

Debora A. Weinert
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Edward Jones
MAKING SENSE OF INVESTING

Dt: 03-28-2008
To: Legal & Finance Committee
Fr: Debora Weinert

Re: Trustee and Trust Agreement required to complete
Rapid City 457(b) Deferred Compensation Plan
(Plan approved by Common Council 02-04-2008)

Members of the Committee:

In order to actually put in place the Deferred Compensation option discussed before this body on 01-30-2008 and approved by the Common Council on 02-04-2008, it is necessary to execute an agreement establishing where the employees' money and investments will be held in trust. The additional step of resolving to name an additional Trustee on the Plan is also required due to the language in the original Common Council resolution creating the original plan in 1984.

Please refer to the Common Council resolution dated 11-05-1984, a copy of which is attached for your convenience. In that Resolution ICMA-Retirement Corporation (ICMA-RC) is named Trustee for the plan. Obviously ICMA-RC will not agree to be trustee for a competing option. It is then necessary to create a new resolution naming an additional Trustee. ICMA-RC will continue to be Trustee for the assets held within the ICMA-RC option, and the new Trustee will be Trustee for the assets held within the new Edward Jones/Digital Retirement Solutions (EJ/DRS) option.

A Custodial Trust Agreement was presented to the City Attorney in February. This Custodial Trust Agreement named the Finance Officer and Mayor as Trustees and provided for MG Trust Company to provide custodial trust services. We believed this Agreement was appropriate based on SDCL 9-16-28, a copy of which is attached. This agreement was rejected by the City Attorney primarily due to the fiduciary responsibility that would be placed upon the Finance Officer and the Mayor.

In the alternative, a Directed Trust Agreement was provided. The Directed Trust Agreement names MG Trust Company as Trustee of the assets it would hold on behalf of Rapid City employees utilizing the EJ/DRS option.

Mr. Green has reviewed the Directed Trust Agreement and has provided an itemized list of his concerns regarding this agreement. The following text will include the verbiage of the agreement, Mr. Green's comment(s) regarding the verbiage, and responses from me, Digital Retirement Solutions or MG Trust Company as appropriate.

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1.04 Board. "Board" means the Board of Directors of the Company, as from time to time constituted, or such other persons or group of persons referred to in Section 5.03 hereof in the case of a company that is not a corporation."

Green: Definition of "Board" doesn't really apply to municipalities (this is not insurmountable.)

Response: Board of Directors certainly equates to a Common Council in the Aldermanic Form of Government as described in SDCL Title 9 Municipal Government, Chapter 8 Aldermanic Form of Government. The term 'Company' as referring to a corporation, does apply as municipalities are municipal corporations as defined in SDCL Title 9 Municipal Government, Chapter 2 Classes of Municipalities.

Article II: Establishment and Purpose of the Trust

- 2.01 Designation.** The Company hereby establishes the Trust. The Trust shall consist of an initial contribution of money or other property, acceptable to the Trustee in its sole discretion, made by the Company or transferred from a previous trustee under the Plan and such additional sums of money or other property acceptable to the Trustee in its sole discretion, as shall from time to time to be delivered to the Trustee under the Plan, all investments made therewith and proceeds thereof, and all earnings and profits thereon, less the payments that are made by the Trustee as provided herein.
- 2.02 Purpose.** This Trust is part of the Plan. The purpose of this Trust is to implement the Plan, which provides certain benefits for the Employer's Eligible Employees who become Participants.
- 2.03 Exclusive Benefit.** This Trust shall be maintained for the exclusive benefit of Participants and their Beneficiaries and, to the extent permitted by the Plan, the payment of reasonable Plan administration expenses. Except as provided under applicable law or otherwise provided in Section 2.04 below, no part of the Trust Funds shall be used for, or diverted to any purpose other than that stated in this Section 2.03.
- 2.04 Return of Amounts to the Company.** The Trustee will return contributions to the Company if the Company or the Plan Administrator provides Instructions to the Trustee to do so. The Company is solely responsible for ensuring that an Instruction to return any amount to the Company meets all applicable legal requirements, including those of ERISA, as applicable. The Trustee has no duty or responsibility to question, and may conclusively rely upon any such Instruction.

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2.05 Superseding Effect of the Trust Agreement. To the extent that there are any inconsistencies between this Trust Agreement and any provisions set forth in the Plan document pertaining to a matter addressed herein, this Trust Agreement shall control, and its provisions shall supersede all other provisions in the Plan pertaining to the duties, responsibilities and obligations and liabilities of the Trustee. Further, this Trust Agreement shall operate as an amendment of the Plan that replaces all references to trustee discretion in the Plan with references to the discretion of the Plan Administrator. Under no circumstances shall the terms of the Plan be interpreted as conferring any investment or administrative discretion on the Trustee.

GREEN: As I understand the current situation, the trust already exists and MG is being appointed a co-trustee. The provisions of 2.01, 2.02 and 2.05 in particular should reflect the co-trustee status. In section 2.05, the language is overly broad in that it will eliminate the current trustee (ICMA) when ICMA will continue as a co-trustee with MG. This is correctable in my view.

Response: A separate trust is being established with MG Trust Company to receive Plan contributions (ongoing deferrals, rollovers from ICMA, etc.), hold the investments being offered as an alternative to ICMA, process distributions, etc.

While the Plan does intend to appoint two trustees, ICMA-RC and MG Trust Company, neither trustee is acting as a directed trustee on assets not held in "their" trust. Naming the two companies co-trustees is not technically correct, as each will act separately with regard to only the assets held in their respective trust accounts.

Article X of the current 457 Plan and Trust Document provides for additional funding vehicles with the provision that it "serves in addition to any other retirement plan, pension, or benefit plan or system presently in existence or hereinafter established..."

3.03 No Separate Trusts. There shall be no separate accounting within the Trust for each Employer, and all assets held by it and contributions received by it, and all such contributions and accruals thereto from time to time, shall be held by the Trustee hereunder in the Trust Fund and shall be invested and applied by it as herein provided, and all of the assets in the Trust fund shall be available to pay benefits that become payable with respect to any Employer hereunder. Notwithstanding the foregoing, amounts held within the Trust with respect to frozen or restricted funds will be accounted for separately.

GREEN: While the heading is "No Separate Trusts" the language references separate accounting within the trust. I think the trustee has to maintain some form of separate accounting, even though all assets are held in a single trust. Something is amiss with this provision.

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Response: This provision doesn't actually apply to this Plan since there are not multiple "employers" making contributions on behalf of participants. If this were a multiple-employer plan where several companies sponsored a single retirement plan together, the trustee is simply saying they do not provide separate accounting within the Trust for each employer. Employer-level accounting (payables, receivables, etc.) would be the responsibility of the third-party administrator/record keeper, a firm like DRS.

3.05(b) Limitations. The Trustee shall neither be responsible for the adequacy of the Trust Fund to discharge any payments and liabilities under the Plan, nor be required to make any disbursements under the Plan in excess of the net realizable value of the assets of the Trust allocable to such Plan at the time of the disbursement. The Trustee shall not be required to make any disbursement in cash unless the Designated Representative and/or the Plan Administrator has/have provided Instructions as to the assets to be converted to cash for the purpose of making the disbursement.

GREEN: Trustee has to be responsible for maintaining adequate assets to discharge payments and liabilities to the participants in the plan. (This is a real issue.)

Response: The provision is actually not an issue at all. The City's 457(b) Plan is a defined contribution plan being valued on a daily basis. This means that the Plan is, in essence, 100% funded at all times. If a terminated participant requests a distribution from the plan, the "investments" in their account are liquidated (converted to cash) at the current day's valuation and the account is distributed in the manner in which the participant elected (rollover to an IRA, rollover into another plan, paid to them, etc.)

An example in which this provision might apply would be in the case of a defined benefit (pension) plan. A defined benefit plan is a retirement plan that promises a specific "benefit" at retirement usually defined in terms of such factors as salary and years of service. Since the "benefit" is not determined solely by allocated contributions and investment earnings (as in a defined contribution plan), the sponsor (employer) – not the employee – bears the investment risk.

The Trustee is simply stating in this provision that they cannot make payments or disbursements for the Plan in excess of the actual Plan assets in the Trust.

4.02(b) Trustee's Powers of Investment and Management. The Plan Administrator shall have the exclusive authority and discretion to select the investments pursuant to Section 4.03, and to provide Instructions to the Trustee regarding investment of contributions hereunder unless an Investment Manager is appointed for such purpose. If permitted under the Plan, Participant directions regarding investments shall be furnished to the Plan Administrator under procedures

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adopted by the Company and/or the Plan Administrator consistent with the Plan document, and the Designated Representative and/or the Plan Administrator shall provide Instructions to the Trustee regarding the investment of such amounts. To the extent provided under ERISA Section 404(c), the Trustee shall not be liable for any loss, or by reason of any breach, which results from such Participant's exercise of control. If a Participant who has the right to direct investments under the terms of the Plan fails to provide such direction to the Plan Administrator, the Plan Administrator shall direct the investment of such Participant's accounts. The Designated Representative and/or the Plan Administrator shall maintain records showing the interest of each Participant and/or Beneficiary in the Trust Fund unless the Trustee enters into a written agreement with the Company to keep separate accounts for each such Participant and/or Beneficiary. The Trustee shall have no duty or responsibility to review, make recommendations, or otherwise render advice regarding investments made pursuant to Instructions received from the Plan Administrator, and shall be required to act only upon receipt of such Instructions.

GREEN: Will Trustee have responsibility to keep separate accounts for each employee? See also the comment to section 3.03 above.

Reponse: No. The Trustee will be responsible for plan-level accounting for the assets in the Trust. DRS will be responsible for the participant-level accounting.

For a simple, graphic representation of how the accounting is handled, please refer to the chart which follows this text.

4.05 Power to Do All Necessary Acts. To the extent not inconsistent with the express provisions hereof, enumeration of any power herein shall not be by way of limitation, but shall be cumulative and construed as full and complete power in favor of Trustee. In addition to the authority specifically herein granted, the Trustee shall have such power to do all acts as may be deemed necessary for full and complete management of the Trust Fund and appropriate to carry out the purposes of this Trust Fund, and shall further have all powers and authorities conferred on trustees by the laws of the State of Colorado.

Green: Trustees authority governed by the law of Colorado.

Response: Trustee's authority is governed by the State of Colorado because MG Trust Company is a state-chartered trust company regulated by the Colorado Department of Regulatory Agencies, Division of Banking. The governing law cannot be changed, however we see the risk of potential litigation minimal as MG Trust Company has an outstanding record and reputation.

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MG Trust Company is a wholly-owned subsidiary of Matrix Financial Solutions, Inc. They have over \$94 billion under their care, serve over 35,000 separate retirement plans and work with over 160 different third-party administrators and record keepers. They have maintained a rating of "in good standing" with the Division of Banking. They are audited annually by the State of Colorado and retain Deloitte & Touche to conduct an independent audit annually. There has never been an irregularity or problem identified by either auditing entity.

In response to the concerns regarding governing law, MG Trust Company issued the following statement for your consideration:

"MG Trust has never been the subject of litigation or arbitration regarding 457 plans since 2005 and neither has its predecessor of the assets Matrix Capital Bank. In addition, MG Trust has never been the subject of litigation or arbitration for any of its services. To the best of my knowledge, there is no current arbitration or litigation pending.

*Regards,
Cindy Dash
General Counsel, Matrix Financial Solutions, Inc., MSCS and MSCS
Financial Services, LLC, member FINRA and SIPC
(720) 956-5403 Phone
(720)932-2725 Fax"*

Ms. Dash has been with the firm since it began as a joint venture in 1999. She has agreed to answer questions by phone if this statement does not suffice.

6.06 Indemnification. The Company hereby agrees to indemnify, defend and hold the Trustee and its affiliates, and their respective directors, manager, officers, employees, agents and other representatives (the "Indemnified Parties") harmless from any and all losses, costs, excise taxes, expenses, fees, liabilities, damages, claims of any nature whatsoever, including but not limited to legal expenses, court costs, legal fees, costs of or associated with enforcement actions, investigations, suits, and regulatory or other actions and appeals thereof resulting from their reliance upon any certificate, notice, confirmation, or Instruction, purporting to have been delivered by the Plan Administrator, a Named Fiduciary, an Investment Manager, or a Designated Representative hereunder ("Plan Representative(s)"). The Company waives any and all claims of any nature it now has or may have against the Indemnified Parties, which arise or indirectly from any action that the Trustee takes in good faith in accordance with any certificate, notice, confirmation or Instruction from a Plan Representative. The Company and the Plan Administrator also hereby agree to indemnify, defend and hold the Indemnified Parties harmless from and against any and all losses, costs, excise taxes, expenses, fees, liabilities, damages, claims of any nature whatsoever, including but not limited to legal expenses, court costs, legal fees, costs of or associated with enforcement actions,

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investigations, suits, and regulatory or other actions and appeals thereof, arising, directly or indirectly, out of any loss of diminution of the Trust Fund resulting from changes in the market value of the Trust Fund assets; reliance, or action taken in reliance, on Instructions from Company or one or more Plan Representatives; any exercise or failure to exercise investment direction authority by the Company or by a Plan Representative; the Trustee's refusal on advice of counsel to act in accordance with any investment direction provided by Company or a Plan Representative; any other act or failure to act by Company or a Plan Representative; any prohibited transaction or disqualification of a Plan due to any actions taken or not taken by the Trustee in reliance on Instructions from the Company or a Plan Representative; or any other act the Trustee takes in good faith hereunder that arises under this Trust Agreement or the administration of the Trust Fund.

The Trustee shall not be liable to Company for any act, omission, or determination made in connection with this Trust agreement except for its gross negligence or willful misconduct. Without limiting the generality of the foregoing, the Trustee shall not be liable for any losses arising from its compliance with Instructions from the Company or a Plan Representative; or executing, failing to execute, failing to timely execute or for any mistake in the execution of any Instructions, unless such action or inaction is by reason of the gross negligence or willful misconduct of the Trustee.

The provisions of this Section 6.06 shall survive the termination, amendment or expiration of this Trust Agreement.

GREEN: Indemnification, liability limitation – gross negligence or willful and wanton misconduct is too broad.

Response: Mr. Green has referred to South Dakota statutes which, in his opinion, prohibit municipalities from granting indemnification. After he provided those statutes, I requested an opinion from the South Dakota Division of Insurance, whose authority is granted by and governs statutes provided by Mr. Green. That opinion, written by Mr. Randy Moses, Assistant Director of the Division of Insurance, is attached. In essence Mr. Moses' opinion states that indemnification agreements are common in many contracts and do not constitute a transaction of insurance. Therefore, according to Mr. Moses, the prohibition of municipalities from issuing insurance does not apply to contractual indemnification agreements.

Article VII: Dispute Resolution: The parties acknowledge that this Trust Agreement evidences a transaction involving interstate commerce. Except as provided in Section 10.02, the parties agree that any misunderstandings, controversies or disputes arising from this Trust Agreement shall be decided by binding arbitration which shall be conducted, upon request by either party, in Denver, Colorado, before three (3) arbitrators designated by the American Arbitration Association (the

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“AAA”), in accordance with the terms of the Commercial Arbitration Rules of the AAA and, to the maximum extent applicable, the United States Arbitration Act (Title 9 of the United States Code). The decision of the majority of the arbitrators shall be binding and conclusive upon the parties. Notwithstanding anything herein to the contrary, either party may proceed to a court of competent jurisdiction to obtain equitable relief at any time, other than to stay arbitration. Further, any such court proceeding shall only be brought in the federal district court in Denver, Colorado. The arbitration panel shall have no authority to award special, indirect, consequential, punitive or other damages not measured by the prevailing party’s actual damages. To the maximum extent practicable, an arbitration proceeding under this Trust Agreement shall be concluded within one hundred eighty (180) days of the filing of the dispute with the AAA. The provisions of this arbitration clause shall survive any termination, amendment or expiration of the Trust Agreement and if any term, covenant, condition or provision of this arbitration clause is found to be unlawful or invalid or unenforceable, the remaining parts of the arbitration clause shall not be affected thereby and shall remain fully enforceable. Judgment on any award rendered by the arbitration panel may be entered in any court having competent jurisdiction. The parties shall each pay one-half of the forum and arbitrators’ fees. The prevailing party in the arbitration, or in any court proceeding, shall be entitled to its reasonable attorney’s fees and expenses from the non-prevailing party.

GREEN: I have never recommended an agreement with an arbitration provision (let alone binding arbitration). Also, venue is in Denver.

Response: Again we believe the actual risk here is minimal. Please refer back to the statement submitted by General Counsel for MG Trust Company’s parent company, Matrix Financial Solutions, Inc. as printed with the response to item 4.05.

9.02 Authorization with Respect to Taxes. The Trustee shall notify the Plan Administrator and/or the Designated Representative of any tax levied upon or assessed against the Trust Fund of which the Trustee has knowledge. If the Trustee receives no instructions from the Plan Administrator and/or the Designated Representative, the Trustee may pay the tax from the Trust Fund. If the Plan Administrator and/or the Designated Representative wish(es) to contest the tax assessment, it shall give appropriate and timely instructions to the Trustee. The Trustee shall not be required to bring any legal actions or proceedings to contest the validity of any tax assessments unless the Trustee has been indemnified to its satisfaction against loss or expense related to such actions or proceedings, including reasonable attorney’s fees. The Trustee shall have no liability for making any distribution or transfer pursuant to the Instruction of the Plan Administrator and/or the Designated Representative (including amounts withheld pursuant to the previous sentence) and shall be under no duty to make inquiry whether any distribution or transfer directed by the Plan Administrator and/or the Designated Representative is made pursuant to the provision of the Plan. The

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Plan Administrator and/or the Designated Representative shall furnish to the Trustee all information necessary to carry out such withholding in a timely fashion or, if such information is not so provided to the Trustee, the Plan Administrator and/or the Designated Representative and the Company shall hold the Trustee harmless from and indemnify it for any liability and related expenses that arise in connection with improper withholding.

GREEN: Another indemnification provision.

Response: This section is simply stating that if the Trustee receives any direct communication (from the IRS for example) of a tax levy, that the Trustee will notify DRS and/or the City accordingly. If DRS and/or the City do not respond in a timely manner, the Trustee may pay the tax from the Trust. If the City wishes to contest the tax assessment it will give appropriate and timely instructions (preferably through DRS) to the Trustee.

The rest of the section simply goes on to say that, in general, the Trustee will not contest the validity of the tax assessment or if the payment complies with plan provisions and is not responsible for the actions or inactions of the City or DRS for a levy payment from the Plan.

10.01 Resignation; Removal of the Trustee: The Trustee may resign at any time by giving at least thirty (30) days' prior notice of such resignation to the Company, the Plan Administrator and all other fiduciaries of the Plan that have been identified in Instructions provided to the Trustee. The Company may remove the Trustee, with or without cause, upon giving at least thirty (30) days' prior notice to the Trustee, the Plan Administrator and all other fiduciaries of the Plan that have been identified in Instructions provided to the Trustee.

13.01 Termination of Trust Fund. This Trust Agreement and the Trust created hereby may be terminated at any time by the Company upon thirty (30) days notice.

GREEN: Thirty days notice very short for municipal government (not a deal breaker).

Response: The existing 457 Plan and Trust Document has the same 30-day provisions in Article XI.

14.01(a) Choice of Law. Except where inconsistent with the express provisions hereof, or where preempted by ERISA, the powers and duties of the Trustee and all questions of interpretation, construction, operation, and effect of this Trust Agreement shall be governed by the laws of the State of Colorado. All contributions to the Trustee shall be deemed to take place in the State of

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Colorado, and except for such matters as may arise under ERISA, the Trustee shall be liable to account in the courts of that state.

GREEN: Colorado Law.

Response: Restating, we believe the actual risk here is minimal. Please refer back to the statement submitted by General Counsel for MG Trust Company's parent company, Matrix Financial Solutions, Inc. as printed with the response to item 4.05.

14.01(b) Choice of Venue. All controversies, disputes, and claims arising under this Trust Agreement and not otherwise resolved will be submitted to the United States District Court for the district where the Trustee has its principal place of business, and by executing this Trust Agreement, each party hereto consents to that court's exercise of personal jurisdiction over them.

GREEN: Venue in Denver.

Response: Again we believe the actual risk here is minimal. Please refer back to the statement submitted by General Counsel for MG Trust Company's parent company, Matrix Financial Solutions, Inc. as printed with the response to item 4.05.

14.04 Limitation on Claims. No claim may be made by the Company against the Trustee for any lost profits or any special, indirect or consequential damages in respect of any breach or wrongful conduct in anyway related to this Trust Agreement.

GREEN: Damage limitation.

Response: The "Company" is the City of Rapid City. The City will have no assets held in the Trust and would therefore not have any standing to sue the Trustee in the first place. This clause does not preclude the Participants from bringing action against the Trustee, although we have already stated that we believe that the risk of that is minute.

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RESOLUTION OF THE CITY OF RAPID CITY AUTHORIZING
ESTABLISHMENT OF A DEFERRED COMPENSATION PLAN

WHEREAS, the Employer has employees rendering valuable services; and

WHEREAS, the establishment of a deferred compensation plan for such employees will serve the interests of the Employer by enabling it to provide reasonable retirement security for its employees, by providing increased flexibility in its personnel management system, and by assisting in the attracting and retention of competent personnel; and

WHEREAS, the Employer has determined that the establishment of a deferred compensation plan to be administered by the ICMA Retirement Corporation will serve the above objectives, and

WHEREAS, the Employer desires that the investment of funds held under its deferred compensation plan be administered by the ICMA Retirement Corporation, as Trustee, with the understanding that such funds will be held by the ICMA Retirement Trust, a trust established by public employers for the purpose of representing the interests of such employers with respect to the collective investment of funds held under their deferred compensation plans;

NOW, THEREFORE, BE IT RESOLVED that the City of Rapid City (Employer) adopts the deferred compensation plan, attached hereto as Appendix A, and appoints the ICMA Retirement Corporation to serve as Administrator thereunder; and

BE IT FURTHER RESOLVED that the Employer hereby executes the ICMA Retirement Trust, attached hereto as Appendix B; and

BE IT FURTHER RESOLVED that the Employer hereby adopts the trust agreement, attached hereto as Appendix C, and appoints the ICMA Retirement Corporation as Trustee thereunder, and directs the ICMA Retirement Corporation, as Trustee, to invest all funds held under the deferred compensation plan through the ICMA Retirement Trust as soon as is practicable; and

BE IT FURTHER RESOLVED that the Personnel Director shall be the coordinator for this program and shall receive necessary reports, notices, etc., from the ICMA Retirement Corporation as Administrator, and shall cast, on behalf of the Employer, any required votes under the program. Administrative duties to carry out the plan may be assigned to the appropriate departments.

November 5, 1984.

ATTEST:

Kent Brugger
Kent Brugger, Finance Officer

THE COMMON COUNCIL

Guy A. Edwards
Guy A. Edwards, Acting Mayor

(SEAL)

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SOUTH DAKOTA CODIFIED LAWS - STATUTORY TITLES
TITLE 9: MUNICIPAL GOVERNMENT
CHAPTER 9-16: CITY RETIREMENT SYSTEMS AND PENSIONS

9-16-28. City treasurer as custodian of fund--Liability of surety on bond. The treasurer of each municipality shall be the custodian of the investments and other moneys in its pension fund, which shall be kept apart from other funds in his custody. The surety on the official bond of the treasurer shall be liable for the safekeeping and due accounting of the moneys, securities, and other property belonging to the pension fund.

The previous requirements of this section shall not apply when such assets are placed with a funding agent or an investment counsel as provided for in this section. The retirement board of a pension fund may select a funding agent or investment counsel to administer and invest the funds of the system. The selection and the appointment of the funding agent or the investment counsel shall be made by the retirement board which shall have the right from time to time to change the funding agent or the investment counsel as to all or any part of the funds. The board shall have the right to determine the form and substance of each agreement under which the funds are to be held, provided that it shall not be inconsistent with the provisions of this section. The term "funding agent" means a corporate or individual trustee or trustees, insurance company or insurance companies authorized to do business in the State of South Dakota, or combination thereof, appointed and acting from time to time pursuant to the provisions of this section in holding, investing and disbursing the funds of the pension fund. The term "investment counsel" means a corporation or individual authorized to do business under the Federal Investment Advisers Act of 1940 and authorized to do business in the State of South Dakota, appointed and acting from time to time pursuant to the provisions of this section in investing the funds of the pension fund.

The retirement board may contract for investment counsel and advice when it deems necessary.

Source: SL 1927, ch 172, § 3; SDC 1939, § 45.1207; SL 1955, ch 202, § 2; SDC Supp 1960, § 45.1207 (3); SL 1970, ch 60; SL 1977, ch 71.

457(b) Basics

Employees provide City with choice of investment vehicle, deferral amount, and investment instructions.

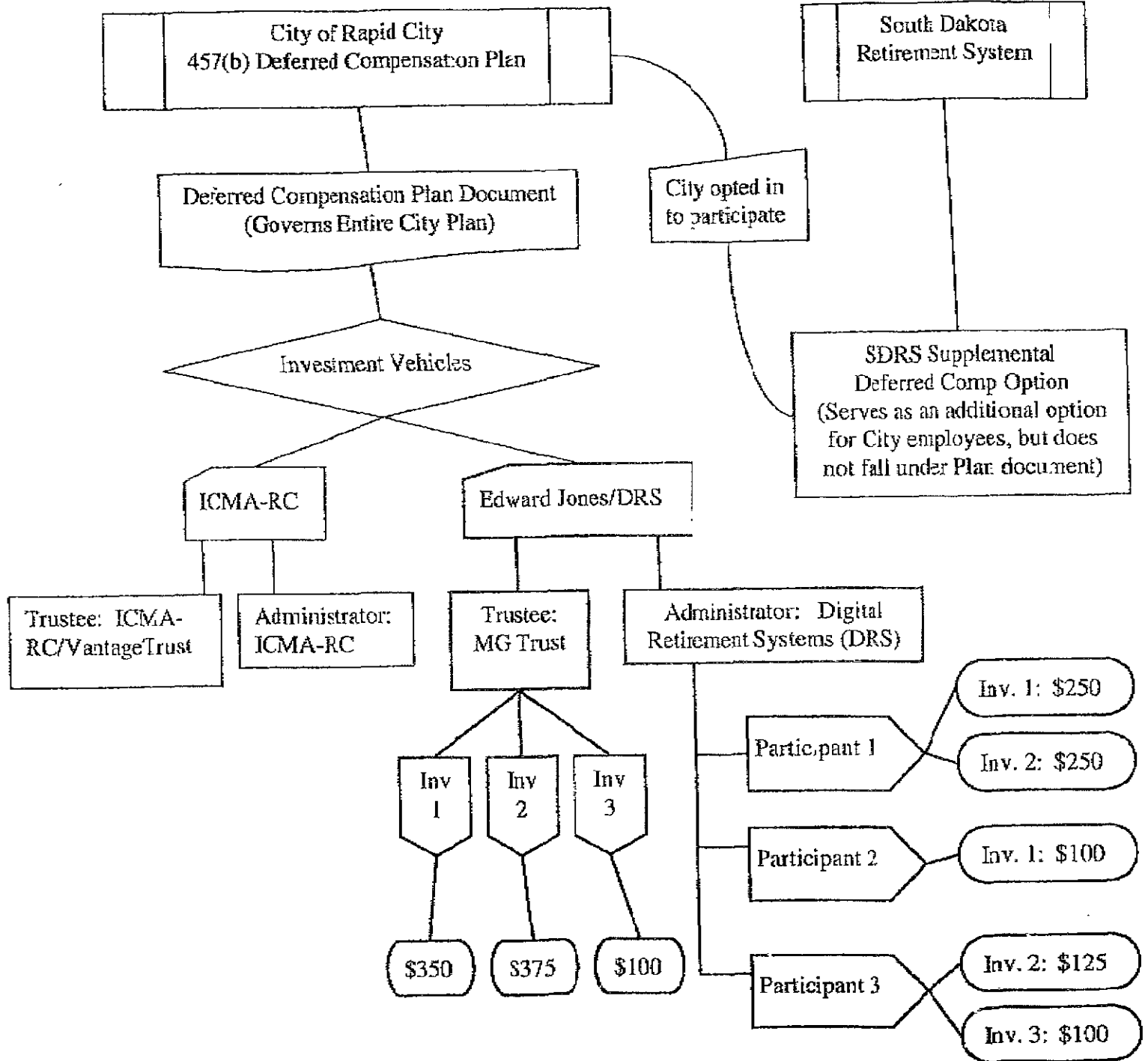
City sends deferral instructions to Administrator.

City sends funds to Trustee.

Administrator tracks participant accounts.

Trustee holds funds and tracks gross investments.

Administrator's and Trustee's accounts are always balanced.



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You forwarded this message on 3/26/2008 3:03 PM.

Weinert, Debora A

From: Randy.Moses@state.sd.us [Randy.Moses@state.sd.us] **Sent:** Thu 3/20/2008 2:38 PM
To: Weinert, Debora A
Cc:
Subject: RE: indemnification statutes
Attachments:

The existence of an indemnification clause is commonplace in a wide variety of contracts entered into in this state and elsewhere. This type of clause does not make the contract in question a contract of insurance or mean that the parties are engaged in the business of insurance pursuant to SDCL 58-1-2. We do not believe that SDCL 58-6-10 is applicable to the situation at hand.

That being said the Division takes no position as to whether the indemnification clause is appropriate for the parties to this proposed contractual arrangement. Please let me know if you need anything further.

R. J. Moses
 Assistant Director
 SD Division of Insurance
 445 E. Capitol
 Pierre, SD 57501
 phone: (605)773-3563
 fax: (605)773-5369

-----Original Message-----

From: Weinert, Debora A [mailto:Debora.Weinert@edwardjones.com]
Sent: Thursday, March 20, 2008 3:27 PM
To: Moses, Randy
Subject: FW: indemnification statutes

Randy,
 Thank you for your call today and your offer to clarify this issue of municipalities granting indemnification. I have included the text, inset and in quotes, of the relevant items on which Mr. Green has commented. Please call me if you have any questions or need further information. I look forward to receiving your response.

Debora Weinert, Financial Advisor
 Edward Jones
 Autumn Hills Plaza
 5312 Sheridan Lake Road, Suite 106
 Rapid City, SD 57702

Phone: 605-341-3359
 Toll-free: 888-341-3359
 Fax: 866-445-0423

Subject: RE: indemnification statutes

Hi Deb,

I have finished my review of the MG Trust agreement. My comments (and the indemnification statutes are below.) I will be out of town until Monday, March 31st. If you want to get the agreement on the next Legal and Finance Agenda, the deadline is Wednesday, March 26th at 4:00pm. Please contact Maggie in my office to have the item placed on the agenda. At this time, I can not recommend approval of the agreement.

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6.06 Indemnification, liability limitation – gross negligence or willful and wanton conduct is too broad.

"6.06 Indemnification. The Company hereby agrees to indemnify, defend and hold the Trustee and

its affiliates, and their respective directors, manager, officers, employees, agents and other representatives (the

"Indemnified Parties") harmless from any and all losses, costs, excise taxes, expenses, fees, liabilities, damages,

claims of any nature whatsoever, including but not limited to legal expenses, court costs, legal fees, costs of or

associated with enforcement actions, investigations, suits, and regulatory or other actions and appeals thereof

resulting from their reliance upon any certificate, notice, confirmation, or Instruction, purporting to have been

delivered by the Plan Administrator, a Named Fiduciary, an Investment Manager, or a Designated

Representative hereunder ("Plan Representative(s)"). The Company waives any and all claims of any nature it

now has or may have against the Indemnified Parties, which arise, directly or indirectly, from any action that the

Trustee takes in good faith in accordance with any certificate, notice, confirmation, or Instruction from a Plan

Representative. The Company and the Plan Administrator also hereby agree to indemnify, defend and hold the

Indemnified Parties harmless from and against any and all losses, costs, excise taxes, expenses, fees, liabilities,

damages, claims of any nature whatsoever, including but not limited to legal expenses, court costs, legal fees,

costs of or associated with enforcement actions, investigations, suits, and regulatory or other actions and appeals

thereof, arising, directly or indirectly, out of any loss or diminution of the Trust Fund resulting

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from changes in
the market value of the Trust Fund assets; reliance, or action taken in reliance, on Instructions
from Company or
one or more Plan Representatives; any exercise or failure to exercise investment direction
authority by the
Company or by a Plan Representative; the Trustee's refusal on advice of counsel to act in
accordance with any
investment direction provided by Company or a Plan Representative; any other act or failure to
act by Company
or a Plan Representative; any prohibited transaction or disqualification of a Plan due to any
actions taken or not
taken by the Trustee in reliance on Instructions from the Company or a Plan Representative; or
any other act the
Trustee takes in good faith hereunder that arises under this Trust Agreement or the administration
of the Trust
Fund.
The Trustee shall not be liable to Company for any act, omission, or determination made in
connection
with this Trust Agreement except for its gross negligence or willful misconduct. Without limiting
the generality
of the foregoing, the Trustee shall not be liable for any losses arising from its compliance with
Instructions from
the Company or a Plan Representative; or executing, failing to execute, failing to timely execute
or for any
mistake in the execution of any Instructions, unless such action or inaction is by reason of the
gross negligence
or willful misconduct of the Trustee.
The provisions of this Section 6.06 shall survive the termination, amendment or expiration of this
Trust
Agreement "

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9.02 Another Indemnification provision

"9.02 Authorization with Respect to Taxes. The Trustee shall notify the Plan Administrator and/or

the Designated Representative of any tax levied upon or assessed against the Trust Fund of which the Trustee

has knowledge. If the Trustee receives no instructions from the Plan Administrator and/or the Designated

Representative, the Trustee may pay the tax from the Trust Fund. If the Plan Administrator and/or the

Designated Representative wish(es) to contest the tax assessment, it shall give appropriate and timely

instructions to the Trustee. The Trustee shall not be required to bring any legal actions or proceedings to contest

the validity of any tax assessments unless the Trustee has been indemnified to its satisfaction against loss or

expense related to such actions or proceedings, including reasonable attorney's fees. The Trustee shall have no

liability for making any distribution or transfer pursuant to the Instruction of the Plan Administrator and/or the

Designated Representative (including amounts withheld pursuant to the previous sentence) and shall be under no

duty to make inquiry whether any distribution or transfer directed by the Plan Administrator and/or the

Designated Representative is made pursuant to the provisions of the Plan. The Plan Administrator and/or the

Designated Representative shall furnish to the Trustee all information necessary to carry out such withholding in

a timely fashion or, if such information is not so provided to the Trustee, the Plan Administrator and/or the

Designated Representative and the Company shall hold the Trustee harmless from and indemnify it for any

liability and related expenses that arise in connection with improper withholding."

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South Dakota Indemnification Statutes

SDCL 58-1-2(8) "Insurance," a contract whereby one undertakes to indemnify another or to pay or provide a specified or determinable amount or benefit upon determinable contingencies;

SDCL 58-6 10. Governmentally owned insurers prohibited--Exceptions. Except for instrumentalities of the United States government, no insurer, the voting control or ownership of which is held in whole or substantial part by any government or governmental agency, or which is operated for or by any such government or agency, may transact insurance in this state, unless, upon verified application by the insurer, the director finds that:

- (1) The insurer is not subject to any form of subsidy that would enable it to compete unfairly with domestic insurers;
- (2) The insurer is not subject to governmental practices that discriminate on the basis of race, color, creed, or national origin;
- (3) The ownership or financial control does not create the presence of any sovereign immunity in the insurer;
- (4) The insurer has agreed to waive sovereign immunity as a defense should it exist for any action by or against the director pursuant to the director's regulatory authority under Title 58;
- (5) The insurer has agreed that it will exhaust all administrative remedies and will neither commence in, nor remove to, federal court any action by or against the director pursuant to the director's regulatory authority under Title 58;
- (6) Appropriate measures and controls exist to avoid security problems resulting from an insurer's access to confidential information and data of its insured; and
- (7) The ownership or financial control does not result in substantial or undue influence being asserted over the insurer.

Membership in a mutual insurer, or subscribership in a reciprocal insurer, or ownership of stock of an insurer by the alien property custodian or similar official of the United States, or supervision of an insurer by public insurance supervisory authority does not constitute ownership, control, or operation of the insurer for the purposes of this section. Nothing contained in this section prohibits or affects self insurance by school districts as provided in § 13-10-3, or by municipalities as provided in § 9-14-30. The failure of any applicant under this section to submit all information requested by the director pursuant to this section and the director's regulatory authority under Title 58 relevant to any finding to be made under this section is sufficient to deny the application.

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-----Original Message-----

Subject: indemnification statutes

Would you mind sending me a copy of, or a link to, the statutes you were referring to regarding indemnification and municipalities. Thanks!

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