



2023 South Dakota Legislature

Senate Bill 95

Introduced by: **Senator Schoenbeck**

1 **An Act to amend provisions regarding trusts.**

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 **Section 1. That § 21-22-18 be AMENDED:**

4 **21-22-18.** The notice provided by § 21-22-17 shall be served upon fiduciaries,
 5 beneficiaries, and attorneys of record, except as otherwise provided in chapter 55-18.
 6 Notice shall be served personally, by mail, postage prepaid, addressed to each person at
 7 the last known post office address as shown by the records and files in the proceeding, or
 8 electronically in accordance with § ~~15-6-5(d)~~15-6-5(b) and applicable local rules, at least
 9 fourteen days prior to the hearing, unless and to the extent that the court for good cause
 10 shown directs a shorter period or approves a different form of notice for some or all
 11 persons.

12 **Section 2. That chapter 55-1 be amended with a NEW SECTION:**

13 Unless specifically restricted by the governing instrument, an enforcer may appoint
 14 an individual or a corporate fiduciary as a co-enforcer. The appointed co-enforcer may
 15 serve only as long as the appointing enforcer serves, or as long as the last to serve if more
 16 than one enforcer appointed the co-enforcer. The appointed co-enforcer may not become
 17 a successor enforcer upon the death, resignation, or incapacity of the appointing enforcer,
 18 unless appointed under the terms of the governing instrument or unless no other
 19 successor enforcer, or method for appointing a successor enforcer, is provided in the
 20 governing instrument.

21 The powers and the responsibilities of the appointed co-enforcer may be limited by
 22 the appointing enforcer in a writing signed by the appointing enforcer at the time of the
 23 appointment. If the powers or responsibilities are so limited, the powers or responsibilities
 24 of the co-enforcer shall be limited as set forth in writing. Unless the powers or
 25 responsibilities are so limited, the appointed co-enforcer may exercise all the powers of

1 the appointing enforcer. The combined powers of the appointed co-enforcer and the
2 appointing enforcer may not exceed the powers of the appointing enforcer alone. The
3 enforcer appointing a co-enforcer may, in writing, revoke the appointment at any time,
4 with or without cause.

5 Unless specifically restricted by the governing instrument, if the governing
6 instrument gives a fiduciary other than the enforcer the power to remove and replace the
7 enforcer, such power includes the power to appoint a co-enforcer to serve with the current
8 enforcer.

9 If an appointment under this section confers upon the appointed co-enforcer, to
10 the exclusion of another co-enforcer, the power to take certain actions, including the
11 power to direct or prevent certain actions of the enforcers, the limitations on liability and
12 the relief from duties and obligations afforded an excluded fiduciary under § 55-1B-2 apply
13 to a co-enforcer who does not hold such power.

14 If the governing instrument is silent concerning the enforcer's power to appoint a
15 co-enforcer, the enforcer shall notify in writing, the trustor, if living, the current trustee
16 or trustees, and any trust protector, trust advisors, and co-enforcers at least thirty days
17 prior to the effective date of the enforcer's exercise of the power granted under this
18 section. The notice, which shall include a copy of the proposed action, shall advise the
19 trustor, the current trustee or trustees, trust protector, trust advisors, or co-enforcers that
20 if they object to the enforcer's appointment, they need to file a written objection with the
21 enforcer prior to the effective date set out in the notice of the proposed action. If an
22 objection is received by the enforcer, prior to the effective date of the appointment, the
23 enforcer may not appoint a co-enforcer. However, this section does not limit the power of
24 the enforcer under law to petition the court for approval of the appointment. If no objection
25 has been timely made, the proposed appointment becomes effective on the later of the
26 date set out in the notice or thirty days after notice has been given. The notice shall be
27 sent by any means allowed under the terms of the trust instrument or authorized in section
28 9 of this Act to the trustor, the current trustee or trustees, trust protector, trust advisors,
29 or co-enforcers.

30 The provisions of this section are effective for trusts created before, on, or after
31 July 1, 2023, except as otherwise directed by the trustor, current trustee or trustees, trust
32 protector, trust advisors, or other fiduciary designated by the terms of the trust.

33 **Section 3. That § 55-1-32 be AMENDED:**

1 **55-1-32. Pierce the veil and dominion and control claims by a party are, in**
 2 essence, a variation of the alter ego common law doctrine. This section covers all of these
 3 types of claims.

4 In the event that a party ~~challenges~~brings an action against a trustee, beneficiary,
 5 trust advisor, or trust protector under an alter ego claim, a settlor or a beneficiary's
 6 influence over a trust, none of the following factors, alone or in combination, may be
 7 considered ~~dominion and control over a trust~~as resulting in the alter ego theory being
 8 applied to a trustee or the person who is claimed to be the alter ego:

- 9 (1) The settlor or a beneficiary serving as a trustee or a co-trustee as described in
 10 § 55-1-28;
- 11 (2) The settlor or a beneficiary holds an unrestricted power to remove or replace a
 12 trustee;
- 13 (3) The settlor or a beneficiary is a trust administrator, a general partner of a
 14 partnership, a manager of a limited liability company, an officer of a corporation,
 15 or any other managerial function of any other type of entity, and part or all of the
 16 trust property consists of an interest in the entity;
- 17 (4) A person related by blood or adoption to the settlor or a beneficiary is appointed
 18 as trustee;
- 19 (5) The settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or
 20 friend is appointed as trustee;
- 21 (6) A business associate is appointed as a trustee;
- 22 (7) A beneficiary holds any power of appointment over any or all of the trust property;
- 23 (8) The settlor holds a power to substitute property of equivalent value;
- 24 (9) The trustee may loan trust property to the settlor for less than a full and adequate
 25 rate of interest or without adequate security;
- 26 (10) The distribution language provides any discretion;
- 27 (11) The trust has only one beneficiary eligible for current distributions; ~~or~~
- 28 (12) ~~The~~A beneficiary serving as ~~a trust advisor for investments under subdivision 55-~~
 29 ~~1B-1(6).~~ an investment trust advisor, as the role is defined in § 55-1B-1;
- 30 (13) Isolated occurrences where the settlor has signed checks, made disbursements, or
 31 executed other documents related to the trust as a trustee, when in fact the settlor
 32 was not a trustee;
- 33 (14) Making any requests for distributions on behalf of beneficiaries;
- 34 (15) Making any requests to the trustee to hold, purchase, or sell any trust property;
 35 or

1 (16) A beneficiary serving as a trust protector or a trust advisor.

2 **Section 4. That § 55-1-33 be REPEALED:**

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

7 ~~(1) Any combination of the factors listed in § 55-1-32;~~

8 ~~(2) Isolated occurrences where the settlor has signed checks, made disbursements, or~~
 9 ~~executed other documents related to the trust as a trustee, when in fact the settlor~~
 10 ~~was not a trustee;~~

11 ~~(3) Making any requests for distributions on behalf of beneficiaries;~~

12 ~~(4) Making any requests to the trustee to hold, purchase, or sell any trust property.~~

13 **Section 5. That chapter 55-1A be amended with a NEW SECTION:**

14 If otherwise validly executed, the following documents may be executed in
 15 accordance with chapter 53-12:

16 (1) The governing instrument of an express trust, or other document, other than a will
 17 or codicil as defined in title 29A;

18 (2) The resignation, removal, appointment, or acceptance of appointment of any
 19 trustee, any advisor or protector, or of any designated representation addressed
 20 in title 55;

21 (3) A consent, release, ratification, or indemnification addressed in title 55; and

22 (4) Any other document addressed by title 55 to the extent it is not excluded from the
 23 scope of chapter 53-12.

24 Notwithstanding any provision of chapter 53-12 to the contrary, the documents
 25 under this section are deemed to be a transaction within the meaning of subdivision 53-
 26 12-1(17) and are within the scope of chapter 53-12.

27 **Section 6. That § 55-1A-41 be AMENDED:**

28 **55-1A-41.** Unless specifically restricted by the governing instrument, a trustee
 29 may appoint an individual or a corporate fiduciary as a co-trustee. The appointed co-
 30 trustee may serve only as long as the appointing trustee serves, or as long as the last to
 31 serve if more than one trustee appointed the co-trustee. The appointed co-trustee may

1 not become a successor trustee upon the death, resignation, or incapacity of the
2 appointing trustee, unless appointed under the terms of the governing instrument or
3 unless no other successor trustee, or method for appointing a successor trustee, is
4 provided in the governing instrument.

5 The powers and the responsibilities of the appointed co-trustee may be limited by
6 the appointing trustee in a writing signed by the appointing trustee at the time of the
7 appointment. If the powers or responsibilities are so limited, the powers or responsibilities
8 of the co-trustee shall be limited as set forth in writing. Unless the powers or
9 responsibilities are so limited, the appointed co-trustee may exercise all the powers of the
10 appointing trustee. The combined powers of the appointed co-trustee and the appointing
11 trustee may not exceed the powers of the appointing trustee alone. The trustee appointing
12 a co-trustee may, in writing, revoke the appointment at any time, with or without cause.

13 Unless specifically restricted by the governing instrument, if the governing
14 instrument gives a fiduciary other than the trustee the power to remove and replace the
15 trustee, such power includes the power to appoint a co-trustee to serve with the current
16 trustee.

17 If an appointment under this section confers upon the appointed co-trustee, to the
18 exclusion of another co-trustee, the power to take certain actions, including the power to
19 direct or prevent certain actions of the trustees, the limitations on liability and the relief
20 from duties and obligations afforded an excluded fiduciary under § 55-1B-2 apply to a co-
21 trustee who does not hold such power.

22 If the governing instrument is silent concerning the trustee's power to appoint a
23 co-trustee, the trustee shall notify in writing, the trustor, if living, and all current income
24 and principal beneficiaries at least thirty days prior to the effective date of the trustee's
25 exercise of the power granted under this section. The notice, which shall include a copy
26 of the proposed action, shall advise the trustor and current beneficiaries that if they object
27 to the trustee's appointment they need to file a written objection with the trustee prior to
28 the effective date set out in the notice of the proposed action. If an objection is received
29 by the trustee, prior to the effective date of the appointment, the trustee may not appoint
30 a co-trustee. However, this section does not limit the power of the trustee under law to
31 petition the court for approval of the appointment. If no objection has been timely made,
32 the proposed appointment ~~shall go into effect~~ becomes effective on the later of the date
33 set out in the notice or thirty days after notice has been given. The notice ~~shall~~ must be
34 sent by any means allowed under the terms of the trust instrument, by mail with postage

1 prepaid to the last known address of the trustor or current beneficiary, or by means
2 otherwise allowed by law.

3 A governing instrument may provide for the appointment of two or more trustees
4 and confer or allocate on one or more of the trustees, to the exclusion of other trustees,
5 the power to direct, veto, or overrule specified actions or decisions of other trustees, or
6 with sole responsibility for certain trustee duties. Any excluded trustee shall act in
7 accordance with the exercise of the power, is not liable for complying with the exercise of
8 the power, and has no obligation to review, inquire, investigate, or undertake any
9 recommendations or evaluations with respect to the exercise of the power. A trustee
10 having the power has the sole duty to account to the beneficiaries with respect to the
11 exercise of the power and, if found liable for a breach of the trustee's duties with respect
12 to the exercise of the power, is liable as if that trustee were the sole trustee.

13 The provisions of this section are effective for trusts created before, on, or after
14 July 1, 2017, except as otherwise directed by the trustor, trust protector, trust advisor,
15 or other fiduciary designated by the terms of the trust.

16 **Section 7. That § 55-2-13 be AMENDED:**

17 ~~**55-2-13.** Notification to any qualified beneficiary under this section may be carried~~
18 ~~out personally, by mail, postage prepaid, addressed to the entity or individual's last known~~
19 ~~post office address, or electronically pursuant to the provisions of § 15-6-5(d), and on~~
20 ~~representatives of qualified beneficiaries pursuant to chapter 55-18.~~

21 ~~For purposes of this section, the term, qualified beneficiary, means a beneficiary~~
22 ~~that is an entity then in existence or an individual who is twenty one years of age or older~~
23 ~~and who, on the date the beneficiary's qualification is determined:~~

24 ~~(1) Is a distributee or permissible distributee of trust income or principal;~~

25 ~~(2) Would be a distributee or permissible distributee of trust income or principal if~~
26 ~~the interests of the distributees terminated on that date; or~~

27 ~~(3) Would be a distributee or permissible distributee of trust income or principal if~~
28 ~~the trust terminated on that date. However, if the distributee is then unknown because a~~
29 ~~person holds a power to change the distributee, the trustee shall give notice only to the~~
30 ~~holder of the power.~~

31 (1) Except as otherwise provided by the terms of a trust instrument governing a
32 revocable trust and subject to § 55-2-14, a trustee has no duty to notify the
33 qualified beneficiaries of the trust's existence.

1 ~~(2)~~ Except as otherwise provided by the terms of a trust instrument governing an
 2 irrevocable trust or otherwise directed in writing by the ~~settlor~~trustor, trust advisor,
 3 or trust protector, the trustee shall:

4 (a) Notify the qualified beneficiaries of the trust's existence and of the right of the
 5 qualified beneficiary to request a copy of the trust instrument pertaining to
 6 the qualified beneficiary's interest in the trust within sixty days after the
 7 trustee has accepted trusteeship of the trust, or within sixty days after the
 8 date the trustee acquires knowledge that a formerly revocable trust has
 9 become irrevocable; ~~notify the qualified beneficiaries of the trust's~~
 10 ~~existence and of the right of the beneficiary to request a copy of the trust~~
 11 ~~instrument pertaining to the beneficiary's interest in the trust.~~

12 For purposes of this section, the terms, trust advisor and trust protector, have the
 13 same meanings as those defined in ~~§ 55-1B-1.~~

14 ~~Except as otherwise provided by the terms of an irrevocable trust or otherwise~~
 15 ~~directed in writing by the settlor, trust advisor, or trust protector, a trustee of an~~
 16 ~~irrevocable trust:~~

17 ~~(1) Upon request of a qualified beneficiary, shall~~

18 ~~(b) promptly~~Promptly furnish to the qualified beneficiary a copy of the trust
 19 instrument upon request by the qualified beneficiary; and

20 ~~(2) If notification of the trust has not been accomplished pursuant to this section within~~
 21 ~~sixty days after accepting a trusteeship, shall notify the qualified beneficiaries of~~
 22 ~~the acceptance and of the trustee's name, address, and telephone number;~~

23 ~~(3)(c) Shall promptly~~Promptly respond to a qualified beneficiary's request for
 24 information related to the administration of the trust, unless the request is
 25 unreasonable under the circumstances.

26 ~~(3)~~ The ~~settlor~~trustor, trust advisor, or trust protector, may, by the terms of the
 27 governing instrument, or by providing written directions to the trustee, expand,
 28 restrict, eliminate, or otherwise modify the rights of beneficiaries to information
 29 relating to a trust. Unless otherwise stated in the governing instrument, the
 30 direction of the trustor controls in the event of a conflict among written directions
 31 provided to the trustee pursuant to this section. The trustee incurs no liability for
 32 a loss or otherwise for relying upon the written directions, including an instance
 33 when the governing instrument of an irrevocable trust does not expressly authorize
 34 an expansion, restriction, or other modification of the rights of beneficiaries to
 35 information relating to a trust. ~~The written directions remain effective until or unless~~

1 ~~the settlor, trust advisor, or trust protector who provided the written directions~~
 2 ~~revokes the written directions by providing a writing to that effect to the trustee or~~
 3 ~~the trustee receives notification that the settlor, trust advisor, or trust protector~~
 4 ~~who provided the written directions is incapacitated. Additionally, the written~~
 5 ~~directions remain in effect only while the trust advisor or trust protector providing~~
 6 ~~the written directions is serving as the current trust advisor or trust protector.~~
 7 ~~Unless otherwise specifically provided in the written directions, upon the death or~~
 8 ~~incapacity of a settlor who provided the written directions described in this section,~~
 9 ~~the directions shall be deemed revoked. However, upon the death or incapacity of~~
 10 ~~the settlor, a trust advisor or trust protector, if any, may further direct the trustee~~
 11 ~~in writing pursuant to this section. Unless otherwise stated in the governing~~
 12 ~~instrument, the direction of the settlor shall control in the event of a conflict among~~
 13 ~~written directions provided to the trustee pursuant to this section.~~

14 The terms of a trust instrument governing an irrevocable trust or written directions
 15 provided pursuant to this section may expand, restrict, eliminate, or otherwise vary the
 16 right of a beneficiary to be informed of the beneficiary's interest in a trust indefinitely or
 17 for a period of time, including for example:

18 ~~(1)(a)~~ A period of time related to the age of a beneficiary;

19 ~~(2)(b)~~ A period of time related to the lifetime of either a ~~settlor~~trustor or spouse of
 20 a ~~settlor~~trustor, or both;

21 ~~(3)(c)~~ A period of time related to a term of years or specific date; and

22 ~~(4)(d)~~ A period of time related to a specific event that is certain to occur.

23 ~~(4)~~ The terms of the governing instrument or written directions provided pursuant to
 24 this section may authorize either the ~~settlor~~trustor, trust advisor, or trust protector
 25 to appoint a representative as provided in subdivisions 55-18-9 (11) and (12) for
 26 the purpose of being informed, on behalf of the beneficiary, of the beneficiary's
 27 interest in a trust for the period of time that the right of a beneficiary to be informed
 28 about a beneficiary's interest is restricted or eliminated pursuant to this section.

29 ~~(5)~~ The written directions of the trustor, whether made in the governing instrument or
 30 by separate written directions made pursuant to the governing instrument or this
 31 section, control and remain in effect upon the death of the trustor until or unless
 32 modified or revoked by a trust advisor or trust protector as permitted by the
 33 governing instrument or the trustor's written directions in effect at the time of the
 34 trustor's death. Subject to subsection (3), the written directions of a trust advisor

1 or trust protector remain in effect until or unless a trust advisor or trust protector
2 revokes the written directions by providing a writing to that effect to the trustee.

3 A(6) Any beneficiary may waive the right to the notice or information otherwise required
4 to be furnished under this section and, with respect to future reports and other
5 information, may withdraw a waiver previously given.

6 ~~The change in the identity of a trustee, occurring as the result of a mere name~~
7 ~~change or a merger, consolidation, combination, or reorganization of a trustee, does not~~
8 ~~require notice.~~

9 (7) ~~If a fiduciary is bound by a duty of confidentiality with respect to a trust or its~~
10 ~~assets, Before providing information to any qualified beneficiary, a fiduciary may~~
11 ~~require that any such qualified beneficiary or beneficiaries who is eligible to receive~~
12 ~~information pursuant to this section be bound by the same duty of confidentiality~~
13 ~~that binds the fiduciary trustee before receiving such information from the trustee.~~
14 If trust information is sought through service of a subpoena on a fiduciary, the
15 fiduciary may petition the court for an order that makes disclosure of trust
16 information contingent upon the receiving party being bound by reasonable
17 conditions to ensure the protection of confidentiality of trust information by the
18 receiving party.

19 (8) ~~The change in the identity of a trustee, occurring as the result of a mere name~~
20 ~~change or a merger, consolidation, combination, or reorganization of a trustee,~~
21 ~~does not require notice.~~

22 (9) ~~For the purposes of this section, the term, qualified beneficiary, means a~~
23 ~~beneficiary that is an entity then in existence or an individual who is twenty-one~~
24 ~~years of age or older and who, on the date the beneficiary's qualification is~~
25 ~~determined:~~

26 (a) ~~Is a distributee or permissible distributee of trust income or principal;~~

27 (b) ~~Would be a distributee or permissible distributee of trust income or principal~~
28 ~~if the interests of the distributees terminated on that date; or~~

29 (c) ~~Would be a distributee or permissible distributee of trust income or principal~~
30 ~~if the trust terminated on that date.~~

31 ~~However, if the distributee is then unknown because a person holds a power to~~
32 ~~change the distributee, the trustee shall give notice only to the holder of the power.~~

33 (10) ~~For purposes of this section, the term, trust advisor, and the term, trust protector,~~
34 ~~are defined as provided in § 55-1B-1.~~

1 ~~A trust advisor, trust protector, or other fiduciary designated by the terms of the~~
2 ~~trust shall keep each excluded fiduciary designated by the terms of the trust reasonably~~
3 ~~informed about:~~

4 ~~(1) The administration of the trust with respect to any specific duty or function being~~
5 ~~performed by the trust advisor, trust protector, or other fiduciary to the extent that~~
6 ~~the duty or function would normally be performed by the excluded fiduciary or to~~
7 ~~the extent that providing such information to the excluded fiduciary is reasonably~~
8 ~~necessary for the excluded fiduciary to perform its duties; and~~

9 ~~(2) Any other material information that the excluded fiduciary would be required to~~
10 ~~disclose to the qualified beneficiaries under this section regardless of whether the~~
11 ~~terms of the trust relieve the excluded fiduciary from providing such information~~
12 ~~to qualified beneficiaries. Neither the performance nor the failure to perform of a~~
13 ~~trust advisor, trust protector, or other fiduciary designated by the terms of the~~
14 ~~trust as provided in this subdivision shall affect the limitation on the liability of the~~
15 ~~excluded fiduciary.~~

16 (11) The provisions of this section are effective for trusts created, amended, or restated
17 after June 30, 2002, except as otherwise directed by the ~~settlor~~trustor, trust
18 protector, trust advisor, or other fiduciary designated by the terms of the trust. For
19 trusts created before July 1, 2002, a trustee has no duty at common law or
20 otherwise to notify a qualified beneficiary of the trust's existence unless otherwise
21 directed by the ~~settlor~~trustor. The provisions of this paragraph do not apply if
22 otherwise directed by the ~~settlor~~trustor, trust protector, trust advisor, or other
23 fiduciary designated by the terms of the trust.

24 **Section 8. That chapter 55-2 be amended with a NEW SECTION:**

25 A trust advisor, trust protector, or other fiduciary designated by the terms of the
26 trust shall keep each excluded fiduciary designated by the terms of the trust reasonably
27 informed about:

28 (1) The administration of the trust with respect to any specific duty or function being
29 performed by the trust advisor, trust protector, or other fiduciary to the extent that
30 the duty or function would normally be performed by the excluded fiduciary or to
31 the extent that providing such information to the excluded fiduciary is reasonably
32 necessary for the excluded fiduciary to perform its duties; and

33 (2) Any other material information that the excluded fiduciary would be required to
34 disclose to the qualified beneficiaries, regardless of whether the terms of the trust

1 relieve the excluded fiduciary from providing such information to the qualified
2 beneficiaries pursuant to § 55-2-13.

3 The limitation of the liability of the excluded fiduciary is not affected by the
4 performance of the actions required above or the failure of a trust advisor, trust protector,
5 or other fiduciary designated pursuant to the terms of the governing instrument, to
6 perform any such actions.

7 **Section 9. That chapter 55-2 be amended with a NEW SECTION:**

8 Except as otherwise provided by chapter 21-22, § 55-4-58, or by the terms of a
9 governing instrument, and in addition to the methods of notice allowed or mandated by
10 title 15, notice to beneficiaries and other persons interested in a trust pursuant to § 55-
11 2-13 or otherwise may be carried out by means of any of the following methods:

12 (1) By delivery to the person, to the person's last known address, or to an address
13 supplied by the person;

14 (2) By U.S. mail, postage prepaid, addressed to the person at the person's last known
15 address, or to an address supplied by the person;

16 (3) By facsimile to a facsimile number of such person;

17 (4) By electronic communication, as defined by subdivision 55-19-1(12); or

18 (5) By posting on or sending to an electronic network or site accessible via the internet,
19 mobile application, computer, mobile device, tablet, or any other electronic device,
20 together with separate notice of the posting provided to the person in conformity
21 with subdivisions (1), (2), (3), or (4) of this section.

22 **Section 10. That § 55-3-28 be AMENDED:**

23 **55-3-28.** On petition by a trustee or beneficiary, the court may reform the terms
24 of the trust, based upon a showing by the preponderance of the evidence and without any
25 preliminary showing of an ambiguity, to conform to the trustor's intention if the failure to
26 conform was due to a mistake of fact or law or a scrivener's error and the trustor's intent
27 can be established. The terms of the trust may be construed or modified, in a manner that
28 does not violate the trustor's probable intention, to achieve the trustor's tax objectives.

29 **Section 11. That § 55-3-45 be AMENDED:**

30 **55-3-45.** If a trust is not subject to court supervision under chapter 21-22, and if
31 no objection has been made by a distribution beneficiary, as defined in this title, of a trust

1 within one hundred eighty days after a copy of the trustee's accounting has been ~~mailed,~~
 2 ~~postage prepaid, to the last known address of such distribution beneficiary, personally, or~~
 3 ~~electronically provided~~ in accordance with ~~§ 15-6-5(d)~~section 9 of this Act, the distribution
 4 beneficiary is deemed to have approved such accounting of the trustee, and the trustee,
 5 absent fraud, intentional misrepresentation, or material omission, shall be released and
 6 discharged from any and all liability to all beneficiaries of the trust as to all matters set
 7 forth in such accounting. Alternatively, the trustee's accounting may be approved on
 8 behalf of all beneficiaries by a trust advisor or trust protector, or in accordance with § 55-
 9 18-9 if:

10 (1) Notice or information to the beneficiaries has been waived or modified in
 11 accordance with § 55-2-13; or

12 (2) Authorized under the terms of the governing instrument.

13 The provisions of chapter 55-18 apply to this section.

14 For purposes of this section, the term, accounting, means any interim or final
 15 report or other statement provided by a trustee reflecting all transactions, receipts, and
 16 disbursements during the reporting period and a list of assets as of the end of the period
 17 covered by the report or statement, and including written notice to the distribution
 18 beneficiary of the provisions of this section.

19 **Section 12. That § 55-15-1 be AMENDED:**

20 **55-15-1.** Terms used in this chapter mean:

21 (1) "Disinterested person," any person who is not a related or subordinate party, as
 22 defined in ~~section 26 U.S.C. § 672(c) of the Internal Revenue Code (26 U.S.C.~~
 23 ~~section 1, et seq.),~~ as amended and in effect on January 1, 2023, with respect to
 24 the person then acting as trustee of the trust and excludes the trustor of the trust
 25 and any interested trustee;

26 (2) "Income trust," any trust, created by either an inter vivos or a testamentary
 27 instrument, which directs or permits the trustee to distribute the net income of the
 28 trust to one or more persons, whether at fixed intervals or from time to time, either
 29 in fixed proportions or in amounts or proportions determined by the trustee.
 30 However, no trust that otherwise is an income trust may qualify pursuant to this
 31 subdivision, if it is subject to taxation under ~~I.R.C. section~~26 U.S.C. § 2001 or
 32 ~~section~~26 U.S.C. § 2501, as amended and in effect on January 1, 2023, until the
 33 expiration of the period for filing the return therefor (including extensions);

- 1 (3) "Interested distributee," any person to whom distributions of income or principal
 2 can currently be made who has the power to remove the existing trustee and
 3 designate as successor a person who may be a related or subordinate party, as
 4 defined in ~~I.R.C. section~~26 U.S.C. § 672(c), as amended and in effect on January
 5 1, 2023, with respect to such distributee;
- 6 (4) "Interested trustee;"
 7 (i) ~~any~~(a) Any individual trustee to whom the net income or principal of the trust
 8 can currently be distributed or would be distributed if the trust were then
 9 to terminate and be distributed~~; or~~;
- 10 (ii) ~~any~~(b) Any trustee who may be removed and replaced by an interested
 11 distributee~~; or~~;
- 12 (iii) ~~any~~(c) Any individual trustee whose legal obligation to support a beneficiary
 13 may be satisfied by distributions of income and principal of the trust~~; or~~
 14 (iv) ~~any~~(d) Any of the above;
- 15 (5) "Total return unitrust," any income trust which has been converted under and
 16 meets the provisions of this chapter;
- 17 (6) "Trustee," all persons acting as trustee of the trust, except where expressly noted
 18 otherwise, whether acting in their discretion or on the direction of one or more
 19 persons acting in a fiduciary capacity;
- 20 (7) "Trustor," any individual who created an inter vivos or a testamentary trust;
- 21 (7A) "Unitrust," a trust, the terms of which require or permit distribution of a unitrust
 22 amount, without regard to whether the trust has been converted to a unitrust in
 23 accordance with this chapter or whether the trust is established by express terms
 24 of the governing instrument;
- 25 (8) "Unitrust amount," an amount equal to a percentage of a unitrust's assets that
 26 may or are required to be distributed to one or more beneficiaries annually in
 27 accordance with the terms of the unitrust. The unitrust amount may be determined
 28 by reference to the net fair market value of the unitrust's assets as of a particular
 29 date each year or as an average determined on a multiple year basis;
- 30 (9) "Current valuation year," the accounting period of the trust for which the unitrust
 31 amount is being determined;
- 32 (10) "Prior valuation year," each of the two accounting periods of the trust immediately
 33 preceding the current valuation year; ~~and~~
- 34 (11) "I.R.C.," the Internal Revenue Code (26 U.S.C. section 1, et seq.)~~; and~~ and

1 (12) "Net income," the amount of income of the trust for the taxable year described in
 2 26 U.S.C. § 643(b), as amended and in effect on January 1, 2023, as income when
 3 not preceded by the words, taxable, distributable net, undistributed net, or gross,
 4 otherwise known as the trust accounting income of a trust.

5 **Section 13. That § 55-15-8 be AMENDED:**

6 **55-15-8.** Following the conversion of an income trust to a total return unitrust,
 7 the trustee:

8 (1) Shall treat the unitrust amount as ~~if it were~~the net income of the trust for purposes
 9 of determining the amount available, from time to time, for distributions from the
 10 trust; and

11 (2) May allocate to trust income for each taxable year of the trust (or portions thereof):
 12 ~~(i) net~~(a) Net short-term capital gain described in ~~I.R.C. section~~26 U.S.C. §
 13 1222(5), as amended and in effect on January 1, 2023, for such year (or
 14 portion thereof) but only to the extent that the amounts so allocated
 15 together with all other amounts allocate to trust income for such year (or
 16 portion thereof) does not exceed the unitrust amount for such year (or
 17 portion thereof); and

18 ~~(ii) net~~(b) Net long-term capital gain described in ~~I.R.C. section~~26 U.S.C. §
 19 1222(7), as amended and in effect on January 1, 2023, for such year (or
 20 portion thereof) but only to the extent that the amount so allocated together
 21 with all other amounts, including amounts described in ~~clause (i)~~subsection
 22 (a) above, allocated to trust income for such year (or portion thereof) does
 23 not exceed the unitrust amount for such year (or portion thereof).

24 **Section 14. That § 55-15-9 be AMENDED:**

25 **55-15-9.** In administering a total return unitrust, the trustee may, in its sole
 26 discretion but subject to the provisions of the governing instrument, determine:

27 (1) The effective date of the conversion;
 28 (2) The timing of distributions during the year, if any, including provisions for prorating
 29 ~~a—distributions for a short year in which a beneficiary' right to payments~~
 30 ~~commences or ceases~~when the effective date of a conversion takes place during
 31 the year;

32 (3) Whether distributions are to be made in cash or in kind or partly in cash and partly
 33 in kind;

- 1 (4) If the trust is reconverted to an income trust, the effective date of such
 2 reconversion; and
 3 (5) Such other administrative issues as may be necessary or appropriate to carry out
 4 the purposes of this chapter.

5 **Section 15. That § 55-15-10 be AMENDED:**

6 **55-15-10.** Conversion to a total return unitrust under the provisions of this
 7 chapter does not affect any other provisions of the governing instrument, if any, regarding
 8 distributions of principal or the standards for distributions of income.

9 **Section 16. That § 55-18-1 be AMENDED:**

- 10 **55-18-1.** Terms used in this chapter mean:
- 11 (1) "Bind" or "bound," to consent, receive notice or service of process, approve, agree,
 12 object, resist, waive, or demand for or as a person with the same binding and
 13 conclusive effect as if the person represented had;
- 14 (2) "Conflict of interest," a situation in which a representative's interest in the trust
 15 causes a significant likelihood that a reasonable person would disregard a
 16 representative's duty to a represented beneficiary. A conflict of interest, however,
 17 excludes:
 18 (i) ~~any(a)~~ Any adversity, conflict or opposed interests substantially unrelated to
 19 the representative's interest in the trust;
 20 (ii) ~~any(b)~~ Any past situation which is not likely to re-occur; and
 21 (iii) ~~any(c)~~ Any conflict of interest which falls short of a material conflict of interest;
- 22 (3) "Co-representative," more than one simultaneously acting representative of the
 23 same class pursuant to § 55-18-9, as when co-guardians are acting;
- 24 (4) "Conservator," a person appointed pursuant to chapter 29A-5 or equivalent
 25 provisions of another jurisdiction's laws including a temporary conservator, a
 26 guardian ad litem, and a limited conservator;
- 27 (5) "Fiduciary," a person defined by subdivision 21-22-1(3), except as used in § 55-
 28 18-17;
- 29 (6) "Guardian," a person appointed pursuant to chapter 29A-5 or equivalent provisions
 30 of another jurisdiction's laws including a temporary guardian and a limited
 31 guardian;
- 32 (7) "Incapacitated" or "incapacity," lacking the capacity to meaningfully understand
 33 the matter in question because of a mental or physical impairment;

- 1 (8) "Interest," a beneficial interest as defined by subdivision 55-1-24(1) but including
2 the holder of a power of appointment, and any power to remove or replace a
3 fiduciary or a representative;
- 4 (9) "Interested beneficiary," a person who, on the date the person's qualification is
5 determined:
- 6 (a) Is a current distributee or permissible distributee of trust income or
7 principal;
- 8 (b) Would be a distributee or permissible distributee of trust income or principal
9 if the interests of the current distributees terminated on that date;
- 10 (c) Would be a distributee or permissible distributee of trust income or principal
11 if the trust terminated on that date;
- 12 (d) Holds a power of appointment; or
- 13 (e) Would hold a power of appointment if the interests of the current
14 distributees terminated on that date or the interests of the persons currently
15 holding a power of appointment under this subdivision terminated on that
16 date;
- 17 (10) "Knows" or "knowingly," actual knowledge of the fact in question;
- 18 (11) "Minor," any person who has not attained the age of eighteen. The term includes
19 a minor with an incapacity;
- 20 (12) "Nonjudicial settlement," an agreement, release, or other action whether or not
21 approved by a court, which may include, without limitation:
- 22 (a) The interpretation or construction of the terms of a trust;
- 23 (b) The approval of any fiduciary's report or accounting;
- 24 (c) Direction to any fiduciary to refrain from performing a particular act or the
25 grant to a fiduciary of any necessary or desirable power;
- 26 (d) The resignation or appointment of any fiduciary;
- 27 (e) The determination of a fiduciary or a representative's compensation;
- 28 (f) The transfer of a trust's principal place of administration or situs;
- 29 (g) The liability of any fiduciary's action or omission relating to a trust;
- 30 (h) Partial or final settlement agreements regarding a trust or its
31 administration; or
- 32 (i) The modification, amendment, reformation, or termination of a trust;
- 33 (13) "Notice" or "notifies," notice provided ~~personally, by mail, postage prepaid,~~
34 ~~addressed to the person's last known post office address, or electronically~~in
35 accordance with ~~§ 15-6-5(d)~~section 9 of this Act;

- 1 (14) "Notifier," a person who is undertaking notice or proposing consent with regard to
2 a matter concerning a trust;
- 3 (15) "Power of appointment," a power defined by § 55-1-12;
- 4 (16) "Proceeding," any judicial or nonjudicial trust proceeding, accounting, termination,
5 modification, reformation, decanting, settlement, nonjudicial settlement, and any
6 proceeding conducted pursuant to chapter 21-22 or title 29A which concerns a
7 trust;
- 8 (17) "Protected person," a person other than a minor for whom a guardian or
9 conservator is appointed;
- 10 (18) "Reasonably available," with respect to a person, that the person can be identified
11 and located with the exercise of reasonable diligence;
- 12 (19) "Representative," a person who may bind another person pursuant to § 55-18-9;
- 13 (20) "Trust," an express inter vivos or testamentary trust; and
- 14 (21) "Uninterested beneficiary," a beneficiary other than an interested beneficiary.