficiaries or any charitable purposes.

**55-1-22.5** Except as otherwise provided in the governing instrument, a trustee of a hybrid purpose trust is vested with full discretion in administering the trust and considering the best interests of the beneficiaries and the purposes of the trust.

**55-1-22.6** Enforcer of hybrid purpose trust. In addition to § 55-1-21.4, an enforcer may also not be a beneficiary of a hybrid purpose trust.

**Source:** SL 2006, ch 247, § 3.

**55-1-23. Repealed by SL 2011, ch 212, § 41**

**55-1-24. Definitions applicable to §§ 55-1-24 to 55-1-45.** Terms used in §§ 55-1-24 to 55-1-45, inclusive, mean:

- (1) "Beneficial interest," is limited to mean a distribution interest or a remainder interest. A beneficial interest specifically excludes a power of appointment or a power reserved by the settlor;
- (2) "Distribution beneficiary," a beneficiary who is an eligible distributee or permissible distributee of trust income or principal;
- (3) "Distribution interest," a distribution interest held by a distribution beneficiary. A distribution interest may be a current distribution interest or a future distribution interest. A distribution interest may be classified as a mandatory interest, a support interest, or a discretionary interest;
- (4) "Power of appointment," as defined in § 55-1-12;
- (5) "Reach," with respect to a distribution interest or power, to subject the distribution interest or power to a judgment, decree, garnishment, attachment, execution, levy, creditor's bill or other legal, equitable, or administrative process, relief, or control of any court, tribunal, agency, or other entity as provided by law;
- (6) "Remainder interest," an interest where a trust beneficiary receives the property outright at some time during the future;
- (7) "Reserved power," a power held by the settlor.

**Source:** SL 2007, ch 280, § 1; SL 2008, ch 257, § 2; SL 2009, ch 252, § 2; SL 2011, ch 212, § 30; SL 2015, ch 240, § 10; SL 2016, ch 231, § 10.

**55-1-24.1. Improper motive.** For purposes of §§ 55-1-24 to 55-1-45, inclusive, improper motive is demonstrated by action such as the following:

- (1) A trustee refusing to make or limiting distributions to beneficiaries other than the trustee due to the trustee's self interest when the trustee also holds a beneficial interest subject to a discretionary interest; or
- (2) A trustee making a distribution in excess of an ascertainable standard to himself or herself as beneficiary when the trustee is restricted by an ascertainable standard in the trust.

**Source:** SL 2008, ch 257, § 3; SL 2011, ch 212, § 31.

**55-1-24.2. Withdrawal power.** A withdrawal power allows a person a right to withdraw all or some part of the trust property, whether from income or principal. The holder of a withdrawal power is not deemed to be the settlor of the trust by failing to exercise a withdrawal power or letting a withdrawal power lapse.

**Source:** SL 2011, ch 212, § 32; SL 2016, ch 231, § 11.

**55-1-25. Distinction between discretionary trust and support trust—Creditor rights—Judicial review.** The common law distinction between a discretionary trust and a support trust and the dual judicial review standards related to this distinction shall be maintained. In the area of creditor rights, the Restatement of Trusts (Third) and the Uniform Trust Code create many new positions of law as well as adopts many minority positions of law. The provisions of §§ 55-1-24 to 55-1-43, inclusive, affirmatively reject many of

these positions. Therefore, the Legislature does not intend the courts to consult the Restatement (Third) of the Law of Trusts § 50, § 56, § 58, § 59, or § 60 as approved by the American Law Institute or Uniform Trust Code Article 5 and Section 814(a) as approved by the National Conference of Commissioners on Uniform State Laws in 2004 with respect to subject matters addressed by the provisions of §§ 55-1-24 to 55-1-43, inclusive.

**Source:** SL 2007, ch 280, § 2; SL 2015, ch 240, § 11.

**55-1-26. Judicial foreclosure of beneficial interests, powers of appointment, and reserved powers prohibited—Creditors may not reach powers of appointment or remainder interests.** Regardless of whether or not a trust contains a spendthrift provision:

- (1) No beneficial interest, power of appointment, or reserved power in a trust may be judicially foreclosed;
- (2) No creditor may reach a power of appointment or a remainder interest at the trust level. The creditor shall wait until the funds are distributed before the creditor may reach the funds; and
- (3) No power of appointment is property or an interest in property.

For purposes of this section, power of appointment is held by a person to whom a power has been given, not the settlor.

**Source:** SL 2007, ch 280, § 3; SL 2009, ch 252, § 3; SL 2016, ch 231, § 12.

**55-1-27. Certain remainder interests not property interests.** Although a remainder interest may be an enforceable right, where it is not absolutely certain based on the language of the trust that the remainder interest will be distributed within one year, it may not be classified as a property interest. This section does not affect eligibility for any public assistance program administered by the Department of Social Services pursuant to § 28-1-1.

**Source:** SL 2007, ch 280, § 4.

**55-1-28. Interest of beneficiary or others not reachable by creditors.** No creditor may reach an interest of a beneficiary or of any other person on the grounds that the beneficiary or other person holds, either alone or in conjunction with another person, either or both of the following:

- (1) An unconditional or conditional power to remove a trustee; or
- (2) An unconditional or conditional power to replace a trustee.

The powers to remove or replace a trustee are personal to the power holder. No court may order, direct, or otherwise compel a power holder to directly or indirectly exercise the power to remove or replace a trustee for the purpose of directly or indirectly satisfying, either in whole or in part, any claim or judgment against the power holder or a beneficiary.

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

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

**Source:** SL 2007, ch 280, § 5; SL 2009, ch 252, § 4; SL 2013, ch 239, § 21.

**55-1-29. Trust property not subject to personal obligations of trustee.** Trust property is not subject to the personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

**Source:** SL 2007, ch 280, § 6.

**55-1-30. Distribution and remainder interests not relevant to division of marital property.** Neither a distribution interest nor a remainder interest are relevant in the equitable division of marital property.

**Source:** SL 2007, ch 280, § 7; SL 2008, ch 257, § 4.

**55-1-31. Resources of settlor's spouse to be considered in making distribution from support trust—Other beneficiary's resources need not be considered.** Unless otherwise provided in the trust, if the settlor's spouse is named as beneficiary, the settlor's spouse is still living, and the trust is classified as a support trust, then the trustee shall consider the resources of the settlor's spouse, including the settlor's obligation of support, prior to making a distribution. In all other cases, unless otherwise provided in the trust, the trustee need not consider the beneficiary's resources in determining whether a distribution should be made.

**Source:** SL 2007, ch 280, § 8; SL 2009, ch 252, § 5; SL 2011, ch 212, § 33.

**55-1-32. Factors which are not dominion and control over trust.** In the event that a party challenges a settlor or a beneficiary's influence over a trust, none of the following factors, alone or in combination, may be considered dominion and control over a trust:

- (1) The settlor or a beneficiary serving as a trustee or a co-trustee as described in § 55-1-28;
- (2) The settlor or a beneficiary holds an unrestricted power to remove or replace a trustee;
- (3) The settlor or a beneficiary is a trust administrator, a general partner of a partnership, a manager of a limited liability company, an officer of a corporation, or any other managerial function of any other type of entity, and part or all of the trust property consists of an interest in the entity;
- (4) A person related by blood or adoption to the settlor or a beneficiary is appointed as trustee;
- (5) The settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or friend is appointed as trustee;
- (6) A business associate is appointed as a trustee;
- (7) A beneficiary holds any power of appointment over any or all of the trust property;
- (8) The settlor holds a power to substitute property of equivalent value;
- (9) The trustee may loan trust property to the settlor for less than a full and adequate rate of interest or without adequate security;
- (10) The distribution language provides any discretion;
- (11) The trust has only one beneficiary eligible for current distributions; or
- (12) The beneficiary serving as a trust advisor for investments under subdivision 55-1B-1(6).

**Source:** SL 2007, ch 280, § 9; SL 2009, ch 252, § 6; SL 2012, ch 233, § 20.

**55-1-33. Factors which are insufficient evidence that settlor controls or is alter ego of trustee.**

Absent clear and convincing evidence, no settlor of an irrevocable trust may be deemed to be the alter ego of a trustee. The following factors by themselves or in combination are not sufficient evidence for a court to conclude that the settlor controls a trustee or is the alter ego of a trustee:

- (1) Any combination of the factors listed in § 55-1-32;
- (2) Isolated occurrences where the settlor has signed checks, made disbursements, or executed other documents related to the trust as a trustee, when in fact the settlor was not a trustee;
- (3) Making any requests for distributions on behalf of beneficiaries;
- (4) Making any requests to the trustee to hold, purchase, or sell any trust property.

**Source:** SL 2007, ch 280, § 10.

**55-1-34. Provision that beneficial interest in trust income or principal may not be transferred before payment to beneficiary permissible.** A settlor may provide in the terms of the trust that a beneficiary's beneficial interest in a trust's income, principal, or in both, may not be voluntarily or involuntarily transferred before payment or delivery of the beneficial interest to the beneficiary by the trustee.

**Source:** SL 2007, ch 280, § 11.

**55-1-35. Trust declaration that beneficiary's interest subject to spendthrift trust—Payment of beneficiary expenses.** A declaration in a trust that the interest of a beneficiary shall be held subject to a spendthrift trust is sufficient to restrain voluntary or involuntary alienation of a beneficial interest by a beneficiary to the maximum extent provided by law. Regardless of whether a beneficiary has any outstanding creditor, a trustee of a spendthrift trust may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a spendthrift trust.

**Source:** SL 2007, ch 280, § 12; SL 2011, ch 212, § 34.

**55-1-36. Satisfaction of claims of settlor's creditors from trust estate if settlor is beneficiary.** If a settlor is also a beneficiary of the trust, and the transfer is a qualified transfer pursuant to chapter 55-16, the provisions of §§ 55-1-24 to 55-1-43, inclusive, also apply. Conversely, if the settlor is a beneficiary of the trust and the transfer is not a qualified transfer pursuant to chapter 55-16, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate.

**Source:** SL 2007, ch 280, § 13; SL 2011, ch 212, § 35; SL 2015, ch 240, § 12.

**55-1-36.1. Effect on creditor claims of trustee discretionary powers to pay taxes or make reimbursements for taxes.** Regardless of whether a disposition is a qualified disposition pursuant to chapter 55-16, where a trustee is granted a discretionary power by the terms of the trust instrument, or any provision of law, to pay directly to any taxing authority, or to reimburse the person liable for, any tax imposed by a taxing authority on the person by reason of the person being treated as the owner of all or any portion of the trust property pursuant to §§ 671 to 678, inclusive, of the Internal Revenue Code of 1986, 26 U.S.C. §§ 671 to 678, inclusive, as of January 1, 2016, and the U.S. Treasury Regulations promulgated thereunder, as of January 1, 2016:

(1) A creditor of the person shall not satisfy a claim from the property of the trust solely because of the existence or exercise of the discretionary power; and

(2) The use of trust property to pay the tax shall not be deemed a distribution or transfer of trust property to the person for any purpose, and the amount paid from the trust to the taxing authority or to the person in reimbursement of the person's payment of the tax is not subject to the claims of a creditor of the person solely because of the existence or exercise of the discretionary power.

**Source:** SL 2015, ch 240, § 13; SL 2016, ch 231, § 13.

**55-1-37. Application of spendthrift provision.** A spendthrift provision applies to both distribution interests and remainder interests. A spendthrift provision is a material provision of a trust.

**Source:** SL 2007, ch 280, § 14; SL 2008, ch 257, § 5.

**55-1-38. Classification of distribution interest. A distribution interest can be classified in three ways:**

(1) As a mandatory interest, which is a distribution interest, in which the timing of any distribution must occur within one year from the date the right to the distribution arises, and the trustee has no discretion in determining whether a distribution shall be made or the amount of such distribution;

(2) As a support interest, which is not a mandatory interest but still contains mandatory language such as "shall make distributions" and is coupled with a standard capable of judicial interpretation; or

(3) As a discretionary interest, which is any interest where a trustee has any discretion to make

or withhold a distribution.

A discretionary interest may be evidenced by permissive language such as "may make distributions" or it may be evidenced by mandatory distribution language that is negated by the discretionary language of the trust, such as "the trustee shall make distributions in the trustee's sole and absolute discretion." An interest that includes mandatory distribution language such as "shall" but is subsequently qualified by discretionary distribution language shall be classified as a discretionary interest and not as a support or a mandatory interest. A discretionary interest is any interest that is not a mandatory or a support interest.

**Source:** SL 2007, ch 280, § 15; SL 2008, ch 257, § 6; SL 2009, ch 252, § 7.

**55-1-38.1. Classification of interest as support interest.** If a trust instrument containing the distribution language specifically provides that the trustee exercise discretion in a reasonable manner with regard to a discretionary interest, then notwithstanding any other provision of §§ 55-1-38 to 55-1-43, inclusive, the distribution interest shall be classified as a support interest. A beneficiary's right to a distribution as well as a creditor's right regarding a beneficiary's support interest is governed by § 55-1-42.

**Source:** SL 2009, ch 252, § 8.

**55-1-39. Bifurcation of trust.** To the extent a trust contains any combination of a mandatory provision, a support provision, the trust shall be bifurcated as follows:

(1) The trust shall be a mandatory interest only to the extent of the mandatory language;

(2) The trust shall be a support interest only to the extent of such support language;

(3) The remaining trust property shall be held as a discretionary interest;

(4) A support interest that includes mandatory language such as "shall" but is subsequently qualified by discretionary language, shall be classified as a discretionary interest and not as a support interest.

**Source:** SL 2007, ch 280, § 16.

**55-1-40. Language resulting in classification of distribution interest.** Although not the exclusive means to create a distribution interest, absent clear and convincing evidence to the contrary, the following language by itself results in the following classification of distribution interest:

(1) Mandatory interest:

(a) "All income shall be distributed to (named beneficiary)"; or

(b) "One hundred thousand dollars a year shall be distributed to (named beneficiary)";

(2) Support interest:

(a) "The trustee shall make distributions for health, education, maintenance, and support";

(3) Discretionary interest:

(a) "The trustee, may, in the trustee's sole and absolute discretion make distributions for health, education, maintenance, and support";

(b) "The trustee, in the trustee's sole and absolute discretion, shall make distributions for health, education, maintenance, and support";

(c) "The trustee may make distributions for health, education, maintenance, and support";

(d) "The trustee shall make distributions for health, education, maintenance, and support. The trustees may exclude any of the beneficiaries or may make unequal distributions among them";

(e) "The trustee may make distributions for health, education, maintenance, support, comfort, and general welfare.

**Source:** SL 2007, ch 280, § 17; SL 2008, ch 257, § 7.

**55-1-41. Effect of spendthrift provision.** If the trust contains a spendthrift provision, no creditor may reach present or future mandatory distributions from the trust at the trust level. Moreover, no court may order a trustee to distribute past due mandatory distributions directly to a creditor.

**Source:** SL 2007, ch 280, § 18; SL 2009, ch 252, § 9.

**55-1-42. Mandatory or support interests.** A beneficiary of a mandatory or a support interest has an enforceable right to a distribution pursuant to a court's review. A trustee's distribution decision may be reviewed for unreasonableness, dishonesty, improper motivation, or failure, if under a duty to do so, to act. This does not, however, raise the beneficiary's support interest to the level of a property interest.

If the trust contains a spendthrift provision, notwithstanding the beneficiary's right to force a distribution with regard to a mandatory or support interest, no creditor may force a distribution with regard to a mandatory or support interest. No creditor may reach present or future support distributions with regard to a mandatory or support interest.

Regardless of whether a beneficiary has any outstanding creditor, a trustee of a mandatory or a support interest may directly pay any expense on behalf of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a mandatory or support interest.

**Source:** SL 2007, ch 280, § 19; SL 2008, ch 257, § 8; SL 2009, ch 252, § 10.

**55-1-43. Discretionary interests.** The following provisions apply only to discretionary interests:

- (1) A discretionary interest is neither a property interest nor an enforceable right. It is a mere expectancy;
- (2) No creditor may force a distribution with regard to a discretionary interest. No creditor may require the trustee to exercise the trustee's discretion to make a distribution with regard to a discretionary interest;
- (3) A court may review a trustee's distribution discretion only if the trustee:
  - (a) Acts dishonestly;
  - (b) Acts with an improper motive; or
  - (c) Fails, if under a duty to do so, to act.

A reasonableness standard may not be applied to the exercise of discretion by the trustee with regard to a discretionary interest. Other than for the three circumstances listed in this subdivision, a court has no jurisdiction to review the trustee's discretion or to force a distribution.

Absent express language to the contrary, in the event that the distribution language in a discretionary interest permits unequal distributions between beneficiaries or distributions to the exclusion of other beneficiaries, the trustee may distribute all of the accumulated, accrued, or undistributed income and principal to one beneficiary in the trustee's discretion.

Regardless of whether a beneficiary has any outstanding creditor, a trustee of a discretionary interest may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a discretionary interest.

**Source:** SL 2007, ch 280, § 20; SL 2009, ch 252, § 11.

**55-1-44. Action for fraudulent transfer of settlor's assets.** Notwithstanding any other provision of law, no action of any kind, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a South Dakota trust or for avoidance of a transfer to a South Dakota trust unless the settlor's transfer of property was made with the intent to defraud that specific creditor.

**Source:** SL 2011, ch 212, § 36.

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

- (1) Is a creditor of the settlor before the settlor's assets are transferred to the trust, and the action under § 55-1-44 is brought within the later of:
  - (a) Two years after the transfer is made; or
  - (b) Six months after the transfer is or reasonably could have been discovered by the creditor if the creditor:
    - (i) Can demonstrate that the creditor asserted a specific claim against the settlor before the transfer; or
    - (ii) Files another action, other than an action under § 55-1-44, against the settlor that asserts a claim based on an act or omission of the settlor that occurred before the transfer, and the action described in this subsection is filed within two years after the transfer; or
- (2) Becomes a creditor subsequent to the transfer into trust, and the action under § 55-1-44 is brought within two years after the transfer is made.

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

**Source:** SL 2011, ch 212, § 37; SL 2013, ch 239, § 23.

**55-1-46. No contest clause defined—Enforceability.** For purposes of §§ 55-1-46 to 55-1-51, inclusive, a no contest clause is a provision or clause in a trust, that penalizes a qualified beneficiary for contesting a trust or instituting other proceedings at law or equity relating to the trust estate, excluding proceedings related to trust administration. Except as provided in §§ 55-1-47 to 55-1-51, inclusive, a no contest clause shall be enforced unless probable cause exists for instituting the proceeding on the grounds of:

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

**Source:** SL 2012, ch 233, § 8.

**55-1-47. Extrinsic evidence not admissible to establish settlor's intent concerning no contest clause.** A no contest clause shall be construed to carry out the settlor's intent. Except to the extent the no contest clause in the trust is vague or ambiguous, extrinsic evidence is not admissible to establish the settlor's intent concerning the no contest clause. The provisions of this section do not prohibit such evidence from being admitted for any other purpose authorized by law.

**Source:** SL 2012, ch 233, § 9.

**55-1-48. Circumstances under which no contest clause unenforceable.** A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, in good faith and based upon probable

cause, contests a provision that benefits any of the following persons:

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

**Source:** SL 2012, ch 233, § 10.

**55-1-49. Contest regarding settlor's signature.** Notwithstanding anything to the contrary in §§ 55-1-46 to 55-1-51, inclusive, a no contest clause is enforceable against a beneficiary to the extent the beneficiary elects to contest or otherwise challenge the settlor's signature whereby such a challenge does not in any manner constitute good, probable, or reasonable cause if the settlor's signature was witnessed by nonrelative witnesses or a duly qualified non-relative notary public or both.

**Source:** SL 2012, ch 233, § 11.

**55-1-50. Attorneys fees and costs.** The court may award attorneys fees and costs to the prevailing party in an action involving the enforceability of a no contest provision.

**Source:** SL 2012, ch 233, § 12.

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

**Source:** SL 2012, ch 233, § 13; SL 2013, ch 239, § 12.

**55-1-52. Interest on general pecuniary devises.** General pecuniary devises bear interest at the Category B rate of interest as provided in § 54-3-16 beginning one year after the event requiring a distribution until payment, unless a contrary intent is indicated by the terms of the trust.

**Source:** SL 2013, ch 239, § 15.

**55-1-53. Expansion, restriction, elimination, or variance of provisions of general application.** The terms of a governing instrument may expand, restrict, eliminate, or otherwise vary any provisions of general application to trusts and trust administration. Nothing in this section allows the terms of the governing instrument to expand, restrict, eliminate, or otherwise vary the duties, restrictions, and liabilities imposed by the provisions of §§ 55-4-11 and 55-4-12.

**Source:** SL 2015, ch 240, § 14.

**55-1-54. Arbitration.** In addition to the trustee's power to submit to an arbitration claim in favor of or against a trust or trustee as set forth in § 55-1A-25, a provision in a trust requiring the arbitration of a dispute between or among the beneficiaries, a fiduciary under the will or trust, or any combination of them, is enforceable pursuant to the provisions of chapter 21-25A. Unless otherwise provided in the governing instrument or a court order, the arbitration shall be held in this state. Notwithstanding the foregoing, a challenge to the validity of all or part of the trust is not subject to arbitration. Any proceeding pursuant to this section is subject, upon request by the acting trustee, the trustor, if living, or any beneficiary, to the privacy protections of § 21-22-28. The arbitrator shall grant the request, if made.

**Source:** SL 2015, ch 240, § 15.

**55-1-55. Trust enforceable although not funded or without res, corpus, or assets.** A trust is valid and enforceable even though it may not be funded at a given time, or from time to time, or does not initially have any res or corpus or otherwise contain any asset of any nature. A trust is valid and enforceable even though its res is neither ascertainable nor identifiable at the time of the trust's creation. No trustee, trust protector, or trust advisor has any duty prior to the time a trust has a res, corpus, or any asset.

**Source:** SL 2016, ch 231, § 14.

**55-1-56. Registration of trust in court at principal place of administration.** The trustee of a trust that has its principal place of administration in this state may register the trust in the court of this state at the principal place of administration. Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's place of business where the records pertaining to the trust are kept, or at the trustee's residence if the trustee has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the trust instrument, is:

- (1) The place of business of the corporate trustee if there is only one corporate co-trustee;
- (2) The place of business or residence of the individual trustee who is a professional fiduciary if there is only one such person and no corporate co-trustee; or
- (3) The place of business or residence of any of the co-trustees as agreed upon by the co-trustees.

**Source:** SL 2017, ch 204, § 8.

**55-1-57. Contents of registration statement.** Registration shall be accomplished by filing a statement indicating the name and address of the trustee in which it acknowledges the trusteeship. The statement shall indicate whether the trust has been registered elsewhere.

The statement shall identify the trust:

- (1) In the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate; or in the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument;
- (2) If a trust has been registered elsewhere, registration in this state is ineffective until either the earlier registration is released by order of the court where prior registration occurred or an instrument executed by the trustee and all current income or principal beneficiaries is filed with the registration in this state;
- (3) The name and address of each co-trustee, trust advisor, trust protector, or other trust fiduciary;
- (4) A statement that the trustee acknowledges the trusteeship and submits to the jurisdiction of the court in any proceeding relating to the trust that may be initiated by any interested person while the trust remains registered, providing that notice is given as provided by law.

**Source:** SL 2017, ch 204, § 9.

**55-1-58. Confidentiality of registration.** The registration shall be sealed and kept confidential except as provided below.

The settlor, a trustee, trust advisor, or trust protector may obtain a certified copy of the registration but no other person or entity, absent a court order, may view or obtain a copy of the trust registration.

The registration may be cancelled by the clerk of courts upon receipt of an instrument executed by the trustee and all current income and principal beneficiaries or upon receipt of a court order.

**Source:** SL 2017, ch 204, § 10.

**55-1-59. Trust registration form.** The trust registration form may be substantially similar to the following form:

State of Court Dakota \_\_\_\_\_ Judicial Circuit

County of \_\_\_\_\_

Trust Registration No. \_\_\_\_\_

REGISTRATION OF TRUST

Name of Trust:

\_\_\_\_\_  
Name & Address of Trustee:

\_\_\_\_\_  
Name & Address of Co-Trustees:

\_\_\_\_\_  
Names and Address of any trust advisors, trust protectors or other trust fiduciaries:

Trustee hereby acknowledges this trusteeship and submits to the jurisdiction of the court in any proceeding relating to the trust that may be initiated by any interested person while the trust remains registered, providing that notice is given as provided by law.

The trust (has) (has not) been registered in another jurisdiction. (If registered elsewhere, state where other registration was made.)

Note: If a trust has been registered elsewhere, registration in this state is ineffective until either the earlier registration is released by order of the court where prior registration occurred or an instrument executed by the trustee and all current income and principal beneficiaries is filed with the registration in this state.

The trust is: (Check one and fill in the blanks.)

A testamentary trust. \_\_\_\_ Name of testator:

\_\_\_\_\_  
Date and place of domiciliary probate:

A written inter vivos trust. \_\_\_\_ Name of settlor:

\_\_\_\_\_  
Name of original trustee:

\_\_\_\_\_  
Date of trust instrument:

Trustee's Signature \_\_\_\_\_

Date: \_\_\_\_\_

Trustee's Signature \_\_\_\_\_

Date: \_\_\_\_\_

Registered in the Circuit Court, \_\_\_\_ Judicial Circuit on \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Circuit Court Clerk

**Source:** SL 2017, ch 204, § 11.

**55-1A-1. Powers enumerated in chapter apply to any trust unless specifically excluded—Powers as**

**additional to common law powers.** Any or all of the powers enumerated in this chapter apply to any trust which is governed by South Dakota law unless the instrument specifically excludes any or all of the powers provided in this chapter. Further, this chapter applies without regard to the date of execution or whether such trust was created by will or inter vivos trust instrument. These powers shall be in addition to, and not in limitation of, all other common law or statutory powers of a trustee. Such powers are applicable to a trustee authorized to administer a trust estate established or to be established pursuant to the terms of a will or other written instrument, with the same effect, and subject to the same judicial interpretation and control in appropriate cases, as though such language were set forth verbatim in the instrument.

**Source:** SL 1979, ch 336, § 2; SL 2002, ch 100, § 10.

**55-1A-2. Trustee defined.** As used in this chapter, the word, trustee, means any natural or legal person or persons acting as an original, substitute, added, or successor trustee of a testamentary or inter vivos trust, whichever in a particular case is appropriate.

**Source:** SL 1979, ch 336, § 1.

**55-1A-3, 55-1A-4. Repealed by SL 2002, ch 100, §§ 11, 12**

**55-1A-4.1. Repealed by SL 2002, ch 100, § 13**

**55-1A-5. Retention of trust property by trustee.** A trustee may collect, hold, and retain trust assets until, in his judgment, disposition of the assets should be made, without regard to any affect the retention may have upon the diversification of the trust estate. Trust property may be retained even though it includes an asset in which its trustee is personally interested.

**Source:** SL 1979, ch 336, § 5.

**55-1A-6. Additions to trust assets.** A trustee may receive additions to the assets of his trust from any source.

**Source:** SL 1979, ch 336, § 6.

**55-1A-7. Operation of business by trustee.** A trustee may continue or participate in the operation of any business or other enterprise, and effect the incorporation, dissolution, or other change in the form of the organization of the business or enterprise.

**Source:** SL 1979, ch 336, § 7.

**55-1A-8. Acquisition of undivided interest in trust asset.** A trustee may acquire an undivided interest in a trust asset in which he, in any trust capacity, holds an undivided interest.

**Source:** SL 1979, ch 336, § 8.

**55-1A-9. Investment of trust assets.** A trustee may invest and reinvest trust assets in any property or in an undivided interest in any property, wherever located, including bonds, debentures, secured or unsecured notes, preferred or common stock of corporations, real estate or improvements thereon or any interest therein, oil and mineral leases or royalty or similar interests, and interests in trusts including investment trusts and common trust funds maintained by a corporate trustee and any affiliated investments as defined in § 55-1A-9.1. Any such investments may be made, regardless of any lack of diversification.

**Source:** SL 1979, ch 336, § 9; SL 1993, ch 354; SL 2007, ch 247, § 6.

**55-1A-9.1. Affiliated investments. (a) As used in this section:**

(1) "Investment" means any security as defined in § 2(a)(1) of the Securities Act of 1933, any contract of sale of a commodity for future delivery within the meaning of § 2(l) of the Commodity Exchange Act, or any other asset permitted for trustee accounts pursuant to the terms of this title or by the terms of the governing instrument, including by way of illustration and not limitation, individual portfolios of investment holdings, shares or interests in a private investment fund (including a private investment fund organized as a

limited partnership, limited liability company, trust or other form, a statutory or common law business trust, or a real estate investment trust), joint venture or other general or limited partnership, or an open-end or closed-end management type investment company or investment trust registered, unregistered, or exempt from registration under the Investment Company Act of 1940;

(2) “Affiliate” means any corporation or other entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the trustee;

(3) “Affiliated investment” means an investment for which the trustee or an affiliate of the trustee acts as investment adviser, sponsor, administrator, distributor, placement agent, underwriter, broker, custodian, transfer agent, registrar or in any other capacity for which it receives or has received a fee or commission from such investment or an investment acquired or disposed of in a transaction for which the trustee or an affiliate of the trustee receives or has received a fee or commission;

(4) “Fee or commission” means compensation paid to a trustee or an affiliate thereof on account of its services to or on behalf of an investment, including by way of illustration and not limitation, advisory fees, management fees, brokerage fees, service fees, special performance fees, profit allocations, and expense reimbursements.

(b) In the absence of an express prohibition in the trust instrument, a trustee may purchase, sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment and, upon satisfaction of the conditions stated in subsection (c) of this section, such trustee may receive trustee compensation from such account at the same rate as the trustee would otherwise be entitled to be compensated.

(c) A trustee seeking compensation pursuant to subsection (b) of this section shall disclose to those beneficiaries, as defined in § 55-2-13, all fees, commissions, compensation or other benefits and profits paid or to be paid by the account, or received or to be received by an affiliate arising from such affiliated investment. The disclosure required under this subsection may be given either in a copy of the prospectus or any other disclosure document prepared for the affiliated investment under federal or state securities laws or in a written summary that includes all fees, commissions, compensation or other benefits and profits received or to be received by the trustee or any affiliate of the trustee and an explanation of the manner in which such fees, commissions, compensation or other benefits and profits are calculated (either as a percentage of the assets invested or by some other method). Such disclosure shall be made at least annually unless there has been no increase in the rate at which such fees or commissions are calculated since the most recent disclosure. Notwithstanding the foregoing provisions of this subsection, no such disclosure is required if:

(i) The governing instrument or a court order expressly authorizes the trustee to invest the trust account in affiliated investments or otherwise deal with an affiliate or an interest in an affiliated investment; or

(ii) The directed trustee is acting at the direction of an investment trust advisor pursuant to chapter 55-1B.

(d) A trustee that has complied with subsection (c) of this section (whether by making the applicable disclosure or by relying on the terms of a governing instrument or court order) shall have full authority to administer an affiliated investment (including the authority to vote proxies thereon) without regard to the affiliation between the trustee and the investment.

(e) If the recipients of information regarding the trust’s existence have been restricted, eliminated, or modified pursuant to § 55-2-13, then the notification described in subsection (c) is subject to such restriction, modification, or elimination.

**Source:** SL 2007, ch 247, § 7; SL 2009, ch 252, § 12; SL 2014, ch 226, § 19; SL 2015, ch 240, § 16.

**55-1A-10. Deposit of trust funds in bank.** A trustee may deposit trust funds in a bank, including a bank operated by himself, or in a state or federal savings and loan association.

**Source:** SL 1979, ch 336, § 10.

**55-1A-11. Disposal of trust assets.** A trustee may acquire, sell, or otherwise dispose of an asset, at public or private sale, for cash or on credit, with or without security as he deems advisable, and he may manage, develop, exchange, partition, change the character of, or abandon a trust asset or any interest therein.

**Source:** SL 1979, ch 336, § 11.

**55-1A-12. Grant or taking of option for disposition of assets.** A trustee may grant an option for the sale or other disposition of a trust asset, or take an option for the acquisition of any asset.

**Source:** SL 1979, ch 336, § 12.

**55-1A-13. Leases by trustees.** A trustee may enter into a lease as lessor or lessee, with or without an option to purchase or renew, even if the term of the lease or renewal thereof, or of the option, extends beyond the term of the trust.

**Source:** SL 1979, ch 336, § 13.

**55-1A-14. Repairs by trustee—Removal or demolition.** A trustee may make ordinary or extraordinary repairs, improvements, or alterations in buildings or other structures or in any other trust asset, and he may remove or demolish any improvements.

**Source:** SL 1979, ch 336, § 14.

**55-1A-15. Razing or erection of party walls or buildings.** A trustee may raze existing, or erect new, party walls or buildings, alone or jointly with owners of adjacent property.

**Source:** SL 1979, ch 336, § 15.

**55-1A-16. Land development or dedication—Valuation adjustments.** A trustee may subdivide, develop or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on the exchange or partition of land by giving or receiving consideration; or dedicate easements to public use without consideration.

**Source:** SL 1979, ch 336, § 16.

**55-1A-17. Mineral and natural resource leases and explorations.** A trustee may enter into a lease or arrangement for the exploration for and removal of oil, gas and other minerals or other natural resources, and he may enter into pooling and unitization agreements.

**Source:** SL 1979, ch 336, § 17.

**55-1A-18. Insurance.** A trustee may insure the assets of his trust against damage or loss, and the trustee against liability to third persons.

**Source:** SL 1979, ch 336, § 18.

**55-1A-19. Voting stock or securities—Voting trust agreements.** A trustee may vote shares of stock or other securities held in trust, in person or by general or limited proxy, and he may enter into voting trust agreements on such terms and for such periods as he deems advisable.

**Source:** SL 1979, ch 336, § 19.

**55-1A-20. Payment of calls, assessments, and other sums charged against corporate securities.** A trustee may pay calls, assessments, and any other sums chargeable or accruing against or on account of shares of stock, bonds, debentures, or other corporate securities held in trust.

**Source:** SL 1979, ch 336, § 20.

**55-1A-21. Corporate powers—Stocks—Reorganizations and mergers—Sales and leases.** A trustee may sell or exercise stock subscription or conversion rights; participate in foreclosures, reorganizations, consolidations, mergers or liquidations; and consent, directly or through a committee or other agent, to

corporate sales, leases and encumbrances. In the exercise of such powers a trustee may, where he deems such course to be expedient, deposit stocks, bonds or other securities with any protective or other similar committee, under such terms and conditions respecting the deposit thereof as the trustee may approve.

**Source:** SL 1979, ch 336, § 21.

**55-1A-22. Holding stock in nominee's name without disclosing fiduciary relationship.** A trustee may hold any stock or other security in the name of a nominee or nominees, without disclosure of any fiduciary relationship, but he shall be liable for any and all acts and omissions of the nominee relating to such assets.

**Source:** SL 1979, ch 336, § 22.

**55-1A-23. Borrowing money against trust assets.** A trustee may borrow money, and mortgage or otherwise encumber or pledge trust assets, for a term within or extending beyond the term of his trust, in connection with the exercise of any power vested in himself.

**Source:** SL 1979, ch 336, § 23.

**55-1A-24. Contracts binding upon trust.** A trustee may enter into contracts binding upon his trust which are reasonably incident to the administration of the trust and which he believes to be for the best interests of the trust.

**Source:** SL 1979, ch 336, § 24.

**55-1A-25. Claims in favor of or against trust or trustee.** A trustee may pay, compromise, contest, submit to arbitration, or otherwise settle any and all claims in favor of or against his trust or himself as trustee.

**Source:** SL 1979, ch 336, § 25.

**55-1A-26. Release of claim or lien.** A trustee may release, in whole or in part, any claim or lien belonging to his trust.

**Source:** SL 1979, ch 336, § 26.

**55-1A-27. Payment of trust administration expenses.** A trustee may pay taxes, assessments, compensation of himself, and other expenses incurred in the collection, care, administration and protection of his trust.

**Source:** SL 1979, ch 336, § 27.

**55-1A-28. Creation of reserves.** A trustee may create reserves out of income for depreciation, obsolescence, or amortization, or for the depletion of mineral or timber properties.

**Source:** SL 1979, ch 336, § 28.

**55-1A-29. Payment of sum distributable to minor or other beneficiary under legal disability—**

**Methods.** A trustee may make payment of any sum distributable to a minor or other beneficiary under legal disability, without liability to himself, by paying the sum in any one or more of the following ways:

- (1) Directly to the beneficiary;
- (2) To the conservator of the beneficiary;
- (3) Directly for the maintenance, education and general welfare of the beneficiary;
- (4) To a parent of the beneficiary; or
- (5) To anyone who has custody and care of the person of the beneficiary.

**Source:** SL 1979, ch 336, § 29; SL 1993, ch 213, § 253.

**55-1A-30. Distribution of property and money.** A trustee may effect distribution of property and money in

divided or undivided interests, and adjust the resulting differences in valuation.

**Source:** SL 1979, ch 336, § 30.

**55-1A-31. Employment of agents and assistants.** A trustee may employ attorneys, accountants, investment advisors, agents or other persons, even if they are associated with himself, to advise or assist himself in the performance of his duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not such act is discretionary.

**Source:** SL 1979, ch 336, § 31.

**55-1A-32. Prosecution or defense of actions and proceedings.** A trustee may prosecute or defend actions, claims or proceedings for the protection of trust assets or of the trustee in the performance of the trustee's duties. However, a trustee has no duty to prosecute, or to defend or continue to defend the trust or its assets in any action, through exercise of judicial process or otherwise, to reach the assets of the trust in satisfaction of a claim against the trust, a beneficiary or the settlor of a trust unless:

(1) The trustee is reasonably satisfied that the readily marketable assets of the trust are sufficient to fully indemnify the trustee for all the liabilities and expenses, including professional fees and expense of counsel, accountants, and expert witnesses, that the trustee may incur in so prosecuting or defending the trust or its assets; or

(2) If the trustee is not satisfied that the settlor or the beneficiaries have provided the trustee with indemnity, supported with such security as may be satisfactory to the trustee in its sole discretion, as is then and will be sufficient to fully indemnify the trustee.

**Source:** SL 1979, ch 336, § 32; SL 2017, ch 204, § 13.

**55-1A-32.1. Trustee immunity from liability for failure to prosecute, defend, or continue to defend.** If the trustee fails to prosecute, defend, or continue to defend the trust or its assets because the conditions set forth in subdivision 55-1A-32(1) or (2) have not been fulfilled, the trustee is not liable for any such failure even if the failure, including without limitation a withdrawal from a proceeding, may result in the granting or awarding of relief against the trustee or the trust, including without limitation a distribution of trust assets in satisfaction of a claim.

For purposes of chapter 55-1A, the term, prosecute, or, defend or continue to defend, means:

(1) Instituting, participating in, intervening in or defending a lawsuit, action in equity or administrative, arbitration or mediation proceeding (collectively a proceeding); or

(2) Taking any other action to resist such claim.

This section and § 55-1A-32 control unless the governing instrument specifically provides otherwise.

**Source:** SL 2017, ch 204, § 14.

**55-1A-33. Advance of income or loan to beneficiary—Lien.** A trustee may advance income or make loans out of trust property to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, for which such advance or loan the trustee shall have a lien on the future benefits of such beneficiary.

**Source:** SL 1979, ch 336, § 33; SL 2011, ch 212, § 18.

**55-1A-34. Advance of money for protection of trust—Lien.** A trustee may advance money for the protection of his trust or its assets, and for all expenses and liabilities sustained or incurred in or about the administration or protection of the trust, or because of the holding or ownership of any trust assets. Such trustee shall have a lien on the trust assets and may reimburse himself, with interest, out of the trust assets

for the advances.

**Source:** SL 1979, ch 336, § 34.

**55-1A-35. Execution and delivery of instruments.** A trustee may execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in himself.

**Source:** SL 1979, ch 336, § 35.

**55-1A-36. Holding of two or more trusts with undivided interests.** A trustee may hold two or more trusts or parts of trusts created by the same instrument, as an undivided whole, without separation between such trusts or parts of such trusts; provided that, such separate trusts or parts of such trusts shall have undivided interests and that no such holding shall defer the vesting of any estate in possession or otherwise.

**Source:** SL 1979, ch 336, § 36.

**55-1A-37. Citation of chapter.** This chapter may be cited or referred to as the "South Dakota Trustees' Powers Act."

**Source:** SL 1979, ch 336, § 37.

**55-1A-38. Trustee may perform necessary and appropriate acts.** A trustee may perform such other acts, which, in the judgment of the trustee, may be necessary or appropriate for the proper management, investment, and distribution of the trust estate.

**Source:** SL 1998, ch 282, § 37.

**55-1A-39. Disclaimer of powers by trustee—Time limit.** Any power granted to a trustee in any written trust instrument may be disclaimed by that trustee in the manner provided by law for disclaimers, but without regard to the time limits provided by law for disclaimers. Upon such disclaimer, the powers so disclaimed shall cease to exist as to that trustee.

**Source:** SL 1998, ch 282, § 39.

**55-1A-40. Trust name change.** A trustee may change the name of an irrevocable trust if the trustee deems such action to be in the best interests of the trust and its beneficiaries.

**Source:** SL 2011, ch 212, § 13.

**55-1A-41. Co-trustee appointment—Powers.** Unless specifically restricted by the governing instrument, a trustee may appoint an individual or a corporate fiduciary as a co-trustee. The appointed co-trustee may serve only as long as the appointing trustee serves, or as long as the last to serve if more than one trustee appointed the co-trustee. The appointed co-trustee may not become a successor trustee upon the death, resignation, or incapacity of the appointing trustee, unless appointed under the terms of the governing instrument or unless no other successor trustee, or method for appointing a successor trustee, is provided in the governing instrument.

The powers and the responsibilities of the appointed co-trustee may be limited by the appointing trustee in a writing signed by the appointing trustee at the time of the appointment. If the powers or responsibilities are so limited, the powers or responsibilities of the co-trustee shall be limited as set forth in writing. Unless the powers or responsibilities are so limited, the appointed co-trustee may exercise all the powers of the appointing trustee. The combined powers of the appointed co-trustee and the appointing trustee may not exceed the powers of the appointing trustee alone. The trustee appointing a co-trustee may, in writing, revoke the appointment at any time, with or without cause.

If the governing instrument is silent concerning the trustee's power to appoint a co-trustee, the trustee shall notify in writing, the trustor, if living, and all current income and principal beneficiaries at least thirty days prior to the effective date of the trustee's exercise of the power granted under this section and § 55-2-15. The notice, which shall include a copy of the proposed action, shall advise the trustor and current beneficiaries that if they object to the trustee's appointment they need to file a written objection with the trustee prior to the effective date set out in the notice of the proposed action. If an objection is received by

the trustee, prior to the effective date of the appointment, the trustee may not appoint a co-trustee. However, this section does not limit the power of the trustee under law to petition the court for approval of the appointment. If no objection has been timely made, the proposed appointment shall go into effect on the later of the date set out in the notice or thirty days after notice has been given. The notice shall be mailed, postage prepaid, to the last known address of the trustor or current beneficiary.

The provisions of this section are effective for trusts created before, on, or after July 1, 2017, except as otherwise directed by the trustor, trust protector, trust advisor, or other fiduciary designated by the terms of the trust.

**Source:** SL 2017, ch 204, § 12.

**55-1B-1. Definition of terms.** Terms used in this chapter mean:

55-1B-1. Terms used in this chapter mean:

(1) "Instrument," any revocable or irrevocable trust document created inter vivos or testamentary or any custodial account agreement whether such document or agreement was created prior to, on, or after July 1, 1997;

(2) "Trust protector," any person whose appointment as protector is provided for in the instrument. Such person may not be considered to be acting in a fiduciary capacity except to the extent the governing instrument provides otherwise. However, a protector shall be considered acting in a fiduciary capacity to the extent that the person exercises the authority of an investment trust advisor or a distribution trust advisor;

(3) "Trust advisor," either an investment trust advisor or a distribution trust advisor or, in the case of a custodial account, a custodial account owner or the owner's designee;

(4) "Fiduciary," a trustee or custodian under any instrument, an executor, administrator, or personal representative of a decedent's estate, or any other party, including a trust advisor, a trust protector, or a trust committee, who is acting in a fiduciary capacity for any person, trust, or estate;

(5) "Excluded fiduciary," any fiduciary excluded from exercising certain powers under the instrument which powers may be exercised by the grantor, custodial account owner, trust advisor, trust protector, trust committee, or other persons designated in the instrument;

(6) "Investment trust advisor," a fiduciary, given authority by the instrument to exercise all or any portions of the powers and discretions set forth in § 55-1B-10;

(7) "Distribution trust advisor," a fiduciary, given authority by the instrument to exercise all or any portions of the powers and discretions set forth in § 55-1B-11;

(8) "Custodial account," an account, established by a party with a bank as defined in 26 U.S.C. 408(n), as of January 1, 2006, or with another person approved by the Internal Revenue Service as satisfying the requirements to be a nonbank trustee or a nonbank passive trustee set forth in U.S. Treasury Regulations promulgated under 26 U.S.C. 408, that is governed by an instrument concerning the establishment or maintenance, or both, of an individual retirement account, qualified retirement plan, Archer medical savings account, health savings account, Coverdell education savings account, or any similar retirement or savings vehicle permitted under the Internal Revenue Code of 1986, as of January 1, 2006;

(9) "Custodial account owner," any party who establishes a custodial account; or has the power to designate the beneficiaries or appoint the custodian of the custodial account; or otherwise is the party who possesses the power to direct the investment, disposition, or retention of any assets in the custodial account or name an authorized designee to effect the same;

(10) "Family advisor," any person whose appointment is provided for in the governing instrument or by court order who is authorized to consult with or advise a fiduciary with regard to fiduciary or nonfiduciary matters and actions, and who may also be authorized by the governing instrument or court order to otherwise act in a nonfiduciary capacity.

**Source:** SL 1997, ch 280, § 1; SL 2005, ch 260, § 2; SL 2006, ch 248, § 1; SL 2008, ch 257, § 9; SL 2011, ch 212, § 3; SL 2016, ch 231, § 15; SL 2017, ch 204, § 15.

**55-1B-1.1. Governing instrument may provide trust advisor or trust protector with powers and immunities of trustee.** Any governing instrument providing for a trust advisor or trust protector may also provide such trust advisor or trust protector with some, none, or all of the rights, powers, privileges, benefits, immunities, or authorities available to a trustee under South Dakota law or under the governing instrument. Unless the governing instrument provides otherwise, a trust advisor or trust protector has no greater liability to any person than would a trustee holding or benefiting from the rights, powers, privileges, benefits, immunities, or authority provided or allowed by the governing instrument to such trust advisor or trust protector.

**Source:** SL 2011, ch 212, § 4.

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

- (1) Any loss that results from compliance with a direction of the trust advisor, including any loss from the trust advisor breaching fiduciary responsibilities or acting beyond the trust advisor's scope of authority;
- (2) Any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely sought but failed to obtain that authorization;
- (3) Any loss that results from any action or inaction, except for gross negligence or willful misconduct, when an excluded fiduciary is required, pursuant to the trust agreement or any other reason, to assume the role of trust advisor or trust protector.

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

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

Absent contrary provisions in the governing instrument, the actions of the excluded fiduciary (such as any communications with the trust advisor and others and carrying out, recording, and reporting actions taken at the trust advisor's direction) pertaining to matters within the scope of authority of the trust advisor or trust protector shall be deemed to be administrative actions taken by the excluded fiduciary solely to allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary under the governing instrument, and such administrative actions may not be deemed to constitute an undertaking by the excluded fiduciary to monitor, participate, or otherwise take any fiduciary responsibility for actions within the scope of authority of the trust advisor or trust protector.

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

In an action against an excluded fiduciary pursuant to the provisions of this section, the burden to prove the matter by clear and convincing evidence is on the person seeking to hold the excluded fiduciary liable.

**Source:** SL 1997, ch 280, § 2; SL 2006, ch 248, § 2; SL 2009, ch 252, § 13; SL 2011, ch 212, § 1; SL 2012, ch 233, § 5; SL 2016, ch 231, § 16.

**55-1B-3. Death of grantor.** An excluded fiduciary may continue to follow the direction of the trust advisor upon the incapacity or death of the grantor if the instrument so allows.

**Source:** SL 1997, ch 280, § 3.

**55-1B-4. When trust advisor considered as fiduciary.** If one or more trust advisors are given authority by the terms of a governing instrument to direct, consent to, or disapprove a fiduciary's investment decisions, or proposed investment decisions, such trust advisors shall be considered to be fiduciaries when exercising such authority. So long as there is at least one fiduciary exercising the authority of the investment advisor pursuant to § 55-1B-10 for the investment, except in the cases of willful misconduct or gross negligence by the fiduciary investment advisor in the selection or monitoring of the nonfiduciary trust advisors, the governing instrument may provide that such other trust advisors acting pursuant to this section are not acting in a fiduciary capacity.

**Source:** SL 1997, ch 280, § 4.

**55-1B-5. Excluded fiduciary's liability for loss if trust protector appointed.** If an instrument appoints a trust protector, the excluded fiduciary is not liable for any loss resulting from any action taken upon such trust protector's direction.

**Source:** SL 1997, ch 280, § 5.

**55-1B-6. Powers and discretions of trust protector.** The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons. The powers and discretion may include the following:

- (1) Modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder;
- (2) Increase or decrease the interests of any beneficiaries to the trust;
- (3) Modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument;
- (4) Remove and appoint a trustee, a fiduciary provided for in the governing trust instrument, trust advisor, investment committee member, or distribution committee member;
- (5) Terminate the trust;
- (6) Veto or direct trust distributions;
- (7) Change situs or governing law of the trust, or both;
- (8) Appoint a successor trust protector;
- (9) Interpret terms of the trust instrument at the request of the trustee;
- (10) Advise the trustee on matters concerning a beneficiary;
- (11) Amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust;
- (12) Provide direction regarding notification of qualified beneficiaries pursuant to § 55-2-13;
- (13) Add to the trust an individual beneficiary or beneficiaries from a class of individuals identified in the governing instrument;
- (14) Add to the trust a charitable beneficiary or beneficiaries from a class of charities identified in the trust instrument;
- (15) Provide other powers and discretions in the governing instrument;

- (16) Remove a representative as provided in subdivision 55-18-4(3);
- (17) Appoint a representative as provided in subdivision 55-18-9(12); and
- (18) Act as a representative as provided in subdivision 55-18-9(11).

The powers referenced in subdivisions (5), (6), and (11) may be granted notwithstanding the provisions of §§ 55-3-24 to 55-3-28, inclusive.

**Source:** SL 1997, ch 280, § 6; SL 2005, ch 260, § 3; SL 2009, ch 252, § 14; SL 2013, ch 239, § 20; SL 2016, ch 231, § 17; SL 2017, ch 208, § 29.

**55-1B-7. Submission to court jurisdiction—Effect on trust advisor or trust protector.** By accepting an appointment to serve as a trust advisor or trust protector of a trust that is subject to the laws of this State, the trust advisor or the trust protector submits to the jurisdiction of the courts of South Dakota even if investment advisory agreements or other related agreements provide otherwise, and the trust advisor or trust protector may be made a party to any action or proceeding if issues relate to a decision or action of the trust advisor or trust protector.

**Source:** SL 1997, ch 280, § 7.

**55-1B-8. Powers of trust protector incorporated by reference in will or trust instrument.** Any of the powers enumerated in § 55-1B-6, as they exist at the time of the signing of a will by a testator or at the time of the signing of a trust instrument by a trustor, may be, by appropriate reference made thereto, incorporated in whole or in part in such will or trust instrument, by a clearly expressed intention of a testator of a will or trustor of a trust instrument.

**Source:** SL 2005, ch 260, § 4.

**55-1B-9. Investment trust advisor or distribution trust advisor provided for in trust instrument.** A trust instrument governed by the laws of South Dakota may provide for a person to act as an investment trust advisor or a distribution trust advisor, respectively, with regard to investment decisions or discretionary distributions. Unless otherwise provided or restricted by the terms of the governing instrument, any person may simultaneously serve as a trust advisor and a trust protector.

**Source:** SL 2005, ch 260, § 5; SL 2017, ch 204, § 16.

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

- (1) Direct the trustee with respect to the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership thereof or rights therein of trust investments. These powers include the pledge or encumbrance of trust property, lending of trust assets, either secured or unsecured, at terms defined by the investment trust advisor to any party including beneficiaries of the trust and the investment and reinvestment of principal and income of the trust;
- (2) Vote proxies for securities held in trust;
- (3) Select one or more investment advisers, managers, or counselors, including the trustee, and delegate to them any of its powers;
- (4) Direct the trustee with respect to any additional powers and discretions over investment and management of trust assets provided in the governing instrument;
- (5) Direct the trustee as to the value of non-publicly traded trust investments; and
- (6) Direct the trustee as to any investment or management power referenced in chapter 55-1A.

**Source:** SL 2005, ch 260, § 6; SL 2012, ch 233, § 6; SL 2014, ch 226, § 17.

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

**Source:** SL 2005, ch 260, § 7; SL 2009, ch 252, § 15; SL 2011, ch 212, § 5; SL 2012, ch 233, § 7.

**55-1B-12. Powers and discretions of family advisor.** The powers and discretions of a family advisor are as provided in the governing instrument or by court order and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the family advisor. The powers and discretions may only include the following:

- (1) Remove and appoint a trustee, a fiduciary provided for in the governing trust instrument, trust advisor, investment committee member, or distribution committee member;
- (2) Appoint a successor trust protector or a successor family advisor;
- (3) Advise the trustee on matters concerning any beneficiary; receive trust accountings, investment reports, and other information from the trustee or to which a beneficiary is entitled; attend meetings whether in person or by any other means with the trustee, investment trust advisors, distribution trust advisors, or other advisors whether in person or by any means, electronic or otherwise; and to consult with a fiduciary regarding both fiduciary and non-fiduciary matters or actions, all without any power or discretion to take any action as a fiduciary; or
- (4) Provide direction regarding notification of qualified beneficiaries pursuant to § 55-2-13.

A family advisor is not required to exercise any powers or discretions under any circumstances. Every action or inaction by a family advisor is a non-fiduciary action or inaction and a family advisor is absolutely excluded from liability to any other person for an action or inaction as a family advisor. A court may review a family advisor's exercise of the powers described in subdivisions (1), (2), and (4) only if the family advisor acts dishonestly or with an improper motive but may not review a family advisor's failure to exercise any powers. A reasonableness standard may not be applied to any action or inaction of a family advisor. Other than for the two circumstances listed above, a court has no jurisdiction to review a family advisor's action or inaction.

A family advisor is entitled to compensation as provided in the governing instrument. If the governing instrument does not provide for or establish compensation, a family advisor is entitled to reasonable compensation for the exercise of the powers and discretions granted to the family advisor pursuant to this chapter.

**Source:** SL 2016, ch 231, § 18.

**55-2-1. Trustee's obligation of good faith.** In all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

**Source:** SDC 1939, § 59.0106.

**55-2-2. Trustee not to use property for his own benefit—Profit of trustee from use of property, extent of liability.** A trustee may not in any manner use or deal with the trust property for his own profit or for any other purpose unconnected with the trust.

If he does so, he may, at the option of the beneficiary, be required to account for all profits thereby made or to pay the value of the use of the trust property, and if he has disposed thereof, to replace it with its fruits or to account for its proceeds with interest.

**Source:** SDC 1939, § 59.0107.

**55-2-3. Transactions involving interest of trustee adverse to beneficiary prohibited—Exceptions.**

Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or anyone for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

- (1) When the beneficiary does have the capacity to contract and, with a full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision and without the use of any influence on the part of the trustee, permits the trustee to do so;
- (2) When the beneficiary does not have the capacity to contract but the circuit court, upon the like information of the facts, grants the like permission;
- (3) When some of the beneficiaries have the capacity to contract and some do not have it and the former grant permission for themselves and the circuit court for the latter in the manner above prescribed; or
- (4) When the instrument creating the trust expressly grants permission to the trustee to buy, sell or lease property for the trust from or to the trust.

**Source:** SDC 1939, § 59.0108; SL 1981, ch 354, § 1.

**55-2-4. Trustee's influence not to be used for his advantage.** A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary.

**Source:** SDC 1939, § 59.0109.

**55-2-5. Trustee not to assume a trust adverse to the interest of beneficiary.** No trustee so long as he remains in the trust may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust without the consent of the latter.

**Source:** SDC 1939, § 59.0110.

**55-2-6. Adverse interest of trustee—Information to beneficiary—Removal of trustee.** If a trustee acquires any interest or becomes charged with any duty adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof and may be at once removed.

**Source:** SDC 1939, § 59.0111.

**55-2-7. Fraud against beneficiary of trust.** Every violation of the provisions of §§ 55-2-1 to 55-2-6, inclusive, is a fraud against the beneficiary of the trust.

**Source:** SDC 1939, § 59.0112.

**55-2-8. Presumption against trustee.** All transactions between a trustee and his beneficiary during the existence of the trust or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence.

**Source:** SDC 1939, § 59.0113.

**55-2-9. Liability of trustee mingling trust property with his own.** A trustee who willfully and unnecessarily mingles the trust property with his own so as to constitute himself in appearance its absolute owner is liable for its safety in all events.

**Source:** SDC 1939, § 59.0114.

**55-2-10. Measure of liability for unauthorized use or disposal of trust property—Intent to serve interest of beneficiary.** A trustee who uses or disposes of the trust property in any manner not authorized by the trust but in good faith and with intent to serve the interest of the beneficiary is liable only to make good whatever is lost to the beneficiary by his error.

**Source:** SDC 1939, § 59.0115.

55-2-11. Liability for acts of cotrustee. A trustee is responsible for the wrongful acts of a cotrustee to which he consented or which by his negligence he enabled the latter to commit, but for no others.

**Source:** SDC 1939, § 59.0116.

**55-2-12. Liability of successor trustee.** Unless otherwise provided in the trust agreement, a successor trustee is not individually liable for agreements, contracts or actions entered into by its predecessor fiduciary.

**Source:** SL 1991, ch 229, § 2.

**55-2-13. Notice to qualified beneficiaries of existence of trust—Written directions—Information to be provided to excluded fiduciaries.** Notification to any qualified beneficiary under this section may be carried out personally, by mail, postage prepaid, addressed to the entity or individual's last known post office address, or electronically pursuant to the provisions of § 15-6-5(d), and on representatives of qualified beneficiaries pursuant to chapter 55-18.

For purposes of this section, the term, qualified beneficiary, means a beneficiary that is an entity then in existence or an individual who is twenty-one years of age or older and who, on the date the beneficiary's qualification is determined:

- (1) Is a distributee or permissible distributee of trust income or principal;
- (2) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees terminated on that date; or
- (3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date. However, if the distributee is then unknown because a person holds a power to change the distributee, the trustee shall give notice only to the holder of the power.

Except as otherwise provided by the terms of a revocable trust, a trustee has no duty to notify the qualified beneficiaries of the trust's existence.

Except as otherwise provided by the terms of an irrevocable trust or otherwise directed in writing by the settlor, trust advisor, or trust protector, the trustee shall, within sixty days after the trustee has accepted trusteeship of the trust, or within sixty days after the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, notify the qualified beneficiaries of the trust's existence and of the right of the beneficiary to request a copy of the trust instrument pertaining to the beneficiary's interest in the trust.

Except as otherwise provided by the terms of an irrevocable trust or otherwise directed in writing by the settlor, trust advisor, or trust protector, a trustee of an irrevocable trust:

- (1) Upon request of a qualified beneficiary, shall promptly furnish to the qualified beneficiary a copy of the trust instrument;
- (2) If notification of the trust has not been accomplished pursuant to this section within sixty days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;
- (3) Shall promptly respond to a qualified beneficiary's request for information related to the administration of the trust, unless the request is unreasonable under the circumstances.

The settlor, trust advisor, or trust protector, may, by the terms of the governing instrument, or in writing

delivered to the trustee, expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to a trust.

Written directions provided by the settlor, trust advisor, or trust protector as set forth in this section remain in effect until and unless the settlor, trust advisor, or trust protector revokes the written instructions or is incapacitated. Additionally, the written directions remain in effect only while the trust advisor or trust protector providing the written directions is serving as the current trust advisor or trust protector. Unless otherwise specifically provided in the written directions, upon the death or incapacity of a settlor who provided the written directions described in this section, the directions shall be deemed revoked. However, upon the death or incapacity of the settlor, a trust advisor or trust protector, if any, may further direct the trustee in writing pursuant to this section. Unless otherwise stated in the governing instrument, in the event of a conflict in direction, the direction of the settlor shall control.

A beneficiary may waive the right to the notice or information otherwise required to be furnished under this section and, with respect to future reports and other information, may withdraw a waiver previously given.

The change in the identity of a trustee, occurring as the result of a mere name change or a merger, consolidation, combination, or reorganization of a trustee, does not require notice.

If a fiduciary is bound by a duty of confidentiality with respect to a trust or its assets, a fiduciary may require that any beneficiary who is eligible to receive information pursuant to this section be bound by the duty of confidentiality that binds the trustee before receiving such information from the trustee.

A trust advisor, trust protector, or other fiduciary designated by the terms of the trust shall keep each excluded fiduciary designated by the terms of the trust reasonably informed about:

(1) The administration of the trust with respect to any specific duty or function being performed by the trust advisor, trust protector, or other fiduciary to the extent that the duty or function would normally be performed by the excluded fiduciary or to the extent that providing such information to the excluded fiduciary is reasonably necessary for the excluded fiduciary to perform its duties; and

(2) Any other material information that the excluded fiduciary would be required to disclose to the qualified beneficiaries under this section regardless of whether the terms of the trust relieve the excluded fiduciary from providing such information to qualified beneficiaries. Neither the performance nor the failure to perform of a trust advisor, trust protector, or other fiduciary designated by the terms of the trust as provided in this subdivision shall affect the limitation on the liability of the excluded fiduciary.

The provisions of this section are effective for trusts created, amended, or restated after June 30, 2002, except as otherwise directed by the settlor, trust protector, trust advisor, or other fiduciary designated by the terms of the trust. For trusts created before July 1, 2002, a trustee has no duty at common law or otherwise to notify a qualified beneficiary of the trust's existence unless otherwise directed by the settlor. The provisions of this paragraph do not apply if otherwise directed by the settlor, trust protector, trust advisor, or other fiduciary designated by the terms of the trust.

**Source:** SL 2002, ch 100, § 15; SL 2007, ch 247, § 8; SL 2008, ch 257, § 10; SL 2009, ch 252, § 16; SL 2010, ch 232, § 1; SL 2011, ch 212, § 8; SL 2017, ch 204, § 17; SL 2017, ch 208, § 30.

**55-2-14. Duty to provide information regarding revocable trust and its administration.** A trustee of a revocable trust:

(1) Subject to subdivision 3 below, shall keep the settlor reasonably informed of the trust and its administration;

(2) Unless otherwise provided in the trust instrument, does not have a duty to inform a trust beneficiary of the trust and its administration, other than the settlor or, if the trustor is an incapacitated person, the trustor's designated agent;

(3) Unless otherwise provided in the trust instrument, if the trustee obtains actual knowledge that the settlor of a revocable trust is an incapacitated person and has no designated agent, the trustee may in its sole discretion keep each interested trust beneficiary, who, if the settlor were then deceased, would be a

current trust beneficiary, reasonably informed of the trust and its administration. Notwithstanding the provisions of the trust instrument, upon good cause shown, the court may order the trustee to keep other beneficiaries reasonably informed of the trust and its administration.

**Source:** SL 2007, ch 247, § 9.

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

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

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

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

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

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

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

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

(3) No restricted trustee of the first trust may exercise such authority over the first trust to the extent that doing so would have the effect of increasing the distributions that can be made from the second trust to the restricted trustees of the first trust or to a beneficiary who may change the trustees of the first trust within the meaning of § 55-2-17 compared to the distributions that can be made to such trustee or beneficiary, as the case may be, under the first trust, unless the exercise of such authority is limited by an ascertainable standard based on or related to health, education, maintenance, or support;

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

(5) In the case of any trust contributions which have been treated as gifts qualifying for the exclusion from gift tax described in § 2503(b) of the Internal Revenue Code of 1986, by reason of the

application of I.R.C. § 2503(c), the governing instrument for the second trust shall provide that the beneficiary's remainder interest shall vest no later than the date upon which such interest would have vested under the terms of the governing instrument for the first trust;

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

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

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

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

(7) The exercise of such authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions, unless after the exercise of such authority, the beneficiary's power of withdrawal is unchanged with respect to the trust property;

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

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

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

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

Furthermore, notwithstanding the provisions of this section or § 55-2-18 or 55-2-19, a trustee may also exercise the power described in those sections by modifying the first trust without an actual distribution of property, in which case the second trust is the modified first trust. In exercising the power described by the preceding sentence of this section, a trustee shall notify all beneficiaries of the trust, in writing, at least twenty days prior to the effective date of the trustee's exercise of the power.

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

**Source:** SL 2007, ch 281, § 1; SL 2008, ch 257, § 11; SL 2009, ch 252, § 17; SL 2011, ch 212, § 10; SL 2012, ch 233, § 4; SL 2013, ch 239, § 16; SL 2017, ch 204, § 18.

**55-2-16. Action that may not be taken by restricted trustee may be taken by another unrestricted trustee.** Any action that may not be taken by a trustee of the first trust by reason of the restrictions in subdivision 55-2-15(2) may instead be taken by any other trustee of the first trust who is not so restricted, or, if none, by the next available party who can be a successor trustee and who is not so restricted. The second trust may be a trust created or administered under the laws of any jurisdiction, within or without the United States.

**Source:** SL 2007, ch 281, § 2.

**55-2-17. Conditions under which beneficiary has power to change trustees.** For the purposes of § 55-2-15, a beneficiary shall be considered to have the power to "change the trustees" if he or she can, alone or with others, name himself or herself as a trustee or can remove a trustee and replace that trustee with a new trustee who is the beneficiary or who is related or subordinate (as defined in § 672 of the I.R.C.) to the

beneficiary.

**Source:** SL 2007, ch 281, § 3; SL 2009, ch 252, § 18.

**55-2-18. Exercise of power to distribute income or principal by written instrument—Notice to beneficiaries of first trust.** The exercise of the power to distribute the income or principal of the trust under § 55-2-15 shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the trust. The trustee of the first trust may notify the beneficiaries of the first trust, in writing, prior to the effective date of the trustee's exercise of the power under § 55-2-15 (applying chapter 55-18). A copy of the exercise of this authority and the second trust agreement shall satisfy this notice provision. For the purposes of this section, the term, beneficiaries, means those persons who would be entitled to notice and a copy of the first trust instrument under § 55-2-13.

**Source:** SL 2007, ch 281, § 4; SL 2009, ch 252, § 19; SL 2013, ch 239, § 17; SL 2017, ch 208, § 31.

**55-2-19. Exercise of power to distribute income or principal considered exercise of power of appointment.** The exercise of the power to distribute the income or principal of the trust under § 55-2-15 shall be considered the exercise of a power of appointment (other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate).

**Source:** SL 2007, ch 281, § 5.

**55-2-20. Impermissible use of power.** The power under § 55-2-15 may not be exercised to suspend the power to alienate trust property or extend the first trust beyond the permissible period of any rule against perpetuities applicable to the first trust.

**Source:** SL 2007, ch 281, § 6; SL 2011, ch 212, § 9.

**55-2-21. Trustee's right to distribute income or principal in trust arising under law or terms of first trust not abridged.** No provision of §§ 55-2-15 to 55-2-20, inclusive, may be construed to abridge the right of any trustee who has power to distribute income or principal in further trust which arises under statute, common law, or the terms of the first trust.

**Source:** SL 2007, ch 281, § 7; SL 2009, ch 252, § 20.

**55-2-22. Fiduciary duty to determine that substituted property is of equivalent value.** Notwithstanding the terms of a trust instrument, if a settlor has a power to substitute property of equivalent value, a trustee has a fiduciary duty to determine that the substituted property is of equivalent value, prior to allowing the substitution.

**Source:** SL 2009, ch 252, § 21.

**55-2-23. Reliance of excluded fiduciaries and trustees on tax information.** An excluded fiduciary as defined in § 55-1B-1 who receives tax information regarding an asset or entity owned by the trust, any trustee of a trust that holds an asset or entity owned by the trust but who does not manage the asset or entity, and any trustee who receives tax information from the settlor, the settlor's agents, or other individuals regarding matters that have tax implications to the trust or trust beneficiaries, may rely, without liability, on tax information it receives in any of the above situations. By way of example, if a trustee holds in trust a limited liability company interest but does not manage the limited liability company, the trustee may rely, without limitation, on any tax information received from the manager of the limited liability company or its accountant or agents.

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

- (1) The accuracy of any information reported on a tax return;
- (2) A copy of a tax return provided by the tax return preparer or the taxpayer filing the return;
- (3) The representation of another fiduciary or tax advisor who filed or prepared a tax return as to the amount of any item reported on that return;

(4) The settlor's representation whether or not a gift or generation skipping transfer tax form has ever been filed as well as how much of the respective exemptions have been utilized; or

(5) The direction from the grantor's or settlor's tax advisors based upon any contribution or distribution, or both, for the appropriate tax filings.

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

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

**Source:** SL 2012, ch 233, § 21.

55-3-1. Application of chapter. The provisions of this chapter apply to all trusts.

**Source:** SDC 1939, § 59.0201; SL 1993, ch 213, § 254; SL 1993, ch 355, § 1; SL 1998, ch 282, § 11; SL 2010, ch 232, § 2.

**55-3-2. Creation of trust—Mutual consent of trustor and trustee.** The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission.

**Source:** SDC 1939, § 59.0202.

**55-3-3. Appointing court or public officer as trustor.** When a trustee is appointed by a court or public officer as a trustee, the court or officer is the trustor. A court may otherwise establish or create a trust and may act as the trustor of a trust.

**Source:** SDC 1939, § 59.0202; SL 2016, ch 231, § 19.

**55-3-4. Declaration of trust—Declarations of trustor to trustee before acceptance.** The nature, extent, and object of a trust are expressed in the declaration of trust.

All declarations of a trustor to his trustees in relation to the trust, before its acceptance by the trustees or any of them are to be deemed part of the declaration of the trust, except that when a declaration of trust is made in writing all previous declarations by the same trustor are merged therein.

**Source:** SDC 1939, § 59.0203.

**55-3-5. Trustee to follow declaration of trust—Modifications.** A trustee must fulfill the purposes of the trust as declared at its creation, or as subsequently amended, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, and upon approval by the court. For purposes of modifications by consent of all parties interested and modifications upon approval by the court, the provisions of chapter 55-18 apply to such modifications.

**Source:** SDC 1939, § 59.0204; SL 1993, ch 355, § 5; SL 2017, ch 208, § 32.

**55-3-6. Revocation of trust—Consent of beneficiaries—Reservation of power in declaration of trust.** If the declaration of trust reserves a power of revocation to the trustor, the trust may be revoked if the power is strictly pursued.

**Source:** SDC 1939, § 59.0216; SL 1993, ch 355, § 2; SL 1998, ch 282, § 9.

**55-3-7. Trustee's power as agent.** A trustee is a general agent for the trust and the trust property. The trustee's authority is the authority that is conferred upon the trustee by the declaration of trust and by this chapter and none other. The trustee's acts, within the scope of the trustee's authority, bind the trust and the trust property to the same extent as the acts of an agent bind the agent's principal.

**Source:** SDC 1939, § 59.0209; SL 2016, ch 231, § 20.

**55-3-8. Repealed by SL 1993, ch 355, § 3**

**55-3-9. Repealed by SL 2007, ch 280, § 25.**

**55-3-10. Degree of care and diligence used in execution of trusts.** A trustee, whether he receives any compensation or not, must use at least ordinary care and diligence in the execution of his trust.

**Source:** SDC 1939, § 59.0205.

**55-3-11. Investment of money by trustee—Interest, simple or compound, on omission to invest trust moneys.** A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same.

If he fails so to do, he must pay simple interest thereon if such omission is merely negligent, and compound interest thereon if it is willful.

**Source:** SDC 1939, § 59.0207.

**55-3-12. Purchase by trustee of claims against trust property.** A trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed by any competent court to charge to the trust property what he has in good faith paid for the claim, upon discharging the same.

**Source:** SDC 1939, § 59.0208.

**55-3-13. Expenses incurred by trustee in performance of trust—Reimbursement.** A trustee is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by the trustee in the performance of his or her trust. The trustee is entitled to the repayment of even unlawful expenditures, if the expenditures were productive of actual benefit to the estate. Expenses in performance of the trust include those expenses actually and properly incurred in the exercise of the trustee's powers as described in the governing instrument, in any applicable court order, or in chapter 55-1A.

**Source:** SDC 1939, § 59.0212; SL 2014, ch 226, § 18.

**55-3-14. Compensation of trustee.** When a declaration of trust does not specify the rate or amount of the trustee's compensation the trustee is entitled to and shall receive reasonable compensation for the performance of his duties. If such declaration specifies the amount or rate of his compensation, he is entitled to the amount or rate thus specified and no more.

**Source:** SDC 1939, § 59.0213; SL 1967, ch 337.

**55-3-15. Implied trustee—No rights to compensation or repayment of expenses.** The trustee of an implied trust who becomes such through his own fault has none of the rights to compensation or repayment of expense prescribed in §§ 55-3-13 and 55-3-14.

**Source:** SDC 1939, § 59.0214.

**55-3-16. Vacation of office of trustee.** The office of a trustee is vacated:

- (1) By his death; or
- (2) By his discharge.

**Source:** SDC 1939, § 59.0217.

**55-3-17. Discharge of trustee—Grounds.** A trustee can be discharged from his trust only as follows:

- (1) By the extinction of the trust;
- (2) By the completion of his duties under the trust;
- (3) By such means as may be prescribed by the declaration of trust;
- (4) By the consent of the beneficiary, if he has capacity to contract;

(5) By the judgment of a competent tribunal in a direct proceeding for that purpose that he is of unsound mind; or

(6) By the circuit court.

**Source:** SDC 1939, § 59.0218.

**55-3-18. Survivorship between cotrustees.** On the death, renunciation, or discharge of one of several cotrustees, the trust survives to the others.

**Source:** SDC 1939, § 59.0219.

**55-3-19. Discharge of trustee before trust executed—Duty to secure appointment of successor.** If a trustee procures or assents to his discharge from his office before his trust is fully executed, he must use at least ordinary care and diligence to secure the appointment of a trustworthy successor before accepting his own final discharge.

**Source:** SDC 1939, § 59.0206.

**55-3-20. Removal of trustee by circuit court—Vacant trusteeship filled by court.** The circuit court may remove any trustee who has violated, or is unfit to execute, his trust. It may appoint a trustee whenever there is a vacancy and the declaration of trust does not provide a practicable method of appointment.

**Source:** SDC 1939, § 59.0220.

**55-3-20.1. Grounds for removal of trustee.** In addition to other remedies available by law and procedures or powers set out in a trust instrument, the settlor, or the settlor's agent, a trust protector, a cotrustee, or a qualified beneficiary as defined in § 55-2-13, may request the court to remove a trustee, or a trustee may be removed by the court on the court's own initiative.

In addition to the powers otherwise granted the court, the court may remove a trustee if:

- (1) The trustee commits a serious breach of trust;
- (2) Lack of cooperation among cotrustees substantially impairs the administration of the trust;
- (3) Because of unfitness, unwillingness, persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries;
- (4) There is a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available; or
- (5) If the trustee merges with another institution or the location or place of administration of the trust changes, and the court finds that removal of the trustee best serves the interests of all of the beneficiaries, and a suitable cotrustee or successor trustee is available.

Pending a final decision on a request to remove a trustee, the court may order such appropriate relief as may be necessary to protect the trust property or the interests of the beneficiaries.

**Source:** SL 2009, ch 252, § 23; SL 2015, ch 240, § 17.

**55-3-21. Appointment of trustee by circuit court—Grounds.** If a trust exists without any appointed trustees, or where all the trustees renounce, die, or are discharged, the circuit court for the county where the trust property or some portion thereof is situated must appoint another trustee and direct the execution of the trust. The court may in its discretion appoint the original number or any less number of trustees.

**Source:** SDC 1939, § 59.0220.

**55-3-22. Repealed by SL 1998, ch 282, § 10**

**55-3-23. Termination of trust.** In addition to the methods specified in §§ 55-3-24 to 55-3-27, inclusive, a trust terminates if:

- (1) The term of the trust expires;
- (2) The trust purpose is fulfilled;
- (3) The trust purpose becomes unlawful or impossible to fulfill; or
- (4) The trust is revoked.

**Source:** SL 1998, ch 282, § 1; SL 2016, ch 231, § 21.

**55-3-24. Modification or termination of trust—Consent required—Distribution of property.** An irrevocable trust may be modified or terminated upon the consent of all of the beneficiaries if continuance of the trust on its existing terms is not necessary to carry out a material purpose. Whether or not continuance of the trust on its existing terms is necessary to carry out a material purpose, an irrevocable trust may be modified or terminated upon the consent of the trustor and all of the beneficiaries. Upon termination of a trust under this section, the trustee shall distribute the trust property in accordance with the trustor's probable intention or in any other manner as agreed by all the beneficiaries. No person may be required to seek court affirmation of the trust's modification or termination made pursuant to this section. The provisions of chapter 55-18 apply to this section.

**Source:** SL 1998, ch 282, § 2; SL 2004, ch 312, § 9; SL 2017, ch 208, § 33.

**55-3-25. Petition to court for affirmation—Non-consenting beneficiaries—Distribution of property.** A trustor, trustee, or beneficiary may but is not required to seek court affirmation of a modification or termination of a trust made pursuant to § 55-3-24. Upon petition by a trustor, trustee, or beneficiary, upon a finding that the provisions of § 55-3-24 have been met, the court shall affirm the proposed modification or termination of the trust. If any beneficiary does not consent to a requested modification or termination of a trust by the other beneficiaries or by the trustor and other beneficiaries, the court, with the consent of the other beneficiaries, and of the trustor, if required, may approve a requested modification or partial termination if the rights or interests of the beneficiaries who do not consent are not significantly impaired or adversely affected. Upon modification or partial termination of the trust, the trustee shall distribute the trust property as ordered by the court.

**Source:** SL 1998, ch 282, § 3; SL 2017, ch 204, § 19.

**55-3-26. Petition to modify terms of trust—Circumstances—Distribution of property.** On petition by a trustee or beneficiary, the court may modify the administrative or dispositive terms of the trust or terminate the trust if, because of circumstances not anticipated by the trustor, modification or termination of the trust would substantially further the trustor's purposes in creating the trust. Upon termination of a trust under this section, the trust property shall be distributed in accordance with the trustor's probable intention.

**Source:** SL 1998, ch 282, § 4.

**55-3-27. Termination of non-charitable trusts valued under one hundred fifty thousand dollars—Distribution of property.** Except as otherwise provided by the terms of the trust, if the value of the trust property of a noncharitable trust is less than one hundred fifty thousand dollars, the trustee may terminate the trust. On petition by a trustee or beneficiary, the court may modify or terminate a noncharitable trust or appoint a new trustee if it determines that the value of the trust property is insufficient to justify the cost of administration involved. Upon termination of a trust pursuant to this section, the trustee shall distribute the trust property in accordance with the trustor's probable intention. The existence of spendthrift or similar protective provisions in a trust does not make this section inapplicable. The court, when considering the termination of a trust containing spendthrift or similar protective provisions, shall consider the feasibility of appointing a new trustee to continue the trust. This section does not apply to a purpose trust under subdivision (1) of section 3 of this Act.

**Source:** SL 1998, ch 282, § 5; SL 2004, ch 312, § 12; SL 2015, ch 240, § 18.

**55-3-28. Terms of trust may be reformed by court.** On petition by a trustee or beneficiary, the court may reform the terms of the trust, based upon a showing by the preponderance of the evidence and without any preliminary showing of an ambiguity, to conform to the trustor's intention if the failure to conform was due to a mistake of fact or law and the trustor's intent can be established. The terms of the trust may be construed or modified, in a manner that does not violate the trustor's probable intention, to achieve the trustor's tax objectives.

**Source:** SL 1998, ch 282, § 6; SL 2016, ch 231, § 22.

**55-3-29. Trustee may combine or divide trusts—Rights of beneficiaries—Trust purposes—Petition to court.** Without approval of court and except as otherwise provided by the terms of the trust, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the combination or division does not impair the rights of any of the beneficiaries or substantially affect the accomplishment of the trust purposes. On petition by a trustee or beneficiary, the court may affirm or prevent a proposed combination or division; and, if the terms of the trust instruments creating the trusts are inconsistent, the court shall resolve such inconsistencies in its order by establishing the terms of the trust that will survive the combination or division.

**Source:** SL 1998, ch 282, § 7; SL 2004, ch 312, § 11.

55-3-29.1. Defense of laches not available. No beneficiary of a trust may assert the defense of laches in any proceeding to modify, reform, or terminate a trust pursuant to §§ 55-3-23 to 55-3-29, inclusive.

**Source:** SL 2009, ch 252, § 22.

**55-3-29.2. Statute of limitations defense not available.** No beneficiary of a trust may assert a statute of limitations defense in any proceeding to modify, reform, or terminate a trust pursuant to §§ 55-3-23 to 55-3-29, inclusive.

**Source:** SL 2011, ch 212, § 12.

**55-3-30. Provisions not exclusive.** The provisions of §§ 55-3-23 to 55-3-29, inclusive, shall not be construed as exclusive methods of modifying or terminating irrevocable trusts.

**Source:** SL 1998, ch 282, § 8.

**55-3-31 to 55-3-38. Repealed by SL 2017, ch 208, § 36.**

**55-3-39. When state law or jurisdiction provision valid, effective, and conclusive.** Except as expressly provided by the terms of a governing instrument or by a court order, a general law or a state jurisdiction provision stating that the laws of this state govern is valid, effective, and conclusive for the trust if all of the following are true:

(1) Some or all of the trust assets are deposited in this state or physical evidence of such assets is held in this state and the trust is being administered by a qualified person; in this subdivision, deposited in this state, includes being held in a checking account, time deposit, certificate of deposit, brokerage account, trust company fiduciary account, or other similar account or deposit that is located in this state including South Dakota investments;

(2) A trustee is a qualified person who is designated as a trustee under the governing instrument, a successor trusteeship, or designated by a court having jurisdiction over the trust; and

(3) The administration, for example, physically maintaining trust records in this state and preparing or arranging for the preparation of, on an exclusive basis or a nonexclusive basis, an income tax return that must be filed by the trust, occurs wholly or partly in this state.

The State of South Dakota and its courts have jurisdiction over a trust created in a foreign jurisdiction if

the administration of the trust meets the three requirements set forth in this section.

Nothing in this section may be construed to be the exclusive means of providing a valid effective and conclusive state jurisdiction provision.

**Source:** SL 1998, ch 282, § 20; SL 2004, ch 312, § 6; SL 2010, ch 232, § 3.

**55-3-40. Validity, construction, and administration of trust with state jurisdiction provision.** The validity, construction, and administration of a trust with a state jurisdiction provision are determined by the laws of this state, including the:

(1) Capacity of the trustor;

(2) Powers, obligations, liabilities, and rights of the trustees and the appointment and removal of the trustees; and

(3) Existence and extent of powers, conferred or retained, including a trustee's discretionary powers, and the validity of the exercise of a power.

**Source:** SL 1998, ch 282, § 21.

**55-3-41. Qualified person defined.** For the purposes of § 55-3-39, the term, qualified person, means:

(1) An individual who, except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause shown, resides in this state, whose true and permanent home is in this state, who does not have a present intention of moving from this state, and who has the intention of returning to this state when away;

(2) A trust company that is organized under Title 51A or under federal law and that has its principal place of business in this state; or

(3) A bank or savings association that possesses and exercises trust powers, has its principal place of business in this state, and the deposits of which are insured by the Federal Deposit Insurance Corporation.

**Source:** SL 1998, ch 282, § 22.

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

**Source:** SL 1998, ch 282, § 23; SL 2013, ch 239, § 22.

**55-3-43. South Dakota investments defined.** For the purposes of § 55-3-39, the term, South Dakota investments, means real property located in South Dakota, any equity or debt securities of a corporation, partnership, or limited liability company organized under the laws of South Dakota or having its headquarters in South Dakota, debt securities of the State of South Dakota or any of its subdivisions, or any of its instrumentalities.

**Source:** SL 1998, ch 282, § 24.

**55-3-44. Trustor defined.** For the purposes of § 55-3-40, the term, trustor, means a person who transfers property in trust, and includes a person who furnishes the property transferred to a trust even if the trust is created by another person.

**Source:** SL 1998, ch 282, § 25.

**55-3-45. Beneficiary approval of trustee's accounting—Accounting defined.** If a trust is not subject to court supervision under chapter 21-22, and if no objection has been made by a distribution beneficiary, as

defined in this title, of a trust within one hundred eighty days after a copy of the trustee's accounting has been mailed, postage prepaid, to the last known address of such distribution beneficiary, personally, or electronically in accordance with § 15-6-5(d), the distribution beneficiary is deemed to have approved such accounting of the trustee, and the trustee, absent fraud, intentional misrepresentation, or material omission, shall be released and discharged from any and all liability to all beneficiaries of the trust as to all matters set forth in such accounting.

The provisions of chapter 55-18 apply to this section.

For purposes of this section, the term, accounting, means any interim or final report or other statement provided by a trustee reflecting all transactions, receipts, and disbursements during the reporting period and a list of assets as of the end of the period covered by the report or statement, and including written notice to the distribution beneficiary of the provisions of this section.

**Source:** SL 1998, ch 282, § 26; SL 2010, ch 232, § 4; SL 2017, ch 208, § 34.

**55-3-46. Effect of the laws, rules, or orders of foreign country on trust or disposition of property.** No trust with South Dakota situs or governed by the laws of the State of South Dakota and no disposition of property to be held upon the terms of such trust is void, voidable, liable to be set aside, or defective in any manner by reason that:

- (1) The law of any foreign country, as defined in subdivision 10-43-1(6), prohibits or does not recognize the concept of a trust; or
- (2) The trust or disposition:
  - (a) Avoids or defeats any right, claim, or interest conferred by the law of a foreign country upon any person by reason of a personal relationship to the trustor or by way of heirship rights; or
  - (b) Contravenes any rule or law of a foreign country or any foreign country's judicial or administrative order or action intended to recognize, protect, enforce, or give effect to such a right, claim, or interest.

**Source:** SL 2005, ch 260, § 8.

**55-3-47. Cessation of trustee upon action of foreign court—Successor trustee.** If, in any action brought against a trustee of a trust, a foreign court takes any action whereby such court declines to apply the law of this state in determining the validity, construction, or administration of such trust, or the effect of a spendthrift provision thereof, the trustee shall immediately upon the foreign court's action and without the further order of any court of this state, cease in all respects to be trustee of the trust and a successor trustee shall thereupon succeed as trustee in accordance with the terms of the trust instrument or, if the trust instrument does not provide for a successor trustee and the trust would otherwise be without a trustee, the court, upon the application of any beneficiary of the trust, shall appoint a successor trustee upon such terms and conditions as it determines to be consistent with the purposes of the trust and this section. Upon the trustee's ceasing to be trustee, the trustee has no power or authority other than to convey the trust property to the successor trustee named in the trust instrument in accordance with this section.

**Source:** SL 2006, ch 243, § 10.

**55-3-48. South Dakota law governs administration of trust.** Unless the governing instrument or a court order expressly prohibits the change of the law of another jurisdiction to govern the administration of the trust, the laws of South Dakota shall govern the administration of a trust while the trust is administered in South Dakota.

**Source:** SL 2012, ch 233, § 25; SL 2016, ch 231, § 23.

**55-4-1. Definition of terms. Terms used in this chapter mean:**

- (1) "Affiliate," any person directly or indirectly controlling or controlled by another person, or any

person under direct or indirect common control with another person. It includes any person with whom a trustee has an express or implied agreement regarding the purchase of trust investments by each from the other, directly or indirectly, except a broker or stock exchange;

- (2) "Person," an individual, a corporation, a partnership, a limited liability company, an association, a joint stock company, a business trust, a trust, an unincorporated organization, or two or more persons having a joint or common interest;
- (3) "Relative," a spouse, ancestor, descendant, brother, or sister;
- (4) "Trust," an express trust only;
- (5) "Trustee," includes trustees, a corporate as well as a natural person and a successor or substitute trustee.

**Source:** SL 1943, ch 308, § 1; SDC Supp 1960, § 59.0501; SL 1998, ch 282, § 41; SL 2015, ch 240, § 19.

**55-4-2. Powers attached to the office of trustee.** Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, all powers of a trustee shall be attached to the office and shall not be personal.

**Source:** SL 1943, ch 308, § 10; SDC Supp 1960, § 59.0510.

**55-4-3. Number of trustees for exercise of powers.** Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any power vested in three or more trustees may be exercised by a majority of such trustees and any power vested in two trustees shall be exercised by both of such trustees.

**Source:** SL 1943, ch 308, § 11; SDC Supp 1960, § 59.0511 (1); SL 2011, ch 212, § 14.

**55-4-4. Liability of trustee not joining in exercise of power.** No trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority trustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of such joinder.

**Source:** SL 1943, ch 308, § 11; SDC Supp 1960, § 59.0511 (1).

**55-4-5. Cotrustee—Liability for maladministration of trust.** Nothing in § 55-4-3 or 55-4-4 shall excuse a cotrustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust.

**Source:** SL 1943, ch 308, § 11; SDC Supp 1960, § 59.0511 (2).

**55-4-6. Voting of corporate stock owned by trustee.** A trustee owning corporate stock may vote it by proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock and in voting it.

**Source:** SL 1943, ch 308, § 8; SDC Supp 1960, § 59.0508.

**55-4-7. Creation of trust—Bank account to pay special debts.** Whenever a bank account shall, by entries made on the books of the depositor and the bank at the time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the creditors to be paid therefrom, subject to such power of revocation as the depositor may have reserved by agreement with the bank.

**Source:** SL 1943, ch 308, § 2; SDC Supp 1960, § 59.0502 (1).

**55-4-8. Trust to pay special debts—Failure of beneficiary to present claim for payment—Revocation of trust by depositor.** If any beneficiary for whom a trust is created pursuant to § 55-4-7 does not present

his claim to the bank for payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor.

**Source:** SL 1943, ch 308, § 2; SDC Supp 1960, § 59.0502 (2).

**55-4-9. Holding stock in name of nominee.** A trustee owning any stocks, bonds, notes, debentures, or other written obligations of any public or private corporation may hold the same in the name of a nominee, without mention of the trust in the records of such corporation or in the stock certificate or stock registration book of such corporation; provided that

(1) The trust records and all reports or accounts rendered by the trustee clearly show the ownership of such stocks, bonds, notes, debentures, or other written obligations of such public or private corporation by the trustee and the facts regarding its holding; and

(2) The nominee shall deposit with the trustee a signed statement showing the trust ownership, shall endorse the stock certificate or other said instrument in blank, and shall not have possession of the stock certificate or other said instrument or access thereto except under the immediate supervision of the trustee.

The trustee shall be personally liable for any loss to the trust resulting from any act of such nominee in connection with stocks, bonds, notes, debentures, or other written obligations of any public or private corporation so held.

**Source:** SL 1943, ch 308, § 9; SDC Supp 1960, § 59.0509; SL 1967, ch 338.

**55-4-10. Loan of trust funds.** Except as provided in §§ 55-4-11 and 55-4-12, or except as may be expressly authorized by a court order, by the written consent of all qualified beneficiaries which may be given notwithstanding the provisions of § 55-4-31, by the written authorization from or direction by a trust protector, or by the terms of the governing instrument, which may be given by the settlor notwithstanding the provisions of § 55-4-30:

(1) No corporate trustee may lend trust funds to itself or an affiliate, or to any director, officer, or employee of itself or of an affiliate;

(2) No non-corporate trustee may lend trust funds to himself or herself, or to any relative, employer, employee, partner, or other business associate.

**Source:** SL 1943, ch 308, § 3; SDC Supp 1960, § 59.0503; SL 2017, ch 204, § 20.

**55-4-11. Corporate trustee depositing trust funds with self—Interest.** A corporate trustee which is subject to regulation and supervision by state or federal authorities may deposit with itself trust funds which are being held necessarily pending investment, distribution, or the payment of debts, provided it pays into the trust for such deposit such interest as it is required by statute to pay on uninvested trust funds, or, if there be no such statute, the same rate of interest it pays upon similar non-trust deposits, and maintains in its trust department as security for all such deposits a separate fund consisting of securities legal for trust investments and at all times equal in total market value to the amount of the deposits. But no such security shall be required to the extent that the deposit is insured or given a preference by any state or federal law.

**Source:** SL 1943, ch 308, § 4; SDC Supp 1960, § 59.0504 (1).

**55-4-12. Corporate trustee depositing trust funds with self—Maintenance of required value—Ownership of income—Items specified in statements of financial condition to Division of Banking.** The separate fund of securities required by § 55-4-11 shall be marked as such. Withdrawals from or additions to it may be made from time to time, as long as the required value is maintained. The income of such securities shall belong to the corporate trustee. In all statements of its financial condition published, or delivered to the Division of Banking, such corporate trustee shall show as separate items the amount of trust funds which it has deposited with itself and the amount of securities which it holds as security for the

payment of such deposits.

**Source:** SL 1943, ch 308, § 4; SDC Supp 1960, § 59.0504 (2).

**55-4-13. Trustee not to buy from or sell to self—Exception.** No trustee, unless expressly authorized by the trust instrument, shall directly or indirectly lease, buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate. Notwithstanding this provision or any statute to the contrary, a trustee may lease, purchase or sell property from or to the trust he represents as trustee if specifically authorized to do so in a decedent's will or the instrument creating the trustee relationship, including the establishment of a trust service office as provided by chapter 51A-5.

**Source:** SL 1943, ch 308, § 5; SDC Supp 1960, § 59.0505; SL 1980, ch 343; SL 1981, ch 354, § 2; SL 1984, ch 314, § 7.

**55-4-14. Permitted sales between trusts held by same corporate trustee.** A corporate trustee may sell stocks, bonds and other securities listed on all exchange supervised by the securities and exchange commission as well as obligations of the U.S. treasury and obligations of U.S. government agencies held by it in one account to itself as trustee of another account if the transaction is fair to both accounts and if such transaction is not prohibited by the instruments creating the trustee relationships.

**Source:** SL 1943, ch 308, § 6; SDC Supp 1960, § 59.0506; SL 1979, ch 337.

**55-4-15. Corporate trustee buying its own stock.** No corporate trustee, unless expressly authorized by the trust instrument, may purchase for a trust shares of its own stock, or its bonds, or other securities, or the stock, bonds, or other securities of an affiliate.

**Source:** SL 1943, ch 308, § 7; SDC Supp 1960, § 59.0507; SL 2006, ch 243, § 4.

**55-4-16. Withdrawals from mingled trust funds.** Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or creditor of one or more of the trusts, or for an unknown purpose, such a withdrawal shall be charged first to the amount of cash, credit, or other property of the trustee in the mingled fund, if any, and after the exhaustion of the trustee's cash, credit, or other property, then to the several trusts in proportion to their several interests in the cash, credit, or other property at the time of the withdrawal.

**Source:** SL 1943, ch 308, § 15; SDC Supp 1960, § 59.0515.

**55-4-17. Unenforceable oral trust created by deed—Duties of intended trustee—Conveyance of real property interest under oral trust.** When an interest in real property is conveyed by deed to a person on a trust which is unenforceable on account of the statute of frauds and the intended trustee or his successor in interest still holds title but refuses to carry out the trust on account of the statute of frauds, the intended trustee or his successor in interest, except to the extent that the successor in interest is a bona fide purchaser of a legal interest in the real property in question, shall be under a duty to convey the interest in real property to the settlor or his successor in interest. A court having jurisdiction may prescribe the conditions upon which the interest shall be conveyed to the settlor or his successor in interest.

**Source:** SL 1943, ch 308, § 16; SDC Supp 1960, § 59.0516 (1).

**55-4-18. Unenforceable oral trust created by deed—Liability of trustee to settlor for transfer of real property.** Where the intended trustee has transferred part or all of his interest and it has come into the hands of a bona fide purchaser, the intended trustee shall be liable to the settlor or his successor in interest for the value of the interest thus transferred at the time of its transfer, less such offsets as the court may deem equitable.

**Source:** SL 1943, ch 308, § 16; SDC Supp 1960, § 59.0516 (2).

**55-4-19. Action on contract against trustee in representative capacity—Execution against trust property—Intervention by beneficiary.** Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his representative capacity, and any judgment rendered in such action in favor of the plaintiff shall be collectible by execution out of the trust property. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim. Any beneficiary, or in the case of charitable trusts the attorney general and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

**Source:** SL 1943, ch 308, § 12; SDC Supp 1960, § 59.0512 (1), (2).

**55-4-20. Action on contract against trustee—Notice to beneficiaries.** No judgment shall be rendered in favor of the plaintiff in an action pursuant to § 55-4-19 unless he proves that within thirty days after the beginning of such action, or within such other time as the court may fix, and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust the attorney general and any corporation which is a beneficiary or agency in the performance of such charitable trust, of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section.

**Source:** SL 1943, ch 308, § 12; SDC Supp 1960, § 59.0512 (2).

**55-4-21. Action on contract against trustee—Personal liability of trustee.** The plaintiff in an action pursuant to § 55-4-19 may also hold the trustee who made the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word "trustee" or the words "as trustee" after the signature of a trustee to a contract shall be deemed prima facie evidence of an intent to exclude the trustee from personal liability.

**Source:** SL 1943, ch 308, § 12; SDC Supp 1960, § 59.0512 (3).

**55-4-22. Exoneration or reimbursement of trustee for tort committed in administration of trust.** A trustee who has incurred personal liability for a tort committed in the administration of the trust is entitled to exoneration therefor from the trust property if he has not discharged the claim, or to be reimbursed therefor out of trust funds if he has paid the claim, if:

- (1) the tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust, or
- (2) although the tort was not a common incident of such activity, neither the trustee nor any officer or employee of the trustee was guilty of personal fault in incurring the liability.

**Source:** SL 1943, ch 308, § 13; SDC Supp 1960, § 59.0513 (1).

**55-4-23. Exoneration or reimbursement of trustee for tort—Increase in value of trust property.** If a trustee commits a tort which increases the value of the trust property, he shall be entitled to exoneration or reimbursement with respect thereto to the extent of such increase in value, even though he would not otherwise be entitled to exoneration or reimbursement.

**Source:** SL 1943, ch 308, § 13; SDC Supp 1960, § 59.0513 (2).

**55-4-24. Liability of trustees of charitable trust for torts not changed by provisions of law as to exoneration or reimbursement of trustee for tort.** Nothing in § 55-4-22 or 55-4-23 shall be construed to

change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees.

**Source:** SL 1943, ch 308, § 13; SDC Supp 1960, § 59.0513 (3).

**55-4-25. Tort liability of trust estate—Action against trustee, amount of recovery, intervention by beneficiary.** Where a trustee or his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may be sued and collection had from the trust property, if the court shall determine in such action:

- (1) that the tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or
- (2) that, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or
- (3) that, although the tort did not fall within classes (1) or (2) above, it increased the value of the trust property.

If the tort is within classes (1) or (2) above, collection may be had of the full amount of damage proved; and if the tort is within class (3) above, collection may be had only to the extent of the increase in the value of the trust property.

Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

**Source:** SL 1943, ch 308, § 14; SDC Supp 1960, § 59.0514 (1), (3).

**55-4-26. Tort liability of trust estate—Action against trustee, proof as to reimbursement unnecessary.** In an action against the trustee in his representative capacity under § 55-4-25 the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

**Source:** SL 1943, ch 308, § 14; SDC Supp 1960, § 59.0514 (2).

**55-4-27. Tort liability of trust estate—Action against trustee, notice to beneficiaries.** No judgment shall be rendered in favor of the plaintiff in an action pursuant to § 55-4-25 unless he proves that within thirty days after the beginning of the action, or within such other period as the court may fix and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to such beneficiaries at their last known addresses. The trustee shall furnish the plaintiff a list of such beneficiaries and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section.

**Source:** SL 1943, ch 308, § 14; SDC Supp 1960, § 59.0514 (3).

**55-4-28. Personal liability for tort committed by trustee.** The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement provided in §§ 55-4-22 and 55-4-23.

**Source:** SL 1943, ch 308, § 14; SDC Supp 1960, § 59.0514 (4).

**55-4-29. Existing law as to charitable immunity not changed by law as to tort liability of trust estate.** Nothing in §§ 55-4-25 to 55-4-28, inclusive, shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees.

**Source:** SL 1943, ch 308, § 14; SDC Supp 1960, § 59.0514.

**55-4-30. Power of settlor of trust.** Subject to the final paragraph below, the settlor of any trust affected by this chapter may:

- (1) By provision in the instrument creating the trust if the trust was created by a writing;
- (2) By oral statement to the trustee at the time of the creation of the trust if the trust was created orally; or
- (3) By an amendment of the trust, if the settlor reserved the power to amend the trust, relieve the trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed upon the trustee by this chapter; or alter or deny to the trustee any or all of the privileges and powers conferred upon the trustee by this chapter; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this chapter. However, no act of the settlor relieves a trustee from the duties, restrictions, and liabilities imposed upon the trustee by §§ 55-4-10 to 55-4-12, inclusive.

A provision of a trust instrument relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or as a result of gross negligence.

**Source:** SL 1943, ch 308, § 17; SDC Supp 1960, § 59.0517; SL 2000, ch 229, § 1; SL 2007, ch 247, § 10.

**55-4-31. Trustee not liable if beneficiary consents to conduct or releases trustee from liability or ratifies transaction.** A trustee is not liable to a beneficiary, as defined under this title or Title 29A, for breach of trust from any or all of the duties, restrictions, and liabilities which would otherwise be imposed on the trustee, except as to the duties, restrictions, and liabilities imposed by §§ 55-4-10 to 55-4-12, inclusive, if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

- (1) The consent, release, or ratifications of the beneficiary were induced by improper conduct of the trustee; or
- (2) At the time of the consent, release, or ratification, the beneficiary did not have knowledge of the beneficiary's rights or of the material facts relating to the breach.

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

**Source:** SL 1943, ch 308, § 18; SDC Supp 1960, § 59.0518; SL 2000, ch 229, § 2; SL 2012, ch 233, § 14; SL 2014, ch 226, § 4.

**55-4-32. Relieving trustee of duties—Power of the court.** A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this chapter, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this chapter.

**Source:** SL 1943, ch 308, § 19; SDC Supp 1960, § 59.0519.

**55-4-33. Liabilities for violations of chapter.** If a trustee violates any of the provisions of this chapter, he may be removed and denied compensation in whole or in part; and any beneficiary, cotrustee, or successor trustee may treat the violation as a breach of trust.

**Source:** SL 1943, ch 308, § 20; SDC Supp 1960, § 59.0520.

**55-4-34. Application of chapter to testamentary trust.** This chapter shall apply only to testamentary trusts created by wills or codicils executed after July 1, 1943 and to non-testamentary trusts created after July 1, 1943.

**Source:** SL 1943, ch 308, § 25; SDC Supp 1960, § 59.0523.

**55-4-35. Uniformity of interpretation.** This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**Source:** SL 1943, ch 308, § 21; SDC Supp 1960, § 59.0521.

**55-4-36. Citation of chapter.** This chapter may be cited as the Uniform Trusts Act.

**Source:** SL 1943, ch 308, § 22; SDC Supp 1960, § 59.0522.

**55-4-37. Liability for fiduciary's partnership interest limited.** If permitted by the trust instrument or will under which a fiduciary serves, or by order of a court having jurisdiction of the estate or trust, a fiduciary may enter into a partnership agreement or arrangement with others or accept the assignment of, or otherwise acquire, hold, and dispose, of an interest in a partnership, and in so doing may become either a general or a limited partner. If the fiduciary becomes a partner, as to creditors of, or claimants against, the partnership and as to the other members of the partnership, the liability, if any, of the fiduciary for the debts and other liabilities of the partnership, whether arising under contract, tort, or otherwise, are limited to the assets of the trust or estate, or so much thereof as may be necessary to discharge such debts and liabilities.

**Source:** SL 1996, ch 285.

**55-4-38. Limitation on trustee's power to make distributions to his or her benefit.** Unless the terms of the trust refer to this section and provide otherwise, a power, including the power to make a distribution to another trust under § 55-2-15, that is exercisable by or attributable to a person, other than the settlor, in such person's capacity as a trustee to make discretionary distribution of either principal or income:

- (1) To or for the benefit of himself or herself is exercisable by the person only for the person's health, education, maintenance, and support in the person's accustomed manner of living; or
- (2) To or for the benefit of others, is not exercisable to discharge any of the person's own legal obligations.

**Source:** SL 2000, ch 229, § 4; SL 2007, ch 281, § 8.

**55-4-39. "Trustee" construed broadly.** The reference to trustee in § 55-4-38 includes any person who is deemed to have any power of a trustee, whether because such person has the right to remove or replace any trustee, or because a reciprocal trust or power doctrine applies, or otherwise.

**Source:** SL 2000, ch 229, § 5.

**55-4-40. Applicability of §§ 55-4-38 and 55-4-39.** The provisions of §§ 55-4-38 and 55-4-39 apply to any trust established before or after July 1, 2000.

**Source:** SL 2000, ch 229, § 6.

**55-4-41. Certain trustees exempted from §§ 55-4-38 to 55-4-40, inclusive.** The provisions of §§ 55-4-38 to 55-4-40, inclusive, do not apply to a decedent's or settlor's spouse who is the trustee of a testamentary trust or an inter vivos trust for which a marital deduction is allowable.

**Source:** SL 2000, ch 229, § 7.

**55-4-42 to 55-4-47. Repealed by SL 2010, ch 232, § 6.**

**55-4-48, 55-4-49. Repealed by SL 2002, ch 100, §§ 23, 24**

**55-4-50. Co-trustee's inability or failure to perform.** If a co-trustee is unable to perform duties because of absence, illness, disqualification under other law, or other incapacity, or fails to perform duties due to inaction or neglect, and action is necessary or appropriate under the circumstances to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.

**Source:** SL 2008, ch 257, § 12.

**55-4-51. Certificate of trust furnished in lieu of copy of trust instrument or will that creates testamentary trust—Contents.** Instead of furnishing a copy of the trust instrument or a copy of a will that creates a testamentary trust to a person other than a beneficiary, one or more trustees may furnish to the person a certificate of trust signed by a trustee, settlor, grantor, or trustor containing the following:

(1) A statement that the trust exists, the current name of the trust if one has been given, any previous name of the trust if the name of the trust was changed, and the date the trust instrument or will was executed;

(2) The name of the settlor, grantor, trustor, testator, or testatrix;

(3) The name of each original trustee and the name and address of each trustee currently empowered to act under the trust instrument or will on the date of the execution of the certificate of trust;

(4) The applicable powers of the trustee and other provisions set forth in the trust instrument or will as are selected by the person signing the certificate of trust, including those powers authorizing the trustee to sell, convey, pledge, mortgage, lease, or transfer title to any interest in property held in the trust, together with a statement setting forth the number of trustees required by the provisions of the trust instrument or will to act;

(5) A statement that the trust is irrevocable or, if the trust is revocable, a statement to that effect and that the trust has not been revoked;

(6) A statement that the trust is not supervised by a court, or, if applicable, a statement that the trust is supervised by a court, and which statement also sets forth any restrictions imposed by the court on the trustee's ability to act as otherwise permitted by statute or the terms of the trust instrument or will;

(7) If applicable, a description of any property to be conveyed by the trustee;

(8) A statement that the trust has not been modified or amended in any manner that would cause the representations contained in the certificate of trust to be incorrect.

The person signing the certificate shall certify that the statements contained in the certificate are true and correct. The signature of the person signing the certificate shall be acknowledged or verified under oath before a notary public or other official authorized to administer oaths. A certificate of trust need not contain the dispositive terms of a trust.

**Source:** SL 2009, ch 252, § 24; SL 2010, ch 232, § 7; SL 2011, ch 212, § 15.

**55-4-51.1. Recording of certificate of trust—Reliance upon content.** A certificate of trust executed under § 55-4-51 may be recorded in the office of the register of deeds with respect to land described in the certificate of trust or any attachment to it. If it is recorded or filed in any county where real property is situated, or in the case of personal property, if it is presented to a third party, the certificate of trust serves to document the existence of the trust, the identity of the trustees, the powers of the trustees, and any limitations on those powers, and other matters the certificate of trust sets out, as though the full trust instrument had been recorded, filed, or presented. Until amended or revoked, or until the full trust instrument or will is recorded, filed, or presented, a certificate of trust is conclusive proof as to the matters contained in it and any party may rely upon the certificate, except a party dealing directly with the trustee or trustees who have actual knowledge of the facts to the contrary.

**Source:** SL 2010, ch 232, § 8.

**55-4-51.2. Applicability of §§ 55-4-51 and 55-4-51.1.** Sections 55-4-51 and 55-4-51.1 are effective July 1, 2010, but apply to trust instruments and wills whenever created or executed.

**Source:** SL 2010, ch 232, § 9.

**55-4-51.3. Form of certificate of trust in support of a real property transaction.** A certificate of a trustee or of trustees of a trust in support of a real property transaction may be substantially in the following form:

*This instrument was prepared by:*

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
(insert name, address and phone number)

CERTIFICATE

OF TRUST

STATE OF SOUTH DAKOTA )

: SS

COUNTY OF)

\_\_\_\_\_, being duly sworn under oath, does hereby state as follows:

1. A trust instrument or Will executed on \_\_\_\_\_ established a trust which is still in existence on the date this Certificate is signed. The current name of the trust, if it has been named, is \_\_\_\_\_ (Insert n/a if the Trust does not have a name). The name of the trust was/was not changed. If the name of the trust was changed, it was previously known as \_\_\_\_\_.

2. The name of the settlor, grantor, trustor, testator or testatrix, as the case may be, is \_\_\_\_\_.

3. The name of each original trustee and the name and address of each trustee and each trust protector currently empowered to act under the trust instrument or Will on the date of the execution of this Certificate of Trust is as follows:

\_\_\_\_\_  
\_\_\_\_\_

4. The person who signs this certificate below certifies that the trust instrument or Will contains the following powers which are given to the trustee, which may or may not be inclusive of all of the powers given to the trustee:

\_\_\_\_\_  
\_\_\_\_\_

and further contains the following provisions (optional):

\_\_\_\_\_.

The number of trustees required to join in an action by the provisions of the trust instrument or Will is \_\_\_\_\_.

5. The trust is revocable/irrevocable. \_\_\_\_\_.

If revocable, the trust has not been revoked.

6. The trust is/is not supervised by a court. The following restrictions are currently imposed by the court on the trustee(s) ability to act even though actions so restricted may be permitted by statute or the terms of the trust instrument or Will:

\_\_\_\_\_.

7. The Trustee intends to convey the following property owned by the Trust:

8. The trust has not been modified or amended in any manner that would cause the representations contained in this Certificate of Trust to be incorrect. The statements contained in this Certificate of Trust are true and correct.

STATE OF SOUTH DAKOTA)

: SSCOUNTY OF)

On this, the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me, the undersigned officer, personally appeared, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that she/he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public, South Dakota

My Commission expires: \_\_\_\_\_

**Source:** SL 2010, ch 232, § 10; SL 2011, ch 212, § 16.

**55-4-52. Request for excerpts from trust instrument.** A recipient of a certificate of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer on the trustee the power to act in the pending transaction.

**Source:** SL 2009, ch 252, § 25.

**55-4-53. Limitation of liability for acting in reliance on certificate of trust.** Any person who acts in reliance on a certificate of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the certification.

**Source:** SL 2009, ch 252, § 26.

**55-4-54. Enforcement of transaction entered into in reliance on certificate of trust.** Any person who in good faith enters into a transaction in reliance on a certificate of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

**Source:** SL 2009, ch 252, § 27.

**55-4-55. Liability for bad faith demand for trust instrument.** Any person making a demand for the trust instrument in addition to a certificate of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

**Source:** SL 2009, ch 252, § 28.

**55-4-56. Right to obtain copy of trust instrument in judicial proceeding.** The provisions of §§ 55-4-51 to 55-4-55, inclusive, do not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

**Source:** SL 2009, ch 252, § 29.

**55-4-57. Time for commencing judicial proceeding to contest validity of trust—Distribution of trust property—Recovery of improper distribution—Notice.** (a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust was validly created may not be

commenced later than the first to occur of:

- (1) One year after the settlor's death;
- (2) Sixty days after the trustee, trust advisor, trust protector, or the settlor sent the person who is contesting the trust a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding;
- (3) Upon notice of entry of an order of adjudication of the trust's validity as a result of a petition filed before the settlor's death by any fiduciary of the trust or the settlor of a trust;
- (4) Upon notice of entry of an order of any other adjudication of the trust's validity or the date the person's right to contest was precluded by consent or other limitation;
- (5) The last date a petition for review of a will could be filed under South Dakota law, if the trust was revocable at the settlor's death and the trust was specifically referred to in the settlor's last will; or
- (6) Upon notice of entry of a court's order approving a conservator's proposal to create a trust or amendment thereto if the trust or trust amendment was created pursuant to and in conformity with § 29A-5-419 or 29A-5-420.

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

- (1) The trustee knows of a pending proceeding contesting the validity of the trust; or
- (2) A potential contestant has notified the trustee of a possible proceeding to contest the trust and a proceeding is commenced within sixty days after the contestant sent the notification.

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

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

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

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

(g) Any trustee, trust advisor, trust protector, or the settlor may petition the court for a judicial order confirming that a trust is valid and enforceable under its current terms, pursuant to the procedures as set forth in chapter 21-22.

(h) The provisions of chapter 55—18 apply to this section.

**Source:** SL 2010, ch 232, § 11; SL 2013, ch 239, § 24; SL 2017, ch 204, § 21; SL 2017, ch 208, § 35.

**55-4-58. Presentation of claims against property of trust revocable at settlor's death.** (a) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, and expenses.

(b) A trustee may:

(1) If the trustee has knowledge of a creditor or potential creditor, provide written notice to the creditor or potential creditor at their last known address, advising the creditor that a claim may not be paid if the creditor fails to present a claim within sixty days of the date of such notice; and

(2) For all unknown creditors and all creditors which the trustee, in good faith, is unable to locate, publish notice to such creditors once a week for three successive weeks in a legal newspaper in the county:

(A) Where the settlor was last a resident if the deceased settlor was a resident of South Dakota; or

(B) Where the principal administration of the trust takes place if the deceased settlor was a nonresident of South Dakota.

The published notice shall state that creditors of a deceased settlor must present their claim within four months after the date of the first publication of the notice or any claim or collection efforts which otherwise could have been asserted or enforced against the trust or assets thereof may be barred.

For purposes of this section, a trustee has knowledge of a creditor or potential creditor if the trustee is aware that the creditor has demanded payment from the settlor or the settlor's estate.

(c) Creditors of the deceased settlor who are given written notice or receive notice by publication are barred if no claim is filed within the applicable period.

(d) Claims by a creditor of a deceased settlor may be presented to the trustee by any of the following three methods:

(1) The creditor may deliver or mail to the trustee a written statement of the claim indicating its basis, the name and address of the creditor, and the amount claimed;

(2) If the trust is court-supervised, the creditor may file a written statement of the claim with the clerk of courts and mail or deliver a copy thereof to the trustee. The claim is deemed presented on the first to occur of the receipt of the written statement of claim by the trustee, or the filing of the claim with the clerk of courts; or

(3) The creditor may commence a proceeding against the trust in any court where the trustee may be subject to jurisdiction, to obtain payment of the claim. Such a claim is deemed presented on the date the proceeding is commenced.

(e) If a claim is not yet due, the date when it will become due shall be stated in the written statement of the claim. If the claim is contingent or unliquidated, the nature of the uncertainty shall be described. If the claim is secured, the nature of the security shall be described. Failure to describe correctly the nature of the security or uncertainty, or the due date of a claim not yet due, does not invalidate the presentation.

(f) No presentation of claim is required in regard to matters claimed in proceedings against a settlor which were pending at the time of the death of the settlor in any court.

(g) No trustee may incur liability for a non-negligent or non-willful failure to give notice to a particular creditor.

(h) If the applicable assets of the trust that are otherwise subject to the claim of an unbarred creditor are insufficient to pay the claim in full, the trustee shall make payment in the following order:

- (1) Costs and expenses relating to administration of the trust or estate;
- (2) Reasonable funeral expenses of the settlor;
- (3) Debts and taxes with preference under federal law;
- (4) Debts and taxes with preference under other laws of this state;
- (5) All other claims.

(i) In paying claims of a deceased settlor, the trustee shall give no preference in the payment of any claim

over any other claim of the same class, and a claim due and payable is not entitled to a preference over claims not yet due except as to claims which are compromised in part or in full.

(j) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to pay creditor claims with the trust property in accordance with the terms of the trust and this section. The trustee is not subject to liability for doing so unless:

(1) The trustee knows of a pending proceeding contesting the validity of the trust or regarding a creditor's claim; or

(2) A potential contestant or creditor has notified the trustee of a possible proceeding to contest the trust or regarding a creditor's claim, and a proceeding is commenced within sixty days after the contestant sent the notification.

However, the trustee may pay creditor claims without liability so long as the trustee determines that, at the time of the determination, the assets of the trust are reasonably adequate to allow for payment of the claim in view of the type of proceeding, the amount at issue, and the likelihood of its probable success.

(k) A creditor who has received a payment from the trustee, if it is later determined to have been invalid, or wrongfully paid under this section, is liable to return any payment received to the trustee. If the creditor refuses to return the payment, the creditor may be liable for all costs, including attorney's fees, incurred for the recovery of the payment.

(l) Except as to creditors barred by publication or by written notice, the statute of limitations provisions of §§ 29A-3-802(b) and 29A-3-803(a)(3) apply.

(m) Nothing in this section requires a trustee to give notice to a secured creditor of a settlor, nor diminish the rights of a secured creditor under applicable law.

**Source:** SL 2010, ch 232, § 12.

**55-5-6. Standards for investing and managing assets.** The trustee shall invest and manage trust assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust. This standard requires the exercise of reasonable care, skill, and caution and shall be applied to investments not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy that should incorporate risk and return objectives reasonably suitable to the trust.

**Source:** SL 1995, ch 271, § 6.

**55-5-7. Prudent investor rule.** No specific investment or course of action is, taken alone, prudent or imprudent. The trustee may invest in every kind of property and type of investment, subject to this chapter. The prudent investor rule is a test of conduct and not of resulting performance. The prudent investor rule may be expanded, restricted, eliminated, or otherwise altered by the terms of the trust instrument or court order. Unless expanded, restricted, eliminated, or otherwise altered by the terms of the trust instrument or a court order, the trustee's investment decisions and actions shall be judged in terms of the trustee's reasonable judgment regarding the anticipated effect on the trust portfolio as a whole under the facts and circumstances prevailing at the time of the decision or action. No trustee is liable to a beneficiary to the extent that the trustee acted in reliance on the provisions of the trust instrument or court order.

**Source:** SL 1995, ch 271, § 7; SL 2009, ch 252, § 30; SL 2010, ch 232, § 13.

**55-5-8. Diversification of investments.** The trustee shall diversify the investments of the trust unless, under the circumstances, the trustee reasonably believes it is in the interests of the beneficiaries and furthers the purposes of the trust not to diversify. Regardless of concentration or lack of diversification, the trustee need not diversify if the trust instrument or court order allows or directs retention of assets forming part of the trust corpus and no trustee is liable to a beneficiary to the extent that the trustee acted in reliance on the provisions of the trust instrument or court order. If a trust instrument or court order allows or directs a fiduciary to invest in a specific investment, type of investment, or investment concentration, no trustee is liable to a beneficiary to the extent that the trustee acted in reliance on the provisions of the trust instrument

or court order.

**Source:** SL 1995, ch 271, § 8; SL 2006, ch 243, § 9; SL 2009, ch 252, § 31; SL 2010, ch 232, § 14.

**55-5-9. Review of assets upon acceptance of trusteeship—Basis for disposition or retention of assets—Interest in closely held entity.** The trustee shall, within a reasonable time after the acceptance of the trusteeship, review trust assets and make and implement decisions concerning the retention and disposition of original pre-existing investments in order to conform to the provisions of this section. The trustee's decision to retain or dispose of an asset may properly be influenced by the asset's special relationship or value to the purposes of the trust or to some or all of the beneficiaries, consistent with the trustee's duty of impartiality.

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

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

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

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

**Source:** SL 1995, ch 271, § 9; SL 2009, ch 252, § 32; SL 2012, ch 233, § 22.

**55-5-10. Investment strategy—Productivity judged by whole portfolio.** The trustee shall pursue an investment strategy that considers both the reasonable production of income and safety of capital, consistent with the trustee's duty of impartiality and the purpose of the trust. Whether investments are underproductive or overproductive of income shall be judged by the portfolio as a whole and not as to any particular asset.

**Source:** SL 1995, ch 271, § 10.

**55-5-11. Circumstances considered in investment decisions.** The circumstances that the trustee may consider in making investment decisions include, without limitation, the general economic conditions, the possible effect of inflation, the expected tax consequences of investment decisions or strategies, the role each investment or course of action plays within the overall portfolio, the expected total return, including both income yield and appreciation of capital, and the duty to incur only reasonable and appropriate costs. The trustee may consider related trusts and the assets of beneficiaries when making investment decisions.

**Source:** SL 1995, ch 271, § 11.

**55-5-12. Precedence of express provisions of trust instrument.** The provisions of this chapter may be expanded, restricted, eliminated, or otherwise altered by express provisions of the trust instrument. The trustee is not liable to a beneficiary for the trustee's reasonable and good faith reliance on those express provisions.

**Source:** SL 1995, ch 271, § 12.

**55-5-13. Court authority over trustee.** Nothing in this chapter abrogates or restricts the power of an

appropriate court in proper cases to direct or permit the trustee to deviate from the terms of the trust instrument or to direct or permit the trustee to take, or to restrain the trustee from taking, any action regarding the making or retention of investments.

**Source:** SL 1995, ch 271, § 13.

**55-5-14. Authorization language.** The following terms or comparable language in the investment powers and related provisions of a trust instrument, unless otherwise limited or modified by that instrument, authorize any investment or strategy permitted under this chapter: "investments permissible by law for investment of trust funds," "legal investment," "authorized investments," "using the judgment and care under the circumstances then prevailing that men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to the speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent person rule."

**Source:** SL 1995, ch 271, § 14.

**55-5-15. Applicability of chapter.** This chapter applies to all existing and future trusts, but only as to actions or inactions occurring after July 1, 1995.

**Source:** SL 1995, ch 271, § 15.

**55-5-16. Delegation of responsibilities to others.** A trustee has a duty to personally perform the responsibilities of the trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in monitoring agents, the trustee may seek the prior approval for the delegation from the settlor, or if the settlor is deceased, the majority of the current income or principal beneficiaries, or from the court. If such approval is given in writing by either the settlor, or if the settlor is deceased, the majority of the current income or principal beneficiaries, or by the court, the trustee is not liable for the acts of the person to whom the authority is delegated except in the cases of willful misconduct or gross negligence by the delegating trustee in the selection or monitoring of the agent.

**Source:** SL 1996, ch 284, § 3; SL 1998, ch 282, § 42; SL 2011, ch 212, § 2.

**55-5-17. Duties of trustee with respect to life insurance—Notice to settlor.** (a) Unless otherwise required by the terms of the trust instrument or court order, no trustee of a trust, with respect to acquiring, retaining, or disposing of a contract of insurance or holding one or more insurance contracts upon the life of the settlor, or the lives of the settlor and the settlor's spouse, has the following duties:

- (1) To determine whether any such contract is or remains a proper investment;
- (2) To investigate the financial strength or changes in the financial strength of the life insurance company;
- (3) To make a determination of whether to exercise any policy options available under any such contract;
- (4) To make a determination of whether to diversify any such contract relative to one another or to other assets, if any, administered by the trustee;
- (5) To inquire about changes in the health or financial condition of the insured or insured's relative to any such contract; or
- (6) To vote, or give proxies to vote, on corporate matters.

A trustee of a revocable or an irrevocable trust, or of either a directed trust pursuant to chapter 55-1B or a delegated trust pursuant to § 55-5-16, is not liable to the beneficiaries of the trust or to any other party for any loss arising from the absence of those duties upon the trustee.

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

**Source:** SL 2010, ch 232, § 15; SL 2012, ch 233, § 27; SL 2014, ch 226, § 5.

**55-5A-1. Release of judgments or mortgages by foreign fiduciaries—Deeds to carry out real estate contracts—Court approval not required.** Judgments rendered by any court in the State of South Dakota, and mortgages belonging to an estate, trust, or person under conservatorship, may, without prior order of court, be released, discharged or assigned, in whole or in part as to any particular property, and deeds may be executed in performance of real estate contracts entered into before the creation of the estate, trust, or conservatorship, by any foreign fiduciary, receiver, referee, or by any other person acting in a fiduciary capacity appointed by a court of record of any foreign state or country, if no fiduciary, receiver or referee has been appointed and qualified in this state. Such release, satisfaction, discharge, assignment or deed may be made without any order of court in any manner, and by any instrument which would be valid and effective if made by a like officer qualified under the laws of this state.

**Source:** SL 1976, ch 179, § 1; SL 1993, ch 213, § 255.

**55-5A-2. Certificate of appointing court or clerk attached—Contents.** Before any instrument executed by any fiduciary or officer as authorized in § 55-5A-1 shall be effective, there shall be attached thereto a certificate executed by the court or clerk making the appointment, with seal attached, if such officer has a seal. Such certificate shall state the name of the court making such appointment, the date of appointment, and that the authority of such fiduciary or officer is still in full force and effect.

**Source:** SL 1976, ch 179, § 1.

**55-6-1. Establishment and maintenance of common trust funds and collective investment funds—Purpose.** Any bank or trust company qualified to act as fiduciary in this state may establish common trust funds or collective investment funds for the purpose of furnishing investments to itself as fiduciary, or to itself and others, as cofiduciaries.

Any common trust fund or collective investment fund authorized by this chapter shall be established and maintained in accordance with 12 C.F.R. 9.18 as of January 1, 2011.

**Source:** SL 1941, ch 20, § 1; SDC Supp 1960, § 6.0901; SL 2011, ch 212, § 23.

**55-6-1.1. Common trust fund defined.** For purposes of this chapter, the term, common trust fund, is a fund as defined in 12 C.F.R. 9.18(a)(1) as of January 1, 2011, and is provided exemption from taxation according to 26 U.S.C. 584 as of January 1, 2011.

**Source:** SL 2011, ch 212, § 28.

**55-6-1.2. Collective investment fund defined.** For purposes of this chapter, the term, collective investment fund, is a fund as defined in 12 C.F.R. 9.18(a)(2) as of January 1, 2011, and is provided exemption from taxation according to Internal Revenue Service, Revenue Ruling 81-100, published March 30, 1981.

**Source:** SL 2011, ch 212, § 29.

**55-6-2. Bank or trust company investment in funds.** Any bank or trust company qualified to act as fiduciary in this state may, as such fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in common trust funds or collective investment funds established pursuant to § 55-6-1, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company procures the consent of its cofiduciary or cofiduciaries to such investment.

**Source:** SL 1941, ch 20, § 1; SDC Supp 1960, § 6.0901; SL 2011, ch 212, § 24.

**55-6-2.1. Powers of bank or trust company qualified to act as fiduciary.** A bank or trust company qualified to act as a fiduciary in this state may:

(1) Establish and maintain common trust funds or collective investment funds for the collective investment of funds held in any fiduciary capacity by it or by another bank or trust company which is owned or controlled by a corporation which owns or controls such bank or trust company;

(2) Invest funds which it holds in common trust funds or collective investment funds established and maintained pursuant to subdivision (1).

The provisions of §§ 55-6-1 to 55-6-7, inclusive, relating to common trust funds or collective investment funds shall apply to the establishment and maintenance of common trust funds or collective investment funds under this section.

This section shall apply to all fiduciary relationships.

**Source:** SL 1978, ch 356, §§ 1 to 3; SL 2011, ch 212, § 25.

**55-6-3. Compliance with law governing administration of trust estates.** The bank or trust company operating such common trust funds or collective investment funds shall comply with the provisions of chapter 21-22 in the administration of the trust estate.

**Source:** SL 1941, ch 20, § 2; SDC Supp 1960, § 6.0902; SL 2011, ch 212, § 26.

**55-6-4. Application of chapter.** This chapter shall apply to fiduciary relationships in existence at the time this chapter takes effect or thereafter established.

**Source:** SL 1941, ch 20, § 7; SDC Supp 1960, § 6.0904.

**55-6-5. Uniformity of interpretation.** This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**Source:** SL 1941, ch 20, § 3; SDC Supp 1960, § 6.0903.

**55-6-6. Repealed by SL 2011, ch 212, § 27.**

**55-6-7. Citation of chapter.** This chapter may be cited as the Uniform Common Trust Fund Act.

**Source:** SL 1941, ch 20, § 4; SDC Supp 1960, § 6.0906.

**55-7-1. Liability of third persons dealing with trustees.** One who actually and in good faith transfers any money or other property to a trustee as such is not bound to see to the application thereof; and his rights can in no way be prejudiced by a misapplication thereof by the trustee. Other persons must at their peril see to the proper application of money or other property paid or delivered by them.

**Source:** SDC 1939, § 59.0117.

**55-7-2. Definition of terms.** Terms used in §§ 55-7-2 to 55-7-15, inclusive, mean:

(1) "Bank," any person or association of persons, whether incorporated or not, carrying on the business of banking;

(2) "Fiduciary," any trustee under any trust, express, implied, resulting or constructive, personal representative, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate;

(3) "Person," any corporation, limited liability company, partnership, or other association, or two or more persons having a joint or common interest; and

(4) "Principal," any person to whom a fiduciary as such owes an obligation.

**Source:** SL 1943, ch 19, § 1; SDC Supp 1960, § 6.0701 (1); SL 1994, ch 351, § 154.

**55-7-3. A thing done “in good faith” defined.** A thing is done “in good faith” within the meaning of §§ 55-7-2 to 55-7-15, inclusive, when it is in fact done honestly, whether it be done negligently or not.

**Source:** SL 1943, ch 19, § 1; SDC Supp 1960, § 6.0701 (2).

**55-7-4. Payment or transfer to fiduciary—Non-Liability of transferor for improper application.** A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary.

**Source:** SL 1943, ch 19, § 2; SDC Supp 1960, § 6.0702.

**55-7-5. Check or bill of exchange drawn by fiduciary payable to third person—Liability of payee.** If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument.

**Source:** SL 1943, ch 19, § 5; SDC Supp 1960, § 6.0705.

**55-7-6. Transfer of check or bill of exchange drawn by fiduciary who holds it as payee or transferee.** If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

**Source:** SL 1943, ch 19, § 6; SDC Supp 1960, § 6.0706.

**55-7-7. Bank account in name of fiduciary—Check drawn by fiduciary—Bank’s liability to principal.** If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

**Source:** SL 1943, ch 19, § 7; SDC Supp 1960, § 6.0707.

**55-7-8. Bank account in name of principal—Check drawn by fiduciary—Bank’s liability to principal.** If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal’s account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in

payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of its obligation as fiduciary in drawing or delivering the check.

**Source:** SL 1943, ch 19, § 8; SDC Supp 1960, § 6.0708.

**55-7-9. Deposit in bank to fiduciary’s personal account—Bank’s liability to principal.** If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or of checks payable to his principal and endorsed by him, if he is empowered to endorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith.

**Source:** SL 1943, ch 19, § 9; SDC Supp 1960, § 6.0709.

**55-7-10. Deposit in bank in names of two or more trustees—Check drawn by one.** When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith.

**Source:** SL 1943, ch 19, § 10; SDC Supp 1960, § 6.0710.

**55-7-11. Negotiable instrument transferred by fiduciary.** If any negotiable instrument payable or endorsed to a fiduciary as such is endorsed by the fiduciary, or if any negotiable instrument payable or endorsed to his principal is endorsed by a fiduciary empowered to endorse such instrument on behalf of his principal, the endorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in endorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument.

**Source:** SL 1943, ch 19, § 4; SDC Supp 1960, § 6.0704.

**55-7-12. Law governing transactions not within Uniform Fiduciaries Act.** In any case not provided for in §§ 55-7-2 to 55-7-15, inclusive, the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply.

**Source:** SL 1943, ch 19, § 12; SDC Supp 1960, § 6.0712.

**55-7-13. Act not retroactive.** The provisions of §§ 55-7-2 to 55-7-15, inclusive, shall not apply to transactions taking place prior to July 1, 1943.

**Source:** SL 1943, ch 19, § 11; SDC Supp 1960, § 6.0711.

**55-7-14. Uniformity of interpretation.** Sections 55-7-2 to 55-7-15, inclusive, shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them.

**Source:** SL 1943, ch 19, § 13; SDC Supp 1960, § 6.0713.

**55-7-15. Citation of uniform act.** Sections 55-7-2 to 55-7-15, inclusive, may be cited as the Uniform Fiduciaries Act.

**Source:** SL 1943, ch 19, § 14; SDC Supp 1960, § 6.0714.

**55-8-1. Definition of terms.** In this chapter, unless the context otherwise requires:

- (1) "Assignment" includes any written stock power, bond power, bill of sale, deed, declaration of trust, or other instrument of transfer.
- (2) "Claim of beneficial interest" includes a claim of any interest by a decedent's legatee, distributee, heir, or creditor, a beneficiary under a trust, a ward, a beneficial owner of a security registered in the name of a nominee or a minor owner of a security registered in the name of a custodian, or a claim of any similar interest, whether the claim is asserted by the claimant or by a fiduciary or by any other authorized person on his behalf, and includes a claim that the transfer would be in breach of fiduciary duties.
- (3) "Corporation" means a private or public corporation, association or trust issuing a security.
- (4) "Fiduciary" means a personal representative, trustee, guardian, committee, conservator, curator, tutor, custodian, or nominee.
- (5) "Person" includes an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.
- (6) "Security" includes any share of stock, bond, debenture, note, or other security issued by a corporation which is registered as to ownership on the books of the corporation.
- (7) "Transfer" means a change on the books of a corporation in the registered ownership of a security.
- (8) "Transfer agent" means a person employed or authorized by a corporation to transfer securities issued by the corporation.

**Source:** SL 1961, ch 22, § 1.

**55-8-2. Rights and duties of corporation and transfer agent—Law governing.** The rights and duties of a corporation and its transfer agent in registering a security in the name of a fiduciary or in making a transfer of a security pursuant to an assignment by a fiduciary are governed by the law of the jurisdiction under whose laws the corporation is organized.

**Source:** SL 1961, ch 22, § 8 (1).

**55-8-3. Application of chapter.** This chapter applies to the rights and duties of a person other than the corporation and its transfer agents with regard to acts and omissions in this state in connection with the acquisition, disposition, assignment, or transfer of a security by or to a fiduciary and of a person who guarantees in this state the signature of a fiduciary in connection with such a transaction.

**Source:** SL 1961, ch 22, § 8 (2).

**55-8-4. Registration of security in name of fiduciary.** A corporation or transfer agent registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship; and thereafter the corporation and its transfer agent may assume without inquiry that the newly registered owner continues to be the fiduciary until the corporation or transfer agent receives written notice that the fiduciary is no longer acting as such with respect to the particular security.

**Source:** SL 1961, ch 22, § 2.

**55-8-5. Assignment of security by fiduciary—Assumption as to authority and capacity.** Except as otherwise provided in this chapter, a corporation or transfer agent making a transfer of a security pursuant to an assignment by a fiduciary may assume without inquiry that the assignment, even though to the fiduciary himself or to his nominee, is within his authority and capacity and is not in breach of his fiduciary duties.

**Source:** SL 1961, ch 22, § 3 (1).

**55-8-6. Assignment of security by fiduciary—Compliance with controlling instrument and law governing fiduciary relationship assumed.** Except as otherwise provided in this chapter, a corporation or transfer agent making a transfer of a security pursuant to an assignment by a fiduciary may assume without inquiry that the fiduciary has complied with any controlling instrument and with the law of the jurisdiction governing the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer.

**Source:** SL 1961, ch 22, § 3 (2).

**55-8-7. Assignment of security by fiduciary—Corporation or transfer agent not charged with notice of records or documents.** Except as otherwise provided in this chapter, a corporation or transfer agent making a transfer of a security pursuant to an assignment by a fiduciary is not charged with notice of and is not bound to obtain or examine any court record or any recorded or unrecorded document relating to the fiduciary relationship or the assignment, even though the record or document is in its possession.

**Source:** SL 1961, ch 22, § 3 (3).

**55-8-8. Assignment of security by fiduciary not the registered owner—Evidence of appointment or incumbency.** A corporation or transfer agent making a transfer pursuant to an assignment by a fiduciary who is not the registered owner shall obtain the following evidence of appointment or incumbency:

- (1) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dated within sixty days before the transfer; or
- (2) In any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the corporation or transfer agent to be responsible or, in the absence of such a document or certificate, other evidence reasonably deemed by the corporation or transfer agent to be appropriate. Corporations and transfer agents may adopt standards with respect to evidence of appointment or incumbency under this subdivision provided such standards are not manifestly unreasonable. Neither the corporation nor transfer agent is charged with notice of the contents of any document obtained pursuant to this subdivision (2) except to the extent that the contents relate directly to the appointment or incumbency.

**Source:** SL 1961, ch 22, § 4.

**55-8-9. Claim of beneficial interest adverse to transfer of security—Written notice to corporation or transfer agent, contents.** A person asserting a claim of beneficial interest adverse to the transfer of a security pursuant to an assignment by a fiduciary may give the corporation or transfer agent written notice of the claim. The corporation or transfer agent is not put on notice unless the written notice identifies the claimant, the registered owner, and the issue of which the security is a part, provides an address for communications directed to the claimant and is received before the transfer.

**Source:** SL 1961, ch 22, § 5 (1).

**55-8-10. Claim of beneficial interest adverse to transfer of security—Notice of presentment to claimant—Restraining order.** As soon as practicable after the presentation of a security for transfer pursuant to an assignment by a fiduciary, a corporation or transfer agent which has received notice of a claim of beneficial interest adverse to the transfer may send notice of the presentation by registered or certified mail to the claimant at the address given by him. If the corporation or transfer agent so mails such a notice it shall withhold the transfer for thirty days after the mailing and shall then make the transfer unless restrained by a court order.

**Source:** SL 1961, ch 22, § 5 (2).

**55-8-11. Liability of corporation or transfer agent for making or refusing transfer.** Nothing in this chapter relieves the corporation or transfer agent of any liability for making or refusing to make the transfer

after it is put on notice pursuant to § 55-8-9, unless it proceeds in the manner authorized in § 55-8-10.

**Source:** SL 1961, ch 22, § 5 (1).

**55-8-12. Non-Liability of corporation or transfer agent for authorized acts.** A corporation or transfer agent incurs no liability to any person by making a transfer or otherwise acting in a manner authorized by this chapter.

**Source:** SL 1961, ch 22, § 6.

**55-8-13. Participation in breach of fiduciary duty—Non-Liability of third persons.** No person who participates in the acquisition, disposition, assignment or transfer of a security by or to a fiduciary, including a person who guarantees the signature of the fiduciary, is liable for participation in any breach of fiduciary duty by reason of failure to inquire whether the transaction involves a breach unless it is shown that he acted with actual knowledge that the proceeds of the transaction were being or were to be used wrongfully for the individual benefit of the fiduciary or that the transaction was otherwise in breach of duty.

**Source:** SL 1961, ch 22, § 7 (1).

**55-8-14. Liability of guarantor of signature of fiduciary.** If a corporation or transfer agent makes a transfer pursuant to an assignment by a fiduciary, a person who guaranteed the signature of the fiduciary is not liable on the guarantee to any person to whom the corporation or transfer agent by reason of this chapter incurs no liability.

**Source:** SL 1961, ch 22, § 7 (2).

**55-8-15. Corporation and transfer agent not liable for breach of fiduciary duty or on guarantee of fiduciary's signature.** Sections 55-8-13 and 55-8-14 do not impose any liability upon the corporation or its transfer agent.

**Source:** SL 1961, ch 22, § 7 (3).

**55-8-16. Tax obligations of corporation or transfer agent not affected by chapter.** This chapter does not affect any obligation of a corporation or transfer agent with respect to estate, inheritance, succession, or other taxes imposed by the laws of this state.

**Source:** SL 1961, ch 22, § 9.

**55-8-17. Uniformity of interpretation.** This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**Source:** SL 1961, ch 22, § 10.

**55-8-18. Citation of chapter.** This chapter may be cited as the Uniform Act for the Simplification of Fiduciary Security Transfers.

**Source:** SL 1961, ch 22, § 11.

**55-9-1. Express trusts—Creation for charitable, educational, religious, or other public use.** Express trusts of real or personal property, or both, may be created to receive by grant, devise, gift, or bequest, and to take charge of, invest and administer in accordance with the terms of the trust, upon and for any charitable, benevolent, educational, religious or other public use or trust.

**Source:** SL 1955, ch 429, § 1; SDC Supp 1960, § 59.0601.

**55-9-2. Validity of trust not affected by uncertainty or violation of rule against perpetuities—Disposal of property by trustee.** No such trust shall be invalid because of indefiniteness or uncertainty of the object of such trust or of the beneficiaries thereof designated in the instrument creating the same nor by reason of the same contravening any statute or rule against perpetuities, but no such trust shall be construed so as to prevent or limit the free alienation of the title to any of the trust estate by the trustee in the administration of said trust, except as may be permitted under existing or subsequent statutes.

**Source:** SL 1955, ch 429, § 2; SDC Supp 1960, § 59.0602.

**55-9-3. Action to enforce charitable trust—Liberal construction to carry out intent—Notice of action to attorney general.** Such trust shall be liberally construed by the courts so that the intentions of the donor thereof shall be carried out whenever possible, and no such trust shall fail solely because the donor has imperfectly outlined the purpose and object of such charity or the method of administration.

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

**Source:** SL 1955, ch 429, § 3; SDC Supp 1960, § 59.0603; SL 2012, ch 233, § 23.

**55-9-4. Incomplete or imperfect trust—Purposes impracticable or impossible of performance—Administration to accomplish general purpose—Order of court with consent of donor, if alive and competent.** Whenever it shall appear to the circuit court for the proper county that the purpose and object of such charity is imperfectly expressed, or the method of administration is not indicated or is incomplete or imperfect, or that the fulfillment of the special purpose expressed in a trust for charitable or public purpose is or becomes impracticable, impossible, inexpedient or unlawful, such court shall upon the application of any trustee of the trust, or any interested party or the attorney general of this state, and upon such notice as said court may direct, make an order directing that such trust shall be administered or expended in such manner as in the judgment of said court will, as nearly as can be, accomplish the general purposes of the instrument and the object and intention of the donor without regard to, and free from any, specific restriction, limitation or direction contained therein, provided, however, that no such order shall be made without the consent of the donor of said trust if he is then living and mentally competent.

**Source:** SL 1955, ch 429, § 3; SDC Supp 1960, § 59.0603.

**55-9-5. Enforcement by attorney general as representative of beneficiaries—Exception.** Except as otherwise set forth in § 55-9-3, the attorney general shall represent the beneficiaries in all cases arising under this chapter, and the attorney general shall enforce such trusts by proper proceedings in the courts.

**Source:** SL 1955, ch 429, § 3; SDC Supp 1960, § 59.0603; SL 2012, ch 233, § 24.

**55-9-6. Restrictions to avoid taxability of income—Definition of terms.** Terms as used in §§ 55-9-6 to 55-9-14, inclusive shall have the following meaning:

- (1) "Charitable trust," as defined in section 4947 (a)(1) of the Internal Revenue Code;
- (2) "Excess business holdings," as defined in section 4943 (c) of the Internal Revenue Code;
- (3) "Internal Revenue Code," the United States Internal Revenue Code of 1954, as amended;
- (4) "Private foundation," as defined in section 509 (a) of the Internal Revenue Code;
- (5) "Self-dealing," as defined in section 4941 (d) of the Internal Revenue Code;
- (6) "Split-interest," as defined in section 4947 (a)(2) of the Internal Revenue Code;
- (7) "Taxable expenditure," as defined in section 4945 (d) of the Internal Revenue Code;
- (8) "Trustee," a corporation, individual, or other legal entity acting as an original, added, or successor trustee of a testamentary or inter vivos trust estate, whichever in a particular case shall be appropriate.

**Source:** SL 1972, ch 259, § 1.

**55-9-7. Restrictions deemed incorporated in instrument creating charitable trust or foundation.** Any will or trust instrument creating a trust which is a private foundation, charitable trust, or a split-interest trust and any other instrument governing the trustee of any such trust or the use, retention, or disposition of any

of the income or property of such trust, shall be deemed to have incorporated within such will, trust instrument, or other governing instrument with the same effect as though such language were set forth verbatim in such will, trust instrument, or other governing instrument, the provisions set forth in §§ 55-9-8 to 55-9-12, inclusive, with respect to such trust and the trustee thereof, and, except as the contrary is provided in §§ 55-9-13 and 55-9-14, such provisions shall govern the administration and distribution of any such trust irrespective of any provisions of any applicable will, trust instrument, or other governing instrument, statute or law of this state to the contrary.

**Source:** SL 1972, ch 259, § 2.

**55-9-8. Self-dealing by trustee prohibited.** The trustee of a trust described in § 55-9-7 shall not engage in any act of self-dealing which would give rise to any liability for the tax imposed by section 4941 (a) of the Internal Revenue Code.

**Source:** SL 1972, ch 259, § 2 (2).

**55-9-9. Distributions required to avoid taxes.** The trustee of a trust described in § 55-9-7 shall distribute for each taxable year of the trust, amounts at least sufficient to avoid liability for the tax imposed by section 4942 (a) of the Internal Revenue Code.

**Source:** SL 1972, ch 259, § 2 (1).

**55-9-10. Retention of excess business holdings prohibited.** The trustee of a trust described in § 55-9-7 shall not retain any excess business holdings which would give rise to any liability for the tax imposed by section 4943 (a) of the Internal Revenue Code.

**Source:** SL 1972, ch 259, § 2 (3).

**55-9-11. Investments to jeopardize exempt purposes prohibited.** The trustee of a trust described in § 55-9-7 shall not make any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of section 4944 of the Internal Revenue Code, so as to give rise to any liability for the tax imposed by section 4944 (a) of the Internal Revenue Code.

**Source:** SL 1972, ch 259, § 2 (4).

**55-9-12. Taxable expenditures prohibited.** The trustee of a trust described in § 55-9-7 shall not make any taxable expenditure which would give rise to any liability for the tax imposed by section 4945 (a) of the Internal Revenue Code.

**Source:** SL 1972, ch 259, § 2 (5).

**55-9-13. Judicial determination that restrictive provisions are contrary to instrument creating trust.** Sections 55-9-7 to 55-9-12, inclusive, shall not apply to the extent that a court of competent jurisdiction shall determine that such application would be contrary to the terms of the will, trust instrument, or other governing instrument described in § 55-9-7 and that such will, trust instrument or other governing instrument may not be changed to conform to §§ 55-9-8 to 55-9-12, inclusive.

**Source:** SL 1972, ch 259, § 3.

55-9-14. State supervisory powers unimpaired by restrictions to avoid taxability of income. Nothing in §§ 55-9-6 to 55-9-13, inclusive, shall impair the rights and powers of the attorney general or the courts of this state with respect to any trust.

**Source:** SL 1972, ch 259, § 4.

**55-11-1. Prearranged funeral contract—Portion of money paid under contract held in trust.** Before a person's death, he or someone on his behalf may contract with another person for the purchase or rental of personal property or professional services for the final disposition of his body. At least eighty-five percent of all money paid under the contract shall be held in a revocable or an irrevocable trust, at the purchaser's

option. The money shall be held in trust until the obligation of the contract is fulfilled according to its terms or, if a revocable trust, the money is refunded to the person who made the payments.

**Source:** SL 1953, ch 496, § 1; SDC Supp 1960, § 27.1409; SL 1967, ch 104, § 1; SL 1975, ch 302, § 1; SL 1981, ch 355, § 1; SL 1986, ch 408, § 1.

**55-11-1.1. Personal property and professional services to be provided under prearranged funeral trust contract.** The personal property to be delivered according to the terms of a prearranged funeral trust contract includes such things as: grave liners, vaults, transportation containers, grave markers, cremation urns or vaults, grave ornamentation, flowers, statuary, floral arrangements, caskets, clothing, memorial items, guest books and other personal property incidental to a funeral or burial service. Professional services to be provided according to the terms of a prearranged funeral trust contract are the embalming of the deceased person's body or the conduct of a funeral service for hire and any other professional services associated with the disposition, storage, preparation or burial of a deceased person's body.

**Source:** SL 1986, ch 408, § 7.

**55-11-2. Deposit of trust fund in banking institution or association—Violation as misdemeanor.** Within ten days after receipt, the person holding money in trust under § 55-11-1 shall deposit it in a banking institution, or place the money in an account in a savings and loan association, or a federal credit union organized under the laws of this state or of the United States of America, provided, however, such institutions are domiciled in the state of South Dakota, and the deposits or accounts of which banking institution, federal credit union or association are guaranteed by the federal government or insured by an instrumentality of the federal government. The money shall be carried in a trust account in the name of the depositor as trustee for the person who will receive the benefit of the property and services upon his death. Any person intentionally violating the provisions of this section is guilty of a Class 1 misdemeanor.

**Source:** SL 1953, ch 496, §§ 2, 4; SDC Supp 1960, §§ 27.1410, 27.9954; SL 1967, ch 104, § 2; SL 1980, ch 24, § 109; SL 1986, ch 408, § 2.

**55-11-3. Contract to be in writing—Copies furnished depository and personal representative of contracting party—Clause concerning trust fund required.** A contract pursuant to § 55-11-1 shall be in writing and sufficient copies thereof shall be left with the depository pursuant to § 55-11-2 to comply with the provisions of this chapter, and a copy thereof shall also be furnished, upon request, to any personal representative of the estate of the decedent who contracted for his burial during his lifetime. The contract shall contain the following in twelve point bold type:

IF THIS CONTRACT IS PURCHASED FOR A GUARANTEED PRICE, NO LESS THAN EIGHTY-FIVE PERCENT OF ANY FUNDS RECEIVED UNDER THIS CONTRACT ARE REQUIRED BY LAW TO BE PLACED IN A FUNERAL TRUST FUND IN A DEPOSITORY DESCRIBED IN SDCL 55-11-2, IN EITHER A REVOCABLE OR IRREVOCABLE TRUST. IF THIS CONTRACT IS NOT FOR A GUARANTEED PRICE, ONE HUNDRED PERCENT OF ANY FUNDS RECEIVED UNDER THIS CONTRACT ARE REQUIRED BY LAW TO BE PLACED IN A FUNERAL TRUST FUND IN A DEPOSITORY DESCRIBED IN SDCL 55-11-2 IN EITHER A REVOCABLE OR IRREVOCABLE TRUST. THIS CONTRACT, IF A REVOCABLE TRUST, MAY BE CANCELED AT ANY TIME UPON THIRTY DAYS WRITTEN NOTICE AND ONE HUNDRED PERCENT OF THE MONEY PAID INTO TRUST TOGETHER WITH ONE HUNDRED PERCENT OF ACCRUED TRUST INTEREST SHALL BE RETURNED TO THE CONTRACT PURCHASER.

**Source:** SL 1953, ch 496, § 1; SDC Supp 1960, § 27.1409; SL 1967, ch 104, § 1; SL 1981, ch 355, § 2; SL 1986, ch 408, § 3.

**55-11-3.1. Clause required in contract not providing guaranteed price.** In addition to the requirements of § 55-11-3, any contract entered into pursuant to § 55-11-1, which does not provide for a guaranteed price for services or personal property to be delivered or performed pursuant to the terms of the contract, shall contain the following in twelve point bold type:

ANY FUNDS PAID UNDER THIS CONTRACT ARE ONLY A DEPOSIT TO BE APPLIED TOWARD THE FINAL COSTS OF THE SERVICES OR PERSONAL PROPERTY CONTRACTED FOR. ADDITIONAL CHARGES MAY BE REQUIRED.

**Source:** SL 1981, ch 355, § 4.

**55-11-4. Financial institution receiving money in trust—Acknowledgment on copy of prearranged funeral contract.** When a banking institution, federal credit union or a savings and loan association has received money in trust under § 55-11-2, it shall acknowledge receipt thereof upon the copies of the contract for said prearranged funerals.

**Source:** SL 1953, ch 496, § 3; SDC Supp 1960, § 27.1411; SL 1967, ch 104, § 3; SL 1981, ch 356; SL 1986, ch 408, § 15.

**55-11-5. Cancellation of contract creating revocable trust.** The contract creating a revocable trust mentioned in § 55-11-1 may be canceled by either party thereto at any time upon thirty days' written notice of such cancellation.

**Source:** SL 1953, ch 496, § 1; SDC Supp 1960, § 27.1409; SL 1967, ch 104, § 1; SL 1975, ch 302, § 2.

55-11-5.1. Return of payments required on revocation under contract with guaranteed price. A person who revokes a revocable trust under a contract providing a guaranteed price is entitled to receive one hundred percent of all money paid into trust under the contract together with one hundred percent of accrued interest unless a greater amount is specified in the contract.

**Source:** SL 1981, ch 355, § 3; SL 1986, ch 408, § 4.

**55-11-6. Repealed by SL 1986, ch 408, § 13**

**55-11-7. Solicitation of funeral trust contracts—Annual registration required—Exception—Unauthorized solicitation or sale prohibited—Violation as misdemeanor.** Notwithstanding the provision contained in subdivision 36-19-38(8), prearranged funeral trust contracts may be solicited. However, no person may sell, offer to sell or solicit a prearranged funeral trust contract unless he registers annually with the State Board of Funeral Service and the person is a funeral establishment licensed in the State of South Dakota or a person, partnership or corporation engaged in the business of the ownership, maintenance or operation of a cemetery or an agent or employee of a funeral establishment licensed in the State of South Dakota or the agent or employee of a person, partnership or corporation engaged in the business of the ownership, maintenance or operation of a cemetery. Any natural person who is licensed to practice funeral service under chapter 36-19 and who is the owner or employee of a funeral home licensed pursuant to § 36-19-14 is exempt from the registration requirements of this section and, as to activities for which such person is licensed pursuant to chapter 36-19, is exempt from the licensing and bonding provisions of chapter 37-13. Failure to annually register is a Class 2 misdemeanor.

No person may sell, offer to sell or solicit a prearranged funeral trust contract for professional services as defined in § 55-11-1.1 unless the seller or the funeral establishment or cemetery of which the seller is an agent or employee is authorized by law to provide and is regularly engaged in the business of providing such services. Any violation of this section is a Class 2 misdemeanor.

**Source:** SL 1981, ch 355, § 5; SL 1986, ch 408, § 5; SL 1987, ch 366.

**55-11-8. Information to be submitted upon registration.** When a person registers to sell prearranged funeral trust contracts, he shall submit to the State Board of Funeral Service the following information:

- (1) The name and address of the funeral establishment or cemetery association which has authorized him to sell prearranged funeral trust contracts;
- (2) His name and address;
- (3) A sworn statement that he has not been convicted of any crime within the last five years involving the elements of fraud or misrepresentation; and

- (4) A statement of compliance with chapter 37-13.

**Source:** SL 1986, ch 408, § 6.

**55-11-9. Annual report required—Contents—Filing fee—Confidentiality—Violation as misdemeanor.**

Before March first of each year, the owner or manager of each cemetery association or licensed funeral establishment that has entered into any prearranged funeral trust contracts shall file a report covering the period of the preceding calendar year with the State Board of Funeral Service. The report shall include:

- (1) The name and address of the licensed funeral establishment or cemetery association, the name and address of the manager or operator thereof, and the name of the contract holder;
- (2) The lump sum consideration paid upon each prearranged funeral trust contract sold or the total amount in dollars of any installments paid upon each prearranged funeral trust contract sold;
- (3) The name and address of the banking institution, federal credit union or savings and loan association in which such consideration was deposited;
- (4) The total in dollars of all sums received as consideration upon prearranged funeral trust contracts executed by the licensed funeral establishment or cemetery association or in its behalf during all periods after July 1, 1986, which are undrawn or unexpended and on deposit in a banking institution, federal credit union or savings and loan association or in the hands of the licensed funeral establishment or cemetery association; and
- (5) The current value, including accrued interest of each prearranged funeral trust contract being held.

The report shall be accompanied by a filing fee of five dollars. The contracts filed under this section are not public records and are confidential records of the board. Failure to file this report is a Class 2 misdemeanor.

**Source:** SL 1986, ch 408, § 11; SL 1990, ch 388.

**55-11-10. Applicability of § 37-24-5.4.** Notwithstanding §§ 55-11-1, 55-11-3, 55-11-5 and 55-11-5.1 and notwithstanding that the prearranged funeral trust contract may create an irrevocable trust, all prearranged funeral trust contracts are subject to the requirements of § 37-24-5.4.

**Source:** SL 1986, ch 408, § 8.

**55-11-11. Prearranged funeral contract pooled funds trust—Creation—Separate accounts—When consent of purchaser required.** A prearranged funeral contract pooled funds trust may be created by a funeral director or a funeral establishment licensed in South Dakota, the South Dakota funeral directors association or a cemetery association organized under chapter 55-12. However, separate accounts within the pooled funds trust shall be maintained so that a purchaser whose money has been deposited into the pooled funds trust may identify his money. No purchaser's money may be deposited into a pooled funds trust unless the purchaser signs a form consenting to the deposit of his money into a pooled funds trust. The provision regarding consent shall not apply to prearranged funeral trusts where the personal property and professional services are to be provided for a guaranteed amount of money.

**Source:** SL 1986, ch 408, § 9.

**55-11-12. Death or relocation of beneficiary of irrevocable prearranged funeral trust—Seller's option to provide comparable services or return deposits and interest—Disposition of funds.** If the beneficiary of an irrevocable prearranged funeral trust for a guaranteed price dies outside the general area or moves outside the general area served by the provider designated in a prearranged funeral trust contract, the seller shall either provide for the furnishing of comparable funeral services and merchandise by a licensed mortuary or cemetery selected by the next of kin of the purchaser or, at the seller's option, shall pay over to the purchaser, or upon the death of the purchaser to the next of kin of the purchaser in fulfillment of all obligations under the contract, an amount equal to all deposits made into trust under the prearranged

funeral trust contract together with the accrued trust interest to be provided for in the contract. Upon seller's full performance under the provisions of this section, the trustee shall distribute to the seller from the trust an amount equal to all deposits made into the trust together with the accrued trust interest.

**Source:** SL 1986, ch 408, § 10; SL 1997, ch 278, § 1.

**55-11-12.1. Disbursement of funds in irrevocable prearranged funeral trust.** Every trustee of an irrevocable prearranged funeral trust which does not provide for a guaranteed price shall pay from the trust funds and any accrued interest the actual charges incurred for furnishing funeral services and merchandise to the funeral director, funeral establishment, or embalmer, licensed under chapter 36-19, or similarly licensed in any other state that provides funeral services and merchandise for the beneficiary of the irrevocable prearranged funeral trust. The balance of the funds remaining in the prearranged funeral trust, if any, shall be paid by the trustee to the purchaser or to the estate or next of kin of the purchaser, subject to § 28-6-23 and rules pertaining thereto and the terms of the prearranged funeral trust agreement. Payment of all of the trust funds, plus any accrued interest, as provided in this section, within thirty days after receipt of a death certificate, relieves the trustee of any further duties or obligations.

**Source:** SL 1997, ch 278, § 2.

**55-11-13. Prearranged funeral contract not burial insurance.** A prearranged funeral contract sold in compliance with chapter 55-11 is not burial insurance under § 58-9-4.

**Source:** SL 1986, ch 408, § 14.

**55-11-14. Applicability of act to certain contracts.** The terms of each prearranged funeral trust contract in effect before July 1, 1986, is subject to chapter 55-11 in effect as it appeared in the 1980 revision and pocket parts of volume 15B of the South Dakota Codified Laws on June 30, 1986. All prearranged funeral trust contracts entered on or after July 1, 1986, are subject to this chapter.

**Source:** SL 1986, ch 408, § 12.

**55-11-15. Certain persons operating cemeteries exempted from provisions regarding sale of merchandise and services—Maintenance of funds.** Any person, corporation, partnership, association or other entity engaged in the business of owning, maintaining or operating a cemetery in the state of South Dakota prior to July 1, 1986, shall be exempt from the provisions of this chapter for purposes of the sale through the cemetery of merchandise and services incidental to a burial service. Except that such person, corporation, partnership, association or other entity engaged in the cemetery business shall maintain at least seventy percent of all money paid under a pre-arranged burial contract in the manner set forth in §§ 55-11-1, 55-11-2 and 55-11-5.1.

**Source:** SL 1986, ch 408, § 15A.

**55-12-1. Cemeteries subject to provisions of chapter.** Any persons, firms, or corporations or other forms of organization organized or engaging in the business under the laws of the State of South Dakota, or wheresoever organized and engaging in the business in the State of South Dakota, of the ownership, maintenance or operation of a cemetery, providing lots or other interment space therein for the remains of human bodies, except such organizations which are churches or religious or established fraternal societies, or municipalities or other political subdivisions of the State of South Dakota owning, maintaining or operating cemeteries, or persons, firms, or corporations owning and operating cemeteries which have been in existence more than five years prior to February 28, 1955 shall be subject to the provisions of this chapter.

**Source:** SL 1955, ch 97, § 1; SDC Supp 1960, § 11.19A01; SL 1992, ch 60, § 2.

**55-12-2. Classification of cemeteries.** All such persons, firms or organizations subject to the provisions of this chapter shall be, for the purposes hereof, designated either as "perpetual care cemeteries" or "non-perpetual care cemeteries."

**Source:** SL 1955, ch 97, § 2; SDC Supp 1960, § 11.19A02.

**55-12-3. Operation of perpetual care cemetery—Creation of perpetual care fund required.** Any such organization subject to the provisions of this chapter which is organized or commences business in the State of South Dakota after February 28, 1955, and desires to operate as a perpetual care cemetery shall, before selling or disposing of any interment space or lots, establish a minimum perpetual care and maintenance guarantee fund of twenty-five thousand dollars or one hundred dollars per burial space, whichever is less, in cash.

**Source:** SL 1955, ch 97, § 3; SDC Supp 1960, § 11.19A03; SL 1990, ch 389, § 1.

**55-12-4. Continuance of operation—Cemetery principal fund deposits.** To continue to operate as a perpetual care cemetery, any such organization shall set aside and deposit in the cemetery principal fund not less than the following amounts for lots of interment space thereafter sold or disposed of:

(1) A minimum of twenty percent of the gross selling price with a minimum of twenty dollars for each adult burial space, whichever is the greater.

(2) A minimum of twenty percent of the gross selling price for each child's space with a minimum of five dollars for each space up to forty-two inches in length or ten dollars for each space up to sixty inches in length, whichever is the greater.

(3) A minimum of twenty percent of the gross selling price with a minimum of one hundred dollars for each crypt in a public mausoleum, whichever is the greater.

(4) A minimum of twenty percent of the gross selling price with a minimum of ten dollars for each inurnment niche in a public columbarium.

No amount of the principal in the principal cemetery fund may be withdrawn or transferred out of the cemetery principal fund.

**Source:** SL 1955, ch 97, § 3; SDC Supp 1960, § 11.19A03; SL 2014, ch 228, § 3, eff. Mar. 28, 2014.

**55-12-5. Previously existing cemetery becoming a perpetual care cemetery—Creation and maintenance of perpetual care fund.** Any such organization subject to the provisions of this chapter which was organized and engaged in business prior to February 28, 1955, shall be a perpetual care cemetery if it shall at all times comply with the requirements of a perpetual care cemetery as set forth in § 55-12-4. Trust funds set aside under § 47-29-22 shall be administered under this chapter.

**Source:** SL 1955, ch 97, § 4; SDC Supp 1960, § 11.19A04.

**55-12-6, 55-12-7. Repealed by SL 2014, ch 228, §§ 1, 2 eff. March 28, 2014.**

**55-12-8. Income from cemetery principal fund—Transfer to earnings fund—Use.** The income from the cemetery principal fund may be transferred to an earnings fund established by the cemetery and may be used for the care and maintenance of the cemetery.

**Source:** SL 1955, ch 97, § 3; SDC Supp 1960, § 11.19A03; SL 2014, ch 228, § 4, eff. Mar. 28, 2014.

**55-12-9. Non-Perpetual care cemeteries.** All other organizations subject to the provisions of this chapter shall be non-perpetual care cemeteries.

**Source:** SL 1955, ch 97, § 5; SDC Supp 1960, § 11.19A05.

**55-12-10. Non-Perpetual care cemetery sign—Requirements as to display.** Each non-perpetual care cemetery shall post in a conspicuous place in the office or offices where sales are conducted a legible sign stating: "This is a non-perpetual care cemetery." The lettering of this sign shall be of suitable size so it is easily read at a distance of fifty feet.

**Source:** SL 1955, ch 97, § 5; SDC Supp 1960, § 11.19A05.

**55-12-11. Forms to disclose status as non-perpetual care cemetery—Information to purchaser of**

**lot.** Each non-perpetual care cemetery shall also have printed or stamped at the head of all its contracts, deeds, statements, letterheads and advertising material, the legend: "This is a non-perpetual care cemetery," and shall not sell any lot or interment space therein unless the purchaser thereof is informed that the cemetery is a non-perpetual care cemetery.

**Source:** SL 1955, ch 97, § 5; SDC Supp 1960, § 11.19A05.

**55-12-12. Non-Perpetual care cemetery becoming a perpetual care cemetery—Creation and maintenance of perpetual care fund.** Any non-perpetual care cemetery may become a perpetual care cemetery by placing in the perpetual care trust fund twenty-five thousand dollars, five thousand dollars per acre of all property sold or one hundred dollars per burial space, whichever is less, and shall comply with the requirement for a perpetual care cemetery as provided in § 55-12-4.

**Source:** SL 1955, ch 97, § 6; SDC Supp 1960, § 11.19A06; SL 1990, ch 389, § 3.

**55-12-13. Commission, bonus, rebate or other thing of value in connection with sale of interment space in perpetual care cemetery prohibited—Exceptions.** No organization subject to the provisions of this chapter may pay or offer to pay to, or for any person, firm or corporation to receive, directly or indirectly, a commission or bonus or rebate or other thing of value, for or in connection with the sale of any interment space, lot or part thereof, in any cemetery described in § 55-12-1. The provisions of this section do not apply to a person regularly employed and supervised by such organization or to any agent of such organization who is directly supervised by such organization.

**Source:** SL 1955, ch 97, § 7; SDC Supp 1960, § 11.19A07; SL 1997, ch 279, § 1.

**55-12-14. Representations in connection with sale of interment space as to speculative investment prohibited.** No organization subject to the provisions of this chapter nor any person representing it in a sales capacity shall advertise or represent, in connection with the sale or attempted sale of any interment space, that the same is or will be a desirable speculative investment for resale purposes.

**Source:** SL 1955, ch 97, § 12; SDC Supp 1960, § 11.19A10.

**55-12-15. Violations as petty offenses.** A violation of § 55-12-3, 55-12-4, 55-12-8, 55-12-10, 55-12-11, 55-12-13 or 55-12-14 is a petty offense. Each day a violation occurs except the commission of any act declared unlawful in § 55-12-13 shall be a separate and distinct offense.

**Source:** SL 1955, ch 97, §§ 9, 10; SDC Supp 1960, § 11.9902; SL 1980, ch 24, § 110.

**55-12-16. Severability of provisions.** If any provision hereof or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

**Source:** SL 1955, ch 97, § 11; SDC Supp 1960, § 11.19A09.

**55-12-17. Annual financial report.** A perpetual cemetery, as defined in § 55-12-4, or a perpetual cemetery corporation operating under chapter 47-29 shall file an annual financial report for the preceding fiscal year with the secretary of state by July thirty-first of each year on a form prescribed by the secretary of state if the cemetery has one hundred or more people buried in the cemetery.

**Source:** SL 2013, ch 232, § 2; SL 2014, ch 228, § 5, eff. Mar. 28, 2014.

**55-12-18. Funds to be administered by trustee under control of licensed banking institution—Report to secretary of state.** If a perpetual care cemetery has more than three thousand people buried in the cemetery, the cemetery shall transfer all moneys from the perpetual care fund into the principal fund. The principal fund and the earnings fund of a perpetual cemetery shall be administered by an independent trustee and shall remain in the control of a licensed banking institution. No moneys may be taken out of the

principal fund to pay for the costs of administering the funds. The principal fund and the earnings fund are open for public inspection. Each perpetual care cemetery shall submit a report to the secretary of state that includes the name and address of the licensed banking institution and the account numbers of the principal account and the earnings account by April 1, 2014.

**Source:** SL 2014, ch 228, § 6, eff. Mar. 28, 2014.

55-13-1. Definitions. As used in this chapter:

(1) "Income beneficiary" means the person to whom income is presently payable or for whom it is accumulated for distribution as income;

(2) "Inventory value" means the cost of property purchased by the trustee and the market value of other property at the time it became subject to the trust, but in the case of a testamentary trust the trustee may use any value finally determined for the purposes of an estate or inheritance tax;

(3) "Remainderman" means the person entitled to principal, including income which has been accumulated and added to principal;

(4) "Trustee" means an original trustee and any successor or added trustee.

**Source:** SL 1984, ch 323, § 1.

**55-13-2. Duty of trustee as to receipts and expenditures.** (a) A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each

(1) in accordance with the terms of the trust instrument, notwithstanding contrary provisions of this chapter;

(2) in the absence of any contrary terms of the trust instrument, in accordance with the provisions of this chapter; or

(3) if neither of the preceding rules of administration is applicable, in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal, and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs.

(b) If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference of imprudence or partiality arises from the fact that the trustee has made an allocation contrary to a provision of this chapter.

**Source:** SL 1984, ch 323, § 2.

**55-13-3. Income—Principal—Charges.** (a) Income is the return in money or property derived from the use of principal, including return received as

(1) rent of real or personal property, including sums received for cancellation or renewal of a lease;

(2) interest on money lent, including sums received as consideration for the privilege of prepayment of principal except as provided in § 55-13-7 on bond premium and bond discount;

(3) income earned during administration of a decedent's estate as provided in § 55-13-5;

(4) corporate distributions as provided in § 55-13-6;

(5) accrued increment on bonds or other obligations issued at discount as provided in § 55-13-7;

- (6) receipts from business and farming operations as provided in § 55-13-8;
- (7) receipts from disposition of natural resources as provided in §§ 55-13-9 and 55-13-10;
- (8) receipts from other principal subject to depletion as provided in § 55-13-11;
- (9) receipts from disposition of underproductive property as provided in § 55-13-12.

(b) Principal is the property which has been set aside by the owner or the person legally empowered so that it is held in trust eventually to be delivered to a remainderman while the return or use of the principal is in the meantime taken or received by or held for accumulation for an income beneficiary. Principal includes

- (1) consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal;
  - (2) proceeds of property taken on eminent domain proceedings;
  - (3) proceeds of insurance upon property forming part of the principal except proceeds of insurance upon a separate interest of an income beneficiary;
  - (4) stock dividends, receipts on liquidation of a corporation, and other corporate distributions as provided in § 55-13-6;
  - (5) receipts from the disposition of corporate securities as provided in § 55-13-7;
  - (6) royalties and other receipts from disposition of natural resources as provided in §§ 55-13-9 and 55-13-10;
  - (7) receipts from other principal subject to depletion as provided in § 55-13-11;
  - (8) any profit resulting from any change in the form of principal except as provided in § 55-13-12 on underproductive property;
  - (9) receipts from disposition of underproductive property as provided in § 55-13-12;
  - (10) any allowances for depreciation established under §§ 55-13-8 and 55-13-13(a)(2).
- (c) After determining income and principal in accordance with the terms of the trust instrument or of this chapter, the trustee shall charge to income or principal expenses and other charges as provided in § 55-13-13.

**Source:** SL 1984, ch 323, § 3.

**55-13-4. When right to income arises—Apportionment of income.** (a) An income beneficiary is entitled to income from the date specified in the trust instrument, or, if none is specified, from the date an asset becomes subject to the trust. In the case of an asset becoming subject to a trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate.

(b) In the administration of a decedent's estate or an asset becoming subject to a trust by reason of a will

- (1) receipts due but not paid at the date of death of the testator are principal;
- (2) receipts in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due at the date of the death of the testator shall be treated as accruing from day to day. That portion of the receipt accruing before the date of death is principal, and the balance is income.

(c) In all other cases, any receipt from an income producing asset is income even though the

receipt was earned or accrued in whole or in part before the date when the asset became subject to the trust.

(d) On termination of an income interest, the income beneficiary whose interest is terminated, or his estate, is entitled to

- (1) income undistributed on the date of termination;
- (2) income due but not paid to the trustee on the date of termination;
- (3) income in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due on the date of termination, accrued from day to day.

(e) Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

**Source:** SL 1984, ch 323, § 4.

**55-13-5. Income earned during administration of a decedent's estate.** (a) Unless the will otherwise provides and subject to subsection (b), all expenses incurred in connection with the settlement of a decedent's estate, including debts, funeral expenses, estate taxes, interest and penalties concerning taxes, family allowances, fees of attorneys and personal representatives, and court costs shall be charged against the principal of the estate.

(b) Unless the will otherwise provides, income from the assets of a decedent's estate after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be determined in accordance with the rules applicable to a trustee under this chapter and distributed as follows:

(1) to specific legatees and devisees, the income from the property bequeathed or devised to them respectively, less taxes, ordinary repairs, and other expenses of management and operation of the property, and an appropriate portion of interest accrued since the death of the testator and of taxes imposed on income (excluding taxes on capital gains) which accrue during the period of administration;

(2) to all other legatees and devisees, except legatees of pecuniary bequests not in trust, the balance of the income, less the balance of taxes, ordinary repairs, and other expenses of management and operation of all property from which the estate is entitled to income, interest accrued since the death of the testator, and taxes imposed on income (excluding taxes on capital gains) which accrue during the period of administration, in proportion to their respective interests in the undistributed assets of the estate computed at times of distribution on the basis of inventory value.

(c) Income received by a trustee under subsection (b) shall be treated as income of the trust.

**Source:** SL 1984, ch 323, § 5.

**55-13-6. Corporate distributions.** (a) Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.

(b) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to

- (1) a call of shares;

(2) a merger, consolidation, reorganization, or other plan by which assets of the corporation are required by another corporation; or

(3) a total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation or any distribution of assets, other than cash, pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets.

(c) Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciation, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.

(d) Except as provided in subsections (a), (b), and (c), all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations of corporations other than the distributing corporation, and the proceeds of the rights or property distributions. Except as provided in subsections (b) and (c), if the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income.

(e) The trustee may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this chapter concerning the source or character of dividends or distributions of corporate assets.

**Source:** SL 1984, ch 323, § 6.

**55-13-7. Increase in value of certain trust investments distributable as income.** (a) Unless otherwise provided in the trust instrument, an increase in the value of the following investments owned by any trust is distributable as income when it becomes available for distribution:

- (1) A zero coupon bond;
- (2) An annuity contract before annuitization;
- (3) A life insurance contract before the death of the insured;
- (4) An interest in a common trust fund (as defined under § 584 of the Internal Revenue Code) (26 U.S.C. § 584);
- (5) An interest in a partnership, as defined in § 7701 of the Internal Revenue Code (26 U.S.C. § 7701); or
- (6) Any other obligation for the payment of money that is payable at a future time in accordance with a fixed, variable, or discretionary schedule of appreciation in excess of the price at which it was issued.

(b) For purposes of this section, the increase in value of an investment described in subsection (a) is available for distribution only if the trustee receives cash on account of the investment.

(c) The increase in value of the obligations described in subsection (a) is distributable to the beneficiary who was the income beneficiary at the time of the increase from the first principal cash available or, if none is available, when realized by sale, redemption, or other disposition. If unrealized increase is distributed as income but out of principal, the principal shall be reimbursed from the increase when realized.

**Source:** SL 1984, ch 323, § 7; SL 1995, ch 272, § 1; SL 2002, ch 100, § 25.

**55-13-8. Business and farming operations.** (a) If a trustee uses any part of the principal in the continuance of a business of which the settlor was a sole proprietor or a partner, the net profits of the business, computed in accordance with generally accepted accounting principles for a comparable business, are income. If a loss results in any fiscal or calendar year, the loss falls on principal and shall not

be carried into any other fiscal or calendar year for purposes of calculating net income.

(b) Generally accepted accounting principles shall be used to determine income from an agricultural or farming operation, including the raising of animals or the operation of a nursery.

**Source:** SL 1984, ch 323, § 8.

**55-13-9. Disposition of natural resources.** (a) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals or other natural resources in, on or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

(1) If received as rent on a lease or extension payments on a lease, the receipts are income.

(2) If received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income.

(3) If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in the preceding paragraphs of this section shall be apportioned on a yearly basis in accordance with this paragraph whether or not any natural resource was being taken from the land at the time the trust was established. Twenty-seven and one-half percent of the gross receipts (but not to exceed fifty percent of the net receipts remaining after payment of all expenses, direct and indirect, computed without allowance for depletion) shall be added to principal as an allowance for depletion. The balance of the gross receipts, after payment therefrom of all expenses, direct and indirect, is income.

(b) If a trustee, on July 1, 1984, held an item of depletable property of a type specified in this section he shall allocate receipts from the property in the manner used before July 1, 1984, but as to all depletable property acquired after July 1, 1984 by an existing or new trust, the method of allocation provided herein shall be used.

(c) This section does not apply to timber, water, soil, sod, dirt, turf, or mosses.

**Source:** SL 1984, ch 323, § 9.

**55-13-10. Timber.** If any part of the principal consists of land from which merchantable timber may be removed, the receipts from taking the timber from the land shall be allocated in accordance with § 55-13-2(a)(3).

**Source:** SL 1984, ch 323, § 10.

**55-13-11. Other property subject to depletion.** Except as provided in §§ 55-13-9 and 55-13-10, if the principal consists of property subject to depletion, including leaseholds, patents, copyrights, royalty rights, and rights to receive payments on a contract for deferred compensation, receipts from the property, not in excess of five percent per year of its inventory value, are income, and the balance is principal.

**Source:** SL 1984, ch 323, § 11.

**55-13-12. Reserved**

**55-13-13. Charges against income and principal.** (a) The following charges shall be made against income:

(1) Ordinary expenses incurred in connection with the administration, management, or preservation of the trust property, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the interests of the income beneficiary, remainderman, or trustee, interest paid by the trustee, and ordinary repairs;

(2) A reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles, but no allowance shall be made for depreciation of that portion of any real property used by a beneficiary as a residence or for depreciation of any property held by the trustee on July 1, 1984 for which the trustee is not then making an allowance for depreciation;

(3) One-half of court costs, attorney's fees, and other fees on periodic judicial accounting, unless the court directs otherwise;

(4) Court costs, attorney's fees, and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise;

(5) One-half of the trustee's regular compensation, whether based on a percentage of principal or income, and all expenses reasonably incurred for current management of principal and application of income;

(6) Any tax levied upon receipts defined as income under this chapter or the trust instrument and payable by the trustee.

(b) If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions.

(c) The following charges shall be made against principal:

(1) Trustee's compensation not chargeable to income under subsections (a)(4) and (a)(5), special compensation of trustees, expenses reasonably incurred in connection with principal, court costs and attorney's fees primarily concerning matters of principal, and trustee's compensation computed on principal as an acceptance, distribution, or termination fee;

(2) Charges not provided for in subsection (a), including the cost of investing and reinvesting principal, the payments on principal of an indebtedness (including a mortgage amortized by periodic payments of principal), expenses for preparation of property for rental or sale, and, unless the court directs otherwise, expenses incurred in maintaining or defending any action to construe the trust or protect it or the property or assure the title of any trust property;

(3) extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments, but, a trustee may establish an allowance for depreciation out of income to the extent permitted by subsection (a)(2) and by § 55-13-8;

(4) Any tax levied upon profit, gain, or other receipts allocated to principal notwithstanding denomination of the tax as an income tax by the taxing authority;

(5) If an estate or inheritance tax is levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, any amount apportioned to the trust, including interest and penalties, even though the income beneficiary also has rights in the principal.

(d) Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under § 55-13-4.

**Source:** SL 1984, ch 323, § 13.

**55-13-14. Application of chapter.** Except as specifically provided in the trust instrument, the will or in this chapter, this chapter shall apply to any receipt or expense received or incurred on or after July 1, 1984 by any trust executed or the estate of any decedent dying on or after July 1, 1984.

**Source:** SL 1984, ch 323, § 14.

**55-13-15. Uniformity of interpretation.** This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**Source:** SL 1984, ch 323, § 15.

**55-13-16. Short title.** This chapter may be cited as the Revised Uniform Principal and Income Act.

**Source:** SL 1984, ch 323, § 16.

**55-13-17. Severability.** If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application and to this end the provisions of this chapter are severable.

**Source:** SL 1984, ch 323, § 17.

**55-13-18. Application of chapter to existing trusts and estates.** The provisions of this chapter may not be utilized by any trust created after June 30, 2007, or by any decedent's estate based upon a will executed subsequent to June 30, 2007. Any trust or decedent's estate not otherwise prohibited by this section from utilizing this chapter may apply the provisions of this chapter to such trust or decedent's estate upon the making of an election as provided in § 55-13A-602.

**Source:** SL 2007, ch 282, § 34.

**55-13A-101. Short title.** This chapter may be cited as the Uniform Principal and Income Act.

**Source:** SL 2007, ch 282, § 1.

**55-13A-102. Definitions.** In this chapter:

(1) "Accounting period" means a calendar year unless another twelve-month period is selected by a fiduciary. The term includes a portion of a calendar year or other twelve-month period that begins when an income interest begins or ends when an income interest ends;

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary;

(3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function;

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in §§ 55-13A-401 to 55-13A-415, inclusive;

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable;

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion;

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute;

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period;

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity;

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the

trust terminates;

(11) “Remainder beneficiary” means a person entitled to receive principal when an income interest ends;

(12) “Terms of a trust” means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct;

(13) “Trustee” includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

**Source:** SL 2007, ch 282, § 2.

**55-13A-103. Fiduciary duties—General principles.** (a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 and 3, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

(3) Shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under § 55-13A-104(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

**Source:** SL 2007, ch 282, § 3.

**55-13A-104. Trustee’s power to adjust.** (a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust’s income, and the trustee determines, after applying the rules in § 55-13A-103(a), that the trustee is unable to comply with § 55-13A-103(b).

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (1) The nature, purpose, and expected duration of the trust;
- (2) The intent of the settlor;
- (3) The identity and circumstances of the beneficiaries;
- (4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust; or

(8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are

intended to deny the trustee the power of adjustment conferred by subsection (a).

(g) Unless prohibited by the governing instrument, the trustee of a trust has the power to consider gains from the sale of capital assets in the trust to be part of a distribution of principal to a beneficiary, or part of an adjustment from principal to income, and if such power is exercised, such gains shall be treated consistently by the trustee on the trust's books, records, and tax returns as part of a distribution to a beneficiary.

**Source:** SL 2007, ch 282, § 4; SL 2009, ch 252, § 33.

**55-13A-105. Judicial control of discretionary power.** (a) The court may not order a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which subsection (a) applies include:

(1) A decision under § 55-13A-104(a) as to whether and to what extent an amount should be transferred from principal to income or from income to principal;

(2) A decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors, in deciding whether and to what extent to exercise the discretionary power conferred by § 55-13A-104(a).

(c) If the court determines that a fiduciary has abused the fiduciary's discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the discretion had not been abused, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position;

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary which is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust;

(3) To the extent that the court is unable, after applying paragraphs (1) and (2), to place the beneficiaries, the trust, or both, in the positions they would have occupied if the discretion had not been abused, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(d) Upon petition by the fiduciary, the court having jurisdiction over a trust or estate shall determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power conferred by this chapter will result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.

**Source:** SL 2007, ch 282, § 5.

**55-13A-201. Determination and distribution of net income.** After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in

Articles 3 through 5 which apply to trustees and the rules in paragraph (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property;

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Articles 3 through 5 which apply to trustees and by:

(A) Including in net income all income from property used to discharge liabilities;

(B) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under paragraph (2) or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

(4) A fiduciary shall distribute the net income remaining after distributions required by paragraph (3) in the manner described in § 55-13A-202 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in paragraph (1) because of a payment described in § 55-13A-501 or 55-13A-502 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

**Source:** SL 2007, ch 282, § 6.

**55-13A-202. Distribution to residuary and remainder beneficiaries.** (a) Notwithstanding any contrary provision of this chapter, if the trust instrument adopts the provisions of this section by reference, an increase in the value of the following investments owned by a charitable remainder unitrust, of the type authorized in § 664(d)(3) of the Internal Revenue Code (26 U.S.C. § 664), as of January 1, 2009, is distributable as income when it becomes available for distribution:

(1) A zero coupon bond;

(2) An annuity contract before annuitization;

(3) A life insurance contract before the death of the insured;

(4) An interest in a common trust fund (as defined under § 584 of the Internal Revenue Code) (26 U.S.C. § 584);

(5) An interest in a partnership, as defined in § 7701 of the Internal Revenue Code (26 U.S.C. § 7701); or

(6) Any other obligation for the payment of money that is payable at a future time in accordance with a fixed, variable, or discretionary schedule of appreciation in excess of the price at which it was issued.

(b) For purposes of this section, the increase in value of an investment described in subsection (a) is available for distribution only if the trustee receives cash on account of the investment.

(c) The increase in value of the obligations described in subsection (a) is distributable to the beneficiary who was the income beneficiary at the time of the increase from the first principal cash available or, if none is available, when realized by sale, redemption, or other disposition. If unrealized increase is distributed as income but out of principal, the principal shall be reimbursed from the increase when realized.

**Source:** SL 2007, ch 282, § 7; SL 2009, ch 252, § 34.

**55-13A-301. When right to income begins and ends.** (a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

**Source:** SL 2007, ch 282, § 8.

**55-13A-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.** (a) A trustee shall allocate an income receipt or disbursement other than one to which § 55-13A-201(1) applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this chapter. Distributions to shareholders or other owners from an entity to which § 55-13A-401 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

**Source:** SL 2007, ch 282, § 9.

**55-13A-303. Apportionment when income interest ends.** (a) In this section, the term, undistributed income, means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

**Source:** SL 2007, ch 282, § 10.

**55-13A-401. Character of receipts.** (a) In this section, the term, entity, means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which § 55-13A-402 applies, a business or activity to which § 55-13A-403 applies, or an asset-backed security to which § 55-13A-415 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

(1) Property other than money;

(2) Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) Money received in total or partial liquidation of the entity; and

(4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subsection (d)(2), to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

**Source:** SL 2007, ch 282, § 11.

**55-13A-402. Distribution from trust or estate.** A trustee shall allocate to income an amount received as a

distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, § 55-13A-401 or 55-13A-415 applies to a receipt from the trust.

**Source:** SL 2007, ch 282, § 12.

**55-13A-403. Business and other activities conducted by trustee.** (a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

- (1) Retail, manufacturing, service, and other traditional business activities;
- (2) Farming;
- (3) Raising and selling livestock and other animals;
- (4) Management of rental properties;
- (5) Extraction of minerals and other natural resources;
- (6) Timber operations; and
- (7) Activities to which § 55-13A-414 applies.

**Source:** SL 2007, ch 282, § 13.

**55-13A-404. Principal receipts.** A trustee shall allocate to principal:

- (1) To the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;
- (2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this article;
- (3) Amounts recovered from third parties to reimburse the trust because of disbursements described in § 55-13A-502(a)(7) or for other reasons to the extent not based on the loss of income;
- (4) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;
- (5) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

- (6) Other receipts as provided in §§ 55-13A-408 to 55-13A-415, inclusive.

**Source:** SL 2007, ch 282, § 14.

**55-13A-405. Rental property.** To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

**Source:** SL 2007, ch 282, § 15.

**55-13A-406. Obligation to pay money.** (a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(c) This section does not apply to an obligation to which § 55-13A-409, 55-13A-410, 55-13A-411, 55-13A-412, 55-13A-414, or 55-13A-415 applies.

**Source:** SL 2007, ch 282, § 16.

**55-13A-407. Insurance policies and similar contracts.** (a) Except as otherwise provided in subsection (b), a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to § 55-13A-403, loss of profits from a business.

(c) This section does not apply to a contract to which § 55-13A-409 applies.

**Source:** SL 2007, ch 282, § 17.

**55-13A-408. Insubstantial allocations not required.** If a trustee determines that an allocation between principal and income required by § 55-13A-409, 55-13A-410, 55-13A-411, 55-13A-412, or 55-13A-415 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in § 55-13A-104(c) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in § 55-13A-104(d) and may be released for the reasons and in the manner described in § 55-13A-104(e). An allocation is presumed to be insubstantial if:

- (1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent; or
- (2) The value of the asset producing the receipt for which the allocation would be made is less than ten percent of the total value of the trust's assets at the beginning of the accounting period.

**Source:** SL 2007, ch 282, § 18.

**55-13A-409. Deferred compensation, annuities, and similar payments.** (a) For the purposes of this section, the term, payment, means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c)(1) For purposes of this subsection, plan income means any of the following:

(A) With respect to payments received from a plan that maintains separate accounts or funds for its participants or account holders, such as defined contribution retirement plans, individual retirement accounts, Roth individual retirement accounts, and some types of deferred compensation plans, either the amount of the plan account or fund held for the benefit of the trust that, if the plan account or fund were a trust, would be allocated to income pursuant to subsections (b) and (d) for that accounting period, or four percent of the value of the plan account or fund on the first day of the accounting period. The trustee shall, in his or her discretion, choose the method of determining plan income pursuant to this paragraph, and may change the method of determining plan income pursuant to this paragraph for any subsequent accounting period;

(B) With respect to payments received from a plan that does not maintain separate accounts or funds for its participants or account holders, such as defined benefit retirement plans and some types of deferred compensation plans, four percent of the total present value of the trust's interest in the plan as of the first day of the accounting period, based on reasonable actuarial assumptions as determined by the trustee.

(2) For each accounting period of a trust in which the trust receives a payment but no part of any payment is allocated to income pursuant to subsection (b), the trustee shall allocate to income that portion of the aggregate value of all payments received by the trustee in that accounting period that is equal to the amount of plan income that is attributable to the trust's interest in the plan from which payment is received for that accounting period. The trustee shall allocate the balance of any payments to principal.

(d) If, to obtain an estate or gift tax marital deduction for an interest in a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(e) This section does not apply to payments to which § 55-13A-410 applies.

**Source:** SL 2007, ch 282, § 19; SL 2009, ch 252, § 35; SL 2010, ch 232, § 5.

**55-13A-410. Liquidating asset.** (a) In this section, the term, liquidating asset, means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to § 55-13A-409, resources subject to § 55-13A-411, timber subject to § 55-13A-412, an activity subject to § 55-13A-414, an asset subject to § 55-13A-415, or any asset for which the trustee establishes a reserve for depreciation under § 55-13A-503.

(b) A trustee shall allocate to income ten percent of the receipts from a liquidating asset and the balance to principal.

**Source:** SL 2007, ch 282, § 20.

**55-13A-411. Minerals, water, and other natural resources.** (a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income;

(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal;

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, ninety percent must be allocated to principal and the balance to income;

(4) If an amount is received from a working interest or any other interest not provided for in paragraph (1), (2), or (3), ninety percent of the net amount received must be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent of the amount must be allocated to principal and the balance to income.

(c) This chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on July 1, 2005, the trustee may allocate receipts from the interest as provided in this chapter or in the manner used by the trustee before July 1, 2005. If the trust acquires an interest in minerals, water, or other natural resources after July 1, 2005, the trustee shall allocate receipts from the interest as provided in this chapter.

**Source:** SL 2007, ch 282, § 21.

**55-13A-412. Timber.** (a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in paragraphs (1) and (2); or

(4) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to paragraph (1), (2), or (3).

(b) In determining net receipts to be allocated pursuant to subsection (a), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This chapter applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(d) If a trust owns an interest in timberland on July 1, 2005, the trustee may allocate net receipts from the sale of timber and related products as provided in this chapter or in the manner used by the trustee before July 1, 2005. If the trust acquires an interest in timberland after July 1, 2005, the trustee shall allocate net receipts from the sale of timber and related products as provided in this chapter.

**Source:** SL 2007, ch 282, § 22.

**55-13A-413. Property not productive of income.** (a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under § 55-13A-104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by § 55-13A-104(a). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by subsection (a), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

**Source:** SL 2007, ch 282, § 23.

**55-13A-414. Derivatives and options.** (a) In this section, the term, derivative, means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under § 55-13A-403 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

**Source:** SL 2007, ch 282, § 24.

**55-13A-415. Asset-backed securities.** (a) In this section, the term, asset-backed security, means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which § 55-13A-401 or 55-13A-409 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate ten percent of the payment to income and the balance to principal.

**Source:** SL 2007, ch 282, § 25.

**55-13A-501. Disbursements from income.** A trustee shall make the following disbursements from income to the extent that they are not disbursements to which § 55-13A-201(2)(B) or (C) applies:

(1) One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

**Source:** SL 2007, ch 282, § 26.

**55-13A-502. Disbursements from principal.** (a) A trustee shall make the following disbursements from principal:

(1) The remaining one-half of the disbursements described in § 55-13A-501(1) and (2);

(2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) Payments on the principal of a trust debt;

(4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) Premiums paid on a policy of insurance not described in § 55-13A-501(4) of which the trust is the owner and beneficiary;

(6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

**Source:** SL 2007, ch 282, § 27.

**55-13A-503. Transfers from income to principal for depreciation.** (a) In this section, the term, depreciation, means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) During the administration of a decedent's estate; or

(3) Under this section if the trustee is accounting under § 55-13A-403 for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

**Source:** SL 2007, ch 282, § 28.

**55-13A-504. Transfers from income to reimburse principal.** (a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which subsection (a) applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(4) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) Disbursements described in § 55-13A-502(a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (a).

**Source:** SL 2007, ch 282, § 29.

**55-13A-505. Income taxes.** (a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid:

(1) From income to the extent that receipts from the entity are allocated only to income;

(2) From principal to the extent that receipts from the entity are allocated only to principal;

(3) Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(4) From principal to the extent that the tax exceeds the total receipts from the entity.

(d) After applying subsections (a) through (c), the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

**Source:** SL 2007, ch 282, § 30; SL 2009, ch 252, § 36.

**55-13A-506. Adjustments between principal and income because of taxes.** (a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) Elections and decisions, other than those described in subsection (b), that the fiduciary

makes from time to time regarding tax matters;

(2) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

**Source:** SL 2007, ch 282, § 31.

**55-13A-601. Uniformity of application and construction.** In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source:** SL 2007, ch 282, § 32.

**55-13A-602. Application of chapter to existing trusts and estates.** This chapter applies to every trust or will created after July 1, 2007, except as otherwise expressly provided in the will or the terms of the trust or in this chapter. No trust or decedent's estate based upon a will executed after July 1, 2007, may utilize the provisions of chapter 55-13. Every trust existing on June 30, 2007, or any decedent's estate existing on June 30, 2007, and based upon a will executed prior to July 1, 2007, may elect to apply the provisions of either chapter 55-13 or this chapter. The election may be made by the trustee or personal representative upon providing sixty days written notice of the election to the beneficiaries of the trust or estate, as the case may be.

Any election made prior to July 1, 2008, is hereby ratified and remains in full force and effect.

The provisions of § 55-13A-409 as amended by SL 2009, ch 252, § 35 apply to a trust described in § 55-13A-409(d) on and after the following dates:

(1) If the trust is not funded as of July 1, 2009, the date of the decedent's death;

(2) If the trust is initially funded in the calendar year beginning January 1, 2010, the date of the decedent's death;

(3) If the trust is not described in subdivision (1) or (2), January 1, 2010.

**Source:** SL 2007, ch 282, § 33; SL 2008, ch 257, § 15; SL 2009, ch 252, § 37.

**55-14A-1. Short title.** This chapter may be cited as the Uniform Prudent Management of Institutional Funds Act.

**Source:** SL 2007, ch 283, § 1.

**55-14A-2. Definitions.** In this chapter:

(1) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(2) "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift

instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(3) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) "Institution" means:

(A) A person, other than an individual, organized and operated exclusively for charitable purposes;

(B) A government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; and

(C) A trust that had both charitable and non-charitable interests, after all non-charitable interests have terminated.

(5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

(A) Program-related assets;

(B) A fund held for an institution by a trustee that is not an institution; or

(C) A fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

**Source:** SL 2007, ch 283, § 2.

**55-14A-3. Standard of conduct in managing and investing institutional fund.** (a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this chapter, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(1) May incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(2) Shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) General economic conditions;

(B) The possible effect of inflation or deflation;

(C) The expected tax consequences, if any, of investment decisions or strategies;

(D) The role that each investment or course of action plays within the overall investment portfolio of the fund;

(E) The expected total return from income and the appreciation of investments;

(F) Other resources of the institution;

(G) The needs of the institution and the fund to make distributions and to preserve capital; and

(H) An asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(3) Except as otherwise provided by law other than this chapter, an institution may invest in any kind of property or type of investment consistent with this section.

(4) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this chapter.

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

**Source:** SL 2007, ch 283, § 3.

**55-14A-4. Appropriation for expenditure or accumulation of endowment fund—Rules of**

**construction.** (a) Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(1) The duration and preservation of the endowment fund;

(2) The purposes of the institution and the endowment fund;

(3) General economic conditions;

(4) The possible effect of inflation or deflation;

(5) The expected total return from income and the appreciation of investments;

(6) Other resources of the institution; and

(7) The investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under subsection (a), a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends", or "rents, issues, or profits", or "to preserve the principal intact", or words of similar import:

(1) Create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(2) Do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (a).

**Source:** SL 2007, ch 283, § 4.

**55-14A-5. Delegation of management and investment functions.** (a) Subject to any specific limitation set forth in a gift instrument or in law other than this chapter, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with subsection (a) is not liable for the decisions or actions of an agent to which the function was delegated.

(d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this chapter.

**Source:** SL 2007, ch 283, § 5.

**55-14A-6. Release or modification of restrictions on management, investment, or purpose.** (a) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a

manner consistent with the charitable purposes expressed in the gift instrument.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution may release or modify the restriction, in whole or part, if:

(1) The institutional fund subject to the restriction has a total value of less than twenty-five thousand dollars;

(2) More than twenty years have elapsed since the fund was established; and

(3) The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

**Source:** SL 2007, ch 283, § 6.

**55-14A-7. Reviewing compliance.** Compliance with this chapter is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

**Source:** SL 2007, ch 283, § 7.

**55-14A-8. Application to existing institutional funds.** This chapter applies to institutional funds existing on or established after July 1, 2007. As applied to institutional funds existing on July 1, 2007, this chapter governs only decisions made or actions taken on or after that date. This chapter does not apply to any funds directly held or managed by a governmental agency.

**Source:** SL 2007, ch 283, § 8.

**55-14A-9. Relation to Electronic Signatures in Global and National Commerce Act.** This chapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).

**Source:** SL 2007, ch 283, § 9.

**55-14A-10. Uniformity of application and construction.** In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source:** SL 2007, ch 283, § 10.

**55-15-1. Definitions.** Terms used in this chapter mean:

(1) "Disinterested person," any person who is not a related or subordinate party, as defined in section 672(c) of the Internal Revenue Code (26 U.S.C. section 1, et seq.), with respect to the person then acting as trustee of the trust and excludes the trustor of the trust and any interested trustee;

(2) "Income trust," any trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee. However, no trust that otherwise is an income trust may qualify pursuant to this subdivision, if it is subject to taxation under I.R.C. section 2001 or section 2501, until the expiration of the period for filing the return therefor (including extensions);

(3) "Interested distributee," any person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a related or subordinate party, as defined in I.R.C. section 672(c), with respect to such distributee;

(4) "Interested trustee," (i) any individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed, or

(ii) any trustee who may be removed and replaced by an interested distributee, or (iii) any individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust, or (iv) any of the above;

(5) "Total return unitrust," any income trust which has been converted under and meets the provisions of this chapter;

(6) "Trustee," all persons acting as trustee of the trust, except where expressly noted otherwise, whether acting in their discretion or on the direction of one or more persons acting in a fiduciary capacity;

(7) "Trustor," any individual who created an inter vivos or a testamentary trust;

(7A) "Unitrust," a trust, the terms of which require or permit distribution of a unitrust amount, without regard to whether the trust has been converted to a unitrust in accordance with this chapter or whether the trust is established by express terms of the governing instrument;

(8) "Unitrust amount," an amount equal to a percentage of a unitrust's assets that may or are required to be distributed to one or more beneficiaries annually in accordance with the terms of the unitrust. The unitrust amount may be determined by reference to the net fair market value of the unitrust's assets as of a particular date each year or as an average determined on a multiple year basis;

(9) "Current valuation year," the accounting period of the trust for which the unitrust amount is being determined;

(10) "Prior valuation year," each of the two accounting periods of the trust immediately preceding the current valuation year; and

(11) "I.R.C.," the Internal Revenue Code (26 U.S.C. section 1, et seq.).

**Source:** SL 2002, ch 225, § 1; SL 2009, ch 252, § 45.

**55-15-2. Trustee's authority to convert income trust, total return unitrust—Calculate trust amount, value—Conditions.** A trustee, other than an interested trustee, or, if two or more persons are acting as trustee, a majority of the trustees who are not an interested trustee (in either case hereafter "trustee"), may, in its sole discretion and without the approval of any court, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount and the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(2) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this chapter, to (i) the trustor, if living, (ii) all living persons who are currently receiving or eligible to receive distributions of income of the trust, (iii) all living persons who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice (without regard to the exercise of any power of appointment) or, if the trust does not provide for its termination, all living persons who would receive or be eligible to receive distributions of income or principal of the trust if the persons identified in subclause (ii) of this subdivision were deceased, and (iv) all persons acting as adviser or protector of the trust;

(3) At least one person receiving notice under each of subclauses (ii) and (iii) of subdivision (2) is, to the best information and belief of the trustee, legally competent; and

(4) No person receiving such notice objects, by written instrument delivered to the trustee, to the proposed action of the trustee within sixty days of receipt of such notice.

**Source:** SL 2002, ch 225, § 2.

**55-15-3. Interested trustee's authority over actions enumerated in § 55-15-2—Conditions.** If there is no trustee of the trust other than an interested trustee, the interested trustee or, if two or more persons are acting as trustee and are interested trustees, a majority of such interested trustees, may, in its sole discretion and without the approval of any court, take such action as provided in § 55-15-2 so long as the trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee (i) the percentage to be used to calculate the unitrust amount, (ii) the method to be used in determining the fair market value of the trust, and (iii) which assets, if any, are to be excluded in determining the unitrust amount; and complies with all of the provisions of subdivisions (1) to (4), inclusive, of § 55-15-2.

**Source:** SL 2002, ch 225, § 3.

**55-15-4. Trustee may petition court—Appointment of disinterested person.** If any trustee desires to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount and the method used to determine the fair market value of the trust but does not have the ability to or elects not to do it under the provisions of §§ 55-15-2 and 55-15-3, or in the event the trustee receives a written objection within the applicable period, the trustee may petition the court for such order as the trustee deems appropriate. In the event, however, there is only one trustee of such trust and such trustee is an interested trustee or in the event there are two or more trustees of such trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of such trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present such information to the court as shall be necessary to enable the court to make its determination.

**Source:** SL 2002, ch 225, § 4.

**55-15-5. Annual valuation of trust required.** The fair market value of the trust shall be determined at least annually, using such valuation date or dates or averages of valuation dates as are deemed appropriate. Assets for which a fair market value cannot be readily ascertained shall be valued using such valuation methods as are deemed reasonable and appropriate. Such assets may be excluded from valuation, if all income received with respect to such assets is distributed to the extent distributable in accordance with the terms of the governing instrument.

**Source:** SL 2002, ch 225, § 5.

**55-15-6. Calculation of unitrust amount.** The unitrust amount shall be determined as follows:

(1) For the first three accounting periods of the trust, the unitrust amount for a current valuation year of the trust may not be less than three percent, nor more than five percent, by the election of the trustee, the disinterested person, or the court, of the net fair market value of the assets held in the trust on the valuation date of the current valuation year;

(2) Beginning with the fourth accounting period of the trust, the unitrust amount for a current valuation year of the trust may not be less than three percent, nor more than five percent, by the election of the trustee, the disinterested person, or the court, of the average of the net fair market value of the assets held in the trust on the valuation date of the current valuation year and the net fair market value of the assets held in the trust on the valuation date of each prior valuation year, as defined in subdivision 55-15-1(10);

(3) The percentage that may be elected by the trustee, the disinterested person, or the court in determining the unitrust amount shall be a reasonable current return from the trust, taking into account the intentions of the trustor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust. However, such election by the trustee, the disinterested person, or the court in determining the unitrust amount may not be less than three percent nor more than five percent;

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

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

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

(7) In determining the net fair market value of the assets held in trust, the determination may not include the value of any residential property or any tangible personal property that, as of the first business day of the current valuation year, one or more income beneficiaries of the trust have or had the right to occupy, or have or had the right to possess or control, other than in a capacity as trustee, and instead the right of occupancy or the right of possession or control shall be deemed to be the unitrust amount with respect to the residential property or the tangible personal property; or any asset specifically given to a beneficiary under the terms of the trust and the return on investment on that asset, which return on investment shall be distributed to the beneficiary.

**Source:** SL 2002, ch 225, § 6; SL 2004, ch 312, § 7; SL 2005, ch 260, § 9; SL 2009, ch 252, § 39; SL 2013, ch 239, § 13.

**55-15-7. Repealed by SL 2009, ch 252, § 40.**

**55-15-8. Unitrust amount as net income of trust—Allocation of capital gains to trust income.**

Following the conversion of an income trust to a total return unitrust, the trustee:

(1) Shall treat the unitrust amount as if it were net income of the trust for purposes of determining the amount available, from time to time, for distributions from the trust; and

(2) May allocate to trust income for each taxable year of the trust (or portions thereof) (i) net short-term capital gain described in I.R.C. section 1222(5) for such year (or portion thereof) but only to the extent that the amounts so allocated together with all other amounts allocate to trust income for such year (or portion thereof) does not exceed the unitrust amount for such year (or portion thereof); and (ii) net long-term capital gain described in I.R.C. section 1222(7) for such year (or portion thereof) but only to the extent that the amount so allocated together with all other amounts, including amounts described in clause (i) above, allocated to trust income for such year (or portion thereof) does not exceed the unitrust amount for such year (or portion thereof).

**Source:** SL 2002, ch 225, § 8.

**55-15-9. Administration of total return unitrust—Authority of trustee.** In administering a total return unitrust, the trustee may, in its sole discretion but subject to the provisions of the governing instrument, determine:

- (1) The effective date of the conversion;
- (2) The timing of distributions (including provisions for prorating a distributions for a short year in which a beneficiary' right to payments commences or ceases);
- (3) Whether distributions are to be made in cash or in kind or partly in cash and partly in kind;

(4) If the trust is reconverted to an income trust, the effective date of such reconversion; and

(5) Such other administrative issues as may be necessary or appropriate to carry out the purposes of this chapter.

**Source:** SL 2002, ch 225, § 9.

**55-15-10. Distributions of principal not affected by conversion.** Conversion to a total return unitrust under the provisions of this chapter does not affect any other provisions of the governing instrument, if any, regarding distributions of principal.

**Source:** SL 2002, ch 225, § 10.

**55-15-11. Spouse may compel reconversion to income trust for certain trusts—Written instrument required.** In the case of a trust for which a marital deduction has been taken for federal tax purpose under I.R.C. section 2056 or 2523, the spouse otherwise entitled to receive the net income of the trust has the right, by written instrument delivered to the trustee, to compel the reconversion during his or her lifetime of the trust from a total return unitrust to an income trust, notwithstanding anything in this chapter to the contrary.

**Source:** SL 2002, ch 225, § 11.

**55-15-12. Applicability of chapter.** This chapter shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered in South Dakota under South Dakota law unless (i) the governing instrument reflects an intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust, ii) the trust is a trust described in I.R.C. section 170(f)(2)(B), 6664(d), 1361(d), 2702(a)(3), or 2702(b), (iii) one or more persons to whom the trustee could distribute income have a power of withdrawal over the trust that is not subject to an ascertainable standard under I.R.C. section 2041 or 2514 or that can be exercised to discharge a duty of support he or she possesses, or (iv) the governing instrument expressly prohibits use of this chapter by specific reference to the chapter. A provision in the governing instrument that "The provisions of this chapter, or any corresponding provision of future law, may not be used in the administration of this trust" or similar words reflecting such intent are sufficient to preclude use of this chapter.

**Source:** SL 2002, ch 225, § 12.

**55-15-13. Trustee acting in good faith not liable—Remedy.** Any trustee or disinterested person who in good faith takes or fails to take any action under this chapter is not liable to any person affected by such action or inaction, regardless of whether such person received written notice as provided in this chapter and regardless of whether such person was under a legal disability at the time of the delivery of such notice. Such person's exclusive remedy shall be to obtain an order of the court directing the trustee to convert an income trust to a total return unitrust, to reconvert from a total return unitrust to an income trust or to change the percentage used to calculate the unitrust amount.

**Source:** SL 2002, ch 225, § 13.

**55-15-14. No duty to act created.** Nothing in this chapter is intended to create or imply a duty to take any action under this chapter, and no trustee is liable for not considering whether to take any action or for choosing not to take any such action.

**Source:** SL 2002, ch 225, § 14.

**55-15-15. Chapter not applicable to charitable remainder unitrust.** This chapter does not apply to a charitable remainder unitrust as defined by § 664(d) of the Internal Revenue Code of 1986 (26 U.S.C. § 664), as of January 1, 2009.

**Source:** SL 2009, ch 252, § 38.

**55-16-1. Definitions.** Terms used in this chapter mean:

- (1) "Claim," a right to payment, whether or not the right is reduced to judgment liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;
- (2) "Creditor," with respect to a transferor, a person who has a claim;
- (3) "Debt," liability on a claim;
- (4) "Disposition," a transfer, conveyance, or assignment of property, including a change in the legal ownership of property occurring upon the substitution of one trustee for another or the addition of one or more new trustees, or the exercise of a power so as to cause a transfer of property to a trustee or trustees. The term does not include the release or relinquishment of an interest in property that theretofore was the subject of a qualified disposition;
- (5) "Property," real property, personal property, and interests in real or personal property;
- (6) "Qualified disposition," a disposition by or from a transferor to a qualified person or qualified persons, without consideration or for less than fair market value, by means of a trust instrument;
- (7) "Spouse" and "former spouse," only persons to whom the transferor was married at, or before, the time the qualified disposition is made;
- (8) "Transferor," any person as an owner of property; as a holder of a power of appointment which authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate, or the creditors of the holder's estate; or as a trustee, directly or indirectly, makes a disposition or causes a disposition to be made.

The terms, transferor and beneficiary, may be any person as defined in subdivision 55-4-1(2).

**Source:** SL 2005, ch 261, § 1; SL 2015, ch 240, § 20.

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

- (1) Expressly incorporates the law of this state to govern the validity, construction, and administration of the trust;
- (2) Is irrevocable, but a trust instrument may not be deemed revocable on account of its inclusion of one or more of the following:
  - (a) A transferor's power to veto a distribution from the trust;
  - (b) An inter vivos power of appointment, other than an inter vivos power to appoint to the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate;
  - (c) A testamentary power of appointment;
  - (d) The transferor's potential or actual receipt of income, including rights to such income retained in the trust instrument;
  - (e) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as such terms are defined in § 664 of the Internal Revenue Code of 1986, 26 U.S.C. § 664, as of January 1, 2009;
  - (f) The transferor's receipt each year of a percentage of the value as determined from time to time pursuant to the trust instrument, but not exceeding the amount that may be defined as income under § 643(b) of the Internal Revenue Code of 1986, 26 U.S.C. § 643(b), as of January 1, 2009;
  - (g) The transferor's potential or actual receipt or use of principal if the potential or actual receipt or use of principal would be the result of a qualified person, including a qualified person acting at the direction of a trust advisor described in this section, acting either in the qualified person's sole discretion or

pursuant to an ascertainable standard contained in the trust instrument;

- (h) The transferor's right to remove a trustee, protector, or trust advisor and to appoint a new trustee, protector, or trust advisor, other than a trustee who is a related or subordinate party with respect to the transferor within the meaning of § 672(c) of the Internal Revenue Code of 1986, 26 U.S.C. § 672(c), as of January 1, 2009;
- (i) The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of such term as described in the regulations promulgated under § 2702(c) of the Internal Revenue Code of 1986, 26 U.S.C. § 2702(c), as of January 1, 2009;
- (j) A pour back provision that pours back to the transferor's will or revocable trust all or part of the trust assets;
- (k) The transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on income of the trust if the potential or actual receipt of income or principal is pursuant to a provision in the trust instrument that expressly provides for the payment of the taxes and if the potential or actual receipt of income or principal would be the result of a qualified person's acting in the qualified person's discretion or pursuant to a mandatory direction in the trust instrument or acting at the direction of an advisor described in § 55-16-4; or
- (l) The ability, whether pursuant to discretion, direction, or the grantor's exercise of a testamentary power of appointment, of a qualified person to pay, after the death of the transferor, all or any part of the debts of the transferor outstanding at the time of the transferor's death, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate; and

(3) Provides that the interest of the transferor or other beneficiary in the trust property or the income from the trust property may not be transferred, assigned, pledged, or mortgaged, whether voluntarily or involuntarily, before the qualified person actually distributes the property or income from the property to the beneficiary, and such provision of the trust instrument shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code, 11 U.S.C. § 541(c)(2), as of January 1, 2009.

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

**Source:** SL 2005, ch 261, § 2; SL 2007, ch 247, § 11; SL 2009, ch 252, § 41; SL 2012, ch 233, § 19; SL 2013, ch 239, § 18; SL 2014, ch 226, § 22.

**55-16-3. Qualified person defined.** For the purposes of this chapter, a qualified person is any person who qualifies as a qualified person under § 55-3-41 and who meets all the requirements of § 55-3-39 other than the transferor.

**Source:** SL 2005, ch 261, § 3; SL 2009, ch 252, § 42.

**55-16-4. Persons and entities not to be considered qualified person—Appointment, removal, or replacement of co-trustee, trust advisor, or trust protector.** Neither the transferor nor any other natural person who is a nonresident of this state nor an entity that is not authorized by the law of this state to act as a trustee or whose activities are not subject to supervision as provided in § 55-16-3 may be considered a qualified person. However, nothing in this chapter precludes a transferor from appointing, removing, or replacing one or more co-trustees, trust advisors, or trust protectors, regardless of whether or not such trust advisor or trust protector is a fiduciary.

**Source:** SL 2005, ch 261, § 4; SL 2006, ch 243, § 5; SL 2011, ch 212, § 6.

**55-16-5. Service as investment trust advisor.** Any individual may serve as an investment trust advisor described in subdivision 55-1B-1(6), notwithstanding that such individual is the transferor of the qualified disposition, but such an individual may not otherwise serve as a fiduciary of a trust that is a qualified

disposition except with respect to the retention of the veto right permitted by subdivision 55-16-2(2). While serving as an advisor of the trust, the individual may have all powers authorized by statute or by the trust instrument, including the power to vote by proxy any stock owned by the trust.

**Source:** SL 2005, ch 261, § 5; SL 2006, ch 243, § 6; SL 2010, ch 232, § 28; SL 2012, ch 233, § 15.

**55-16-6. Successor qualified person.** If a qualified person of a trust ceases to meet the requirements of § 55-16-3, and there remains no trustee that meets such requirements, such qualified person shall be deemed to have resigned as of the time of such cessation, and thereupon the successor qualified person provided for in the trust instrument shall become a qualified person of the trust, or in the absence of any successor qualified person provided for in the trust instrument, the circuit court shall, upon application of any interested party, appoint a successor qualified person.

**Source:** SL 2005, ch 261, § 6.

**55-16-7. Disposition to more than one trustee—Qualified disposition even if all trustees are not qualified persons.** In the case of a disposition to more than one trustee, a disposition that is otherwise a qualified disposition may not be treated as other than a qualified disposition solely because not all of the trustees are qualified persons.

**Source:** SL 2005, ch 261, § 7.

**55-16-8. Powers and rights of transferor—Effect on qualified disposition.** A qualified disposition is subject to §§ 55-16-9 to 55-16-14, inclusive, notwithstanding a transferor's retention of any or all of the powers and rights described in subdivision 55-16-2(2) and the transferor's service as trust advisor pursuant to § 55-16-5. The transferor has only such powers and rights as are conferred by the trust instrument. Except as permitted by §§ 55-16-2 and 55-16-5, a transferor has no rights or authority with respect to the property that is the subject of a qualified disposition or the income therefrom, and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority is void.

**Source:** SL 2005, ch 261, § 8.

**55-16-9. Creditors' actions limited to transfers with intent to defraud.** Notwithstanding any other provision of law, including chapter 54-8A, no action of any kind, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for avoidance of a qualified disposition unless the settlor's transfer of property was made with the intent to defraud that specific creditor. In the event of any conflict between any provision of this chapter and any provision of chapter 54-8A or any other provision of law similar to any provision of chapter 54-8A, the provisions of this chapter control and prevail.

**Source:** SL 2005, ch 261, § 9; SL 2008, ch 257, § 16; SL 2014, ch 226, § 21.

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

- (1) Is a creditor of the settlor before the settlor's assets are transferred to the trust, and the action under § 55-16-9 is brought within the later of:
  - (a) Two years after the transfer is made; or
  - (b) Six months after the transfer is or reasonably could have been discovered by the creditor if the creditor:
    - (i) Can demonstrate that the creditor asserted a specific claim against the settlor before the transfer; or
    - (ii) Files another action, other than an action under § 55-16-9, against the settlor that asserts a claim based on an act or omission of the settlor that occurred before the transfer, and the action described in

this sub-subsection is filed within two years after the transfer;

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

(3) In any action described in § 55-16-9, the burden to prove the matter by clear and convincing evidence is upon the creditor;

(4) A person is deemed to have discovered a transfer at the time a public record of the transfer is made, including the conveyance of an interest in real property that is recorded in the appropriate public filing office where the property is located, the filing of a financing statement pursuant to chapter 57A-9, or the filing of a bill of sale or other transfer instrument regarding personal property; or

(5) The filing of a bill of sale or other transfer instrument which conveys personal property to a trust which is governed by this chapter shall be filed in the applicable public filing office determined as follows:

(a) If the transferor is a natural person and is a resident of this state, the personal property transfer instrument shall be recorded in the county in this state where the transferor maintains the transferor's principal residence; and

(b) In all other cases, the personal property transfer instrument shall be recorded in the county in this state where the trustee of the trust maintains a principal residence or principal place of business.

This section and §§ 55-16-9, 55-16-11 to 55-16-13, inclusive, are inseparably interwoven with substantive rights that a deprivation of legal rights would result if another jurisdiction's laws and regulations to the contrary are applied to a claim or cause of action described therein.

**Source:** SL 2005, ch 261, § 10; SL 2008, ch 257, § 17; SL 2012, ch 233, § 16; SL 2016, ch 231, § 24; SL 2017, ch 204, § 22.

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

If property transferred to a spendthrift trust is conveyed to the settlor or to a beneficiary for the purpose of obtaining a loan secured by a mortgage or deed of trust on the property and then reconveyed to the trust within one hundred eighty days of recording the mortgage or deed of trust, for purposes of subdivision 55-16-10(1), the transfer is disregarded and the reconveyance relates back to the date the property was originally transferred to the trust. The mortgage or deed of trust on the property is enforceable against the trust.

**Source:** SL 2005, ch 261, § 11; SL 2012, ch 233, § 17; SL 2016, ch 231, § 25.

**55-16-12. Creditor or other person—Rights with respect to a qualified disposition—Action against trustee, advisor, or trust preparer prohibited.** Notwithstanding any law to the contrary, a creditor, including a creditor whose claim arose before or after a qualified disposition, or any other person has only such rights with respect to a qualified disposition as are provided in §§ 55-16-9 to 55-16-16, inclusive, and no such creditor nor any other person has any claim or cause of action against the trustee, or advisor, described in § 55-16-4, of a trust that is the subject of a qualified disposition, or against any person involved in the counseling, drafting, preparation, execution, or funding of a trust that is the subject of a qualified disposition. In addition to the provisions of § 55-1-43, at no time is a qualified person, as defined in § 55-16-3, personally liable to a creditor of a transferor or any other person for distributions made by the qualified person, before the creditor or person notified the qualified person, in writing, that a claim or cause of action

existed. This applies regardless of whether the distributions are made to or for the benefit of the transferor or a beneficiary during the period in which a creditor or other person could make a claim as provided in § 55-16-10.

**Source:** SL 2005, ch 261, § 12; SL 2012, ch 233, § 18.

**55-16-13. Action against trustee, advisor, or preparer of trust prohibited if action by creditor would be barred—Jurisdiction—Attorneys' fees and costs.** Notwithstanding any other provision of law, no action of any kind, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity against the trustee, or advisor described in § 55-16-4, of a trust that is the subject of a qualified disposition, or against any person involved in the counseling, drafting, preparation, execution, or funding of a trust that is the subject of a qualified disposition, if, as of the date such action is brought, an action by a creditor with respect to such qualified disposition would be barred under §§ 55-16-9 to 55-16-12, inclusive. A court of this state has exclusive jurisdiction over an action brought under a claim for relief that is based on a transfer of property to a trust that is the subject of this section. A court of this state may award attorneys' fees and costs to the prevailing party in such an action. In any action described in this section, the burden to prove the matter by clear and convincing evidence is upon the creditor.

**Source:** SL 2005, ch 261, § 13; SL 2007, ch 247, § 12; SL 2009, ch 252, § 44; SL 2016, ch 231, § 26.

**55-16-14. Multiple qualified dispositions in same trust instrument.** If more than one qualified disposition is made by means of the same trust instrument:

- (1) The making of a subsequent qualified disposition shall be disregarded in determining whether a creditor's claim with respect to a prior qualified disposition is extinguished as provided in § 55-16-10; and
- (2) Any distribution to a beneficiary is deemed to have been made from the latest such qualified disposition.

**Source:** SL 2005, ch 261, § 14.

**55-16-15. Application of chapter.** (1) Notwithstanding the provisions of §§ 55-16-9 to 55-16-14, inclusive, but subject to subdivision (2) of this section, this chapter does not apply in any respect to any person to whom at the time of transfer the transferor is indebted on account of an agreement or order of court for the payment of support or alimony in favor of the transferor's spouse, former spouse, or children, or for a division or distribution of property in favor of the transferor's spouse or former spouse, to the extent of the debt.

(2) If the transferor is married at the time of the transfer, the provisions of §§ 55-16-9 to 55-16-14, inclusive, and this chapter apply to:

- (a) Any of the transferor's separate property transferred to the trust; and
- (b) Any marital property transferred to the trust if the spouse or former spouse was provided with notice in the form set forth in subdivision (3) of this section, or executed a written consent to the transfer after being provided the information set forth in the notice.
- (3) For purposes of the application of this section, a notice of transfer of property to a trust subject to this chapter:
  - (a) Shall also contain the following language, in capital letters, at or near the top of the notice:

YOUR SPOUSE IS CREATING A PERMANENT TRUST INTO WHICH PROPERTY IS BEING TRANSFERRED.

YOUR RIGHTS TO THIS PROPERTY MAY BE AFFECTED DURING YOUR MARRIAGE, UPON DIVORCE (INCLUDING THE PAYMENT OF CHILD SUPPORT OR ALIMONY OR A DIVISION OR DISTRIBUTION OF PROPERTY IN A DIVORCE), OR AT THE DEATH OF YOUR SPOUSE.

YOU HAVE A VERY LIMITED PERIOD OF TIME TO OBJECT TO THE TRANSFER OF PROPERTY INTO THIS TRUST.

YOU MAY, UPON REQUEST TO THE TRUSTEE AT THE ADDRESS BELOW, BE FURNISHED A COPY OF THE TRUST DOCUMENT.

IF YOU HAVE ANY QUESTIONS, YOU SHOULD IMMEDIATELY SEEK INDEPENDENT LEGAL ADVICE.

IF YOU FAIL TO OBJECT WITHIN THE REQUIRED TIME PERIOD, YOU WILL HAVE CONSENTED TO THE TRANSFER OF PROPERTY INTO THIS TRUST.

- (b) Shall contain a description of the property being transferred to the trust and the name of the trust;
- (c) May require that any person who is eligible to receive information pursuant to this section be bound by the duty of confidentiality that binds the trustee before receiving such information from the trustee; and
- (d) Shall be provided by the transferor, the transferor's agent, the trustee, or other fiduciary of the trust.
- (4) If a notice is provided under this section before the property is transferred, the period to commence an action under § 55-16-10 shall commence running on the date of the transfer. If a notice is provided after the date the property is transferred, the period to commence an action pursuant to § 55-16-10 commences running on the date the notice is provided. In no event may the period to commence an action to challenge a transfer under this section and § 55-16-10 exceed the period set forth in § 54-8A-9.
- (5) The exception contained in subdivision (1) of this section does not apply to any claim for forced heirship or legitime.
- (6) Subdivisions (2) to (4), inclusive, of this section apply to any transfer made after June 30, 2014.

**Source:** SL 2005, ch 261, § 15; SL 2011, ch 212, § 17; SL 2013, ch 239, § 19; SL 2014, ch 226, § 20.

**55-16-16. Avoidance of qualified disposition.** A qualified disposition is avoided only to the extent necessary to satisfy the transferor's debt to the creditor at whose instance the disposition had been avoided, together with such costs, including attorney's fees, as the court may allow. If any qualified disposition is avoided as provided in this section, then:

- (1) If the court is satisfied that a qualified person has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition:
  - (a) Such qualified person has a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorney's fees, properly incurred by such qualified person in the defense of the action or proceedings to avoid the qualified disposition. It is presumed that such qualified person did not act in bad faith merely by accepting such property; and
  - (b) The qualified disposition is avoided subject to the proper fees, costs, preexisting rights, claims, and interests of such qualified person, and of any predecessor qualified person that has not acted in bad faith; and
- (2) If the court is satisfied that a beneficiary of a trust has not acted in bad faith, the avoidance of the qualified disposition is subject to the right of such beneficiary to retain any distribution made upon the exercise of a trust power or discretion vested in the qualified person or qualified persons of such trust, which power or discretion was properly exercised prior to the creditor's commencement of an action to avoid the qualified disposition. It is presumed that the beneficiary, including a beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.

**Source:** SL 2005, ch 261, § 16.

**55-17-1. Arrangement qualifying as special spousal trust.** An arrangement is a South Dakota special spousal trust if one or both spouses in a marriage transfer property to a trust, the trust expressly declares that some or all the property transferred is South Dakota special spousal property as provided in this chapter, and at least one trustee is a qualified person. A South Dakota special spousal trust is enforceable without consideration. Both spouses or either spouse may be a trustee. The trust must be signed by both spouses. The trust may be revocable or irrevocable.

For purposes of this section, a qualified person is any person who meets the requirements of §§ 55-3-41 and 55-3-39, but without regard to whether that person is the transferor.

**Source:** SL 2016, ch 231, § 29.

**55-17-2. Required language.** A South Dakota special spousal trust shall contain the following language in capital letters at the beginning of the trust:

THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE, AT THE TIME OF A DIVORCE, AND AT THE DEATH OF YOU OR YOUR SPOUSE. ACCORDINGLY, THIS TRUST AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST AGREEMENT, YOU SHOULD SEEK INDEPENDENT LEGAL ADVICE.

**Source:** SL 2016, ch 231, § 30.

**55-17-3. Classification of property.** Spouses may classify all or any of their property as special spousal property by transferring property to a South Dakota special spousal trust established pursuant to this chapter, and by expressly declaring in the trust that the property is community property. Unless there is a specific provision in the governing instrument stating otherwise, each spouse's respective interest in the special spousal property is fifty percent.

**Source:** SL 2016, ch 231, § 31.

**55-17-4. Amendment and revocation.** A South Dakota special spousal trust may not be amended or revoked unless the trust agreement provides for amendment or revocation, or unless the trust agreement is amended or revoked by a later South Dakota special spousal trust. To amend or revoke the trust, the later South Dakota special spousal trust is not required to declare any property held by the trustee as special spousal property. The amended trust or the revocation is enforceable without consideration. However, notwithstanding the other provisions of this chapter, unless the South Dakota special spousal trust expressly provides otherwise, at any time after the death of the first spouse the surviving spouse may amend the South Dakota special spousal trust with regard to the surviving spouse's property to be disposed of at the surviving spouse's death. For purposes of this section, the term, surviving spouse's property, means the property that consists of the surviving spouse's property that is not South Dakota special spousal property and the surviving spouse's share of the special spousal property determined as of the date of the first spouse's death.

**Source:** SL 2016, ch 231, § 32.

**55-17-5. Application of Internal Revenue Code—Special spousal property defined—Community property classified by another jurisdiction.** For purposes of the application of § 1014(b)(6) of the Internal Revenue Code of 1986, 26 U.S.C. § 1014(b)(6), as of January 1, 2016, a South Dakota special spousal trust is considered a trust established under the community property laws of South Dakota. For purposes of this chapter, the term, special spousal property, means community property for those purposes. Community property as classified by a jurisdiction other than South Dakota transferred to a South Dakota special spousal trust retains its character as community property while in the trust. If the trust is revoked and property is transferred on revocation of the trust, the community property as classified by a jurisdiction other than South Dakota retains its character as community property to the extent otherwise provided by South Dakota law.

**Source:** SL 2016, ch 231, § 33.

**55-17-6. Qualified disposition in trust.** A transfer to a South Dakota special spousal trust may also be a qualified disposition in trust if the transfer complies with the provisions of chapter 55-16.

**Source:** SL 2016, ch 231, § 34.

**55-17-7. Types of transfers to special spousal trust.** In addition to other transfers of property to a South Dakota special spousal trust, property is considered transferred to a South Dakota special spousal trust if the property is subject to a nonprobate transfer on death under an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature and the South Dakota special spousal trust is designated as a beneficiary to receive the property under the transfer. The property is considered the surviving spouse's property that is not South Dakota special spousal property.

**Source:** SL 2016, ch 231, § 35.

**55-17-8. Records.** The trustee of a South Dakota special spousal trust shall maintain records that identify which property held by the trust is South Dakota special spousal property and which property held by the trust is not South Dakota special spousal property.

**Source:** SL 2016, ch 231, § 36.

**55-17-9. Matters upon which spouses may agree.** Except as provided in §§ 55-17-10 and 55-17-11, in a South Dakota special spousal trust, spouses may agree on:

- (1) The rights and obligations in the property transferred to the trust, notwithstanding when and where the property is acquired or located;
- (2) The management and control of the property transferred to the trust;
- (3) The disposition of the property transferred to the trust on dissolution, death, or the occurrence or nonoccurrence of another event; if there is no provision in the governing instrument on disposition of the property transferred to the trust on dissolution, South Dakota law on disposition of property on dissolution applies;
- (4) The choice of law governing the interpretation of the trust; and
- (5) Any other matter that affects the property transferred to the trust and does not violate public policy or a statute imposing a criminal penalty.

**Source:** SL 2016, ch 231, § 37.

**55-17-10. Right of child to support.** Notwithstanding anything contained in § 55-17-9 to the contrary, a South Dakota special spousal trust may not adversely affect the right of a child to support.

**Source:** SL 2016, ch 231, § 38.

**55-17-11. Creditor rights—Good faith between spouses.** Notwithstanding anything contained in § 55-17-9 to the contrary:

- (1) A provision of a revocable South Dakota special spousal property trust does not adversely affect the interest of a creditor unless the creditor has actual knowledge of the trust when the obligation to the creditor is incurred. The interest of a creditor in an irrevocable South Dakota special spousal property trust may be subject to the rights and liabilities of a creditor with respect to transfers under chapter 55-16 as

provided in § 55-17-6;

(2) A spouse shall act in good faith with respect to the other spouse in matters involving South Dakota special spousal property. The obligation under and effect of this section may not be varied by a South Dakota special spousal property trust.

**Source:** SL 2016, ch 231, § 39.

**55-17-12. Bona fide purchasers.** Notwithstanding anything contained in § 55-17-9 to the contrary:

(1) Notice of the existence of a South Dakota special spousal property trust, a marriage, or the termination of a marriage does not affect the status of a purchaser as a bona fide purchaser;

(2) Special spousal property purchased by a bona fide purchaser from a spouse having the right to manage and control the property is acquired free of any claim of the other spouse. The effect of this subsection may not be varied by a South Dakota special spousal property trust.

**Source:** SL 2016, ch 231, § 40.

**55-17-13. Bona fide purchaser defined.** For purposes of § 55-17-12, the term, bona fide purchaser, means a purchaser of property for value who has not knowingly been a party to fraud or illegality affecting the interest of the spouses or other parties to the transaction, does not have notice of an adverse claim by a spouse, and has acted in the transaction in good faith.

For purposes of this section, the term, purchaser, means a person who acquires property by sale, lease, discount, negotiation, mortgage, pledge, or lien, or otherwise deals with property in a voluntary transaction other than making a gift.

A purchaser gives value for property if the property is acquired:

- (1) In return for a binding commitment to extend credit;
- (2) As security for or in total or partial satisfaction of a preexisting claim;
- (3) By accepting delivery under a preexisting contract for purchase; or
- (4) In return for other consideration sufficient to support a contract.

**Source:** SL 2016, ch 231, § 41.

**55-17-14. Unenforceable trusts.** A South Dakota special spousal trust executed during marriage is not enforceable if the spouse against whom enforcement is sought proves that:

- (1) The trust was unconscionable when made;
- (2) The spouse against whom enforcement is sought did not execute the South Dakota special spousal trust agreement voluntarily; or
- (3) Before execution of the South Dakota special spousal trust agreement, the spouse against whom enforcement is sought:
  - (a) Was not given a fair and reasonable disclosure of the property and financial obligations of the other spouse;
  - (b) Did not voluntarily sign a written waiver expressly waiving right to disclosure of the property and financial obligations of the other spouse beyond the disclosure provided; and
  - (c) Did not have notice of the property or financial obligations of the other spouse.

Whether a South Dakota special spousal trust is unconscionable is determined by a court as a matter of law.

**Source:** SL 2016, ch 231, § 42.

**55-18-1. Definitions.** Terms used in this chapter mean:

- (1) "Bind" or "bound," to consent, receive notice or service of process, approve, agree, object, resist, waive, or demand for or as a person with the same binding and conclusive effective as if the person represented had;
- (2) "Conflict of interest," a situation in which a representative's interest in the trust causes a significant likelihood that a reasonable person would disregard a representative's duty to a represented beneficiary;
- (3) "Co-representative," more than one simultaneously acting representative of the same class pursuant to § 55-18-9, as when co-guardians are acting;
- (4) "Conservator," a person appointed pursuant to chapter 29A-5 or equivalent provisions of another jurisdiction's laws including a temporary conservator, a guardian ad litem, and a limited conservator;
- (5) "Fiduciary," a person defined by subdivision 21-22-1(3), except as used in § 55-18-17;
- (6) "Guardian," a person appointed pursuant to chapter 29A-5 or equivalent provisions of another jurisdiction's laws including a temporary guardian and a limited guardian;
- (7) "Incapacitated" or "incapacity," lacking the capacity to meaningfully understand the matter in question because of a mental or physical impairment;
- (8) "Interest," a beneficial interest as defined by subdivision 55-1-24(1) but including the holder of a power of appointment, and any power to remove or replace a fiduciary or a representative;
- (9) "Interested beneficiary," a person who, on the date the person's qualification is determined:
  - (a) Is a current distributee or permissible distributee of trust income or principal;
  - (b) Would be a distributee or permissible distributee of trust income or principal if the interests of the current distributees terminated on that date;
  - (c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date;
  - (d) Holds a power of appointment; or
  - (e) Would hold a power of appointment if the interests of the current distributees terminated on that date or the interests of the persons currently holding a power of appointment under this subdivision terminated on that date;
- (10) "Knows" or "knowingly," actual knowledge of the fact in question;
- (11) "Minor," any person who has not attained the age of eighteen. The term includes a minor with an incapacity;
- (12) "Nonjudicial settlement," an agreement, release, or other action whether or not approved by a court, which may include, without limitation:
  - (a) The interpretation or construction of the terms of a trust;
  - (b) The approval of any fiduciary's report or accounting;
  - (c) Direction to any fiduciary to refrain from performing a particular act or the grant to a fiduciary of any necessary or desirable power;
  - (d) The resignation or appointment of any fiduciary;
  - (e) The determination of a fiduciary or a representative's compensation;
  - (f) The transfer of a trust's principal place of administration or situs;
  - (g) The liability of any fiduciary's action or omission relating to a trust;
  - (h) Partial or final settlement agreements regarding a trust or its administration; or
  - (i) The modification, amendment, reformation, or termination of a trust;
- (13) "Notice" or "notifies," notice provided personally, by mail, postage prepaid, addressed to the person's last known post office address, or electronically in accordance with § 15-6-5(d);
- (14) "Notifier," a person who is undertaking notice or proposing consent with regard to a matter concerning a trust;
- (15) "Power of appointment," a power defined by § 55-1-12;
- (16) "Proceeding," any judicial or nonjudicial trust proceeding, accounting, termination, modification, reformation, decanting, settlement, nonjudicial settlement, and any proceeding conducted pursuant to chapter 21-22 or title 29A which concerns a trust;
- (17) "Protected person," a person other than a minor for whom a guardian or conservator is appointed;
- (18) "Reasonably available," with respect to a person, that the person can be identified and located with the exercise of reasonable diligence;
- (19) "Representative," a person who may bind another person pursuant to § 55-18-9;
- (20) "Trust," an express inter vivos or testamentary trust;
- (21) "Uninterested beneficiary," a beneficiary other than an interested beneficiary.

**Source:** SL 2017, ch 208, § 2.

**55-18-2. Application of chapter to proceedings involving persons interested in trust.** Notwithstanding the provisions of § 15-6-17(c), the provisions of this chapter apply to any proceeding involving any person interested in a trust.

**Source:** SL 2017, ch 208, § 1.

**55-18-3. Effect of provisions of chapter. In any proceeding:**

- (1) Any notice, governing instrument, accounting, report, or other information which is provided to a representative has the same effect as if the same was given to the person represented;
- (2) The consent of a representative has the same effect as if the person represented had consented;
- (3) A representative may otherwise bind the person represented; and
- (4) A finding, decree, judgment, ruling, or order in a judicial proceeding is binding and conclusive on all persons upon whom notice or service of process is not required pursuant to this chapter.

**Source:** SL 2017, ch 208, § 3.

**55-18-4. Conditions under which representative may not bind person represented.** Notwithstanding the provisions of § 55-18-3, no representative may bind the person represented if, prior to the representative binding the person in the matter in question:

- (1) The court finds that the person cannot be adequately represented pursuant to § 55-18-19;
- (2) The representative refuses to act pursuant to § 55-18-11;
- (3) The representative has been removed by a person with power to remove the representative; or
- (4) The represented person notifies:
  - (a) The trustee;
  - (b) The notifier; and
  - (c) The representative, that the represented person will not be bound by the representative.

**Source:** SL 2017, ch 208, § 4.

**55-18-5. Notice, service of process, and consent not required of certain persons.** Neither notice nor service of process on, nor consent to, any matter in any proceeding is required from:

- (1) An unborn individual;
- (2) An unascertained person;
- (3) The potential appointee of a power of appointment;
- (4) The potential taker in default of a general power of appointment;
- (5) An uninterested beneficiary; and
- (6) A person bound by a representative.

Notwithstanding subdivisions (1) and (2), if no interested beneficiary, or representative thereof, would otherwise receive notice or provide consent with respect to the matter in question, a representative of an unborn or unascertained person shall act pursuant to § 55-18-9.

Notwithstanding subdivision (5), with respect to the matter in question, notice is required to, or consent is required from, an uninterested beneficiary who does not have a substantially identical interest with one or more interested beneficiaries.

**Source:** SL 2017, ch 208, § 5.

**55-18-6. Notice or consent respecting co-representatives.** When notice is made on, or consent obtained from, co-representatives, notice on, or consent from, all acting co-representatives is required except when the terms of the co-representatives' authority provide that the co-representatives may act independently or by other means.

However, when a representative is acting pursuant to subdivision 55-18-9(3), (4), or (7), consent from or notice to one representative is sufficient to bind the person represented.

**Source:** SL 2017, ch 208, § 6.

**55-18-7. Demand for notice.** Following the commencement of a judicial proceeding, if a beneficiary timely files

a demand for notice with the court, notice shall be given to the beneficiary unless otherwise ordered by the court.

**Source:** SL 2017, ch 208, § 7. ;

**55-18-8. Notice to Department of Social Services.** The Department of Social Services shall be provided with notice in any proceeding in which an interested beneficiary of a trust may owe a debt to the department pursuant to § 28-6-23. An interested beneficiary is not considered a person who may owe a debt to the department solely on account of the person's residence in this state.

**Source:** SL 2017, ch 208, § 8.

**55-18-9. Persons who may bind others.** Persons who may bind others are as follows:

- (1) Except as provided in subdivision 55-18-20(2), a conservator may bind a minor or protected person;
- (2) A guardian may bind the minor or protected person if no conservator of the minor or protected person has been appointed;
- (3) A parent may bind the parent's minor or unborn child if no conservator or guardian for the child has been appointed;
- (4) A person who has assumed responsibility for a minor child's care or custody may bind the child if no conservator or guardian for the child has been appointed and neither parent is living;
- (5) A trustee responsible for the management of all or a significant portion of the estate of an incapacitated individual other than a minor may bind the individual if no conservator or guardian for the individual has been appointed;
- (6) A custodian under chapter 55-10A or equivalent provisions of another jurisdiction's laws who is responsible for all or a significant portion of the estate of a minor may bind the minor if no conservator or guardian for the minor has been appointed;
- (7) An individual who has assumed responsibility for an incapacitated individual other than a minor, including a spouse of an incapacitated individual, may bind the individual if no conservator or guardian for the individual has been appointed and no agent has authority to act with respect to the matter in question, but an individual who is an employee of any assisted living, hospital, surgery center, nursing home, adult foster care, adult day care, or any other custodial care institution where the incapacitated person is residing or receiving services may not act as a representative pursuant to this subdivision;
- (8) Except as provided in subdivision 55-18-20(1), an agent having authority to act with respect to the matter in question may bind the principal if the principal is incapacitated or not reasonably available;
- (9) When a trust is a beneficiary of a trust, the trustee of the trust which is a beneficiary may bind the trust and the beneficiaries thereof without regard to whether the trust has yet been funded or the trustee has begun acting as trustee;
- (10) When a decedent's estate is a beneficiary of a trust, the personal representative of the estate may bind the estate and the persons interested in the estate;
- (11) Except as provided in § 55-18-23, a person designated in the governing instrument to represent another person or class of persons may bind that person or class of persons;
- (12) Except as provided in § 55-18-23, if a fiduciary or other person is authorized by the terms of the governing instrument to appoint a representative and the authorized fiduciary or other person appoints a representative in writing, the representative may bind the person or class of persons identified in the appointment;
- (13) Unless otherwise adequately represented pursuant to the foregoing provisions of this section, a minor, incapacitated individual, unborn individual, or a person who is not reasonably available, may be bound by a person having a substantially identical interest with respect to the matter in question;
- (14) A person described in subsection 55-18-1(9)(a) may bind beneficiaries described in subsection 55-18-1(9)(b) and (c), if, with respect to the matter in question:
  - (a) The person agrees in writing to serve as a representative for the represented beneficiary either with regard to a particular matter, for a particular period of time, generally in any matter or future matter, or for an indefinite period of time;
  - (b) The interests of the person are substantially identical to the interests of the represented beneficiary; and
  - (c) The person does not have a conflict of interest;
- (15) A person described in subsection 55-18-1(9)(d) may bind beneficiaries described in subsection 55-18-1(9)(e);

(16) A court representative appointed pursuant to § 55-18-19 may bind the person that the representative represents; and

(17) Without diminishing the authority of an attorney to act on behalf of the attorney's client, an attorney representing a person may bind the person that the attorney represents within the scope of the attorney's representation.

When more than one class of persons may act as a representative, such as where persons may act under different subdivisions of this section, the notifier has discretion in selecting which class of representatives bind the person represented, except as otherwise provided in the governing instrument. The governing instrument may provide that representatives acting pursuant to subdivisions (11) and (12) may act to the exclusion of any other class or classes of representatives, in certain circumstances, or in all circumstances, other than representatives acting pursuant to subdivisions (16) and (17).

**Source:** SL 2017, ch 208, § 9.

**55-18-10. Disclosure of information regarding representatives.** In a judicial proceeding, the petitioner shall set forth information with respect to each representative, each person the representative represents, and the authority by which each representative acts under this chapter.

In a nonjudicial proceeding, the notifier shall set forth information with respect to each representative, each person the representative represents, the authority by which each representative acts under the provisions of this chapter, and a notification that a representative may decline to act pursuant to § 55-18-11.

No information need to be set forth regarding any person described in subdivisions (1) to (5), inclusive, of § 55-18-5 unless a representative is acting for those persons.

**Source:** SL 2017, ch 208, § 10.

**55-18-11. Refusal to act as representative.** Any representative may decline to act as a representative as to the matter in question by timely expressing the representative's refusal to the notifier.

A notifier may specify a time of not less than three days in which the representative may decline to act as a representative.

The governing instrument may specify a time in which the representative may decline to act as a representative.

A representative may waive in writing the representative's right to decline to act in the matter in question.

**Source:** SL 2017, ch 208, § 11.

**55-18-12. Petition for advance approval of action.** A representative may petition the court for an order approving the representative's actions prior to or in advance of the representative's action, upon such notice as the court may order.

**Source:** SL 2017, ch 208, § 12.

**55-18-13. Representative with conflict of interest.** A representative with a conflict of interest with respect to the matter in question may bind the person that the representative represents notwithstanding any cause of action that the represented person may have against a representative who acts knowingly.

**Source:** SL 2017, ch 208, § 13.

**55-18-14. Disclosure of conflict of interest by representative.** If a representative knows that the representative has a conflict of interest with respect to the matter in question, the representative shall timely disclose the nature of the conflict of interest:

- (1) In a judicial proceeding to the interested parties and the court; or
- (2) Otherwise to the notifier and the trustee.

**Source:** SL 2017, ch 208, § 14.

**55-18-15. Disclosure of conflict of interest by notifier.** Unless notice of a conflict of interest has been carried out pursuant to § 55-18-14, if the notifier knows that a representative has a conflict of interest with respect to the matter in question, the notifier shall timely disclose the nature of the conflict of interest:

- (1) In a judicial proceeding to the interested parties and the court; or
- (2) Otherwise, to the representative, the trustee, and, to the extent the person represented can be reasonably notified, to the person represented along with notification that that person may elect not to be bound pursuant to subdivision 55-18-4(4).

**Source:** SL 2017, ch 208, § 15.

**55-18-16. Court findings regarding conflict of interest—Immunity of representative from liability.** In a judicial proceeding, if the court has been notified of a representative's conflict of interest or potential conflict of interest, the court may find that the representative conflict of interest or potential conflict of interest is immaterial in view of the facts and circumstances and order that the representative may act as a representative notwithstanding the conflict of interest or potential conflict of interest.

The court's findings pursuant to this section are binding and conclusive with regard to the matter in question and, to the extent ordered by the court, absolve the representative of liability.

In a nonjudicial proceeding, unless otherwise provided in the governing instrument, the trustee may find that a representative's conflict of interest or potential conflict of interest is immaterial in view of the facts and circumstances and direct the representative to act as a representative notwithstanding the conflict of interest or potential conflict of interest.

The trustee's findings pursuant to this section are binding and conclusive with regard to the matter in question and, to the extent provided by the trustee in writing, absolve the representative of liability.

**Source:** SL 2017, ch 208, § 16.

**55-18-17. Discretion of representative—Fiduciary status.** A representative may make a decision with broad discretion and no representative is liable for an action or omission unless the representative:

- (1) Acts dishonestly;
- (2) Acts with an improper motive; or
- (3) Fails, if under a duty to do so, to act.

A representative may represent any number of persons. A representative is not a fiduciary solely by reason of being a representative unless otherwise ordered by the court, expressly affirmed in writing by the representative, or provided in the governing instrument.

The provisions of this section do not expand or diminish the duties of an attorney.

**Source:** SL 2017, ch 208, § 17.

**55-18-18. Compensation of representative.** A representative is entitled to reasonable compensation as determined by the trustee except as otherwise provided in the governing instrument.

**Source:** SL 2017, ch 208, § 18.

**55-18-19. Appointment of court representative.** In a judicial proceeding, if the court determines that a person cannot be adequately represented by a representative, the court may order that the person be provided notice or may order the appointment of a court representative or a replacement court representative to bind the person. The basis for a finding that representation is inadequate shall be set forth specifically in an order and may include, by way of example, a finding that a representative has a material conflict of interest or acted with hostility to the interest of the person represented.

A trustee, a beneficiary, or, if authorized by the governing instrument, a fiduciary other than a trustee, may petition the court for the appointment of a court representative. A court representative has the authority to act as a representative in any proceeding unless otherwise ordered by the court.

Notwithstanding § 55-18-5, the court may appoint a court representative to bind uninterested beneficiaries, unborn persons, unascertained persons, or the potential appointees or the takers in default of a power of appointment.

Notwithstanding § 55-18-20, the court may appoint a court representative to bind a settlor

**Source:** SL 2017, ch 208, § 19.

**55-18-20. Limitations on representative's authority to bind settlor and settlor's authority to bind beneficiary.** A settlor may be represented by a representative in amending, terminating, or revoking an inter vivos revocable trust only when the representative is:

- (1) An agent under a written power of attorney when the settlor is incapacitated or not reasonably available and to the extent expressly authorized by the power of attorney with specific reference to the trust and expressly authorized by the terms of the governing instrument; or
- (2) A conservator only to the extent authorized or approved by order of the court pursuant to § 29A-5-420 or equivalent provisions of another jurisdiction's laws.

In other respects, a settlor may be represented by a representative only pursuant to subdivisions 55-18-9(5), (11), (16), and (17) and pursuant to subdivision 55-18-9(1) to the extent authorized or approved by the court.

A settlor may not bind a beneficiary with respect to a trust termination pursuant to § 55-3-24 or 55-3-30 or a trust modification pursuant to § 55-3-24 or 55-3-30 where the ability to bind the beneficiary to the proposed trust modification would constitute a retained interest pursuant to 26 U.S.C. § 2036, as of January 1, 2017, or a revocable transfer pursuant to 26 U.S.C. § 2038 as of January 1, 2017.

**Source:** SL 2017, ch 208, § 20.

**55-18-21. Limitations on trustee's authority to bind beneficiary.** Except as provided in subdivisions 55-18-9(5), (11) and (16), a trustee may not bind a beneficiary of the trustee's trust.

**Source:** SL 2017, ch 208, § 21.

**55-18-22. Unauthorized practice of law not permitted.** Nothing in this chapter, permits the unauthorized practice of law or diminishes the provisions of § 16-16-19.

**Source:** SL 2017, ch 208, § 22.

**55-18-23. Provisions of governing instrument.** A governing instrument may require additional notification or consent than otherwise required by law. Unless expressly authorized by the governing instrument, a person designated by a governing instrument to represent another person or class of persons may not represent such person or class of persons while that designee is serving as a trustee or co-trustee of such trust.

A governing instrument which authorizes a person or fiduciary to appoint a representative may also identify or describe a person, several persons, a class of persons, or a description of persons who may not be appointed as representatives as to all or certain represented persons or matters or during a period of time.

**Source:** SL 2017, ch 208, § 23.

**55-18-24. Construction with chapter 29A-1.** With regard to a testamentary trust proceeding governed by title 29A, in the event of any conflict between this chapter, and chapter 29A-1, the provisions of this chapter, shall prevail.

**Source:** SL 2017, ch 208, § 24.

**55-18-25. Liability of notifier.** No notifier is liable for undertaking any additional notification or seeking additional consent than required by law or the governing instrument.

**Source:** SL 2017, ch 208, § 25.

**55-18-26. Liability of fiduciary.** No fiduciary is liable for reliance on the outcome or resolution of any proceeding conducted under this chapter, unless the fiduciary knowingly disregarded the lack of a representative's authority to act with regard to the matter in question.

**Source:** SL 2017, ch 208, § 26.

# Administrative Rules Article 20-07 Banking

## CHAPTER 20-07-22 TRUST COMPANIES

- 20:07:22:01 Supervision fee schedule.  
 20:07:22:02 Remittance.  
 20:07:22:03 Private trust company defined.  
 20:07:22:04 Trust administration defined.

**20:07:22:01. Supervision fee schedule.** A state-chartered trust company shall pay an annual fee for supervision at the rate of seven cents per \$10,000 of total assets under management, administration, or custody, as reported as of the end of December. However, the minimum annual fee is \$3,750 and the maximum annual fee is \$20,000 for private trust companies and the minimum annual fee is \$4,500 and the maximum annual fee is \$30,000 for public trust companies. Trust companies shall also pay the actual cost for each on-site examination and the additional supervision costs for any trust company operating under an enforcement action. For purposes of this section, the term enforcement action does not include a resolution adopted by a trust company to implement findings identified through an examination conducted by the division.

The division shall maintain on its website a separate fee calculator for public and private trust companies to be used for the purpose of calculating the annual supervision fee owed by each trust company. The formulas used to operate the fee calculator shall be available upon request.

**Source:** 30 SDR 193, effective June 15, 2004; 31 SDR 87, effective December 19, 2004; 36 SDR 99, effective December 10, 2009; 39 SDR 55, effective October 8, 2012.

**General Authority:** SDCL 51A-2-36, 51A-6A-33.

**Law Implemented:** SDCL 51A-6A-33.

**20:07:22:02. Remittance.** A state-chartered trust company shall remit the annual fee with the report of trust assets to the division within 30 days following December 31.

**Source:** 30 SDR 193, effective June 15, 2004; 31 SDR 87, effective December 19, 2004.

**General Authority:** SDCL 51A-2-36, 51A-6A-33.

**Law Implemented:** SDCL 51A-6A-33.

**20:07:22:03. Private trust company defined.** A private trust company is one that does not engage in trust company business with the general public or otherwise hold itself out as a trustee or fiduciary for hire by advertising, solicitation, or other means and instead operates for the benefit of a family or families, regardless of whether compensation is received or anticipated.

**Source:** 36 SDR 208, effective June 30, 2010.

**General Authority:** SDCL 51A-2-13.

**Law Implemented:** SDCL 51A-6A-1.

**20:07:22:04. Trust administration defined.** For purposes of SDCL 51A-6A-11.1, trust administration in South Dakota means that at least three of the following are performed wholly or partly in South Dakota for the accounts under the management, administration, or custody of the trust company:

- (1) Annual account reviews;
- (2) Annual investment reviews;
- (3) Trust accountings;
- (4) Account correspondence;
- (5) Completing trust account tax returns; or
- (6) Distributing account statements.

Notwithstanding the definition above, trust administration as set forth in SDCL 51A-6A-11.1(4) may be satisfied by other means if the director determines the nature and degree of risks presented by the trust company are low based upon a review of the size, nature, and number of accounts administered by the trust company and the number of employees or persons performing services for the trust company in South Dakota.

If the size, risk profile, or rate of growth of a trust company changes, the director may, to the extent it is deemed necessary, require additional administration be performed in South Dakota to satisfy the requirement in SDCL 51A-6A-11.1(4) as defined by this section.

**Source:** 36 SDR 208, effective June 30, 2010; 39 SDR 55, effective October 8, 2012.

**General Authority:** SDCL 51A-6A-11.1.

**Law Implemented:** SDCL 51A-6A-11.1, 55-3-39