

D R A F T
FOR DISCUSSION ONLY

DIRECTED TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 28-29, 2016 Committee Meeting

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ON UNIFORM STATE LAWS

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October 7, 2016

DIRECTED TRUST ACT

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PREFATORY NOTE

Background. The Directed Trust Act addresses an increasingly common arrangement in contemporary estate planning and asset management known as a directed trust. A directed trust usually involves the naming of a trustee to hold custody of the trust property and another person who is not a trustee to perform one or more of the investment, distribution, and administration functions that would otherwise have belonged to the trustee. There is no consistent vocabulary for the nontrustee powerholder in a directed trust. Several terms are common in practice, including “trust protector,” “trust adviser,” and “trust director.” There is much uncertainty about the fiduciary status of a nontrustee who has control over the administration of a trust and about the fiduciary responsibility of a trustee with regard to actions taken or directed by such a nontrustee. Existing uniform trusts and estates statutes address the issue inadequately. Existing nonuniform state laws are in disarray.

The Directed Trust Act. Under this act, a nontrustee who holds a fiduciary power over the administration of a trust is called a “trust director.” A trustee that is subject to a power of a trust director is called a “directed trustee.” The core contribution of the act is to address the many complications created by giving a power over the administration of a trust to a person who is not a trustee. These complications include the fiduciary duty of a trust director (Section 7) and the fiduciary duty of a directed trustee (Sections 8 and 10).

Enabling Settlor Autonomy Subject to Fiduciary Minimums. By validating terms of a trust that provide for a trust director with a power over the administration of a trust, this act supports the settlor’s freedom of disposition. At the same time, the act provides for certain mandatory minimum fiduciary safeguards in accordance with the venerable principle that a trust is a fiduciary relationship.

Structure of the Act. The heart of the act appears in Sections 5 through 10, which address the powers and duties of trust directors and directed trustees. Sections 5 through 7 address the kinds of powers that the terms of a trust can grant to a trust director and the fiduciary duty of the director. Sections 8 through 10 address the fiduciary duty of a directed trustee, prescribing the ways in which the existence of a trust director changes the trustee’s normal fiduciary duty. Section 11 addresses the relationship between a directed trust and cotrusteeship. The remaining sections address a variety of important technical issues in the administration of a directed trust and in this act’s relationship to existing law.

Key Policy Questions. The key policy questions on which the drafting committee focused are: (1) the scope of the powers that may be granted to a trust director (Sections 5 and 6); (2) the fiduciary duties of a trust director (Section 7) and a directed trustee (Sections 8 and 10); and (3) the extension of the fiduciary rules of a directed trust to cotrusteeship (Section 11). With respect to the fiduciary duties of a directed trustee, as explained in the comment to Section 8, of the viable options from among the existing directed trust statutes, the drafting committee preferred the one that protects beneficiaries most strongly. **[Further prefatory note to come/for discussion—e.g., “willful misconduct” as a net increase in duty relative to nondirected trust.]** October 28-29, 2016 Committee Meeting

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SECTION 1. SHORT TITLE. This [act] may be cited as the Directed Trust Act.

Comment

This act governs a set of trust arrangements that are commonly known as “directed trusts.” In rough terms, a directed trust is a trust in which a person other than a trustee holds a fiduciary power to direct some aspect of the trust’s administration. Under this act, the person who holds such a power is called a “trust director,” and a trustee that is subject to such a power is called a “directed trustee” (see Section 2(2) and (6)). This act covers any arrangement that exhibits the functional features of a directed trust, even if the terms of the trust use other terminology, such as a “trust protector” or a “trust advisor.”

SECTION 2. DEFINITIONS. In this [act]:

(1) “Breach of trust” includes a violation by a trust director or trustee of a duty imposed by this [act] or the terms of a trust.

(2) “Directed trustee” means a trustee that is subject to a trust director’s power of direction under Section 6.

(3) “Person” means an individual, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(4) “Power of appointment” means a power given by the terms of a trust to a person that enables the person in a nonfiduciary capacity to designate a recipient of an ownership interest in or a power of appointment over the trust property.

(5) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or insular possession subject to the jurisdiction of the United States.

(6) “Terms of a trust” means the manifestation of a settlor’s intent regarding a trust’s provisions:

(A) as expressed in the trust instrument;

(B) as established by other evidence that would be admissible in a judicial proceeding;

(C) as amended by a trustee or trust director in accord with the terms of the trust;

[or]

(D) as determined or amended by court order[; or

(E) as determined or amended by nonjudicial settlement agreement under [Uniform Trust Code Section 111]].

(7) “Trust director” means a person, other than a trustee, that is given a power of direction under Section 6 by the terms of a trust whether or not the terms of the trust designate the person as a trust director, trust protector, or trust adviser, and whether or not the person is a beneficiary.

Legislative Note: A state that has adopted Uniform Trust Code Section 103(18) (2004) or Uniform Trust Decanting Act Section 2(28) (2015), defining “terms of a trust,” should consider updating those definitions to conform with paragraph (6) of this section. A state that has not adopted Uniform Trust Code Section 111 (2000) should replace the bracketed language of subparagraph 6(E) with a cross reference to the state’s law governing nonjudicial settlement or should omit subparagraph 6(E) if the state does not have such a law.

Comment

(1) *Breach of trust.* The definition of “breach of trust” in paragraph (1) clarifies that the term “includes” a breach by a trust director of a duty imposed by this act or the terms of a trust. Historically, the term has been used to reference a breach of duty by a trustee, as under Uniform Trust Code § 1001(a) (2000) and Restatement (Third) of Trusts § 93 (2012). By expanding the meaning of the term to include a breach of duty by a trust director, this paragraph resolves any doubt about whether such conduct is also a “breach of trust.”

(2) *Directed trustee.* The definition of “directed trustee” in paragraph (2) includes only a trustee that is subject to a trust director’s power of direction under Section 6. A cotrustee that is subject to direction by another cotrustee is not for that reason a directed trustee, as paragraph (7) excludes a trustee from the definition of a “trust director.” Because a trustee cannot be a trust director, a trustee that is subject to direction only by a cotrustee is not a directed trustee under this paragraph. Section 11 addresses the relationship between this act and cotrusteeship.

(3) *Person.* The definition of “person” in paragraph (3) tracks the current Uniform Law Commission definition for that term except that paragraph (3) excludes an “estate” and a “trust,”

1 which has the effect of excluding an “estate” and a “trust” from being a trust director.
2

3 (4) *Power of appointment.* The definition of “power of appointment” in paragraph (4) is
4 based on the similar definition in Uniform Powers of Appointment Act § 102(13) (2013). The
5 definition is consistent with what Restatement (Third) of Property: Wills and Other Donative
6 Transfers § 17.1 cmt. g (2011), refers to as a “discretionary” power of appointment, that is, one
7 in which “the donee may exercise the power arbitrarily as long as the exercise is within the scope
8 of the power.”
9

10 If a power to designate a recipient of an ownership interest in or a power of appointment
11 over trust property is held in a fiduciary capacity, then it is not a “power of appointment” under
12 this paragraph. Instead, it is what Restatement (Third) of Property: Wills and Other Donative
13 Transfers § 17.1 cmt. g (2011), calls a “fiduciary distributive power.” In the hands of a person
14 other than a trustee, a fiduciary distributive power would ordinarily be a power of direction under
15 Section 6.
16

17 Section 6(c)(2) prescribes a default rule of construction under which a power to designate
18 a recipient of an ownership interest in or a power of appointment over trust property is a power
19 of appointment (and so not held in a fiduciary capacity) unless the terms of the trust provide
20 otherwise.
21

22 (5) *State.* The definition of state in paragraph (4) follows the standard Uniform Law
23 Commission definition.
24

25 (6) *Terms of a trust.* The definition of “terms of a trust” in paragraph (5) is based on
26 Uniform Trust Decanting Act § 2(28) (2015), which updates the comparable definition in
27 Uniform Trust Code § 103(18) (2004), to take notice of court orders and nonjudicial settlement
28 agreements, both of which are of growing practical significance. Paragraph (5) improves on the
29 Uniform Trust Decanting Act by further expanding the definition to include amendments (in
30 addition to determinations) by court order and nonjudicial settlement agreement and to include
31 amendments by a trustee or trust director. The Restatement likewise recognizes the possibility
32 that the terms of a trust may later be varied from the settlor’s initial expression, though it does
33 not mention as many mechanisms for variance as paragraph (6). See Restatement (Third) of
34 Trusts § 76 cmt. b(1) (2007) (“References ... to the terms of the trust ... also refer to trust terms
35 as reformed or modified by court decree, and as modified by the settlor or others or by consent of
36 all beneficiaries.”) (internal cross-references omitted).
37

38 (7) *Trust director.* The definition of a “trust director” in paragraph (7) includes any
39 person other than a trustee who is given a power of direction under Section 6. A person granted a
40 power by the terms of a trust that is a power of direction under Section 6 is a trust director even
41 if the terms of the trust or the parties call the person an “adviser” or “protector” or otherwise
42 purport to disclaim trust director status and even if the person is also a beneficiary. However,
43 because the term excludes a trustee, a trustee is not a trust director even if the trustee has a power
44 over another trustee that would be a power of direction under Section 6 if held by a person other
45 than a trustee. The power of such a trustee, and the cotrustee over which the trustee has the
46 power, are governed by the otherwise applicable law of cotrusteeship as modified by Section 11.

1 If a person other than a trustee has a power over a trust that is not a power of direction
2 under Section 6, that person is not a trust director with respect to that power, and the power is not
3 governed by this act.
4

5 **SECTION 3. APPLICATION; PRINCIPAL PLACE OF ADMINISTRATION.**

6 (a) This [act] applies to a trust, whenever created, that has its principal place of
7 administration in this state, subject to the following rules:

8 (1) If the trust was created before or on [the effective date of this [act]], this [act]
9 applies only to conduct after that date.

10 (2) As to a trust whose principal place of administration is changed to this state on
11 or after [the effective date of this [act]], this [act] applies only to conduct after the change.

12 (b) Without precluding other means to establish a sufficient connection with the
13 designated jurisdiction, terms of a trust designating the principal place of administration of the
14 trust are valid and controlling if:

15 (1) a trustee's principal place of business is located in or a trustee is a resident of
16 the designated jurisdiction;

17 (2) a trust director's principal place of business is located in or a trust director is a
18 resident of the designated jurisdiction; or

19 (3) all or part of the administration occurs in the designated jurisdiction.

20 **Legislative Note:** A state that has adopted Uniform Trust Code Section 108(a) (2000) could omit
21 subsection (b) and instead add subsection (b)(2) to Section 108 of the state's Uniform Trust
22 Code.

23 **Comment**

24
25 *Subsection (a).* Subsection (a) addresses two matters. First, because powers and duties in
26 a directed trust are matters of trust administration, *see* Restatement (Second) of Conflict of Laws
27 § 271 cmt. a (1971), this subsection follows the prevailing conflict of laws rule by linking
28 application of this act to the trust's principal place of administration. As with other matters of
29 administration, the parties are protected against inconsistent court orders by the common law
30 principle of "primary supervision." *See id.* § 267 cmt. e.
31

1 Second, this subsection applies this act to all trusts administered in an enacting state
2 regardless of whether the trust was in existence on the effective date of this act. However, under
3 subsections (a)(1) and (2), this act applies only with respect to conduct after the effective date or,
4 if the trust's principal place of administration was changed to the enacting state after the
5 effective date, only with respect to conduct after that change. Because some of the standards of
6 conduct prescribed by this act depart from Uniform Trust Code § 808 (2000) and the common
7 law, *see* Restatement (Third) of Trusts § 75 (2007), the drafting committee reasoned that the act
8 should apply prospectively, following the model of Uniform Prudent Investor Act § 11 (1994).

9
10 *Subsection (b).* Subsection (b), which derives from Uniform Trust Code § 108(a) (2000),
11 establishes a safe harbor for a settlor's designation of a trust's principal place of administration.
12 Such a designation is valid if (1) a trustee is located in the designated jurisdiction, (2) a trust
13 director is located in the designated jurisdiction, or (3) at least some of the trust administration
14 occurs in the designated jurisdiction. Subsections (b)(1) and (b)(3) reproduce without change the
15 safe harbor prescribed by Uniform Trust Code § 108(a) (2000). Subsection (b)(2) is an
16 innovation in that it expands the safe harbor of Section 108(a) to include the location of a trust
17 director, in addition to the location of a trustee, as a sufficient connection with the designated
18 jurisdiction. This expansion reflects this act's validation of a directed trust with a trust director.
19 Other than this expansion, the drafting committee followed the Uniform Trust Code in "not
20 attempt[ing] to further define principal place of administration." Uniform Trust Code § 108 cmt.

21 **SECTION 4. LAW AND PRINCIPLES OF EQUITY.** Unless displaced by a
22 provision of this [act], the law and principles of equity of this state supplement this [act].

23 **Comment**

24 This section confirms that the law and principles of equity of an enacting state remain
25 applicable to a directed trust except to the extent modified or displaced by this act. For example,
26 other than the safe harbor under Section 3(b) for a term of a trust that designates the trust's
27 principal place of administration, the law of an enacting state by which principal place of
28 administration is determined would continue to apply to a directed trust. Provisions such as this
29 one are familiar from other uniform acts. *See, e.g.,* Uniform Powers of Appointment Act § 104
30 (2013); Uniform Trust Code § 106 (2000). This section departs from other uniform acts,
31 however, by referencing "the law" rather than the "common law." Given that so much trust law
32 has been codified by statutes such as the Uniform Trust Code (2000), Uniform Trust Decanting
33 Act (2015), Uniform Principal and Income Act (1997), and Uniform Prudent Investor Act
34 (1994), the drafting committee intended for this section to reference both common law and
35 statute law.

36 **SECTION 5. EXCLUSIONS.** This [act] does not apply to:

- 37 (1) a power of appointment;
- 38 (2) a power to appoint or remove a trustee or trust director;
- 39 (3) a power of a settlor with respect to a revocable trust;

(4) a power of a beneficiary with respect to a trust to the extent the exercise or nonexercise of the power affects only the interest of the beneficiary or another beneficiary represented by the beneficiary under [Uniform Trust Code Sections 301 through 305]; or

Alternative A for Paragraph (5)

(5) a power of a trust director to the extent the power must be held in a nonfiduciary capacity to achieve the settlor's federal tax objectives.

Alternative B for Paragraph (5)

(5) a power to substitute for trust property other property of equivalent value to the extent the power must be held in a nonfiduciary capacity to achieve the settlor's federal tax objectives.

Legislative Note: *A state that has not adopted Uniform Trust Code Sections 301-305 (2000) should replace the bracketed language with a cross reference to the state's law governing virtual representation.*

Comment

This section excludes five categories of powers that the drafting committee concluded should not be covered by this act for reasons of policy, coverage by other law, or both. A power that falls within one of these exclusions is governed by law other than this act.

(1) *Power of appointment.* Paragraph (1) excludes a "power of appointment," which is defined by Section 2(4) to mean "a power given by the terms of a trust to a person other than a trustee that enables the person in a nonfiduciary capacity to designate a recipient of an ownership interest in or a power of appointment over the trust property." A nonfiduciary power of appointment that may be exercised arbitrarily within the scope of the power is governed by other statutory law, such as the Uniform Powers of Appointment Act (2013), and by extensive common law, such as under Restatement (Third) of Property: Wills and Other Donative Transfers §§17.1-23.1 (2011).

In consequence of this exclusion, the terms of a trust may grant to a person a nonfiduciary power over distribution of the trust property—that is, a power of appointment—without that person becoming a trust director subject to this act. Not every power of distribution is excluded, however. If the terms of a trust indicate that a power of distribution is held in a fiduciary capacity, then the power is not a power of appointment within the exclusion in this section. In the hands of a person other than a trustee, such a fiduciary distribution power would be a power of direction under Section 6.

Section 6(c)(2) prescribes a default rule of construction under which a power to designate

1 a recipient of an ownership interest in or a power of appointment over trust property is a power
2 of appointment (and so not held in a fiduciary capacity) unless the terms of the trust provide
3 otherwise.
4

5 (2) *Power to appoint or remove.* Paragraph (2) excludes “a power to appoint or remove a
6 trustee or trust director.” This exclusion is responsive to multiple suggestions to the drafting
7 committee that such a power, in particular a power to remove a trustee and appoint a successor
8 corporate trustee, is a normal and customary drafting practice that arose separately from the
9 phenomenon of directed trusts. Under prevailing law, the only limit on the exercise of such a
10 power is that it “must conform to any valid requirements or limitations imposed by the trust
11 terms.” Restatement (Third) of Trusts § 37 cmt. c (2003). If the terms of the trust do not impose
12 any requirements or limitations on the power to remove, then it may be exercised without cause.
13 See Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on
14 Trusts § 11.10.2 (5th ed. 2006) (“If the terms of the trust confer the power of removal without
15 any limitation, it is unnecessary for the holder to show cause.”).
16

17 (3) *Revocable trust.* Paragraph (3) excludes a power of a settlor with respect to a
18 revocable trust. Because the settlor of a revocable trust may at any time revoke the trust and take
19 back the trust property, under modern law the trustee’s duties run to the settlor rather than to the
20 beneficiaries, see Uniform Trust Code § 603(a) (2004), and the trustee must “comply with a
21 direction of the settlor even though the direction is contrary to the terms of the trust or the
22 trustee’s normal fiduciary duties.” Restatement (Third) of Trusts § 74(1)(a)(i) (2007). Without
23 the exclusion of this paragraph, Section 6(b) could have been read to transform all powers
24 retained by a settlor in a revocable trust into fiduciary powers of a trust director. A nonfiduciary
25 power in a person other than the settlor to withdraw the trust property is a power of appointment
26 that would fall within paragraph (1) of this section.
27

28 (4) *Power of a beneficiary.* Paragraph (4) excludes a power of a beneficiary to the extent
29 that the exercise or nonexercise of the power affects only the interest of the beneficiary (or the
30 interest of another beneficiary who is represented by the beneficiary under applicable virtual
31 representation law). This exclusion follows traditional law, under which “[a] power that is for the
32 sole benefit of the person holding the power is not a fiduciary power.” Restatement (Third) of
33 Trusts § 75 cmt. d (2007). By contrast, if the exercise or nonexercise of a power held by a
34 beneficiary affects the interests of another beneficiary, and the power falls within the scope of
35 Section 6, then under this act the beneficiary is a trust director subject to the standards of conduct
36 prescribed by this act to the extent of the effect on the other beneficiary’s interests.
37

38 For example, a power in a beneficiary to release a trustee from a claim by the beneficiary
39 is excluded from this act. But a power in a beneficiary to release the trustee from a claim by
40 another beneficiary (other than by virtual representation) is a power of direction under Section
41 6(b), and the beneficiary would be a trust director under Section 2(7) to the extent the
42 beneficiary’s power to release the trustee affects the claims of the other beneficiary.
43

44 (5) *Tax-related powers.* **[For discussion: (1) Choice of alternative A or B, and (2)**
45 **whether to include provisions guarding against powers with adverse tax consequences or**
46 **affecting charitable status or special needs trusts, as discussed in the accompanying memo.]**

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(b) The terms of a trust may grant a trust director a power of direction under which the trust director may administer the trust or direct a trustee or another trust director in the administration of the trust, including in the investment, management, or distribution of the trust property.

(1) a trust director may exercise any further power appropriate to the exercise of

ector's express powers under subsection (b);

(3) the powers of a trust director are not affected by the incapacity or death of the settlor; and

Note: A state that has adopted Uniform Probate Code § 2-907(c)(4) (1993) or Code §§ 408(b) or 409(2) (2000) should revise those provisions to **[For how long would an enforcer under those sections be a “trust director” under this act?]**

ction valida

Background law on trust purposes. Although this section validates terms of a trust that provide for a trust director, it does not override the background law that regulates the formation of trusts, such as the requirements that a trust be lawful, not contrary to public policy, and

possible to achieve. See Uniform Trust Code § 404 (2000); Restatement (Third) of Trusts §§ 29-30 (2003).

Subsection (a). Subsection (a) confirms that a trust director has only those powers expressly granted to the director by the terms of the trust. This act does not provide any default powers to a trust director. Nor does the act specify the scope or parameters of any power that the terms of a trust might grant to a director. For a trust director to have any powers, the scope and content of those powers must be prescribed by the terms of a trust.

Subsection (b). By validating terms of a trust that authorize a trust director to “administer” the trust or direct a trustee in the “administration” of the trust, subsection (b) enables a broad array of director powers, including powers that go beyond those customarily held by a trustee. As used in this subsection, the term “administration” has a meaning at least as broad as it has in the context of determining a trust’s “principal place of administration,” such as under Section 3(b). For the avoidance of doubt, the last clause of subsection (b) confirms that administration includes the kinds of investment, management, and distribution powers that are customarily given to a trustee, such as under Uniform Trust Code § 815(a)(2)(b) (2000). The drafting committee further intended the term to include other powers that might affect the administration of a trust, such as the power to modify a trust or to release a trustee from liability.

Capaciousness of subsection (b). Without limiting the set of powers enabled by subsection (b), the drafting committee specifically contemplated that the terms of a trust could create a power in a trust director to:

- direct investments, including a power to
 - acquire, dispose of, exchange, or retain any investment;
 - make or take loans;
 - vote proxies for securities held in trust;
 - adopt a particular valuation of trust property or determine the frequency or methodology of valuation;
 - adjust between principal and income or convert to a unitrust;
 - manage a trust-owned business; or
 - select custodians for trust assets;
- modify, reform, terminate, or decant a trust;
- direct a trustee’s or another director’s delegation of the trustee’s or other director’s powers;
- change the principal place of administration, situs, or governing law of the trust;
- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;
- prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;
- grant permission before a trustee or another director may exercise a power of the trustee or other director; or
- release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.

1 *Manner of direction.* Subsection (b) provides that a trust director may either “administer”
2 a trust or “direct a trustee or another trust director in the administration of the trust.” The terms
3 of a trust may thus allow a director to exercise its powers either independently or through
4 directions given to a trustee. For example, in connection with a power to direct investments, the
5 terms of a trust might enable a trust director to enter into an investment subscription agreement
6 by signing that agreement itself or by directing the trustee to sign the agreement. Note, however,
7 that this act does not specify by default the manner in which a director may act. Whether a
8 director may act independently or only by directing a trustee’s actions is governed by the terms
9 of the trust.

10
11 *Exclusions.* Like the other provisions of this act, subsection (b) does not apply to matters
12 that are excluded by Section 5. Thus, because Section 5(2) excludes a power “to appoint or
13 remove a trustee or trust director,” subsection (b) does not include such a power as a power of
14 direction within the meaning of this act. The validity and construction of such a power is
15 governed by law other than this act.

16
17 *Subsection (c).* This subsection prescribes four default rules of construction that apply
18 unless the terms of a trust provide otherwise.

19
20 *Further appropriate powers.* Subsection (c)(1) prescribes a default rule under which a
21 trust director may exercise any “further” power that is “appropriate” to the director’s exercise of
22 the director’s express powers under the terms of the trust as authorized by subsection (b). The
23 term “appropriate” is drawn from Uniform Trust Code § 815(a)(2)(B) (2000). Appropriateness
24 should be judged in relation to the purpose or function being carried out by the director.
25 Examples of further powers that might be appropriate include a power to: (1) incur reasonable
26 costs and direct indemnification for those costs; (2) make a report or accounting to a beneficiary
27 or other interested party; (3) direct a trustee to issue a certification of trust under Uniform Trust
28 Code § 1013 (2000); or (4) prosecute, defend, or join an action, claim, or judicial proceeding
29 relating to a trust. In some circumstances, it may be appropriate for a trust director to delegate
30 the director’s powers, much as it may sometimes be prudent for a trustee to do so.

31
32 Subsection (c)(1) would reverse the result in *Schwartz v. Wellin*, No. 2:13-CV-3595-
33 DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014) if under the circumstances it would be
34 “appropriate” for a trust director to prosecute, defend, or join an action, claim, or judicial
35 proceeding pertaining to the trust. In *Wellin*, the court held that a trust director (which the terms
36 of the trust referred to as a “trust protector”) lacked standing because under Rule 17(a)(1) of the
37 Federal Rules of Civil Procedure it was neither a real party in interest nor a party who could
38 pursue a claim if not a real party in interest. However, Rule 17(a)(1) does allow “a party
39 authorized by statute” to bring such litigation, and subsection (c)(1) supplies the requisite
40 statutory authorization if appropriate under the circumstances in light of the terms of the trust.
41 Subsection (b) would also provide the requisite statutory authorization if the terms of the trust
42 expressly confer a power of litigation on the director.

43
44 *Rule of construction for powers of appointment.* Subsection (c)(2) prescribes a default
45 rule of construction under which a power to designate a recipient of an ownership interest in or a
46 power of appointment over trust property is a power of appointment unless the terms of the trust

1 provide otherwise. Powers of appointment, the exercise of which are not subject to fiduciary duty
2 but must be in accord with the terms of the power, are excluded from the scope of this act by
3 Section 5(1).

4
5 *Settlor incapacity or death.* Subsection (c)(3) specifies a default rule under which a trust
6 director's powers survive the incapacity or death of the settlor. Following the directed trust
7 statutes in several states, including Nevada and South Dakota, *see Nev. Rev. Stat. § 163.555*
8 *(2015); S.D. Codified Laws § 55-1B-3 (2016)*, the drafting committee included this section to
9 confirm that the common law rule of agency under which an agent's authority terminates on the
10 incapacity or death of the principal would not apply to a trust director. *See Restatement (Third)*
11 *of Agency §§ 3.07-3.08 (2006)*.

12
13 *Majority decision.* Subsection (c)(4) provides a default rule of majority action for
14 multiple trust directors with "joint powers," such as a three-person committee with a power of
15 direction over investment or distribution. Majority action is the prevailing default for multiple
16 trustees. *See Uniform Trust Code § 703(a) (2000); Restatement (Third) of Trusts § 39 (2003)*. In
17 the event of a deadlock among trust directors with joint powers, by analogy to a deadlock among
18 cotrustees, a court could "direct exercise of the [joint] power or take other action to break the
19 deadlock." *Id. cmt. e*.

20 21 **SECTION 7. DUTY AND LIABILITY OF TRUST DIRECTOR.**

22 (a) Subject to subsection (b), with respect to a power of direction under Section 6(b) or a
23 further power under Section 6(c)(1) appropriate to the power of direction:

24 (1) the trust director is subject to the same fiduciary duty and liability as a trustee;
25 and

26 (2) the director's duty or liability may be varied by the terms of the trust to the
27 same extent that the terms of the trust could vary the duty or liability of a trustee.

28 (b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified,
29 or otherwise authorized or permitted by law to provide health care in the ordinary course of the
30 director's business or practice of a profession, and the director acts in such a capacity, the
31 director is not subject to duty or liability under this [act].

32 (c) The terms of a trust may impose a duty or liability on a trust director in addition to the
33 duties and liabilities under this [act].

Comment

Subsection (a). Subsection (a) imposes the same fiduciary duties on a trust director that would ordinarily apply to a trustee. A trust director with a power to make or direct investments, for example, has the same duties that a trustee would have in making investments to act prudently, in the sole interest of the beneficiaries, and impartially with due regard for the respective interests of the beneficiaries. *See, e.g.,* Restatement (Third) of Trusts §§ 77-79, 90-92 (2007). The theory behind subsection (a) is that if a trust director exercises a power, the director is the most appropriate person to bear the duty associated with the exercise or nonexercise of that power. Put differently, in a directed trust, a trust director functions much like a trustee in a non-directed trust, and thus should have the same duties as a trustee.

Accordingly, subsection (a)(1) sets the default duties of a trust director by absorbing the duties that would ordinarily apply to a trustee, and subsection (a)(2) sets the mandatory minimum duties of such a director by absorbing the mandatory minimum duties that a settlor cannot waive for a trustee. In aligning the fiduciary duties of a trust director with those of a trustee, subsection (a) follows the great majority of the existing state directed trust statutes.

Absorption of existing trust fiduciary law. Subsection (a) operates by absorbing existing state law rather than by inventing a new body of law. Incorporating existing trust fiduciary law in this manner offers several advantages. First, it avoids the need to spell out the entirety of trust fiduciary law. That is, it avoids the need to replicate something like Article 8 of the Uniform Trust Code. Second, absorbing the trust fiduciary law of each enacting state accommodates diversity across the states in the particulars of a trustee's default and mandatory fiduciary duties, such as the duties to diversify and to give information to beneficiaries, both of which have become increasingly differentiated across the states. Third, absorption allows for changes to the law of a trustee's fiduciary duties to be absorbed automatically into the duties of a trust director without need for periodic conforming revisions to this act.

Absorption and circumstances of trust directors. In applying the law of trustee fiduciary duties to a trust director, a court must make use of the flexibility built into trust fiduciary law. Courts have long applied the duties of loyalty and prudence across a wide array of circumstances, including many different kinds of trusts as well as other fiduciary relationships, such as corporations and agencies. Courts are thus capable of applying fiduciary duties in a manner that is sensitive to the wide variation that is possible across powers of direction. In assessing the actions of a director that holds a power to modify a trust, for example, a court should apply the standards of loyalty and prudence in a manner that is appropriate to the particular context, including the trust's terms and purposes and the director's particular powers.

Springing powers without a duty to monitor. The drafting committee contemplated that a settlor could construct a director's power to be springing and without an ongoing obligation to monitor the administration of the trust. For example, a settlor could grant a trust director a power to direct a distribution, but only if requested to do so by a beneficiary. A director holding such a power would not be under a duty to act unless requested to do so by a beneficiary. Moreover, because under subsection (a)(2) a settlor can vary the fiduciary duties of a trust director to the same extent that the settlor could vary the fiduciary duties of a trustee, in the example just given

1 under Uniform Trust Code § 105(b)(2) (amended 2004) the settlor could waive all of the
2 director's otherwise applicable duties other than the duty to act in good faith. In such a situation,
3 the director would be subject to the minimum duty to act in good faith in the director's response
4 to the beneficiary's request for a distribution.

5
6 *Extended discretion and exculpation or exoneration.* Under the framework of subsection
7 (a), the terms of a trust could give a trust director extended discretion, such as in the form of
8 "sole," "absolute," or "uncontrolled" discretion, with the same effect as those terms would have
9 on the discretion of a trustee. Under prevailing law, "words such as 'absolute' or 'unlimited' or
10 'sole and uncontrolled' are not interpreted literally. Even under the broadest grant of fiduciary
11 discretion, a trustee must act honestly and in a state of mind contemplated by the settlor. Thus,
12 the court will not permit the trustee to act in bad faith or for some purpose or motive other than
13 to accomplish the purposes of the discretionary power." Restatement (Third) of Trusts § 50 cmt.
14 c (2003); *see also* Uniform Trust Code § 814(a) (amended 2004). Under subsection (a)(2), the
15 same rules would apply to a grant of extended discretion to a trust director.

16
17 A trust director is likewise subject to the same rules as a trustee with regard to an
18 exculpation or exoneration clause. Under prevailing law, such as under Uniform Trust Code §
19 1008 (2000) and Restatement (Third) of Trusts § 96 (2012), an exculpation or exoneration clause
20 cannot protect a trustee against liability for acting in bad faith or with reckless indifference.
21 Under subsection (a)(2), the same rules would apply to an exculpation or exoneration clause for a
22 trust director.

23
24 *Subsection (b)—health-care professionals.* Subsection (b) refers to a trust director who is
25 "licensed, certified, or otherwise authorized or permitted by law to provide health care in the
26 ordinary course of the director's business or practice of a profession." This phrasing is based on
27 the definition of "health-care provider" in Uniform Health-Care Decisions Act § 1(8) (1993). To
28 the extent that a trust director acts in the director's business or practice of a profession to provide
29 health care, the director is relieved from duty or liability under this act unless the terms of the
30 trust provide otherwise.

31 The rule of this subsection, which applies unless the terms of the trust provide otherwise,
32 addresses the concern that a health-care professional might refuse appointment as a trust director
33 if such service would expose the provider to fiduciary duty under this act. For example, a trust
34 might call for a health-care professional to determine the capacity or sobriety of a beneficiary or
35 the capacity of the settlor. In making such a determination, under subsection (b) the health-care
36 professional would not be subject to duty or liability under this act, instead the professional
37 would be subject to the rules and regulations otherwise applicable to the professional.

38
39 *Subsection (c)—no ceiling on duties.* Subsection (c) confirms that the duties prescribed
40 by this section are defaults and minimums, not ceilings. The terms of a trust can impose further
41 duties in addition to those prescribed by this section.

42 43 **SECTION 8. DUTY AND LIABILITY OF DIRECTED TRUSTEE.**

44 (a) Subject to subsection (b), a directed trustee must take reasonable action to comply

1 with the terms of a power of direction.

2 (b) A directed trustee must not comply with the terms of a power of direction to the
3 extent that by complying the trustee would engage in willful misconduct.

4 (c) If under the terms of the trust a trust director may release a trustee or another trust
5 director from liability for breach of trust and the director grants such a release, the trustee or
6 other director is not liable to the extent of the release unless:

7 (1) the breach involved the trustee's or the other director's own willful
8 misconduct;

9 (2) the release was induced by improper conduct of the trustee or other director;
10 or

11 (3) at the time of the release, the director did not know of the material facts
12 relating to the breach.

13 (d) A directed trustee that has reasonable doubt about its duty under this section may
14 satisfy that duty by timely petitioning the court for instructions or presenting the issue in a
15 pending proceeding.

16 (e) The terms of a trust may impose a duty or liability on a directed trustee in addition to
17 the duties and liabilities prescribed by this [act].

18 ***Legislative Note:*** A state that has adopted Uniform Trust Code Section 808 [***For discussion:***
19 ***what recommendation should we make about revision or repeal of UTC Section 808?***].

20 **Comment**

21 *Duties of a directed trustee.* This section addresses the duties of a directed trustee. It
22 should be read in conjunction with Section 9, which governs information sharing among directed
23 trustees and trust directors, and Section 10, which provides that a directed trustee has no duty to
24 monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director
25 about the director's exercise or nonexercise of the director's powers.

26
27 *Subsection (a)—duty of obedience.* Subsection (a) requires a directed trustee to obey the
28 terms of a power of direction. The "terms of a power of direction" may impose a variety of

1 demands on a directed trustee. The terms of a trust may require a trustee to follow the express
2 directions of a trust director, such as if the terms of the trust allow the director to direct the
3 trustee to invest trust assets in a particular security. The terms of a trust may require a trustee to
4 request permission from a director before acting or to refrain from acting if the director so
5 directs. The terms of a trust may also allow a director to modify the trust or to impose particular
6 administrative procedures. The duty imposed by subsection (a) requires a trustee to comply with
7 any such terms in a power of direction, subject to the limitation in subsection (b).
8

9 *The terms of a power of direction.* The reference to “the terms of a power of direction”
10 limits a directed trustee’s duty to comply to a direction that is within the trust director’s power of
11 direction. A trustee should not comply with a direction by a trust director that is outside of the
12 director’s power of direction. To do so would violate the trustee’s duty to comply with the terms
13 of the power of direction and the trustee’s broader background duty to act in accordance with the
14 terms of a trust. *See, e.g.,* Uniform Trust Code § 105(b)(2) (amended 2005) (making mandatory
15 “the duty of a trustee to act ... in accordance with terms ... of the trust”); Restatement (Third) of
16 Trusts § 76 (2007) (“The trustee has a duty to administer the trust ... in accordance with the
17 terms of the trust.”). For example, a direction rendered in a form contrary to that required by the
18 terms of the trust, such as an oral direction if the terms of the trust require a writing, is not within
19 the trust director’s power of direction.
20

21 *Duty to take “reasonable action.”* Subsection (a) requires that a trustee take “reasonable
22 action” in complying with the terms of a power of direction. If a trust director with a power to
23 direct investments directs the trustee to purchase a particular security, for example, the trustee
24 must take reasonable care and must refrain from self-dealing and conflicts of interest in selecting
25 a broker or executing the trade. The duty to act reasonably in complying with the terms of a
26 power of direction does not, however, impose a duty to ensure that the substance of a direction is
27 reasonable. Although a trustee must take reasonable care in executing a direction to purchase a
28 security, for example, the trustee is not required to assess whether the purchase of that security
29 would be prudent in relation to the trust’s investment portfolio.

30 *Subsection (b)—willful misconduct.* Subsection (b) provides an exception to the duty of
31 obedience prescribed by subsection (a). Under subsection (b), a trustee must not comply with the
32 terms of a power of direction to the extent that by complying the trustee would engage in “willful
33 misconduct.” The drafting committee settled upon the term willful misconduct after a review of
34 the existing specialized directed trust statutes.
35

36 Roughly speaking, the existing directed trust statutes fall into two groups. In one group,
37 which constitutes a majority, are the statutes that fully relieve a directed trustee from duty or
38 liability for complying with an action of a trust director. This group includes the statutes in
39 Alaska, New Hampshire, Nevada, and South Dakota. The policy rationale for these statutes is
40 that duty should follow power. A director who possesses a power of direction should be the
41 exclusive bearer of fiduciary duty in the exercise or nonexercise of that power. Moreover, the
42 settlor of a directed trust could have made the trust director the sole trustee instead. Thus, on
43 greater-includes-the-lesser reasoning, the settlor should also be able to eliminate a directed
44 trustee’s duty and liability for complying with an action of a trust director. Under these statutes, a
45 beneficiary’s only recourse for misconduct by the trust director is an action against the director
46 for breach of the director’s fiduciary duty to the beneficiary.

1 In the other group, which includes Delaware, Illinois, Colorado, North Carolina, and
2 Virginia, are the statutes under which a directed trustee is not liable for complying with a
3 direction of a trust director, unless by so doing the directed trustee would personally engage in
4 “willful” or “intentional” misconduct. The policy rationale for these statutes is that, because a
5 trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is
6 directed. Although the settlor could have made the trust director the sole trustee, the settlor did
7 not actually do so—and under traditional understandings of trust law, a trustee must always be
8 accountable to a beneficiary in some way. *See, e.g.,* Restatement (Third) of Trusts § 96 cmt. c
9 (2012) (“Notwithstanding the breadth of language in a trust provision relieving a trustee from
10 liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on the
11 types and degree of misconduct for which the trustee can be excused from liability.”).

12
13 The states in the second group also recognize, however, that to facilitate the settlor’s
14 intent that the trust director rather than the directed trustee be the primary decisionmaker, it is
15 appropriate to reduce the trustee’s duty and liability below the usual level with respect to a
16 matter subject to a power of direction. Accordingly, under these statutes a beneficiary’s main
17 recourse for misconduct by the trust director is an action against the director for breach of the
18 director’s fiduciary duty to the beneficiary. The beneficiary also has recourse against the trustee,
19 but only if the trustee’s compliance with the terms of the power of direction amounted to “willful
20 misconduct” by the trustee. Relative to a non-directed trust, this second approach has the effect
21 of increasing the total fiduciary duties owed to a beneficiary. All of the usual duties of
22 trusteeship are preserved in the trust director, and in addition the directed trustee also has a duty
23 to avoid willful misconduct.

24
25 After extensive deliberation and debate, the drafting committee opted to follow the
26 second group of statutes, which includes the prominent Delaware act, on the grounds that this
27 model does more to protect a beneficiary and is more consistent with traditional fiduciary policy,
28 even while remaining viable and popular, as evidenced by the large number of directed trusts in
29 Delaware. To put the point otherwise, the popularity of directed trusts in Delaware establishes
30 that a directed trust regime that preserves a “willful misconduct” safeguard is workable and that
31 a total elimination of duty in a directed trustee is unnecessary.

32
33 The willful misconduct standard prescribed by this subsection changes the policy of
34 Uniform Trust Code § 808 (2000), which provides the current uniform law treatment of directed
35 trusts and is similar in substance to Restatement (Third) of Trusts § 75 (2007). Section 808(b)
36 provides: “If the terms of a trust confer upon a person other than the settlor of a revocable trust
37 power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise
38 of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the
39 trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that
40 the person holding the power owes to the beneficiaries of the trust.” In deciding to change this
41 standard, the drafting committee was deeply influenced by the fact that a growing number of
42 states that had previously adopted Section 808 have since abandoned it or modified it to follow
43 one of the two other models discussed above. The drafting committee was also strongly
44 influenced by the fact that a review of every existing specialized state statute on directed trusts
45 showed that no state that has legislated specifically on the issue of directed trustee fiduciary
46 duties has chosen to follow Section 808.

1 The willful misconduct standard in subsection (b) is to be distinguished from the duty to
2 take reasonable action in subsection (a). The reasonability standard of subsection (a) applies to
3 the manner in which a trustee complies with a power of direction. The willful misconduct
4 standard of subsection (b) applies to the decision of whether to comply with a power of direction.
5

6 *Subsection (c)—release by trust director.* Subsection (c) provides additional substantive
7 and procedural safeguards for a release by a trust director of a trustee from liability. Under
8 Section 6, the terms of a trust may empower a trust director to release a trustee or another trust
9 director from liability for breach of trust. If the director grants such a release, the trustee or other
10 director is not liable to the extent of the release. The terms of a trust may enable such a release to
11 be given at any time, whether before or after the trustee or other director acts.
12

13 This subsection imposes certain substantive and procedural limitations on a release by a
14 trust director. First, consistent with the policy of subsection (b) as described above, a trustee
15 cannot be released for a breach that involves the trustee’s own willful misconduct. Second,
16 consistent with prevailing law governing a release of a trustee by a beneficiary, *see, e.g.*,
17 Uniform Trust Code § 1009 (amended 2001); Restatement (Third) of Trusts § 97 (2012), a
18 release by a trust director is not enforceable if it was induced by improper conduct of the trustee
19 or if at the time of the release the director did not know of the material facts relating to the
20 breach.
21

22 **[To discuss: (1) release can also be of another trust director but with the same**
23 **“willful misconduct” substantive safeguard; (2) the interaction of this section with the**
24 **exclusion in Section 5(4) as regards a release by a beneficiary that affects the interest of**
25 **another beneficiary. Per the comment to Section 5(4), a power in a beneficiary to release a**
26 **trustee from a claim by the beneficiary is excluded from this act. But a power in a**
27 **beneficiary to release the trustee from a claim by another beneficiary (other than by virtual**
28 **representation) is a power of direction under Section 6(b), and the beneficiary would be a**
29 **trust director under Section 2(7), subject to fiduciary duty under this Section 8, to the**
30 **extent the beneficiary’s power to release the trustee affects the claims of the other**
31 **beneficiary. This act would therefore reverse the result in *Vena v. Vena*, 899 N.E.2d 522 (Ill.**
32 **App. 2008), which we should discuss.]**
33

34 *Subsection (d)—petition for instructions.* Subsection (d) provides that a directed trustee
35 may satisfy its duty under this section by petitioning for instructions. The specific language of
36 this subsection parallels Restatement (Third) of Trusts § 71 (2007) (“A trustee or beneficiary
37 may apply to an appropriate court for instructions regarding the administration or distribution of
38 the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the
39 proper interpretation of the trust provisions.”). The safe harbor of this subsection is bounded by
40 two limits: a trustee must have “reasonable doubt” about its duty, and the trustee’s petition for
41 instructions must be “timely.”
42

43 The safe harbor of this subsection is permissive rather than mandatory. A trustee may
44 satisfy its duties by petitioning for instructions. But this subsection does not, by itself, require a
45 trustee to bring such a petition.
46

[To discuss: Question from the floor about affiliates.]

Subsection (d)—no ceiling on duties. Subsection (d) confirms that the duties prescribed by this section are merely defaults and minimums, not ceilings. The terms of a trust can impose further duties in addition to those prescribed by this section.

**SECTION 9. DUTY TO PROVIDE INFORMATION TO TRUSTEE OR TRUST
DIRECTOR.**

(a) A directed trustee shall provide information to a trust director to the extent the information is reasonably related to the powers or duties of the trustee and the powers or duties of the director.

(b) A trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related to the powers or duties of the director and the powers or duties of the trustee or other director.

Comment

Duty to provide information. This section imposes a duty on a directed trustee and trust director to provide information to each other. Subsection (a) imposes this duty on a directed trustee, and subsection (b) imposes this duty on a trust director.

Reasonableness. This section relies heavily on the concept of reasonableness. Information must be disclosed only if it is reasonably related both to the powers or duties of the person making the disclosure and to the powers or duties of the person receiving the disclosure. The information must be reasonably related to the powers or duties of the person making the disclosure, because otherwise that person cannot be expected to possess the information. The information must also be reasonably related to the powers or duties of the person receiving the disclosure, because otherwise that person would not need the information. Examples of matters that might require disclosure under this section include modifications to the terms of a trust, changes to investment policy or strategy, distributions, changes in accounting procedure or valuations, and removal or appointment of trustees and trust directors.

An affirmative and a responsive duty to inform. This section imposes an affirmative duty to provide information even in the absence of a request for that information and a responsive duty to reply to requests for information. For example, if a trust director exercises a power to modify the terms of a trust, the director would have an affirmative duty to inform the trustees and other trust directors whose powers or duties are reasonably related to the amendment whether or not the trustees or other trust directors inquired about it. Similarly, the director would have a responsive duty to provide information about the amendment upon a request by a trustee or

1 another trust director whose powers or duties were reasonably related to the amendment.

2
3 *Shelton v. Tamposi.* In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), the terms of the
4 trust left distribution in the hands of the trustee, but shifted power over investment to a trust
5 director (the “investment director”). In consequence, the trustee could not raise the cash
6 necessary to fund a distribution to one of the beneficiaries. Under this section, the trust director
7 would have been under a duty to give the trustee information about the effects of the director’s
8 investment program on the trust’s cash position, and the trustee would have been under a duty to
9 give the director information about the cash requirements of the trustee’s distribution program.
10 Moreover, in making and implementing the investment program, under Section 7(a) the trust
11 director would be subject to the same duties as a similarly situated trustee, in parallel to the
12 trustee’s duties in making and implementing the distribution program.

13
14 *Interaction with Section 10.* Section 10 provides that a directed trustee does not have a
15 duty to monitor, inform, or advise other parties about the actions of a trust director. Section 10
16 does not, however, eliminate the trustee’s duty to provide information related to the trustee’s
17 own powers and duties. This section, which requires a directed trustee to provide information
18 “reasonably related to the powers or duties of the trustee” is therefore not inconsistent with
19 Section 10.

20
21 *Disclosure to beneficiaries.* This section governs disclosure of information to trustees and
22 trust directors, rather than to beneficiaries. The duty of a trust director to disclose information to
23 a beneficiary is governed by Section 7, which prescribes the fiduciary duties of a trust director.
24 The duty of a directed trustee to disclose information to a beneficiary is governed by the
25 background law of an enacting state under Section 4, and by Section 10, which limits a directed
26 trustee’s duty to inform a beneficiary about the actions of a trust director.

27
28 *Mandatory floor, not ceiling.* This section imposes a mandatory floor on a directed
29 trustee’s and a trust director’s duty to share information, rather than a ceiling. The terms of a
30 trust may specify more extensive duties of information sharing among directed trustees and trust
31 directors.

32
33 **SECTION 10. NO DUTY TO MONITOR, INFORM, OR ADVISE.** Unless the
34 terms of a trust provide otherwise, a directed trustee:

35 (1) does not have a duty to monitor a trust director or inform or give advice to a settlor,
36 beneficiary, trustee, or trust director about the director’s exercise or nonexercise of the director’s
37 powers; and

38 (2) does not assume the duty described in paragraph (1) because the directed trustee on
39 another occasion monitors a trust director or informs or gives advice to a settlor, beneficiary,

trustee, or trust director about a trust director's exercise or nonexercise of the director's powers.

Comment

Following the weight of existing statute law. This section provides that a directed trustee does not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director about a trust director's actions. Many existing state statutes have provisions to similar effect, though the language in this section is more direct and simpler than those provisions.

The existing provisions on which this section is based were meant to reverse the result in *Rollins v. Branch Banking & Trust Company of Virginia*, 56 Va. Cir. 147 (2002), in which the court considered the liability of a trustee that was subject to direction in investment. The court declined to hold the trustee liable for the investment director's failure to direct diversification of the trust's investments, but the court nevertheless held the trustee liable for failing to advise the beneficiaries about the risks of the investment director's actions.

Survival of trustee's general duty of disclosure. Although this section confirms that a directed trustee has no duty to monitor, inform, or advise regarding a trust director's exercise or nonexercise of its powers, this section does not relieve a trustee of its ordinary duties to disclose and report under otherwise applicable law such as under Uniform Trust Code § 813 (amended 2004) or Restatement (Third) of Trusts § 82 (2007). For example, although a directed trustee would not have a duty to advise a beneficiary about the risks of a portfolio concentration, the trustee would remain under a duty to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust to the extent required by otherwise applicable law.

This section does not relieve a trustee of the duty under Section 9 to provide a trust director with information reasonably related to the director's powers or duties.

The trust director's duty of disclosure. Under Section 7(a), a trust director is subject to the same disclosure duties as a trustee would be. Thus, for example, if a trust director intended to direct a nonroutine transaction, to change "investment ... strategies," or to take "significant actions ... involving hard-to-value assets or special sensitivity to beneficiaries," the director might be under a duty of affirmative advance disclosure. See Restatement (Third) of Trusts § 82 cmt. d (2007); *Allard v. Pacific Nat'l Bank*, 663 P.2d 104, 110 (Wash. 1983) ("The trustee must inform beneficiaries, however, of all material facts in connection with a nonroutine transaction which significantly affects the trust estate and the interests of the beneficiaries prior to the transaction taking place.").

No assumption of duty. In addition to waiving a directed trustee's duty to monitor, inform, or advise as under paragraph (1) of this section, many state statutes go further and also provide that if a trustee for some reason chooses to do so, those monitoring, informing, or advising activities will be deemed to be "administrative actions." The purpose of these provisions is to ensure that if a directed trustee chooses for some reason to inform, monitor, or advise, the trustee does not assume a continuing obligation to do so nor concede a prior duty to

1 have done so. This section dispenses with the opacity of an administrative classification and
2 achieves the intended result more directly in paragraph (2) by providing that if a trustee
3 monitors, informs, or advises about the actions of a trust director on one occasion, the trustee
4 does not thereby assume a duty to monitor, inform, or advise on another occasion.

5
6 **SECTION 11. APPLICATION TO COTRUSTEE.** The terms of a trust may provide
7 that a cotrustee is subject only to the duty and liability of a directed trustee under Sections 8
8 through 10 with respect to another trustee’s power to administer the trust or direct the cotrustee
9 in the administration of the trust, including in the investment, management, or distribution of the
10 trust property.

11 **Legislative Note:** A state that has adopted Uniform Trust Code § 703(c), (f), and (g) should
12 revise those sections by **[for discussion at next meeting]**.

13 **Comment**

14 *Cotrusteeship and directed trusteeship compared.* Cotrusteeship and directed trusteeship
15 are similar in many ways. The principal difference is that in a cotrusteeship, every person named
16 as a cotrustee holds title to the trust property. In a directed trust, by contrast, title to trust property
17 belongs only to the trustee, and not to the trust director. The placement of title can have
18 important consequences for dealings with third parties and for tax, property, and other bodies of
19 law outside of trust law.

20
21 *Cotrusteeship by default.* Under this section the default rule is that, if a settlor names
22 cotrustees, the traditional law of cotrusteeship applies. The fiduciary duties of directed
23 trusteeship will only apply if the terms of the trust so provide.

24
25 *Settlor autonomy.* Under traditional law governing cotrustees, each cotrustee “has a duty
26 to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach
27 of trust occurs, to obtain redress.” Restatement (Third) of Trusts § 81(2) (2007). This rule applies
28 even if the settlor limits the role or function of one of the cotrustees. “Even in matters for which
29 a trustee is relieved of responsibility, ... if the trustee knows that a co-trustee is committing or
30 attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent
31 the fiduciary misconduct.” *Id.* cmt. b. This rule for a cotrustee contrasts with the rules for a
32 directed trustee under Sections 8 and 10 of this act, which impose a less demanding fiduciary
33 standard

34
35 This section allows a settlor to choose either fiduciary regime for a cotrusteeship—the
36 traditional rules of cotrusteeship or the more permissive rules of a directed trusteeship. There
37 seems little reason to prevent the settlor from applying the fiduciary rules of this act to an
38 arrangement that uses the labeling of cotrusteeship because a settlor could choose the more
39 permissive rules for a directed trusteeship by labeling one of the cotrustees as a trust director and
40 another as a directed trustee.

1 *Mechanics of choosing directed trustee duties.* Whether this section applies to a given
2 trust is a question of construction of the terms of that trust. This section does not impose a
3 requirement of express reference to this section or to this act. Under Section 3(a), this section
4 applies to a trust created before the effective date of this act, but only as to conduct after that
5 date.

6
7 *Cotrustees as directed trustees and trust directors.* The terms of a trust can place a
8 cotrustee in a position of either giving direction, like a trust director, or taking direction, like a
9 directed trustee. This section only applies to a cotrustee who takes direction. This section does
10 not address the duties of a cotrustee that gives direction because under Section 7, the duties of a
11 trust director are the ordinary duties of a trustee.

12
13 *No third-party effects.* This section does not change the rights of third parties who deal
14 with a cotrustee in the cotrustee's capacity as such. Although this section changes the degree to
15 which the terms of a trust may reduce a cotrustee's duties to a beneficiary, it does not alter the
16 rules that affect the rights of third parties who contract with or otherwise interact with a
17 cotrustee.

18 **SECTION 12. LIMITATION OF ACTION AGAINST TRUST DIRECTOR.**

19
20 (a) An action against a trust director for breach of trust must be commenced within the
21 same limitations period as an action against a trustee for breach of trust [as prescribed by
22 Uniform Trust Code Section 1005].

23 (b) A report or accounting to a person of the conduct of a trust director has the same
24 effect on the limitations period for an action by the person against the director that the report or
25 accounting would have if the director were a trustee [as prescribed by Uniform Trust Code
26 Section 1005].

27 ***Legislative Note:*** A state that has adopted Uniform Trust Code Section 1005 should update the
28 bracketed language to reference that enactment. A state that has adopted a statute other than
29 Uniform Trust Code Section 1005 to govern limitation of an action against a trustee should
30 replace the bracketed language with a cross reference to that statute. A state that has not
31 adopted a statutory limitation should delete the bracketed language.

32 **Comment**

33 Subsection (a) extends to a trust director the same limits on liability that a trustee enjoys
34 under the law of an enacting state by way of a statutory limitations period, such as under
35 Uniform Trust Code § 1005(c) (2000). The limitations period absorbed by subsection (a) applies
36 to all claims against a trust director for breach of trust, whether by a beneficiary, a trustee,
37 another trust director, or some other party.

1 Subsection (b) extends to a trust director the same limits on liability that a trustee enjoys
2 under the law of an enacting state arising from the making of a report or accounting, such as
3 under Uniform Trust Code § 1005(a)-(b) (2000), except that the rule of subsection (b) applies
4 regardless of whether the report or accounting was made by the trust director. A trust director
5 may therefore be protected by a report or accounting made by a trustee or another trust director
6 even though the director did not make the report or accounting, so long as the report or
7 accounting fairly discloses the director's actions.

8
9 Laches, which strictly speaking is an equitable defense rather than a limitations period, is
10 made applicable to an action against a trust director by Section 13.

11
12 **SECTION 13. DEFENSES IN ACTION AGAINST TRUST DIRECTOR.** In an
13 action against a trust director for breach of trust, the director may assert the same defenses a
14 trustee could assert in an action against the trustee for breach of trust.

15 **Comment**

16
17 *Absorption.* This section applies to an action for breach of trust against a trust director the
18 law of an enacting state governing defenses available to a trustee in a comparable action. A trust
19 director can assert any defense that would be available to a trustee in an action for breach of trust
20 under existing state law, including: **[For discussion: Should we move these examples into the**
21 **blackletter, with bracketed UTC cross-references, and indicate that they are not**
22 **exhaustive? We moved these examples to the comment in response to suggestions by**
23 **several Commissioners at the Annual Meeting in July.]**

- 24
- 25 • *laches or estoppel* (see Restatement (Third) of Trusts § 98 (2012));
- 26 • *beneficiary consent, release, or ratification* (see Uniform Trust Code § 1009 (amended
- 27 2001); Restatement (Third) of Trusts § 97(b)–(c) (2012));
- 28 • *reasonable reliance on the terms of a trust* (see Uniform Trust Code § 1006 (2000);
- 29 Uniform Prudent Investor Act § 1(b) (1994)); and
- 30 • *reasonable care in ascertaining the happening of an event affecting administration or*
- 31 *distribution* (see Uniform Trust Code § 1007 (2000); Restatement (Third) of Trusts § 76
- 32 cmt. f (2007)).
- 33

34 *Exculpation or exoneration.* The comments to Section 7 address the effect of an
35 exculpation or exoneration clause on the duty and liability of a trust director.

36
37 *Attorney's fees and indemnification.* Attorney's fees and indemnification for a trust
38 director are governed by Section 6(c)(1), which establishes a default rule that allows a trust
39 director to exercise "any further power appropriate to the exercise of the director's express
40 power" under Section 6(b). By default, therefore, a trust director has the power to incur
41 attorney's fees and other expenses and to direct indemnification for them if "appropriate" to the
42 exercise of the director's express powers.

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(b) This section does not preclude other methods of obtaining jurisdiction over a trust director.

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1 **Legislative Note:** A state that has adopted the Uniform Trust Code sections referenced in this
2 section should update the bracketed language to reference the appropriate portions of that
3 enactment. A state that has adopted relevant statutory provisions other than the sections of the
4 Uniform Trust Code referenced in this section should replace the bracketed language with cross
5 references to those provisions. A state that has not adopted relevant statutory provisions should
6 delete the bracketed language accordingly.

7 **Comments**

8 This section absorbs the state law of trusteeship for a trust directorship with regard to
9 seven subjects. The default or mandatory character of the law as applied to a trusteeship governs
10 whether the law is default or mandatory as applied to a trust directorship.

11
12 *Paragraph (1)—acceptance.* This paragraph absorbs an enacting state’s law governing
13 acceptance of a trusteeship, such as under Uniform Trust Code § 701(a)–(b) (2000) or
14 Restatement (Third) of Trusts § 35 (2003), for application to acceptance of a trust directorship.

15
16 *Paragraph (2)—appointment.* This paragraph absorbs an enacting state’s law governing
17 trustee appointment, such as under Uniform Trust Code § 704(c) and (e) (amended 2004) and
18 Restatement (Third) of Trusts § 34 (2003), for application to appointment of a trust director.

19
20 *Paragraph (3)—bond.* This paragraph absorbs an enacting state’s law governing bond to
21 secure performance by a trustee, such as under Uniform Trust Code § 702(a)–(b) (2000) and
22 Restatement (Third) of Trusts § 34(3) (2003), for application to bond by a trust director.

23
24 *Paragraph (4)—compensation.* This paragraph absorbs an enacting state’s law governing
25 compensation of a trustee, such as under Uniform Trust Code § 708 (2000) and Restatement
26 (Third) of Trusts § 38 cmt. i (2003), for application to compensation of a trust director. The
27 drafting committee contemplated that, just as in total “the reasonable fees for multiple trustees
28 may be higher than for a single trustee,” *id.*, so too the total reasonable fees for a trust with a
29 directed trustee and a trust director may be higher than for a single trustee.

30
31 On the other hand, the reasonable compensation of a directed trustee is likely to be less
32 than that for a trustee that is not directed. An apt analogy is to a trustee that hires others to
33 “render services expected or normally to be performed by the trustee.” Restatement (Third) of
34 Trusts § 38 cmt. c(1) (2003); *see also* Uniform Prudent Investor Act § 9 cmt. (1994) (“If, for
35 example, the trustee’s regular compensation schedule presupposes that the trustee will conduct
36 the investment management function, it should ordinarily follow that the trustee will lower its fee
37 when delegating the investment function to an outside manager.”).

38
39 *Paragraph (5)—resignation.* This paragraph absorbs an enacting state’s law governing
40 resignation by a trustee, such as under Uniform Trust Code § 705 (amended 2001) and
41 Restatement (Third) of Trusts § 36 (2003), for application to resignation by a trust director.

42
43 *Paragraph (6)—removal.* This subsection absorbs an enacting state’s law governing
44 removal of a trustee, such as under Uniform Trust Code § 706 (2000) and Restatement (Third) of
45 Trusts § 37 cmt. e (2003), for application to removal of a trust director.

1 *Paragraph (7)—vacancy.* This section absorbs an enacting state’s law applicable to a
2 vacancy in a trusteeship, such as under Uniform Trust Code § 704 (amended 2004), for
3 application to a vacancy in a trust directorship.
4

5 *Costs and indemnification.* The power of a trust director to incur reasonable costs and
6 direct indemnification for expenses would in most cases be covered by Section 6(c)(1).
7

8 **SECTION 16. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
9 applying and construing this uniform act, consideration must be given to the need to promote
10 uniformity of the law with respect to its subject matter among states that enact it.

11 **SECTION 17. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
12 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
13 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
14 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
15 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
16 Section 7003(b).

17 **SECTION 18. REPEALS; CONFORMING AMENDMENTS.**

18 (a)

19 (b)

20 (c)

21 **SECTION 19. EFFECTIVE DATE.** This [act] takes effect