

SENATE BILL 137

**53RD LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2018**

INTRODUCED BY

Stuart Ingle

Pursuant to House Rule 24-1, this document incorporates amendments that have been adopted prior to consideration of this measure by the House. It is a tool to show the amendments in context and is not to be used for the purpose of amendments.

AN ACT

RELATING TO FINANCIAL INSTITUTIONS; PROVIDING ADDITIONAL REQUIREMENTS FOR CERTIFICATES, MINIMUM CAPITAL, FIDELITY BONDS AND INSURANCE; CLARIFYING POWERS OF THE DIRECTOR; PROVIDING FOR INVESTIGATIONS AND INVESTIGATIVE FEES; PROVIDING FOR THE REORGANIZATION OF A TRUST COMPANY; PROVIDING PENALTIES; AMENDING AND REPEALING SECTIONS OF THE TRUST COMPANY ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 58-9-2 NMSA 1978 (being Laws 1973, Chapter 191, Section 2, as amended) is amended to read:

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"58-9-2. DEFINITIONS.--As used in the Trust Company Act:

A. [~~"commissioner" or~~] "director" means the director of the financial institutions division of the regulation and licensing department;

B. "trust business" means the holding out by a person, legal entity or corporation to the public at large by advertising, solicitation or other means that the person, legal entity or corporation is available to act as a fiduciary in this state or is accepting and undertaking to perform the duties of a fiduciary in the regular course of its business;

C. "trust company" means a corporation holding a certificate issued pursuant to the Trust Company Act;

D. "certificate" means a certificate of authority issued [~~under the provisions of~~] pursuant to the Trust Company Act to engage in trust business;

E. "fiduciary" means executor, administrator, conservator or trustee; [~~and~~]

F. "nonprofit corporation" means a nonprofit corporation as defined in the Nonprofit Corporation Act that [~~is funded by or contracts with a federal, state, county or other governmental entity~~] was formed and is operating a pooled trust in compliance with the requirements of 42 U.S.C.

1396p(d)(4) to provide trust services for individuals who are disabled, and the nonprofit corporation is not otherwise engaged in the trust business. As used in this subsection,

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"disabled" has the meaning set forth in 42 U.S.C. 1382c(a)(3);  
and

G. "division" means the financial institutions  
division of the regulation and licensing department."

SECTION 2. Section 58-9-4 NMSA 1978 (being Laws 1973,  
Chapter 191, Section 4, as amended) is amended to read:

"58-9-4. CERTIFICATE REQUIRED--COMPLIANCE WITH STATE AND  
FEDERAL LAW--SEPARATION OF TRUST FUND AND INVESTMENTS.--

A. No person, legal entity or corporation shall  
engage in the trust business without first obtaining a  
certificate from the [~~commissioner~~] director; provided,  
however, that a bank having its principal office in this state  
or an out-of-state bank not having an established office in  
this state otherwise authorized under state or federal laws to  
engage in the trust business or a savings and loan association  
having its principal office in this state acting as trustee or  
custodian [~~under the provisions of~~] pursuant to Section  
58-10-35 NMSA 1978 may engage in [~~such~~] trust business to the  
extent permitted in that section without obtaining a  
certificate under the Trust Company Act.

B. A trust company shall conduct such business in  
compliance with all state and federal laws, and all rules  
promulgated pursuant to those laws, including the Trust Company  
Act, the Uniform Probate Code, the Uniform Prudent Investor Act  
and the Uniform Trust Code.

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C. A trust company shall keep all trust funds and investments separate and apart from the assets of the trust company, and all investments made by the trust company as a fiduciary shall be designated so that the trust or estate to which such investment belongs is clearly identified."

SECTION 3. Section 58-9-5 NMSA 1978 (being Laws 1973, Chapter 191, Section 5, as amended by Laws 2013, Chapter 88, Section 2 and by Laws 2013, Chapter 97, Section 2) is amended to read:

"58-9-5. APPLICATION FOR CERTIFICATE--FEE.--

A. An application for a certificate shall be in writing, in such form as the director prescribes, verified under oath and supported by such information, data and records as the director may require.

B. Each application for a certificate shall be accompanied by an application fee of one thousand dollars (\$1,000), made payable to the [~~financial institutions~~] division [~~of the regulation and licensing department~~]. No portion of the application fee shall be refunded.

C. An application for a certificate shall be accompanied by an oath sworn by each proposed member of the board of directors of the trust company stating that the board member will diligently and honestly administer the affairs of the trust company and will not knowingly violate or knowingly permit to be violated any state or federal laws or any rules

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promulgated pursuant to those laws, including the Trust Company Act, the Uniform Probate Code, the Uniform Prudent Investor Act or the Uniform Trust Code. The oath shall be in such form as the director prescribes and shall be certified by a notary public.

D. On and after July 1, 2018, any board member newly elected or appointed to the board of directors of a trust company certified under the Trust Company Act shall, immediately upon election to the board, swear and cause to be transferred to the director the oath of a trust company board member as set forth in Subsection C of this section."

SECTION 4. Section 58-9-6 NMSA 1978 (being Laws 1973, Chapter 191, Section 6, as amended by Laws 2013, Chapter 88, Section 3 and by Laws 2013, Chapter 97, Section 3) is amended to read:

"58-9-6. MINIMUM CAPITAL.--

A. A certificate shall not be issued to an applicant for certification pursuant to the Trust Company Act having ~~[a paid-up]~~ capital of less than five hundred thousand dollars (\$500,000). ~~[All trust companies that have been issued certificates pursuant to the Trust Company Act as of December 31, 2012 shall meet the increased paid-up capital requirement of five hundred thousand dollars (\$500,000) on or before December 31, 2017.]~~

B. The minimum capital requirement shall be waived

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for nonprofit corporations."

SECTION 5. Section 58-9-7 NMSA 1978 (being Laws 1973, Chapter 191, Section 7) is amended to read:

"58-9-7. FIDELITY BOND--INSURANCE REQUIRED--EVIDENCE OF FINANCIAL RESPONSIBILITY REQUIRED.--

A. No corporation shall obtain a certificate without securing and filing with the ~~[commissioner]~~ director a ~~[surety]~~ fidelity bond ~~[or otherwise establishing to the commissioner's satisfaction such corporation's financial responsibility]~~

~~B. For a corporation organized and engaged in the trust business prior to the effective date of the Trust Company Act, the amount of the surety bond, if financial responsibility is not otherwise established to the commissioner's satisfaction, shall be not less than twenty-five percent of the aggregate value of the property, money or other valuables held in trust as of the first day of the month in which the application for a certificate is filed.~~

~~C. For a corporation not engaged in the trust business prior to the effective date of the Trust Company Act, the amount of the surety bond, if financial responsibility is not otherwise established to the commissioner's satisfaction, shall be one hundred thousand dollars (\$100,000) in the following amounts:~~

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<u>a Fiduciary</u> ←SJC	<u>Fidelity Bond Amounts</u>
<u>\$3,000,000 or less</u>	<u>\$500,000</u>
<u>More than \$3,000,000 but not more than \$15,000,000</u>	<u>\$750,000</u>
<u>More than \$15,000,000 but not more than \$25,000,000</u>	<u>\$1,000,000</u>
<u>More than \$25,000,000 but not more than \$50,000,000</u>	<u>\$1,500,000</u>
<u>More than \$50,000,000 but not more than \$75,000,000</u>	<u>\$2,000,000</u>
<u>More than \$75,000,000 but not more than \$100,000,000</u>	<u>\$2,750,000</u>
<u>More than \$100,000,000 but not more than \$500,000,000</u>	<u>\$3,500,000</u>
<u>More than \$500,000,000 but not more than \$1,000,000,000</u>	<u>\$5,000,000</u>
SJC→ <del>More than \$1,000,000,000</del>	<del>\$5,000,000 plus \$1,000,000 for every \$100,000,000 over \$1,000,000,000.</del> ←SJC
SJC→ <u>More than \$1,000,000,000 but not more than \$2,000,000,000</u>	<u>\$6,000,000</u>
<u>More than \$2,000,000,000</u>	<u>\$6,000,000 plus \$1,000,000 for</u>

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every

\$1,000,000,000 over

\$2,000,000,000. ←SJC

B. A trust company shall file a signed copy of its fidelity bond with the director, and the fidelity bond shall remain a part of the division's records.

C. Every fidelity bond filed with the director by a trust company pursuant to Subsection A of this section shall contain a provision prohibiting the bond company from canceling such fidelity bond for failure to pay the premium unless the bond company files a written notice with the director at least ten days before canceling the fidelity bond. Every fidelity bond filed with the director by a trust company pursuant to Subsection A of this section shall contain a provision prohibiting the bond company from canceling such fidelity bond for any other reason unless the bond company files a written notice with the director at least thirty days before canceling the fidelity bond.

D. Except as provided in Subsection E of this section, a fidelity bond secured and filed pursuant to this section shall contain a deductible clause not to exceed fifteen percent of the face amount of the fidelity bond.

E. A trust company may submit a written request to the director for approval of a fidelity bond with a deductible clause in excess of fifteen percent of the face amount of the

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bond. Such written request must be submitted not less than ninety days prior to the expiration of any fidelity bond for the trust company previously filed with the director. If the director has not issued written approval for the trust company to secure and file a fidelity bond with a deductible clause in excess of fifteen percent within thirty days of the expiration of the trust company's prior fidelity bond, the request of the trust company shall be deemed denied.

[D.] F. On or before [~~the first day of~~] March 1 of each year beginning with the year [~~1974~~] 2019, every trust company shall increase or adjust its [~~surety~~] fidelity bond [~~if financial responsibility is not otherwise established to the commissioner's satisfaction~~] to an amount equal to [~~twenty-five percent of the aggregate value of the property, money or other valuables held in trust as of the last day of the preceding year if the amount of its surety bond is less than twenty-five percent of the aggregate value of the property, money or other valuables held in trust~~] the amount required pursuant to Subsection A of this section.

[~~E.~~] In no event shall the amount of the surety bond, if financial responsibility is not otherwise established to the commissioner's satisfaction, be less than one hundred thousand dollars (\$100,000) nor more than five hundred thousand dollars (\$500,000).

[~~F.~~] G. The [~~surety~~] fidelity bond [~~or other~~]

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~~evidence of financial responsibility~~] required by this section shall be for the benefit of:

(1) any person damaged by an act or acts of a trust company or its directors, officers or employees as a result of a violation of the provisions of, or any [~~regulation or~~] rule promulgated pursuant to, the Trust Company Act, the Uniform Probate Code, the Uniform Prudent Investor Act or the Uniform Trust Code;

(2) any person damaged by the negligence, fraud or embezzlement of a [~~certified~~] trust company or its directors, officers or employees; [~~and~~] or

(3) any person damaged by any other breach of trust of any [~~certified~~] trust company.

H. The amount of a fidelity bond required by this section may be reduced by the director for nonprofit corporations that have otherwise established financial responsibility to the director's satisfaction.

I. A reduction in the amount of a required fidelity bond approved by the director pursuant to Subsection H of this section shall be reviewed by the director on an annual basis, at which time the reduction may be terminated upon ninety days' written notice by the director to the nonprofit corporation.

[G.] J. The [commissioner] director shall revoke the certificate of any trust company [which] that fails to maintain a bond or to otherwise supply evidence of financial

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responsibility as required by this section.

K. The board of directors of a trust company shall acquire suitable insurance to protect the trust company against burglary, robbery, forgery, theft, fraud, embezzlement and other similar insurable losses to which the trust company may be exposed in the operation of the trust company.

L. The board of directors of a trust company shall procure errors and omissions insurance of at least five hundred thousand dollars (\$500,000).

M. At least once each year, the board of directors of a trust company shall review the insurance coverage as set forth in Subsections K and L of this section to determine the adequacy of coverage in relation to the exposure of the trust company. The minimum amount of insurance required pursuant to this section does not automatically represent adequate insurance coverage in relation to the exposure. The actions of the board of directors shall be recorded in the minutes of the board. Immediately after procuring the insurance as required by Subsections K and L of this section, the board of directors shall file copies of the insurance policies with the director.

N. The director may revoke the certificate of any trust company that fails to maintain insurance as required by Subsections K and L of this section.

O. A trust company may be determined by the director to have demonstrated a lack of financial

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responsibility when any of the following nonexclusive conditions exist:

(1) the actual cash market value of the trust company's assets is less than its liabilities; or

(2) the trust company fails to pay, in the manner commonly accepted by business practices, its obligations when due.

P. A trust company may be determined by the director to be in an unsafe and unsound condition when any one of the following nonexclusive conditions exist:

(1) the trust company fails to safely manage its operations;

(2) the trust company fails to provide services to its trust customers pursuant to the trust company's fiduciary duty; or

(3) the trust company fails to manage and monitor its operational and financial risks."

SECTION 6. Section 58-9-8 NMSA 1978 (being Laws 1973, Chapter 191, Section 8, as amended) is amended to read:

"58-9-8. PROCEDURE FOR GRANTING OR DENYING CERTIFICATE.--

A. Upon the filing of an application for a certificate, the director [~~of the financial institutions division~~] shall make or cause to be made a careful investigation and examination and shall issue a certificate if [~~he~~] the director finds:

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(1) that the persons who will serve as directors or officers, [~~other than directors and officers of nonprofit corporations~~] insofar as those persons are known, are qualified to be fiduciaries by character and experience and that the financial status of the stockholders, directors and officers [~~other than directors and officers of nonprofit corporations~~] is consistent with their responsibilities and duties as fiduciaries; [~~except that~~] for nonprofit corporations, [~~the~~] any employee responsible for trust management shall be qualified to be a fiduciary by character and experience;

(2) that the name of the proposed company is not deceptively similar to that of another trust company or bank or is not otherwise misleading;

(3) that the capital and surplus are not less than the required minimum, except that this requirement shall not apply to nonprofit corporations; and

(4) that there is a need for trust facilities or additional trust facilities, as the case may be, in the community where the proposed trust company is to be located.

B. The director [~~of the financial institutions division~~] may consider and inquire into such other facts and circumstances bearing on the proposed trust company and its relation to its locality as in [~~his~~] the director's opinion may be relevant.

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C. The certificate may be granted or denied without hearing, but the director [~~of the financial institutions division~~] may, and at the request of the applicant shall, fix a date for a hearing on the application. At the hearing, any person may be heard with reference to the facts to be investigated."

SECTION 7. Section 58-9-9 NMSA 1978 (being Laws 1973, Chapter 191, Section 9, as amended) is amended to read:

"58-9-9. POWERS OF DIRECTOR.--In addition to other powers conferred by the Trust Company Act, the director [~~of the financial institutions division has power to~~] may:

A. examine the business and affairs of each trust company at least once each year and at such other times and to such extent as [~~he may deem~~] the director deems necessary or advisable. The expense of every examination shall be paid by the corporation examined, in such amount as the director certifies to be just and reasonable;

B. regulate the procedure and practice at hearings;

C. implement by order and [~~regulation~~] rule the [~~provisions of the~~] Trust Company Act; [~~and~~] in making orders and rules to implement the Trust Company Act, the director shall act in the interest of promoting and maintaining a sound trust company system, the security of assets and trust accounts and the protection of persons utilizing trust services;

D. obtain restraining orders and injunctions to

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prevent violation of and enforce compliance with the Trust Company Act, and orders and [~~regulations issued~~] rules promulgated pursuant to the [~~provisions of the~~] Trust Company Act [~~In making orders and regulations to implement the Trust Company Act, the director shall act in the interest of promoting and maintaining a sound trust company system, the security of assets and trust accounts and the protection of persons utilizing trust services~~], the Uniform Probate Code, the Uniform Prudent Investor Act and the Uniform Trust Code;

[~~D-~~] E. order any person or trust company to cease violating the Trust Company Act, orders and [~~regulations issued~~] rules promulgated pursuant to the [~~provisions of the~~] Trust Company Act, the Uniform Probate Code, the Uniform Prudent Investor Act or the Uniform Trust Code, or to cease engaging in breaches of trust. A copy of such orders shall be mailed to each director of the trust company involved;

[~~E-~~] F. suspend, after notice and hearing, any officer or director, or any employee of a nonprofit corporation, for fraud, embezzlement or failure to comply with the Trust Company Act or orders or [~~regulations issued~~] rules promulgated pursuant to the Trust Company Act [~~or any provision of that act~~], the Uniform Probate Code, the Uniform Prudent Investor Act or the Uniform Trust Code; and

[~~F-~~] G. subpoena witnesses, compel their attendance, require the production of evidence, administer an

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oath and examine any person under oath in connection with any subject relating to a duty imposed upon or a power vested in the director."

SJC→SECTION 8. A new section of the Trust Company Act is enacted to read:

"[NEW MATERIAL] APPEALS.--

A. A person aggrieved by a final order of the director may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

B. The commencement of proceedings pursuant to Subsection A of this section does not, unless specifically ordered by the court, operate as a stay of the director's order."←SJC

SECTION SJC→8 9←SJC. Section 58-9-10 NMSA 1978 (being Laws 1973, Chapter 191, Section 10, as amended by Laws 2013, Chapter 88, Section 4 and by Laws 2013, Chapter 97, Section 4) is amended to read:

"58-9-10. IMPAIRMENT OF CAPITAL--UNSAFE CONDITIONS--RECEIVERSHIP.--

A. If it appears to the director that the capital of a trust company is either reduced or impaired below [~~five hundred thousand dollars (\$500,000)~~] the minimum capital requirements set forth in Section 58-9-6 NMSA 1978, except for nonprofit corporations, [~~or the affairs of the company are in~~

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~~an unsound condition~~] the director shall order the company to make good any deficit [~~or to remedy the unsafe condition of its affairs~~] within sixty days of the date of the order and may restrict and regulate the operation of the trust business until the capital is restored.

B. If the deficiency in capital has not been made good [~~and the unsafe condition remedied~~] within the prescribed time, the director may apply to the district court in the county in which the principal office of the company is located to [~~be appointed~~] have a receiver appointed for the liquidation or rehabilitation of the company. The expense of the receivership shall be paid out of the assets of the trust company.

C. The director may investigate, upon complaint or otherwise, if it appears that a trust company is conducting business in an unsafe, unsound, financially irresponsible or injurious manner or in violation of the Trust Company Act, or the rules promulgated pursuant to that act, the Uniform Probate Code, the Uniform Prudent Investor Act or the Uniform Trust Code, or when it appears that any person is engaging in trust business without being certified pursuant to the Trust Company Act.

D. If it appears upon sufficient ground or evidence satisfactory to the director that a trust company has engaged in or is about to engage in any act or practice in violation of

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the Trust Company Act, or any rule or order pursuant to that act, or the Uniform Probate Code, the Uniform Prudent Investor Act or the Uniform Trust Code, to the extent that the security of the assets and trust accounts or the protection of persons utilizing the trust services have been or may be jeopardized, the director may summarily order the trust company to cease and desist from that act or practice, or the director may apply to the district court of the first judicial district of Santa Fe county to enjoin the trust company in engaging in the act or practice and to enforce compliance with the Trust Company Act, the Uniform Probate Code, the Uniform Prudent Investor Act or the Uniform Trust Code, or for any other appropriate equitable relief. Upon a proper showing, if a temporary restraining order, a preliminary injunction or a permanent injunction is granted, a receiver may be appointed for the defendant or defendant's assets, and the certification of the trust company may be canceled and such additional or other equitable remedies may be provided as the court deems appropriate. The director shall not be required to post a bond.

E. If an investigation pursuant to Subsection C of this section reveals that a trust company is conducting business in an unsafe, unsound or injurious manner, or in violation of the Trust Company Act or rules promulgated pursuant to that act, the Uniform Probate Code, the Uniform Prudent Investor Act or the Uniform Trust Code, or that any

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person is engaging in trust business without being certified pursuant to the Trust Company Act, the trust company or person investigated shall pay to the director an investigation fee at the rate of one hundred fifty dollars (\$150) per day or fraction of a day for each authorized representative engaged in the investigation."

SECTION SJC→9 10←SJC. Section 58-9-11 NMSA 1978 (being Laws 1973, Chapter 191, Section 11) is amended to read:

"58-9-11. DISCONTINUING BUSINESS--REORGANIZATION--  
CONTINUING JURISDICTION.--

A. Whenever any corporation desires to discontinue doing a trust business and surrenders its certificate or if its certificate is suspended or revoked, the company shall [~~nevertheless~~] continue to be subject to the [~~provisions of the~~] Trust Company Act for so long as it acts as a fiduciary with respect to any trust business previously undertaken.

B. A trust company seeking to relinquish its certificate by liquidation shall file an application for dissolution with the director. The application shall include a comprehensive plan for dissolution setting forth the proposed disposition of all assets and liabilities in reasonable detail to effect a liquidation. The plan of dissolution shall provide for the discharge or assumption of all the trust company's known and unknown claims and liabilities and for the transfer of all its responsibilities as a trustee to a successor trustee

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or trustees. Additionally, the application for dissolution shall include other evidence, certifications, affidavits, documents or information as the director may require demonstrating how assets and liabilities will be disposed of, the timetable for effecting disposition of the assets and liabilities and the trust company's proposal for addressing any claims that are asserted after the dissolution has been completed. The director shall examine the application for completeness and compliance with the requirements of this section, the business entity laws applicable to the required type of dissolution and applicable rules. The director may conduct a special examination of the trust company for purposes of evaluating the application.

C. A trust company seeking to reorganize, including any change in ownership of the corporation of ten percent or greater, shall file an application for reorganization with the director. The application shall include a comprehensive plan for reorganization setting forth the proposed disposition of all assets and liabilities in reasonable detail to effect a reorganization. The plan of reorganization shall provide for the assumption of all the trust company's known and unknown claims and liabilities and for the transfer of all its responsibilities as a trustee to a successor trustee or trustees. Additionally, the application for reorganization shall include other evidence, certifications, affidavits,

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documents or information as the director may require demonstrating how assets and liabilities will be treated and the trust company's proposal for addressing any claims that are asserted after the reorganization has been completed. The director shall examine the application for completeness and compliance with the requirements of this section, the business entity laws applicable to the required type of reorganization and applicable rules. The director may conduct a special examination of the trust company for purposes of evaluating the application."

SECTION SJC→10 11←SJC. Section 58-9-12 NMSA 1978 (being Laws 1973, Chapter 191, Section 12) is amended to read:

"58-9-12. PENALTY FOR NONCOMPLIANCE.--

A. It [~~shall be~~] is unlawful for any corporation to carry on or conduct a trust company business or to advertise or hold itself out as being engaged in or doing a trust company business or to use in connection with its business the words "trust company" or words of similar import without first having complied with all the provisions of law relating to trust companies. All officers, directors or trustees of any corporation violating this section [~~shall be~~] are guilty of a misdemeanor and shall be punished by a fine not to exceed five thousand dollars (\$5,000) or imprisonment in the county jail for a definite term not exceeding one year or both [~~such fine and imprisonment~~].

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B. Any person refusing or obstructing access to the director to any books, records or papers, refusing to furnish required information or hindering a full examination of the books, accounts, papers or finances of a trust company is guilty of a misdemeanor and shall be punished by a fine not to exceed five thousand dollars (\$5,000) or imprisonment in the county jail for a definite term not exceeding one year or both."

SECTION SJC→11 12←SJC. REPEAL.--Section 58-9-13 NMSA 1978 (being Laws 1973, Chapter 191, Section 13) is repealed.

SECTION SJC→12 13←SJC. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2018.