



## **SOUTH DAKOTA TRUST LAW UPDATE - 2021 Edition**

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The landscape of the 2021 South Dakota 96th Legislative Session was undeniably altered by the pandemic. Despite the pandemic, the Legislature met in person, accommodated remote testimony and passed an array of Bills that impacted the South Dakota trust industry which are effective July 1, 2021, all of which (and more) will be discussed in the 2021 Edition of GPNA's Trust Law Update.

During my annual testimony on trust legislation to the legislature, I compare the process of updating South Dakota's trust statutes to weeding the garden to keep it healthy and bountiful. The annual package of legislative changes resulting from the work of the Governor's Task Force on Trust Administration and Reform ("TTF") yields the statutory equivalent of a healthy and productive garden for families, fiduciaries and other folks to harvest toward the goal of achieving their objectives.

Two Bills were enacted this past session affecting South Dakota trust law and trust companies - Senate Bill 9 (the SD Division of Banking's ("DOB") annual legislative package) and Senate Bill 78 (the TTF's annual legislative package). In addition to these legislative enactments, this session was notable for what was NOT accomplished regarding passage of a statutory framework to implement the two initiated measures regarding legalization of marijuana. However a notable exception was passage of HB 1203, which authorizes banks to engage in business with hemp and marijuana licensees and those persons engaging in lawful business dealings with such licensee. Unfortunately, HB 1203 does not extend such protections to trust companies.

The DOB also issued Memorandum #10-008 on January 5, 2021, providing guidance on FinCen Final Rule dated September 25, 2020. The DOB memo provides trust companies essential guidance in the development and implementation of a compliant AML Program.

### **Notable Items in Senate Bill 78 (the TTF legislation) include:**

- SDCL 55-3-24 was amended to make it clear a trust can be modified by both a court order and by agreement of the parties (AKA a Non-Judicial Settlement Agreement). The NJSA does NOT require court approval.

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- Two new statutes were enacted to codify the landmark decision, *Matter of Cleopatra Cameron Gift Trust (2019 SD 35)*. SDCL 55-3-46.1 makes it clear that a trust governed by South Dakota law cannot be undone by the laws of another state. SDCL 55-3-49 provides a roadmap regarding the enforceability of a foreign judgement (AKA out-of-state judgement).
- SDCL 55-1B-4 was amended to make it clear a Trust Advisor is a fiduciary and owes a fiduciary duty.
- SDCL 55-2-12 was amended to add protections to successor trustees.
- SDCL 55-1A-32 was amended to clarify that a former trustee has no duty to defend the trust.
- SDCL 55-1-12 was revised to reinforce common law that a holder of a power of appointment is not a fiduciary under South Dakota law. This revision is important to accommodate grantors engaging in state income tax planning.
- SDCL 55-5-9 & 55-5-16 revisions simply add the Trust Protector to the list of people who are authorized to act on the matters addressed in these statutes. The statutes address disposition or retention of closely held entity assets and the delegation of responsibilities to others.
- SDCL 55-1B-2 was amended to provide further protections to an excluded fiduciary in a directed trust arrangement on tax matters.
- SDCL 55-16-2 was amended to add the grantor's enjoyment of a power to reacquire the trust corpus by substituting property of equivalent value to the list of powers that can be retained by the grantor without adversely impacting the status of the trust as a qualified DAPT under South Dakota law.

**Notable Items in Senate Bill 9 (the DOB legislation) include:**

- SDCL 51A-6A-7.1 was added to make it clear that corporate and LLC law applies to trust companies.
- SDCL 51A-6A-29.1 was added to limit trust company business activities as a companion to SDCL 51A-6A-29, which sets forth a comprehensive list of statutorily permissible trust company powers.

There you have it. Another eventful Legislative Session and aftermath is now in the books. Planning is under way for the next Legislative Session. If you have any recommendations for legislation or need additional information on 2021 legislation, please don't hesitate to contact me.



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