

D R A F T  
FOR DISCUSSION ONLY

## **DIVIDED TRUSTEESHIP ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAW

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October 23-24, 2015 Drafting Committee Meeting

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October 2, 2015

## **DIVIDED TRUSTEESHIP ACT**

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1 **DIVIDED TRUSTEESHIP ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Divided Trusteeship Act.

3 **Discussion Notes**

4 *Prior draft.* This section corresponds to Section 101 in the Spring 2015 draft.

5  
6 *Pending “Uniform” designation.* The normal practice within the Uniform Law  
7 Commission is for an act to be designated as “Uniform” or “Model” by the ULC leadership  
8 toward the end of the drafting process. The strong expectation is that this act will be designated  
9 as a uniform act, making it the “Uniform Divided Trusteeship Act.”

10  
11 **SECTION 2. DEFINITIONS.** In this [act]:

12 (1) “Directed trustee” means a trustee that is subject to a power of a trust director under  
13 Section 5.

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

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

19 (4) “Terms of a trust” means the manifestation of the settlor’s intent regarding the trust’s  
20 provisions as expressed in the trust instrument or as may be established by other evidence that  
21 would be admissible in a judicial proceeding, or as may be established or superseded by court  
22 order or nonjudicial settlement agreement.

23 (5) “Trust director” means a person that is given a power under Section 5 whether or not  
24 the terms of the trust designate the person as a trust director, trust protector, trust advisor, or  
25 otherwise, and whether or not the person is also a trustee. The term excludes a holder of a  
26 nonfiduciary power of appointment.

27 (6) “Trustee” includes an original, additional, and successor trustee, and a cotrustee.

1 (7) “Vacancy in a trust directorship” means a period of time in which a trust director is  
2 absent for any of the following reasons and no successor has been appointed under Section 16(c):  
3 (A) a person designated as trust director rejects the directorship;  
4 (B) a person designated as trust director cannot be identified or does not exist;  
5 (C) a trust director resigns;  
6 (D) a trust director is disqualified or removed;  
7 (E) a trust director dies; or  
8 (F) a [guardian] or [conservator] is appointed for an individual serving as trust  
9 director.

### 10 Discussion Notes

11 *Prior draft.* This section corresponds to Section 102 in the Spring 2015 draft.  
12

13 *Directed trustee.* The definition of “directed trustee” has been modified slightly since the  
14 prior draft to acknowledge that, under Section 5, a trust director might have direction-type,  
15 consent-type, or protector-type powers. Moreover, because in paragraph (6) “trustee” is defined  
16 to include a cotrustee, and because this definition uses the term “trustee,” a cotrustee may be a  
17 directed trustee. And because the definition of a “trust director” in paragraph (5) no longer  
18 excludes a trustee (“whether or not the person is also a trustee”), under this draft one cotrustee  
19 could be subject to another cotrustee’s power of direction under Section 5. In such  
20 circumstances, by default the more permissive terms of this act would apply rather than the less  
21 permissive law of cotrusteeship such as under Uniform Trust Code § 703(g) (2000) and  
22 Restatement (Third) of Trusts § 81 (2007).  
23

24 *Person.* Following a suggestion at the prior meeting, the definition of “person” has been  
25 modified from the uniform law boilerplate to exclude an “estate” and a “trust.” Negotiations with  
26 the Style Committee have begun.  
27

28 *State.* The definition of “state” follows standard uniform law boilerplate.  
29

30 *Terms of a trust.* With a few edits as indicated below, the definition of “terms of a trust”  
31 is drawn from Uniform Trust Decanting Act (2015). Section 2(29) of that act updates the  
32 definition of “terms of a trust” found in Uniform Trust Code § 103(18) (amended 2004) to take  
33 notice of court orders and nonjudicial settlement agreements, both of which are of practical  
34 significance in creating divided trusteeships.<sup>1</sup> Several existing divided trustee statutes make

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<sup>1</sup> See Todd A. Flubacher & Kenneth F. Hunt, The Non-Judicial Settlement Agreement Wrapper, 152 Tr. & Est. 42, 42–51 (2013).

1 express reference to nonjudicial settlements.<sup>2</sup> We have modified the Uniform Trust Decanting  
2 Act definition slightly, however, to acknowledge that a court order or nonjudicial settlement  
3 might “supersede[]” rather than merely “establish[]” the settlor’s intent thus:  
4

5 “Terms of ~~the~~ a trust” means the manifestation of the settlor’s intent  
6 regarding a the trust’s provisions as expressed in the trust instrument, or as may  
7 be established by other evidence that would be admissible in a judicial  
8 proceeding, or as may be established or superseded by court order or nonjudicial  
9 settlement agreement.

10 *Trust director.* The definition of “trust director” has been revised in two important  
11 respects. First, in accordance with the strong consensus at the last meeting, the revised definition  
12 allows for a “trustee,” which includes a “cotrustee,” to be a trust director. Second, the definition  
13 is express in providing that a person designated by the settlor as a “trust protector,” “trust  
14 advisor,” or other such term is a “trust director” under this act if the person has a power of a trust  
15 director under Section 5. As before, the definition excludes a holder of a nonfiduciary power of  
16 appointment, which is addressed by other law, such as the Uniform Powers of Appointment Act  
17 (2013). What this means is that a person can be given a nonfiduciary power over distribution that  
18 will be subject to the law governing powers of appointment rather than this act. A few states  
19 have provisions to similar effect.<sup>3</sup>  
20

21 *Trustee.* The definition of “trustee” is drawn from Uniform Trust Code § 103(20)  
22 (amended 2004). Because the definition includes a “cotrustee,” and because the definition of  
23 “directed trustee” in paragraph (1) uses the term “trustee,” a cotrustee may be a directed trustee.  
24 Moreover, as noted in the comment above on the definition of “directed trustee,” because the  
25 definition of a “trust director” in paragraph (5) no longer excludes a trustee (“whether or not the  
26 person is also a trustee”), under this draft one cotrustee could be subject to another cotrustee’s  
27 power of direction under Section 5, in which case by default the more permissive terms of this  
28 act rather than the less permissive common law would apply.  
29

30 *Vacancy in a trust directorship.* The defined term “vacancy in a trust directorship,” used  
31 in Sections 7, 9, and 16, is new to this draft. The definition facilitates differing rules for a  
32 directed trustee’s powers and duties depending on whether there is a “vacancy in a trust  
33 directorship,” in accordance with the consensus at the last meeting. The definition used here is  
34 based on Uniform Trust Code § 704(a) (amended 2004), which addresses the parallel issue of  
35 vacancy in a trusteeship, but modified to reference the period of time in which the trust director  
36 is absent and no successor has yet been appointed. The discussion notes to Section 7 raise the  
37 possibility of adding language to cover emergent circumstances in which the office is not vacant  
38 but reaching the trust director is impossible or impracticable.  
39

40 *Removal of “trust fiduciary.”* The prior draft defined “trust fiduciary” to mean a trustee  
41 or a trust director. In this way, we could use “trust fiduciary” whenever we meant to refer to both

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<sup>2</sup> See, e.g., 760 Ill. Comp. Stat. Ann. 5/16.3(j)(2)(B); N.H. Rev. Stat. Ann. §§ 564-B:12-1201(a), 12-1204(a);  
Tenn. Code Ann. § 35-15-710; Va. Code Ann. § 64.2-770(E); Wis. Stat. Ann. §§ 701.0808(2), 701.0818(1)-(3).

<sup>3</sup> See, e.g., Va. Code Ann. § 64.2-770(E)(1) (“No person shall be a ‘trust director’ for purposes of this subsection merely by holding a general or limited power of appointment over the trust assets.”).

1 a trustee and a trust director. However, at the prior meeting several people pointed out that in  
2 some circumstances a trust director or a trustee might not be a “fiduciary,” and also that adverse  
3 state tax consequences might follow from identifying a trust director as a “trust fiduciary.” In this  
4 draft, therefore, we refer to both trustees and trust directors as necessary without a single  
5 umbrella term, except in Section 11, in which we have a single-use definition of “trust  
6 administrator” as an umbrella to mean either. We should discuss whether to make “trust  
7 administrator” a global definition and use the term throughout.

8  
9 *Additional definitions.* If the drafting process points to the need for additional definitions,  
10 we can look to the existing statutes for models.<sup>4</sup>

### 11 **SECTION 3. APPLICATION; GOVERNING LAW.**

12  
13 (a) This [act] applies to a trust created before, on, or after [the effective date of this [act]]  
14 that has its principal place of administration in this state, including a trust whose principal place  
15 of administration has been changed to this state.

16 (b) Without precluding other means for establishing a sufficient connection with the  
17 designated jurisdiction, terms of a trust designating the principal place of administration are valid  
18 and controlling if:

19 (1) a trustee’s principal place of business is located in or a trustee is a resident of  
20 the designated jurisdiction;

21 (2) a trust director’s principal place of business is located in or a trust director is a  
22 resident of the designated jurisdiction; or

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

24 (c) If a trust has only one corporate trustee, the corporate trustee is subject to one or more  
25 trust directors under Section 5, and the terms of the trust do not designate the trust’s principal  
26 place of administration, then the trust’s principal place of administration is **[?presumptively?]**  
27 the corporate trustee’s principal place of business.

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<sup>4</sup> See, e.g., Colo. Rev. Stat. Ann. § 15-16-801; Idaho Code Ann. § 15-7-501(1); 760 Ill. Comp. Stat. Ann. 5/16.3(a); S.D. Codified Laws § 55-1B-1.

## Discussion Notes

*Prior draft.* This section corresponds to Section 103 in the Spring 2015 draft.

*Subsection (a)* - This subsection, which is a shortened version of Uniform Trust Decanting Act § 5(1) (2015), provides that this act applies to all trusts, whether created before or after the adoption of this act, and without regard to whether the terms of the trust expressly reference this act. Two substantive consequences bear emphasis. First, an existing trust that in substance provides for a trust director by giving a person a power that falls within Section 5 will be governed by this act.<sup>5</sup> The alternative, rejected by consensus at the last meeting, is to apply this act prospectively to new trusts only (perhaps with a mechanism for existing trusts to opt in). Second, a new trust that in substance provides for a trust director is governed by this act whether or not the terms of the trust references this act expressly. The alternative, as under the Virginia statute but rejected at the last meeting, is to limit application of this act to new trusts that expressly reference the act, preserving the state’s prior law for trusts that do not include an express reference.<sup>6</sup>

On the assumption that powers and duties in a divided trusteeship are matters of trust administration, this subsection follows the normal conflict of laws rule by linking the application of this act to a trust’s “principal place of administration.”<sup>7</sup> As with other matters of administration, the parties are protected against inconsistent court orders by the common law principle of “primary supervision.” *See* Restatement (Second) of Conflicts of Law § 267 cmt. e (1971).

*Subsection (b)* - This provision, which derives from Uniform Trust Code § 108(a) (2000), confirms the validity of a settlor’s designation of a trust’s principal place of administration if: (1) a trustee is located in the designated jurisdiction; (2) a trust director is located in the designated jurisdiction; or (3) at least some of the trust administration occurs in the designated jurisdiction. Paragraphs (1) and (3) reproduce without change the safe harbor under Uniform Trust Code § 108(a). Paragraph (2), which is new since the prior draft, is an innovation in that it expands the

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<sup>5</sup> The Illinois statute takes this position expressly. *See* 760 Ill. Comp. Stat. Ann. 5/16.3(j)(1) (“On and after its effective date, this Section applies to all existing and future trusts that appoint or provide for a directing party, including but not limited to a party granted power or authority effectively comparable in substance to that of a directing party as provided in this Section.”).

<sup>6</sup> *See* Va. Code Ann. § 64.2-770(E) (“The provisions of this subsection shall apply if the settlor incorporates this section into the trust instrument by specific reference. The provisions of this subsection shall also apply if this subsection is incorporated into the trust instrument by a nonjudicial settlement agreement under § 64.2-709 by specific reference.”).

<sup>7</sup> Restatement (Second) of Conflict of Laws § 271 cmt. a (1971) (citations omitted) provides in pertinent part:

The term “administration of a trust” . . . includes those matters which relate to the management of the trust. Matters of administration include those relating to the duties owed by the trustee to the beneficiaries. They include the powers of a trustee, such as the power to lease, to sell and to pledge, the exercise of discretionary powers, the requirement of unanimity of the trustees in the exercise of powers, and the survival of powers. They include the liabilities which may be incurred by the trustee for breach of trust. They include questions as to what are proper trust investments. They include the trustee’s right to compensation. They include the trustee’s right to indemnity for expenses incurred by him in the administration of the trust. They include the removal of the trustee and the appointment of successor trustees. They include the terminability of the trust.



1 safe harbor of § 108(a) to include also the location of a trust director as a sufficient connection  
2 with the designated jurisdiction. This expansion reflects this act’s validation of fracturing  
3 trusteeship among trustees and trust directors.

4 *Subsection (c)* - This subsection is meant to simplify the problem of discerning the  
5 principal place of administration for a divided trusteeship if the terms of the trust do not  
6 prescribe the trust’s principal place of administration as contemplated by Subsection (b). In the  
7 paradigmatic case of a single corporate trustee that is subject to one or more trust directors, this  
8 section prescribes that the principal place of administration is the corporate trustee’s principal  
9 place of business. This subsection thus extends the logic of Restatement (Second) of Conflict of  
10 Laws § 267 cmt. c (1971) to divided trusteeship.<sup>8</sup> A question for discussion is whether the rule of  
11 this subsection should be presumptive only. A further question for discussion is whether there  
12 are other principles of conflict of laws that require updating in light of recognition of divided  
13 trusteeship (within our charge), as compared to generally problematic matters in conflict of laws  
14 in trust practice (not within our charge).

15 **SECTION 4. COMMON LAW AND PRINCIPLES OF EQUITY.** Unless displaced  
16 by a provision of this [act], the common law and principles of equity of this state supplement this  
17 [act].

#### 18 **Discussion Notes**

19 *Prior draft.* This section corresponds to Section 104 in the Spring 2015 draft.

20  
21 *Minimal changes.* Following a suggestion at the prior meeting, in this draft we changed  
22 “principles of law and equity” to “common law and principles of equity.” The substantive import  
23 of this section, however, remains unchanged. The purpose is to confirm that the law of an  
24 enacting state other than this act remains applicable to divided trusteeship except as displaced by  
25 this act. For example, other than as provided by Section 3(b)-(c), the law of an enacting state by  
26 which principal place of administration is determined would continue to apply to a trust with  
27 divided trusteeship. Provisions such as this one are familiar from other uniform acts. *See, e.g.,*

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<sup>8</sup> Restatement (Second) of Conflict of Laws § 267 cmt. c (1971) (emphasis added) provides in pertinent part:

The question frequently arises whether a testator or settlor has manifested an intention that the trust be administered in a state other than that of his domicil. It may be expressly provided in the will or trust instrument that the trust is to be administered in a particular state. *In the absence of such a provision, it is reasonable to infer in most situations that the testator or settlor expected the trustee to administer the trust at his or its place of business or domicil. This is especially true of a corporate trustee which will ordinarily administer its trust business at its principal trust office.* It is true even though the corporate trustee is or may be qualified to do business in the state of the testator's domicil. In the case of an individual trustee, it may be inferred that the testator intended that the trust should be administered at the trustee's place of business or domicil. *Where the testator or settlor names two or more trustees who are domiciled in different states, he may manifest an intention that the trust should be administered at the domicil or place of business of one of them. Thus, if he names a corporate trustee and an individual trustee, he may thereby manifest an intention that the trust should be administered at the place of business of the corporate trustee.*

1 Uniform Premarital and Marital Agreements Act § 5 (2012); Uniform Trust Code § 106 (2000).

2 **SECTION 5. POWERS OF TRUST DIRECTOR.**

3 (a) Subject to Section 6, the terms of a trust may give a trust director:

4 (1) a power of direction to direct a trustee or another trust director in the exercise  
5 or nonexercise of any of its powers in the administration of the trust;

6 (2) a power of protection

7 (A) to appoint or remove a trustee or another trust director, or a successor  
8 to either;

9 (B) to bring an action for instructions, to declare rights, to enforce the  
10 trust, to enforce claims of the trust, or to defend claims against the trust;

11 (C) to ratify an action of a trustee or another trust director;

12 (D) to amend or modify the terms of the trust;

13 (E) to change the principal place of administration, the situs, or the  
14 governing law of the trust;

15 (F) to terminate the trust;

16 (G) to appoint some or all of the trust property to a new trust;<sup>9</sup> or

17 (H) to determine the capacity of the settlor; or

18 (3) a power of consent under which a trustee or another trust director must obtain  
19 the consent of the director before acting.

20 (b) Subject to Section 6, a trust director may exercise any other power appropriate to  
21 exercise the powers given to the director by the terms of the trust, including:

22 (1) to delegate powers and duties;

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<sup>9</sup> See Wis. Stat. Ann. § 701.0818(2)(b)(2)(h).

1 (2) to incur and direct indemnification of reasonable costs;  
2 (3) to bring an action for instructions, to declare rights, to enforce the trust, to  
3 enforce claims of the trust, or to defend claims against the trust;  
4 (4) to intervene in an action against a trustee, another trust director, beneficiary, or  
5 third party to the extent the action pertains to the trust[; and][.]  
6 [(5) to direct a trustee to issue a Certification of Trust under [Uniform Trust Code  
7 Section 1013].]  
8 (c) Unless the terms of a trust provide otherwise, trust directors with joint powers shall  
9 act by majority decision.

#### 10 Discussion Notes

11 *Prior draft.* This section corresponds to Section 202 in the Spring 2015 draft.  
12

13 *Powers versus duties.* Subject to the limitations stated in Section 6, this section governs  
14 the powers of a trust director. The duties and liability of a trust director in the exercise or  
15 nonexercise of a power are governed by Section 8. The powers of a directed trustee are governed  
16 by Section 7, and the duties and liability of a directed trustee are governed by Sections 9 and 10.  
17 Information sharing among directed trustees and trust directors is governed by Section 11.  
18

19 *Enabling versus off-the-rack.* As discussed at the prior meeting, the existing divided  
20 trusteeship statutes can be sorted roughly into “enabling” or “off-the-rack” categories. In  
21 accordance with the strong consensus at the prior meeting, this section provides for an enabling  
22 rather than off-the-rack approach. Instead of creating several categories of trust directors and  
23 giving each of them a particular set of default powers, this section authorizes the appointment of  
24 a generic “trust director,” forcing the settlor (and so the settlor’s lawyer) to provide expressly in  
25 the terms of the trust what powers the director will have. Under this section, therefore, a trust  
26 director has only those powers given expressly by the terms of the trust (Subsection (a)) and such  
27 further powers as are “appropriate” to the exercise of those powers (Subsection (b)).  
28

29 *The structure of this section.* The structure of this section is as follows:  
30

- 31 • *Subsection (a)* provides that a trust director may be given certain powers of  
32 “direction,” “protection,” or “consent” over the administration of a trust. This  
33 subsection is discussed in further depth below.  
34
- 35 • *Subsection (b)* gives a trust director such additional powers as are appropriate to  
36 the director’s exercise of her express powers. This subsection is discussed in

1 further depth below.

- 2
- 3 • *Subsection (c)* provides a default rule of majority action for multiple trust  
4 directors with “joint powers,” such as in the case of a three person committee with  
5 a power of direction over investment or distribution. Majority rule is the modern  
6 default for multiple trustees, as under Uniform Trust Code § 703(a) and  
7 Restatement (Third) of Trusts § 39 (2003). In the event of a deadlock among trust  
8 directors with joint powers, by analogy to a deadlock among cotrustees, a court  
9 could “direct exercise of the [joint] power or take other action to break the  
10 deadlock.” Restatement (Third) of Trusts § 39 cmt. e. The question of information  
11 sharing among trust directors with related but not “joint” powers, such as between  
12 a trust director with a power of direction over investment and a trust director with  
13 a power of direction over distribution, is addressed by Section 11.

14

15 *Subsection (a): three categories of powers.* In accordance with the discussion at the last  
16 meeting, in this draft we have organized the powers that may be given to a trust director into  
17 three categories: “direction,” “protection,” and “consent.” Categorization has the functional  
18 purpose of allowing us to prescribe different rules in Sections 7, 8, and 9 for different types of  
19 powers. An important issue for discussion is whether this categorization solution is viable—for  
20 example, are there other powers that might be given to a trust director that are not covered by  
21 these categories as currently drafted? If the Committee concludes that the same rules should  
22 apply to all types of powers, then there will be no need for categories. Conversely, we will need  
23 additional categories if the committee concludes that even further differentiation in the rules is  
24 warranted.

25

26 In keeping with comments from the prior meeting, this section constructs its categories  
27 by sorting the different types of *powers*. Many existing state statutes construct their categories  
28 instead by sorting different types of *directors* who hold the different types of powers. Rather than  
29 distinguishing between powers of protection and powers of direction, for example, many existing  
30 statutes distinguish between “trust protectors,” who hold powers of protection, and “trust  
31 advisors,” who hold powers of direction.<sup>10</sup> This section employs a power-based, rather than  
32 director-based, categorization system, because the power-based system is clearer. In a director-  
33 based system, if a single director holds more than one power, that director can end up having  
34 several different labels under the same statute at the same time.

35

36 *Other powers not covered in Subsection (a)?* An initial question for discussion is whether  
37 a settlor might want to give a trust director a power that does not fall within Subsection (a). In  
38 thinking about this question, a useful starting point will be to compare Subsection (a) with  
39 Appendix A, which schedules all of the powers provisions in the existing statutes, and to  
40 consider whether each of the powers listed in Appendix A would be covered by the language of  
41 Subsection (a). Here are two potential examples from Appendix A that do not obviously fall  
42 within Subsection (a)(1) and are not included in the list of powers of protection in Subsection

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<sup>10</sup> Alaska Stat. Ann. §§ 13.36.370, 13.36.375 (protector and advisor); Nev. Rev. Stat. Ann. §§ 163.5535, 163.5537, 163.5543, 163.5545, 163.5547 (distribution trust adviser, investment trust adviser, trust adviser, trust protector, custodial account owner); S.D. Codified Laws §§ 55-1B-1, 55-1B-4 (protector, advisor, investment trust advisor, distribution trust advisor).

1 (a)(2): (i) a power to determine a trustee’s or another trust director’s compensation,<sup>11</sup> and (ii) a  
2 power to resolve disputes between or among trustees, trust directors, and beneficiaries.<sup>12</sup> A  
3 related question, noted below, is whether we can come up with a residual catch-all within the  
4 protection power category.

5  
6 *Subsection (a)(1): “power of direction.”* A “power of direction” is one that allows a trust  
7 director “to direct a trustee or another trust director in the exercise or nonexercise of any of the  
8 trustee’s or director’s powers in the administration of the trust.” Conceptually, this category  
9 includes two kinds of powers in a trust director: (1) a power to direct a trustee in the trustee’s  
10 exercise or nonexercise of the trustee’s powers (what is commonly called a directed trust), and  
11 (2) a power to direct a trust director in the director’s exercise or nonexercise of the director’s  
12 powers. The common thread is that a trust director holding a power of direction is in function the  
13 party responsible for the exercise or nonexercise of the power that is formally held by the  
14 directed party. The rules prescribed in Sections 7 (limitations on powers of directed trustee), 8  
15 (duties and liability of trust director), and 9 (duties and liability of directed trustee) follow from  
16 this functional premise. For example, under Section 7(a), “[w]ith respect to any matter for which  
17 a trustee is subject to a trust director’s power of direction . . . , the trustee may take only those  
18 actions appropriate to carry out the directions of the trust director,” provided that there is no  
19 “vacancy in the trust directorship.” And under Section 8(a), the duties of a trust director who has  
20 a power of direction over a trustee are derived from the duties that would normally apply to a  
21 trustee.

22  
23 *Investment, distribution, and other trustees’ powers.* The language “any of the trustee’s  
24 or director’s powers in the administration of the trust” incorporates the entire field of trustees’  
25 powers. For example, a power in a trust director to direct a trustee in the investment of some or  
26 all of the trust property would be a power of direction. A power to direct a trustee as regards the  
27 distribution function, including when, to whom, what to distribute, and satisfaction of conditions,  
28 would likewise be a power of direction. So too would be a power to direct the trustee to make or  
29 take loans; to vote proxies for securities held in trust; to adopt a particular valuation of trust  
30 property; to determine the frequency or methodology of valuation; or to interpret the trust. Many  
31 of these specific powers, which fall within the general language of Subsection (a)(1), are  
32 provided for expressly in various state statutes per Appendix A. In sum, as regards a directed  
33 trustee, the “power of direction” category encompasses any power in a trust director to direct the  
34 trustee in the trustee’s exercise or nonexercise of any of the trustee’s powers.

35  
36 *What about a power of appointment?* Per the definition of a trust director in Section 2(5),  
37 a holder of a nonfiduciary power of appointment is not a trust director. Such a power is not  
38 governed by this act, and instead is governed by other law, such as the Uniform Powers of  
39 Appointment Act (2013).

40  
41 *Subsection (a)(2): “power of protection.”* The “power of protection” category includes

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<sup>11</sup> See 760 Ill. Comp. Stat. Ann. 5/16.3(b)(3) (“select and determine reasonable compensation of one or more advisors, managers, consultants, or counselors, including the trustee, and to delegate to them any of the powers of the investment trust advisor”); see also Wis. Stat. Ann. § 701.0902(1)(c).

<sup>12</sup> See Wis. Stat. Ann. § 701.0818(2)(b)(1)(c) (“Resolve disputes between the trustee or a directing party and a beneficiary.”).

1 eight enumerated kinds of powers, largely drawn from existing statutes per Appendix A, that are  
2 not customarily thought of as a power of trusteeship over which a trust director could be given a  
3 power of direction. Many of these powers are commonly associated with the term “trust  
4 protector.” As noted above, we should discuss whether to add (i) a power to determine a trustee’s  
5 or another trust director’s compensation, and (ii) a power to resolve disputes between or among  
6 trustees, trust directors, and beneficiaries. We should also discuss whether we can come up with  
7 a residual catch-all for powers of protection. The difficulty is that powers of protection is not a  
8 neat conceptual category like powers of direction.  
9

10 The protection power of Subsection (a)(2)(C), “to ratify an action of a trustee or trust  
11 director,” is meant to be a power of after-the-fact ratification. It is thus different from a “power  
12 of consent” under Subsection (a)(3), under which the party subject to the power must obtain  
13 consent before acting. The protection power of Subsection (a)(2)(D), “to amend or modify the  
14 terms of the trust,” is consistent with *Minassian v. Rachins*, 152 So.3d 719 (Fla. Dist. Ct. App.  
15 2014). In that case, the terms of the trust gave a trust director (i.e., a “trust protector”) a power to  
16 modify the trust to resolve ambiguities. The court upheld the validity of the power and ruled that,  
17 because the provision in question was ambiguous, the director’s (i.e., the protector’s) exercise of  
18 the power was valid.  
19

20 Under Section 8(c) of this act, in the exercise of a power of protection—such as to ratify  
21 an action of the trustee or to amend or modify the terms of the trust—a trust director “must act in  
22 good faith and is not liable for breach of trust unless the trust director acted or failed to act in bad  
23 faith or with reckless indifference to the purposes of the trust or the interests of the  
24 beneficiaries.”  
25

26 The protection power of Subsection (a)(2)(H), “to determine the capacity of the settlor,”  
27 raises interesting questions. A familiar drafting strategy in a revocable trust is to name a  
28 committee of persons to determine the settlor’s capacity. Here is an example taken from a  
29 Northern Trust form:  
30

31 For purposes of this agreement, I shall be considered to be unable to  
32 manage my affairs if I am under a legal disability or by reason of illness or mental  
33 or physical disability am unable to give prompt and intelligent consideration to  
34 financial matters. The determination as to my inability at any time shall be made  
35 by \_\_\_\_\_ and my physician, or the survivor of them, and the trustee may  
36 rely upon written notice of that determination.<sup>13</sup>  
37

38 Under Subsection (a)(2)(H), the named person(s) and physician would be trust directors. In  
39 consequence, they would be subject to the default voting rules of Subsection (c) for directors  
40 with a joint power. And they would be subject to the rule of Section 8(c) requiring that they  
41 “must act in good faith,” and providing that each is “not liable for breach of trust unless the trust  
42 director acted or failed to act in bad faith or with reckless indifference to the purposes of the trust  
43 or the interests of the beneficiaries.”  
44

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<sup>13</sup> Northern Trust Company, Will and Trust Forms 201-1 (2004).

1            *Subsection (a)(3): “Power of consent.”* If a trust director must give consent before a  
2 trustee or another trust director may act, then the trust director has a “power of consent.” Thus,  
3 for example, a trustee could be required to obtain the consent of a trust director before selling  
4 certain trust property or acquiring other property or making a distribution. Any power of  
5 trusteeship can be subjected to a power of consent. The core distinction between a “power of  
6 consent” and a “power of direction” is that a power of consent contemplates initiative on the part  
7 of the party subject to the power, whereas a “power of direction” contemplates initiative on the  
8 part of the party holding the power. Under Section 8(c), in the exercise of a power of consent, a  
9 trust director “must act in good faith and is not liable for breach of trust unless the trust director  
10 acted or failed to act in bad faith or with reckless indifference to the purposes of the trust or the  
11 interests of the beneficiaries.”

12  
13            *Subsection (b): other “appropriate” powers.* Subsection (b) gives a trust director such  
14 additional powers as are “appropriate” to the director’s exercise of her express powers under  
15 Subsection (a). The term “appropriate” and the structure of the opening clause is based on  
16 Uniform Trust Code § 815(a)(2)(B) (2000).

17  
18            The examples given in the blackletter—to delegate; incur and direct indemnification of  
19 reasonable costs; bring an action for instructions, to declare rights, or to enforce the trust; to  
20 intervene in litigation pertaining to the trust; and to direct issuance of a Certification of Trust—  
21 are meant to be illustrative and not limiting. Thus, for example, a trust director could direct a  
22 trustee to execute documents or make regulatory filings if “appropriate” to the exercise of an  
23 express power of the trustee. The power “to incur and direct indemnification of reasonable costs”  
24 would allow a trust director to direct reimbursement of the director’s attorney’s fees if those fees  
25 were “reasonable” under the circumstances and “appropriate” to the director’s exercise of the  
26 director’s powers.

27  
28            *Distinct litigation powers in Subsections (a)(2)(B) and (b)(3)-(4).* Subsections (a)(2)(B)  
29 and (b)(3) both reference a power “to bring an action for instructions, to declare rights, to enforce  
30 the trust, to enforce claims of the trust, or to defend claims against the trust.” Subsection (b)(4)  
31 adds a power “to intervene in an action against a trustee, another trust director, beneficiary, or  
32 third party to the extent the action pertains to the trust.” In spite of the common subject matter  
33 and overlapping language, the litigation power under Subsection (a)(2)(B) is distinct from that  
34 under Subsections (b)(3)-(4).

35  
36            Subsection (a)(2)(B) enables a settlor to give a trust director a power of protection to  
37 litigate matters pertaining to the trust. For example, a settlor could give a trust director a power  
38 to enforce the trust, as might be apt if the beneficiaries are unlikely to be able to do so or if the  
39 trust has a charitable purpose without a discrete beneficiary.<sup>14</sup> Likewise, as in *Schwartz v.*  
40 *Wellin*, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D. S.C. April 17, 2014), a settlor could  
41 give a trust director (the “trust protector” in that case) a power to bring or defend claims “for the  
42 protection of trust assets,” as might be apt if the settlor wanted a party other than the trustee to  
43 manage such litigation. In *Schwartz*, the court held that the trust director (i.e., the “trust  
44 protector”) lacked standing, because Rule 17(a)(1) of the Federal Rules of Civil Procedure does

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<sup>14</sup> At least two states have statutes that authorize a settlor of a charitable trust to designate persons who may enforce the trust. *See* Del. Code Ann. tit. 12, § 3303(b); Iowa Code Ann. § 633A.5106.

1 not include such a person as a party who may bring litigation if not the “real party in interest.”  
2 However, Rule 17(a)(1) does include “a party authorized by statute,” hence this subsection  
3 would reverse the result in that case in accordance with the settlor’s express intent.  
4

5 Subsections (b)(3) and (b)(4), by contrast, are examples of “other power[s]” that might be  
6 “appropriate to exercise the powers given to the director” under Subsection (a). Accordingly,  
7 these provisions only authorize a trust director to bring or intervene in litigation to the extent the  
8 litigation is related to the trust director’s expressly granted powers. For example, under  
9 Subsection (b)(3), a trust director could bring an action against a trustee that failed to comply  
10 with a direction under Subsection (a)(1). Likewise, if a trust director had a power to direct  
11 investment, and the trust became involved in a contractual dispute with a private equity fund in  
12 which the director had directed investment, under Subsections (b)(3) and (b)(4) the director  
13 could bring or intervene in litigation to resolve the matter. Unlike the litigation power under  
14 Subsection (a)(2)(B), which arises only if granted expressly by the terms of the trust, the  
15 narrower power to litigate under Subsections (b)(3) and (b)(4) arises by default.  
16

17 *Reconciling uniform laws on pet and other noncharitable purpose trusts.* A power to  
18 enforce a trust, which falls under Subsection (a)(2)(B), is also recognized in Uniform Trust Code  
19 §§ 408(b), 409(2) (2000), and Uniform Probate Code § 2-907(c)(4) (amended 1993), which are  
20 specialized provisions dealing with pet and other noncharitable purpose trusts. We will need to  
21 consider how to reconcile those provisions with this act, and if appropriate, to recommend  
22 amendments to those provisions accordingly.  
23

24 *Nonbinding advice givers.* This section does not apply to a nonbinding advice giver, such  
25 as a person with whom a settlor directs a trustee to consult in a way that is not binding on the  
26 trustee. A nonbinding advice giver is not a “trust director,” which is defined in Section 2(5) as a  
27 person who holds a power under this section, as nonbinding advice is not a power under this  
28 section. Because a nonbinding advice giver does not have a binding power over the trust or its  
29 administration, there is no need for the framework of duties, ancillary powers, and other  
30 governance provisions in this Act.  
31

32 *Settlor incapacity or death.* The divided trusteeship statutes in several states address  
33 expressly the question of whether a trust director’s powers continue after the incapacity or death  
34 of the settlor. The South Dakota statute, for example, says, “An excluded fiduciary may continue  
35 to follow the direction of the trust advisor upon the incapacity or death of the grantor if the  
36 instrument so allows.”<sup>15</sup> At the last meeting, we reached a consensus that these provisions were  
37 probably meant to override the default rule within the common law of agency that an agent’s  
38 power terminates upon the principal’s incapacity or death. *See* Restatement (Third) of Agency §§  
39 3.07-3.08 (2006). We also reached a consensus that the rule prescribed by the South Dakota  
40 statute was backwards, that the default should be that the trust director’s powers abide even after  
41 the settlor’s incapacity or death unless the instrument provides to the contrary. An issue for  
42 discussion, therefore, is whether this outcome is implied clearly enough by the structure of this  
43 section or if instead we should add a subsection that says so expressly.

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<sup>15</sup> S.D. Codified Laws § 55-1B-3; *see also* Colo. Rev. Stat. Ann. § 15-16-808; Idaho Code Ann. § 15-7-501(3);  
Miss. Code Ann. § 91-8-1201(d); Nev. Rev. Stat. Ann. § 163.555; N.C. Gen. Stat. Ann. § 36C-8A-8; Tenn. Code  
Ann. § 35-15-1201(d); Wyo. Stat. Ann. § 4-10-716.



1           **SECTION 6. LIMITATIONS ON POWERS OF TRUST DIRECTOR.**

2           (a) Notwithstanding a contrary provision in the terms of a trust, a trust director may not:

3                   (1) remove from a trust created to meet the requirements of 42 U.S.C. Section  
4 1396p(d)(4) [as amended] a requirement to pay back a governmental entity for benefits provided  
5 to a beneficiary of the trust at the death of that beneficiary;

6                   (2) grant a beneficial interest to a noncharitable interest or purpose in a trust for  
7 which all of the beneficiaries are charitable organizations; or

8                   (3) reduce or eliminate an interest in income of a beneficiary of:

9                           (A) a trust for which a marital deduction was taken for federal tax purposes  
10 under 26 U.S.C. Sections 2056 or 2523, [as amended,] or for state tax purposes under any  
11 comparable provision of applicable state law, during the life of the settlor's spouse;

12                           (B) a charitable remainder trust under 26 U.S.C. Section 664, [as  
13 amended,] during the life of the noncharitable beneficiary;

14                           (C) a grantor retained annuity trust under 26 U.S.C. Section 2702, [as  
15 amended,] during any period in which the settlor is a beneficiary; or

16                           (D) a trust for which an election as a qualified Sub-Chapter S Trust under  
17 26 U.S.C. Section 1361(d), [as amended,] is currently in force.

18           (b) Except as provided by the terms of a trust specifically referring to this subsection, a  
19 trust director may not exercise a power in a way that would result in a taxable gift for federal gift  
20 tax purposes or cause the inclusion of any assets of the trust in the trust director's gross estate for  
21 federal estate tax purposes.

22                                   **Discussion Notes**

23                                   *Prior draft.* This section corresponds to Section 203 in the Spring 2015 draft.  
24  
25

1 Under the capacious language of Section 5, there is little in the administration or terms of  
2 a trust that cannot be subject to the control of a trust director. At least four states, however, have  
3 specific statutory provisions that cut back on the powers that may be given to a trust director (see  
4 Appendix B).<sup>16</sup> In general, these limits relate to charitable trusts, tax planning, or special needs  
5 trusts. The blackletter above, which is derived from Missouri Ann. Statutes § 456.8-808(4)-(5)  
6 and Tennessee Code Ann. § 35-15-1201(e), is a first pass at consolidating the existing provisions  
7 into a simpler synthesis that complies with Uniform Law Commission drafting norms. Whether  
8 to include a provision such as this, and if so, what provisions should be included, are both open  
9 questions for discussion at the meeting. The purpose of this first draft is meant to provide a  
10 starting point for that discussion, along with Appendix B, which extracts the existing state  
11 statutes on the topic.

12  
13 **SECTION 7. LIMITATIONS ON POWERS OF DIRECTED TRUSTEE.**

14 (a) With respect to any matter for which a trustee is subject to a trust director’s power of  
15 direction under Sections 5(a)(1) and 5(b), the trustee may take only those actions appropriate to  
16 carry out the directions of the trust director. A directed trustee is not subject to a trust director’s  
17 power of direction if at the time in question there is a vacancy in the trust directorship.

18 (b) With respect to any matter for which a trustee is subject to a trust director’s power of  
19 consent under Sections 5(a)(3) and 5(b), the trustee may not act without the consent of the trust  
20 director. A directed trustee is not subject to a power of consent if at the time in question there is a  
21 vacancy in the trust directorship.

22 **Discussion Notes**

23 *Prior draft.* This section corresponds to Section 302 in the Spring 2015 draft.

24  
25 *Powers versus duties.* This section protects the integrity of a trust director’s powers by  
26 limiting the powers of a trustee to act if the trustee is subject to a trust director’s power of  
27 direction (Subsection (a)) or is subject to a trust director’s power of consent (Subsection (b)). On  
28 the assumption that a power of protection would not ordinarily overlap with a power of  
29 trusteeship, there is no similar provision for limiting a trustee’s powers if subject to a power of  
30 protection. Whether such a provision should be added is an open issue for discussion.

31  
32 Conceptually, this section narrows the powers of a directed trustee; it does not impose a  
33 duty on such a trustee. The duties of a directed trustee are governed by Section 9. The central  
34 purpose of this section is to override the background default rule of modern trust law under

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<sup>16</sup> See Miss. Code Ann. § 91-8-1201(e); Mo. Ann. Stat. § 456.8-808(4)-(5); Tenn. Code Ann. § 35-15-1201(e); Wis. Stat. Ann. § 701.0818(6).

1 which a trustee has effectively unlimited power. *See, e.g.*, Uniform Trust Code § 815(a)(2)  
2 (amended 2003) (“all powers over the trust property which an unmarried competent owner has  
3 over individually owned property” and “any other powers appropriate to achieve the proper  
4 investment, management, and distribution of the trust property”); Restatement (Third) of Trusts §  
5 85 (2007) (“all of the powers over trust property that a legally competent, unmarried individual  
6 has with respect to individually owned property”).  
7

8 *Directed trust directors.* This section only limits the powers of a *trustee* that is subject to  
9 a power of direction, and not the powers of a *trust director* that is subject to such a power.  
10 Because a trust director does not have default powers, there is no need to cut back on the powers  
11 of a trust director when the director is subject to a power of direction. Under Section 5, a trust  
12 director possesses only those powers that are specifically granted to it by the terms of the trust  
13 and such other powers that are “appropriate to exercise” those specifically granted powers.  
14

15 For example, the terms of a trust might give a power of direction over investment to a  
16 professional investment adviser, but also make that adviser’s power subject to a power of  
17 consent by the settlor’s brother. In this case, there is no need to limit the investment adviser’s  
18 power to act when the brother refuses consent, because by default the adviser has no power to act  
19 other than in accordance with the powers specifically granted by the terms of the trust. If the  
20 terms of the trust do not specifically empower the adviser to direct investments in a particular  
21 circumstance, then the adviser cannot do it.  
22

23 *Powers of protection.* This section limits a trustee’s powers when the trustee is subject to  
24 a power of direction or a power of consent, but not when the trustee is subject to a power of  
25 protection. Because a trustee does not usually have by default the sorts of powers that fall within  
26 the power of protection category, there is no need to cut back on the powers of a trustee when the  
27 trustee is subject to a power of protection. For example, by default a trustee does not have a  
28 power to remove another trustee, hence there is no need to limit the trustee’s exercise of this  
29 power when it belongs to a trust director.  
30

31 *Carrying out a direction; seeking consent; acting with consent.* Subsections (a) and (b)  
32 implicitly preserve a trustee’s incidental power to carry out the directions of a trust director  
33 (Subsection (a)), actions for which a trust director has given consent (Subsection ((b)), and  
34 actions appropriate toward seeking such consent (Subsection (b)). Note also Subsection (a)’s  
35 preservation of power to take “actions appropriate to carry out the directions of the trust  
36 director.”  
37

38 *Vacancy in a trust directorship.* Disempowering a trustee that is subject to a power of  
39 direction or a power of consent creates the possibility that, during a vacancy in the trust  
40 directorship, there might be no one with the power to administer the trust. This section solves  
41 that problem by lifting the limit on a trustee’s powers during a vacancy in the trust directorship, a  
42 term that is defined in Section 2(7). However, in accordance with the consensus at the last  
43 meeting and the prevailing approach in the sample instruments provided by our advisers and  
44 observers after that meeting, under Sections 9(a)(2) and 9(c)(2) a trustee thrust into  
45 administration by reason of a vacancy in a trust directorship is subject to a lower fiduciary  
46 standard than would otherwise apply by default. Under those provisions, which are discussed in

1 further detail in the discussion notes to Section 9, “If there is a vacancy in the trust directorship,  
2 the trustee is not liable for breach of trust unless the trustee acted or failed to act in bad faith or  
3 with reckless indifference to the purposes of the trust or the interests of the beneficiaries.”  
4

5 *Impracticable, impossible, or other emergency?* As defined in Section 2(7), a vacancy in  
6 a trust directorship does not necessarily include circumstances in which reaching the trust  
7 director is impracticable or impossible. Nor does it encompass emergency situations more  
8 generally. So an issue for discussion is whether it should be broadened, for example in line with  
9 this sample form language supplied by Diana Zeydel, one of our observers:  
10

11 Notwithstanding the foregoing provisions of this Article if, in any case of  
12 emergency, it is impossible, impracticable or inexpedient for the Administrative  
13 Trustee, as determined by the Administrative Trustee, to obtain the direction of  
14 the General Trustee with respect to investment decisions by reason of the absence  
15 of the General Trustee, or an incapacity, disability or other condition preventing  
16 the General Trustee from acting, then all the rights, powers and discretion  
17 conferred upon the General Trustee under the foregoing provisions of this Article,  
18 until the passing of such emergency, shall vest in and may be exercised by the  
19 Administrative Trustee as fully and effectively as if such rights, powers and  
20 discretions had originally been conferred solely upon the Administrative Trustee.  
21 The Administrative Trustee shall incur no liability for actions taken in good faith  
22 pursuant to the powers granted by this Subdivision.  
23

#### 24 **SECTION 8. DUTIES AND LIABILITY OF TRUST DIRECTOR.**

25 (a) Subject to subsection (b), a trust director is subject to the same fiduciary duties in the  
26 exercise or nonexercise of a power of direction under Sections 5(a)(1) and 5(b) as a trustee  
27 would be in the exercise or nonexercise of the same power under the same circumstances.

28 (b) The terms of a trust may vary or eliminate the fiduciary duties of a trust director in the  
29 exercise or nonexercise of a power of direction under Sections 5(a)(1) and 5(b) to the same  
30 extent that the terms of the trust could vary or eliminate the fiduciary duties of a trustee under the  
31 same circumstances.

32 (c) A trust director that has a power of protection or consent under Sections 5(a)(2),  
33 5(a)(3), or 5(b) must act in good faith and is not liable for breach of trust unless the trust director  
34 acted or failed to act in bad faith or with reckless indifference to the purposes of the trust or the  
35 interests of the beneficiaries.

## Discussion Notes

*Prior draft.* This section corresponds to Section 204 in the Spring 2015 draft.

*Powers versus duties.* In combination with Sections 5, 7, and 9, this section offers a simple but principled model of powers and fiduciary duties in a divided trusteeship: fiduciary duty, and so fiduciary liability exposure, follows power. If a trust director has the relevant power, the director bears fiduciary obligation to the beneficiaries and thus has fiduciary liability exposure in the exercise or nonexercise of that power. And if a trustee has the relevant power, then the trustee bears fiduciary obligation to the beneficiaries and thus has fiduciary liability exposure in the exercise or nonexercise of that power. This structure, which is intuitive and functional in nature and is consistent with the sample instruments provided before and after the last meeting, is an adaptation for divided trusteeship of the “basic principle of trust administration” that “a trustee presumptively has comprehensive powers to manage the trust estate and otherwise to carry out the terms and purpose of the trust, but that all powers held in the capacity of trustee must be exercised, or not exercised, in accordance with the trustee’s fiduciary obligations.” Restatement (Third) of Trusts § 70 cmt. a (2007).

*Subsections (a) and (b).* Subsections (a) and (b) address a power of direction. Because such a power gives a trust director functional control over a matter that sits at the core of ordinary trust administration (i.e., a power to direct a trustee in the trustee’s exercise or nonexercise of the trustee’s powers of trusteeship), Subsections (a) and (b) apply to the director the same fiduciary duties that would ordinarily apply to a trustee. The theory is that within the scope of a power of direction, the trust director is in function the trustee; and under Section 7(a), the trustee is disempowered within the scope of the power of direction. Accordingly, Subsection (a) sets the default duties of a trust director with a power of direction by absorbing the default fiduciary law that would ordinarily apply to a trustee. And Subsection (b) sets the mandatory duties of a trust director with a power of direction by absorbing the mandatory fiduciary law that would ordinarily apply to a trustee in the same way.

There are three main benefits to absorbing existing trust fiduciary law rather than reinventing it for a trust director with a power of direction. First, absorption 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 on the scope of the duty to diversify or to give information to the beneficiaries, both examples of areas in which the states are becoming increasingly differentiated. Third, absorption allows for changes to the law of a trustee’s fiduciary duties to be absorbed automatically without need for periodic conforming revision to this act.

In giving strong default fiduciary duties to a trust director, Subsection (a) follows the great majority of the existing state statutes.<sup>17</sup> It improves on the existing statutes, however, by

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<sup>17</sup> A majority of states treat at least some types of trust directors as fiduciaries by default. These include Alaska, Colorado, Delaware, Idaho, Illinois, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Ohio, South Dakota, Tennessee, Utah, Virginia, Wisconsin, and Wyoming. A minority of states exempts trust protectors (as distinct from other types of directors) from fiduciary duties by default. These include Alaska,

1 absorbing the state’s existing law on a trustee’s fiduciary duties. Many of the existing statutes  
2 simply designate a trust director as a fiduciary without elaborating what that designation means.  
3 The statutes thus tend not to spell out the nature or extent of a trust director’s fiduciary duties any  
4 detail. This draft is more complete because it adopts the rich body of law already in existence for  
5 trustees, including the state’s law on the mandatory core of trust fiduciary law, such as under  
6 Uniform Trust Code § 105 (amended 2005).

7  
8 *“Under the same circumstances.”* Subsections (a) and (b) reference the law that applies  
9 to a trustee acting “under the same circumstances” as a trust director. The phrase “under the  
10 same circumstances” refers to a trustee’s direct exercise of its powers, rather than a trustee’s  
11 exercise of a power of direction. In exercising a power of direction over investments, for  
12 example, a trust director is subject to the same duties that a trustee would have in managing those  
13 investments directly.

14  
15 *Directing another trust director.* This section applies the same duties to a trust director  
16 regardless of whether the director has a power of direction over a trustee or over another trust  
17 director. Subsection (a) imposes on a trust director the same duties that a trustee would have if  
18 the trustee exercised the power directly, so that a trust director who directs another trust director  
19 has the same duties that a trustee would have if the trustee simply acted on its own. For example,  
20 if the settlor’s son has a power of direction over a family investment adviser, and the investment  
21 adviser in turn has a power to direct the trustee’s investments, the settlor’s son would have the  
22 same duties as a trustee with regard to investment management, and the investment adviser  
23 would have the same duties of a directed trustee subject to a power of direction.

24  
25 *Extended discretion and exculpation or exoneration.* Under the framework of  
26 Subsections (a)-(b), the terms of a trust could give a trust director extended discretion, such as in  
27 the form of “sole,” “absolute,” or “uncontrolled” discretion, with the same effect as those terms  
28 would have on the discretion of a trustee. Under prevailing law, “words such as ‘absolute’ or  
29 ‘unlimited’ or ‘sole and uncontrolled’ are not interpreted literally. Even under the broadest grant  
30 of fiduciary discretion, a trustee must act honestly and in a state of mind contemplated by the  
31 settlor. Thus, the court will not permit the trustee to act in bad faith or for some purpose or  
32 motive other than to accomplish the purposes of the discretionary power.” Restatement (Third)  
33 of Trusts § 50 cmt. c (2003); *see also* Uniform Trust Code § 814(a) (amended 2004). Likewise,  
34 the terms of a trust could give a trust director the protection of an exculpation or exoneration  
35 clause with the same effect as such a clause would have for a trustee. Under prevailing law, such  
36 as under the authorities referenced in the next paragraph, an exculpation or exoneration clause  
37 cannot protect against liability for acting in bad faith or with reckless indifference.

38  
39 *Subsection (c).* Subsection (c) specifies the duties of a trust director holding a power of  
40 protection or a power of consent. Neither type of power has an analogue for an ordinary trustee.  
41 Instead, a power of protection is typically meant to provide additional flexibility, and a power of  
42 consent is typically meant to provide a further control on the trustee. Hence, Subsection (c)  
43 departs from the absorption approach of Subsections (a) and (b), and instead cuts straight to a  
44 mandatory minimum duty of “good faith” with a threshold of “bad faith or reckless indifference”

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Arizona, Idaho, and Wisconsin.

1 for liability. The minimum of “good faith” is consistent with Uniform Trust Code § 105(b)(2)  
2 (amended 2005). The threshold of “bad faith or reckless indifference” is consistent with Uniform  
3 Trust Code § 1008(a)(1) (2000); *see also* Restatement (Third) of Trusts § 96 cmt. c (2012)  
4 (“[A]n exculpatory clause cannot excuse a trustee for a breach of trust committed in bad faith.  
5 Nor can the trustee be excused for a breach committed with indifference to the interests of the  
6 beneficiaries or to the terms and purposes of the trust—that is, committed without reasonable  
7 effort to understand and conform to applicable fiduciary duties.”).

8  
9 *Removal and injunctive relief.* Section 16(b) governs removal of a trust director. It  
10 provides for several grounds for removal, including “serious breach of trust” and “persistent  
11 failure of the trust director to administer the trust effectively.” Nothing in this section reduces or  
12 otherwise alters the inherent power of a court of appropriate jurisdiction to issue an order  
13 “enjoining [a trust director] to take or refrain from taking certain action(s) or otherwise to avoid  
14 committing a breach of trust” or other appropriate injunctive relief. Restatement (Third) of Trusts  
15 § 95 cmt. c (2012); *see also* Uniform Trust Code § 1001 (2000).

16  
17 *Shifting of duties.* Section 204(c)(2) of the Spring 2015 draft purported to allow a settlor  
18 to eliminate a trust director’s fiduciary duties—even the state’s mandatory duties otherwise  
19 applicable in a unitary trusteeship—if the settlor imposed those mandatory duties on the directed  
20 trustee instead. The theory was that in this way the state’s policy on the mandatory core of  
21 fiduciary law would be protected. Either the mandatory duties would be borne by the trust  
22 director, and the trustee could be relieved of duty accordingly (in that draft, by Section 303; in  
23 this draft, by Section 9), or the mandatory duties would be borne by the trustee. This theory,  
24 although easy to state, is extremely difficult to implement in a workable statutory provision—and  
25 we could not come up with suitable draft language. An issue for discussion, therefore, is whether  
26 we should try again.

## 27 28 **SECTION 9. DUTIES AND LIABILITY OF DIRECTED TRUSTEE.**

29 (a) If a directed trustee is subject to a trust director’s power of direction under Sections  
30 5(a)(1) and 5(b), then with respect to any matter for which the trustee is subject to the power of  
31 direction, the following rules apply:

32 (1) If there is no vacancy in the trust directorship and a trust director gives a  
33 direction that is within the trust director’s power of direction, the directed trustee must act in  
34 accordance with the direction and is not liable for so acting. A directed trustee may satisfy its  
35 duty to act under this subsection by petitioning the court for instructions.

36 (2) If there is a vacancy in the trust directorship, the trustee is not liable for breach  
37 of trust unless the trustee acted or failed to act in bad faith or with reckless indifference to the

1 purposes of the trust or the interests of the beneficiaries.

2 (b) If a directed trustee is subject to a trust director’s power of protection under Sections  
3 5(a)(2) and 5(b) the trust director exercises that power, the directed trustee must take appropriate  
4 action to implement that exercise of the power and is not liable for so acting. A directed trustee  
5 may satisfy its duty to act under this subsection by petitioning the court for instructions.

6 (c) If a directed trustee is subject to a trust director’s power of consent under Sections  
7 5(a)(3) and 5(b), then with respect to any matter for which the trustee is subject to the power of  
8 consent, the following rules apply:

9 (1) If there is no vacancy in the trust directorship, and the directed trustee timely  
10 proposes an action but fails to obtain consent, the directed trustee is not liable for failing to take  
11 the action.

12 (2) If there is a vacancy in the trust directorship, the trustee is not liable for breach  
13 of trust unless the trustee acted or failed to act in bad faith or with reckless indifference to the  
14 purposes of the trust or the interests of the beneficiaries.

## 15 Discussion Notes

16 *Prior draft.* This section corresponds to Section 303 in the Spring 2015 draft.

17  
18 *Powers versus duties.* This section prescribes the duties of a directed trustee in the  
19 trustee’s exercise or nonexercise of its powers under Section 7. It should be read in conjunction  
20 with Section 10, which provides that a directed trustee has no duty to monitor or advise a trust  
21 director or to warn or advise a beneficiary about the conduct of a trust director. Information  
22 sharing among directed trustees and trust directors is governed by Section 11.

23  
24 *Subsection (a)(1).* This subsection imposes on a directed trustee a duty of obedience to a  
25 trust director in the trust director’s exercise of its powers of direction. Many of the existing  
26 statutes have provisions to similar effect. For example, the Illinois statute says, “The excluded  
27 fiduciary [i.e., a directed trustee] shall act in accordance with the governing instrument and  
28 comply with the directing party’s exercise of the powers granted to the directing party by the  
29 governing instrument.”<sup>18</sup>

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<sup>18</sup> 760 Ill. Comp. Stat. Ann. § 5/16.3(f).



1           The phrase “with respect to any matter in which the trustee is subject to the power of  
2 direction” limits a directed trustee’s duty of obedience to circumstances in which a direction is  
3 within the trust director’s power of direction. It follows, therefore, that a trustee should not obey  
4 a direction that is outside of the trust director’s power of direction. To do so would be a violation  
5 of the background duty of a trustee to act in accordance with the terms of the trust as under  
6 Uniform Trust Code § 105(b)(2) (amended 2005) (making mandatory “the duty of a trustee to act  
7 ... in accordance with terms ... of the trust”) and Restatement (Third) of Trusts § 76 (2007)  
8 (“The trustee has a duty to administer the trust ... in accordance with the terms of the trust.”). A  
9 direction rendered in a form contrary to that required by the terms of the trust, such as an oral  
10 direction if the terms of the trust require a writing, is not within the trust director’s power of  
11 direction.  
12

13           Although Subsection (a)(1) requires a directed trustee to make a judgment about a trust  
14 director’s *powers*, it does not require the trustee to make a judgment about the director’s *duties*.  
15 If a trust director issues a direction that is within its power of direction, the trustee is obligated to  
16 “act in accordance with the direction and is not liable for so acting.” Under this draft, as under a  
17 substantial number of existing statutes (see the discussion of existing statutory models below),  
18 the beneficiary safeguard against an imprudent or disloyal direction is the duties of the trust  
19 director (see Section 8(a)-(b)). In determining whether a direction is within a director’s power of  
20 direction (as distinct from consistent with the director’s duties), a trustee is subject to whatever  
21 fiduciary standard of care applies to the trustee under the terms of the trust and otherwise  
22 applicable law.  
23

24           For example, a trust instrument might give a trust director a power to direct the  
25 investment of the trust property. A direction from this director to the trustee to invest the trust  
26 property in a manner that aggravates an existing concentration would be within the director’s  
27 power of direction. As such, Subsection (a)(1) would require the trustee to act in accordance with  
28 the direction, even though the direction might well be a breach of the director’s duties under  
29 Sections 8(a)-(b). If the trustee is concerned about the potential breach of the director’s duties,  
30 the trustee may petition a court for instructions, but the trustee will not be liable if it chooses  
31 simply to carry out the direction. The beneficiary safeguard in this example is the duties of the  
32 trust director under Sections 8(a)-(b), which the beneficiary may enforce in an action against the  
33 trust director.  
34

35           *Existing statutory models.* The existing statutory provisions on the duties of what under  
36 this act is a “directed trustee” fall into roughly three categories: (1) those that impose no duties  
37 (the Nevada/South Dakota/New Hampshire rule<sup>19</sup>); (2) those that impose moderate duties (such  
38 as the “wilful misconduct” standard in Delaware<sup>20</sup>); and (3) those that impose traditional duties

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<sup>19</sup> Alaska Stat. Ann. § 13.36.375(c); Ga. Code Ann. § 53-12-303(b), (c); Idaho Code Ann. § 15-7-501(2), (5); 760 Ill. Comp. Stat. Ann. 5/16.3(f); Ky. Rev. Stat. Ann. § 286.3-275(1); Miss. Code Ann. § 91-8-1205; Nev. Rev. Stat. § 163.5549(1); N.H. Rev. Stat. Ann. § 564-B:12-1205; Ohio Rev. Code Ann. § 5185.25(C); S.D. Codified Laws §§ 55-1B-2, 55-1B-5; Tenn. Code Ann. §§ 35-3-122, 123, 35-15-1205.

<sup>20</sup> Several other state statutes follow Delaware’s “wilful misconduct” formulation, or instead use “bad faith” or “reckless indifference.” These include Colo. Rev. Stat. Ann. § 15-16-807(1); Mo. Ann. Stat. § 456.8-808(8); N.C. Gen. Stat. Ann. § 36C-8A-4(a); Utah Code Ann. §§ 75-7-906(4), 5(b); Va. Code Ann. § 64.2-770(E)(2); and Wis. Stat. Ann. § 701.0808.

1 (such as the “manifestly contrary to the terms of the trust” or “serious breach of a fiduciary duty”  
2 standard in Uniform Trust Code § 808 (2000)).  
3

4 Of these three different categories, Subsection (a) is closest to the first. The no-duty  
5 statutes are most consistent with the broad concept animating this draft, which is to transfer  
6 fiduciary duty from the trustee to the trust director when the director is in function the  
7 decisionmaking authority. The no-duty statutes are also cleaner and conceptually more honest.  
8 The intermediate standards of liability that appear in the second category of statutes create  
9 confusion and uncertainty without offering meaningful protections to compensate. In holding  
10 trustees liable for “wilful misconduct,” for example, Delaware leaves open the central question  
11 of whether following an authorized direction could ever be misconduct. This interpretation  
12 would render Delaware’s statute effectively indistinguishable from the no-duty statutes, but with  
13 more confusion and increased likelihood of litigation.  
14

15 In thinking about whether the no-duty statutes are the right model for this act, we should  
16 keep in mind the basic policy tension. On the one hand, permitting a fiduciary to act in a manner  
17 that the fiduciary knows is inimical to the beneficiary’s welfare runs contrary to traditional  
18 fiduciary policy. On the other hand, imposing fiduciary duties on a directed trustee undermines  
19 the aim of relocating one or more functions of trusteeship, and with them the fiduciary duties of  
20 trusteeship, to a trust director. Under Sections 8(a)-(b), a trust director is subject to the same  
21 default and mandatory fiduciary duties as would be a trustee in the same circumstances.  
22

23 *Petition for instructions.* A directed trustee may satisfy its duty of obedience under  
24 Subsections (a)(1) and (b) by a timely petition for instructions (discussion issue: should  
25 “reasonable time” or “timely” be added to the blackletter?). *See* Restatement (Third) of Trusts §  
26 71 (2007) (“A trustee or beneficiary may apply to an appropriate court for instructions regarding  
27 the administration or distribution of the trust if there is reasonable doubt about the powers or  
28 duties of the trusteeship or about the proper interpretation of the trust provisions.”). A trustee  
29 might have “reasonable doubt” about whether a director’s instructions are within the director’s  
30 power of direction (Subsection (a)(1)) or protection (Subsection (b)). A trustee might also have  
31 doubt about whether an instruction is consistent with the director’s duties, though under  
32 Subsections (a)(1) and (b), a trustee is protected against liability if the trustee acts nonetheless.  
33 This provision is thus meant to be responsive to the suggestion made at the prior meeting that a  
34 trustee should be protected both for complying and for reasonably refusing to comply with a  
35 direction that is within the trust director’s power of direction but possibly in breach of the  
36 director’s duties.  
37

38 *Subsection (a)(2) and a vacancy in the trust directorship.* Under Section 7(a), a directed  
39 trustee is not disempowered as regards a matter subject to a power of direction if there is “a  
40 vacancy in the trust directorship” (see Section 2(7)). The theory is that, if there is a vacancy in  
41 the trust directorship, the trustee should be empowered to act to protect the interests of the trust.  
42 Subsection (a)(2) prescribes a trustee’s (minimal) duties in such circumstances. Under  
43 Subsection (a)(2), during a period of vacancy in the trust directorship, “the trustee is not liable  
44 for breach of trust unless the trustee acted or failed to act in bad faith or with reckless  
45 indifference.” This low standard is meant to be protective of the trustee and, in consequence,  
46 protective of the settlor’s overall scheme. First, a trustee thrust into administration in a normally

1 directed area may lack information about the relevant circumstances, and should be protected  
2 while ascertaining those circumstances and determining an appropriate course of conduct during  
3 the vacancy. Second, the fact that the trustee would be subject to direction but for the vacancy  
4 indicates an intent by the settlor that the trustee not be the normal decisionmaking agent within  
5 the sphere of direction. Subsection (a)(2) resolves this tension by reassuring the trustee that it  
6 will only be liable for acting or failing to act in bad faith or with reckless indifference. On the  
7 other hand, this more lax standard will make more difficult a claim against the trustee for acting  
8 in a manner that undermines the settlor's a design, a tradeoff that we should discuss at the  
9 meeting. A similar analysis pertains to Subsection (c)(2), discussed in further detail below.

10  
11 *Subsection (b).* This subsection imposes on a directed trustee a duty to “take appropriate  
12 action to implement” a trust director’s exercise of a power of protection, confirms that a trustee  
13 is not liable for doing so (i.e., is not liable for the director’s act of protection), and exonerates a  
14 trustee for so acting. The logic behind exonerating the trustee is the same as in Subsection (a). If  
15 a director holds the power in question, the director should bear the corresponding duty. Like  
16 Subsections (a) and (c), Subsection (b) requires a directed trustee to do as a trust director asks  
17 only if the director is acting within the scope of its power. Unlike Subsections (a) and (c),  
18 however, Subsection (b) includes no contingency for a vacancy in the trust directorship. Because  
19 trustees do not ordinarily hold protection-type powers, and because Section 7 does not shift those  
20 powers to the trustee during a vacancy, there is no need to prescribe duties to govern powers that  
21 a trustee does not have. Subsection (b) includes the same recourse to a petition for instructions as  
22 in Subsection (a).

23  
24 *Subsection (c).* This subsection prescribes a directed trustee’s duties as regards any matter  
25 in which the trustee is subject to a trust director’s power of consent. A power of consent is  
26 different from a power of direction in that the former contemplates that the trustee will take  
27 initiative, but then must obtain consent before acting. Under Section 7(b), if there is no vacancy  
28 in the trust directorship, the trustee “may not act without the consent of the trust director.”

29  
30 Subsection (c)(1), which is applicable if there is no vacancy in the trust directorship,  
31 leaves undisturbed the trustee’s otherwise applicable fiduciary duties, except that the trustee is  
32 relieved of liability for failing to take an action for which the trustee timely sought but failed to  
33 obtain consent. Several state statutes are to similar effect. South Dakota, for example, exonerates  
34 a trustee for “[a]ny loss that results from a failure to take any action proposed by an excluded  
35 fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely  
36 sought but failed to obtain that authorization.”<sup>21</sup>

37  
38 Subsection (c)(1) does not exonerate a trustee for acts for which a director granted  
39 consent. The theory is that, because the trustee is the party that takes initiative, the trustee is the  
40 fiduciary ultimately responsible for the action. Hence, the trustee’s otherwise applicable duties  
41 pertain unless the director refuses consent. We should discuss whether this theory is consistent  
42 with the typical settlor’s intent, or if instead the default should be that the trust director exercises  
43 ultimate control and bears the corresponding duties. Regardless of which default rule is codified  
44 in this subsection, a settlor could provide otherwise in the terms of the trust.

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<sup>21</sup> S.D. Codified Laws § 55-1B-2(2); *see also* Mich. Comp. Laws Ann. § 700.7809(4), 5(a); Miss. Code Ann. § 91-8-1205(1), (3); Nev. Rev. Stat. Ann. § 163.5549(1)(a)-(b); Ohio Rev. Code Ann. § 5815.25(C)(1)-(2).

1 Subsection (c)(2) provides a parallel to Subsection (a)(2). It prescribes the duties of a  
2 trustee subject to a power of consent during a vacancy in the trust directorship. Under Section  
3 7(b), a trustee who is otherwise subject to a power of consent is not disempowered from acting in  
4 the absence of consent if there is a vacancy in the trust directorship. The theory, as under  
5 Subsection (a)(2), is that in the event of a vacancy in the trust directorship, the trustee should be  
6 empowered to take actions necessary to protect the interests of the trust, but should not be liable  
7 for failing to comply with the full set of duties that would apply by default if the trustee  
8 originally had the exclusive power to manage the trust. For example, suppose a settlor creates a  
9 trust to hold the family business and provides that the trustee, an institution, may not divest the  
10 business without the consent of a familial trust director (perhaps the settlor's brother). If the trust  
11 director dies, creating a vacancy, then in the absence of exigent circumstances the trustee should  
12 have more room to retain the business during the interim until a successor director takes office in  
13 accordance with the settlor's design that retention be decided by a familial trust director rather  
14 than the institutional trustee.

15  
16 **SECTION 10. NO LIABILITY FOR MONITORING, WARNING, OR**

17 **ADVISING.** A directed trustee is not liable for failing to monitor the actions of a trust director  
18 or to warn or give advice to a beneficiary, trustee, or trust director about a trust director's  
19 exercise or nonexercise of the director's powers.

20 **Discussion Notes**

21 *Prior draft.* This section corresponds to Section 304 in the Spring 2015 draft.

22  
23 *Following the weight of existing statute law.* This section, which has been simplified  
24 since the last draft, provides that a directed trustee is not liable for failing to monitor a trust  
25 director or for failing to warn or give advice to a beneficiary, trustee, or trust director about a  
26 trust director's actions, whether those actions already happened in the past past or are likely to  
27 occur in the future. Many existing state statutes, including those in Alaska, Colorado, Delaware,  
28 Idaho, Illinois, Kentucky, Maryland, Mississippi, Missouri, Nevada, New Hampshire, North  
29 Carolina, Ohio, South Dakota, Tennessee, Virginia, Wisconsin, and Wyoming, have similar  
30 provisions. The Delaware provision, which was added to the Delaware divided trusteeship statute  
31 in 2007,<sup>22</sup> is representative:

32  
33 Whenever a governing instrument provides that a fiduciary is to follow the  
34 direction of an adviser with respect to investment decisions, distribution  
35 decisions, or other decisions of the fiduciary ... then, except to the extent that the  
36 governing instrument provides otherwise, the fiduciary shall have no duty to:

- 37  
38 (1) Monitor the conduct of the adviser;

39  

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<sup>22</sup> 2007 Del. Laws. Ch. 90 (S.B. 117).

1 (2) Provide advice to the adviser or consult with the adviser; or  
2

3 (3) Communicate with or warn or apprise any beneficiary or third party  
4 concerning instances in which the fiduciary would or might have exercised  
5 the fiduciary's own discretion in a manner different from the manner  
6 directed by the adviser.<sup>23</sup>  
7

8 *Reversing Rollins.* It appears that these provisions were meant to reverse the result in  
9 *Rollins v Branch Banking & Trust Company of Virginia*,<sup>24</sup> in which the court held a trustee that  
10 was subject to direction in investment liable for failing to warn the beneficiaries about the risks  
11 of a concentration and the investment director's failure to give a direction to diversify.  
12

13 *Survival of trustee's general duty of disclosure.* Although this section confirms that a  
14 directed trustee has no duty to monitor, warn, or advise regarding a trust director's exercise or  
15 nonexercise of its powers, this section does not relieve a trustee of its ordinary disclosure and  
16 reporting duties under otherwise applicable law. For example, although a directed trustee would  
17 not have a duty to warn the beneficiaries about the risks of a portfolio concentration, the trustee  
18 would remain under a duty to make periodic reports or accountings of the trust assets to the  
19 beneficiaries, or to answer reasonable inquiries by the beneficiaries about the administration of  
20 the trust, to the extent required by otherwise applicable statute law such as Uniform Trust Code §  
21 813 (amended 2004) or common law such as under Restatement (Third) of Trusts § 82 (2007).  
22

23 *The trust director's specific duties of disclosure.* Under Sections 8(a)-(b), a trust director  
24 holding a power of direction is subject to the same disclosure rules as a trustee would be in the  
25 exercise or nonexercise of the same power under the same circumstances. For example, if a trust  
26 director intended to direct a nonroutine transaction, to change "investment ... strategies," or to  
27 take "significant actions ... involving hard-to-value assets or special sensitivity to  
28 beneficiaries," the director might be under a duty of affirmative advance disclosure. Restatement  
29 (Third) of Trusts § 82 cmt. d (2007).  
30

31 *Administrative classification.* In addition to expressly waiving a directed trustee's duties  
32 to monitor and warn, many state statutes also go further and say that if a trustee for some reason  
33 chooses to monitor or warn, the trustee will not be liable for doing so. The typical approach is to  
34 classify a trustee's monitoring and warning activities as "administrative actions." The Delaware  
35 statute, for example, says:  
36

37 Absent clear and convincing evidence to the contrary, the actions of the fiduciary  
38 pertaining to matters within the scope of the adviser's authority (such as  
39 confirming that the adviser's directions have been carried out and recording and  
40 reporting actions taken at the adviser's direction), shall be presumed to be  
41 administrative actions taken by the fiduciary solely to allow the fiduciary to  
42 perform those duties assigned to the fiduciary under the governing instrument and  
43 such administrative actions shall not be deemed to constitute an undertaking by

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<sup>23</sup> Del. Code Ann. tit. 12, § 3313(e).

<sup>24</sup> 56 Va. Cir. 147 (2002).

1 the fiduciary to monitor the adviser or otherwise participate in actions within the  
2 scope of the adviser’s authority.<sup>25</sup>  
3

4 The apparent logic of these provisions is to ensure that if a directed trustee chooses for some  
5 reason to monitor or warn, the trustee does not become a de facto fiduciary with respect to those  
6 actions. We should discuss whether to include such a provision.  
7

## 8 **SECTION 11. INFORMING TRUSTEES AND TRUST DIRECTORS.**

9 (a) In this section, a “trust administrator” means a trustee or a trust director.

10 (b) A trust administrator must keep other another trust administrator reasonably informed  
11 about the administration of the trust as reasonably related to the other trust administrator’s  
12 powers or duties. A trust administrator must provide to another trust administrator within a  
13 reasonable time information that the other trust administrator reasonably requests to the extent  
14 the information is reasonably related to the other trust administrator’s powers or duties.

### 15 **Discussion Notes**

16 *Prior draft.* This section corresponds to Sections 206 and 305 in the Spring 2015 draft.  
17

18 *Trust administrator.* Subsection (a) introduces the term “trust administrator,” meaning a  
19 trustee or a trust director, to simplify the drafting of Subsection (b). A broader question for  
20 discussion, flagged in the Discussion Notes to Section 2, is whether to make this a global defined  
21 term and use it throughout the act. Under the style rules of the Uniform Law Commission, a  
22 defined term used in only one section must be defined in that section and not in the general  
23 definitions provision.  
24

25 *An affirmative and a responsive duty to inform.* Subsection (b) imposes two duties on  
26 trust administrators. First, Subsection (b) imposes an affirmative duty to give information to  
27 other trust administrators to the extent reasonably related to the other administrators’ powers or  
28 duties. For example, if a trust director exercises a power of protection to amend the terms of the  
29 trust, the director would then be under an affirmative duty to inform all other trust administrators  
30 whose powers or duties are reasonably related to the amendment. Second, Subsection (b)  
31 imposes on all trust administrators a duty to respond within a reasonable time to a reasonable  
32 request by another trust administrator for information reasonably related to the other  
33 administrator’s powers or duties.  
34

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<sup>25</sup> Del. Code Ann. tit. 12, § 3313(e); *see also* Md. Code. Ann., Est. & Trusts § 14.5-808(c)(2); Miss. Code Ann. § 91-8-1204(b); N.H. Rev. Stat. Ann. § 564-B:12-1204(b); Ohio Rev. Code Ann. § 5815.25(B), (D); S.D. Codified Laws § 55-1B-2; Tenn. Code Ann. § 35-15-1204(b); Va. Code Ann. § 64.2-770(E)(4); Wis. Stat. Ann. § 701.0808(4).

1 This section imposes a mandatory floor on a trust administrator’s duty to share information,  
2 rather than a ceiling. The terms of a trust can specify more robust duties of information sharing  
3 among trust administrators.  
4

5 *Reasonableness.* This section relies heavily on reasonableness to govern the scope of a  
6 trust administrator’s obligation to share information with another trust administrator. A trust  
7 administrator is under an affirmative duty to keep another trust administrator “reasonably  
8 informed” of matters that are “reasonably related” to the other administrator’s powers and duties.  
9 A trust administrator is under a duty to respond within a “reasonable time” to a “reasonabl[e]  
10 request[.]” by another trust administrator for information “reasonably related” to the other  
11 administrator’s powers or duties. Another possible formulation, perhaps simpler, would be to say  
12 “reasonable under the circumstances” or, following Uniform Trust Code § 813(a) (amended  
13 2004), “unless unreasonable under the circumstances.”  
14

15 Assuming the committee decides to keep the reliance on reasonability, it may be useful  
16 for the comments to elaborate by way of example the application of the reasonableness test to  
17 common occurrences. These may include, without limitation:  
18

- 19 • modifications to the terms of the trust;
- 20 • changes to investment policy or strategy;
- 21 • distributions of trust property;
- 22 • changes in accounting procedure or valuations; or
- 23 • removal or appointment of trustees or trust directors.  
24

25 We welcome suggestions for further examples.  
26

27 *Narrowing cotrusteeship disclosure.* Because Section 2(6) defines “trustee” to include a  
28 cotrustee; Section 2(1) defines “directed trustee” by reference to a “trustee”; and Section 2(5)  
29 defines a “trust director” as a person “whether or not the person is also a trustee,” under this draft  
30 one cotrustee could be subject to another cotrustee’s power of direction, power of protection, or  
31 power of consent. In such circumstances, by default the more narrow disclosure rules of this  
32 section would apply, conditioning each trust administrator’s access to information on a  
33 reasonable relation to the administrator’s powers or duties, instead of the broader default rule  
34 under the common law as under Restatement (Third) of Trusts § 81 cmt. b (2007) (“Furthermore,  
35 absent clear provision in the trust to the contrary, even in the absence of any duty to intervene or  
36 grounds for suspicion, a trustee is entitled to request and receive reasonable information  
37 regarding an aspect of trust administration in which the trustee is not required to participate.”).  
38

39 *Shelton v. Tamposi.* In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), the terms of the  
40 trust left distribution in the hands of the trustee but shifted power over investment to a trust  
41 director (i.e., the “investment director”). In consequence, the trustee could not raise the cash  
42 necessary to fund a distribution to one of the beneficiaries. Under the terms of this section, the  
43 trust director would have been under a duty to give the trustee information about the liquidity  
44 effects of the director’s investment program, and the trustee would have been under a duty to  
45 give the director information about the liquidity needs of the trustee’s distribution program.  
46 Moreover, in making and implementing the investment program, under Sections 8(a)-(b) the trust

1 director would be subject to the same duties as a similarly situated trustee would have been, in  
2 parallel to the trustee's duties in making and implementing the distribution program.

3  
4 **SECTION 12. LIMITATION OF ACTION AGAINST TRUST DIRECTOR.**

5 **Alternative A: Adapt Uniform Trust Code § 1005**

6 (a) A beneficiary may not commence an action against a trust director for breach of trust  
7 more than one year after the date the beneficiary or a representative of the beneficiary was sent a  
8 report that adequately disclosed the existence of a potential claim for breach of trust and  
9 informed the beneficiary of the time allowed for commencing a proceeding.

10 (b) A report adequately discloses the existence of a potential claim for breach of trust if it  
11 provides sufficient information so that the beneficiary or representative knows of the potential  
12 claim or should have inquired into its existence.

13 (c) If subsection (a) does not apply, an action by a beneficiary against a trust director for  
14 breach of trust must be commenced within [five] years after the first to occur of:

15 (1) the removal, resignation, or death of the trustee;

16 (2) the termination of the beneficiary's interest in the trust; or

17 (3) the termination of the trust.

18 **Alternative B: Absorb Local Law**

19 (a) An action by a beneficiary against a trust director for breach of trust must be  
20 commenced within the same limitations period as required by the law of this state for an action  
21 by a beneficiary against a trustee for a breach of trust.

22 (b) A report or an accounting by a trust director to a beneficiary shall have the same  
23 effect on the limitations period for an action against the trust director by the beneficiary as would  
24 a report or an accounting by a trustee to the beneficiary.

25 **End of Alternatives**



1 **Discussion Notes**

2  
3 *Prior Draft.* This section (plus Section 13) corresponds to Section 205 in the Spring 2015  
4 draft.

5  
6 *Establishing a limitations period.* The purpose of this section is to extend to a trust  
7 director the same rules of limitations on liability that a trustee enjoys by way of a statutory  
8 limitations period or by filing a report or accounting. The blackletter above offers two alternative  
9 ways of implementing this idea. Both are responsive to the fair criticism at the prior meeting that  
10 the prior draft was insufficiently detailed. The prior draft said, “In a proceeding against a trust  
11 director, the same limitations and defenses apply as if the trust director were a sole trustee in the  
12 same circumstances.” This section deals with limitations. Section 13 deals with defenses.

13  
14 *Two alternatives.* Alternative A imports the limitations period and reporting rules of  
15 Uniform Trust Code § 1005 (2000). Alternative B absorbs the enacting state’s local rules of  
16 limitations and reports or accountings. The advantages to Alternative A are clarity, uniformity,  
17 and specificity, and possibly also an improvement to local law. The advantage of Alternative B is  
18 avoiding a possible point of disagreement between the treatment of a trust director under this act  
19 and a trustee under local law, potentially creating an obstacle to enactment.

20  
21 **SECTION 13. DEFENSES IN ACTION AGAINST TRUST DIRECTOR.** In an  
22 action against a trust director, the following rules apply:

23 (1) A trust director is not liable to a beneficiary for breach of trust if the beneficiary  
24 consented to the conduct constituting the breach, released the trust director from liability for the  
25 breach, or ratified the transaction constituting the breach, unless:

26 (A) the consent, release, or ratification of the beneficiary was induced by  
27 improper conduct of the trust director; or

28 (B) at the time of the consent, release, or ratification, the beneficiary did not know  
29 of the beneficiary’s rights or of the material facts relating to the breach.

30 (2) A trust director that acts in reasonable reliance on the terms of the trust as expressed  
31 in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach  
32 resulted from the reliance.

33 (3) If the happening of an event, including marriage, divorce, performance of educational

1 requirements, or death, affects the administration or distribution of a trust, a trust director who  
2 has exercised reasonable care to ascertain the happening of the event is not liable for a loss  
3 resulting from the trust director’s lack of knowledge.

#### 4 **Discussion Notes**

5  
6 *Prior draft.* This section (plus Section 12) corresponds to Section 205 in the Spring 2015  
7 draft.

8  
9 *Elaborating defenses.* The prior draft said, “In a proceeding against a trust director, the  
10 same limitations and defenses apply as if the trust director were a sole trustee in the same  
11 circumstances.”<sup>26</sup> In accordance with the fair criticism at the prior meeting that the prior draft  
12 was insufficiently detailed, this section elaborates on several defenses (Section 12 elaborates on  
13 limitations), primarily drawing on the parallel language for the comparable defenses of a trustee  
14 under the Uniform Trust Code.

15  
16 *Paragraph (1)—beneficiary consent.* This paragraph establishes a defense for a trust  
17 director of beneficiary consent, provided that the beneficiary’s consent was informed and not  
18 improperly obtained, comparable to the same defense for a trustee under Uniform Trust Code §  
19 1009 (amended 2001).

20  
21 *Paragraph (2)—reasonable reliance.* This paragraph establishes a defense for a trust  
22 director of “reasonable reliance on the terms of the trust as expressed in the trust instrument,”  
23 comparable to the same defense for a trustee under Uniform Trust Code § 1006 (2000), and  
24 analogous to Uniform Prudent Investor Act § 1(b) (1994).

25  
26 *Paragraph (3)—event affecting administration or distribution.* This paragraph establishes  
27 a defense for a trust director of “reasonable care” in ascertaining “the happening of an event” that  
28 “affects the administration or distribution of a trust” comparable to the same defense for a trustee  
29 under Uniform Trust Code § 1007 (2000).

30  
31 *Restatement (Third) of Trusts.* The rules of this section, although derived from the  
32 Uniform Trust Code, are not idiosyncratic to the Code. Principles similar to those prescribed by  
33 paragraph (1) are expressed in Restatement (Third) of Trusts § 97(b)-(c) (2012) (providing for  
34 beneficiary consent if not “induced by improper conduct” and if the beneficiary “was aware of  
35 the beneficiary’s rights and of all material facts”). Principles similar to those prescribed by  
36 paragraphs (2) and (3) are expressed in Restatement (Third) of Trusts § 76 cmt. f (2007) (“A  
37 trustee is not liable, however, when a misdelivery results from information the trustee was unable  
38 to obtain despite diligent, good-faith efforts or results from reasonable reliance on the express  
39 provisions of a trust instrument.”).

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40  
<sup>26</sup> Cf. Va. Code Ann. § 64.2-770(E)(1) (“Unless the governing instrument provides otherwise, the trust director may assert defenses to liability on the same basis as a trustee serving under the governing instrument, other than defenses provided to the trustee under this subsection.”).





1 with those for a trustee under Restatement (Third) of Trusts § 35 (2003).

2  
3 *Subsection (b).* This subsection prescribes the circumstances under which a trust director  
4 must give bond to secure performance. These rules are based on the rules applicable to a trustee  
5 under Uniform Trust Code § 702(a)-(b) (2000) and are consistent with those for a trustee under  
6 Restatement (Third) of Trusts § 34(3) (2003).

7  
8 *Subsection (c).* This subsection prescribes rules for compensation of a trust director that  
9 are based on the rules applicable to a trustee under Uniform Trust Code § 708 (2000), but in a  
10 more simplified form, and with a tweak to the changed circumstances basis for a change in  
11 compensation to align it more closely with the deviation doctrine. Just as in total “the reasonable  
12 fees for multiple trustees may be higher than for a single trustee,” Restatement (Third) of Trusts  
13 § 38 cmt. i (2003), so too the total reasonable fees in a trust with with multiple trustees and trust  
14 directors may be higher than for a single trustee. In both circumstances, the trust may benefit  
15 “from the enhanced quality of decision-making.” Uniform Trust Code § 708 cmt. On the other  
16 hand, the reasonable compensation of a trustee that is subject to a trust director’s power of  
17 direction is likely to be less than that for a similarly situated trustee that is not subject to such a  
18 power. An apt analogy is to a trustee who hires others to “render services expected or normally  
19 to be performed by the trustee.” Restatement (Third) of Trusts § 38 cmt. c(1); *see also* Uniform  
20 Prudent Investor Act § 9 cmt. (1994) (“If, for example, the trustee’s regular compensation  
21 schedule presupposes that the trustee will conduct the investment management function, it  
22 should ordinarily follow that the trustee will lower its fee when delegating the investment  
23 function to an outside manager.”).

24  
25 **SECTION 16. RESIGNATION; REMOVAL; VACANCY.**

26 (a) A trust director may resign by substantially complying with a method of resignation  
27 provided in the terms of the trust, with the approval of the court, or, if not precluded by the terms  
28 of the trust, upon at least 30 days notice to all of the trustees and other trust directors.

29 (b) A trust director may be removed as provided in the terms of the trust or by the court  
30 upon a finding that:

31 (1) the trust director has committed a serious breach of trust;

32 (2) lack of cooperation among the trust director and a trustee or another trust  
33 director substantially impairs the administration of the trust;

34 (3) because of unfitness, unwillingness, or persistent failure of the trust director to  
35 administer the trust effectively, the court determines that removal of the director best serves the

1 interests of the beneficiaries;

2 (4) there has been a substantial change of circumstances and removal of the trust  
3 director would further the administration of the trust; or

4 (5) removal of the trust director best serves the interests of all of the beneficiaries  
5 and is not inconsistent with a material purpose of the trust.

6 (c) A vacancy in a trust directorship shall be filled or not as provided in the terms of the  
7 trust. If under the circumstances the terms of the trust do not resolve the vacancy, the court may  
8 appoint a successor trust director if the court determines that the appointment would further the  
9 administration of the trust.

#### 10 **Discussion Notes**

11  
12 *Prior Draft.* This section (plus Section 15) corresponds to Section 207 in the Spring 2015  
13 draft.

14  
15 *Elaboration.* Section 207 of the Spring 2015 draft applied to a trust director “the same  
16 rules” as would apply to a trustee concerning acceptance or declining appointment, bond,  
17 vacancy and appointment of a successor, resignation, removal, and compensation. This strategy  
18 of simple absorption was criticized at the last meeting as being insufficiently detailed and  
19 therefore difficult to apply in individual cases. The consensus was that in this draft we should try  
20 for further elaboration. This section, plus Section 15, is our first pass at doing so. The rules in  
21 both this section and Section 15 are defaults, subject to override by the terms of a trust.

22  
23 *Subsection (a).* This subsection prescribes rules for resignation by a trust director that are  
24 based on the rules applicable to a trustee under Uniform Trust Code § 705 (amended 2001), but  
25 in a more simplified form, and with the addition of substantial compliance with the terms of the  
26 trust, an addition inspired by Section 15(a) and Uniform Trust Code § 701(a)(1). This subsection  
27 is generally consistent with the rules for resignation by a trustee under Restatement (Third) of  
28 Trusts § 36 (2003).

29  
30 *Subsection (b).* This subsection prescribes rules for removal of a trust director that are  
31 based on the rules applicable to a trustee under Uniform Trust Code § 706 (2000), but in a more  
32 simplified form, and with the changed circumstances (i.e., deviation) and material purpose (i.e.,  
33 *Clafin* rule) grounds for removal separated for greater clarity. The grounds for removal under  
34 Uniform Trust Code § 706, and so under this subsection, are similar to those found in  
35 Restatement (Third) of Trusts § 37 cmt. e (2003).

36  
37 *Subsection (c).* This subsection prescribes rules for appointment of a successor trust

1 director in the event of a vacancy in a trust directorship (see Section 2(7)). It is based roughly on  
2 the rules applicable to trustee succession under Uniform Trust Code § 704(c) and (e) (2000), but  
3 in a much more simplified form.

4  
5 *Indemnification.* The power of a trust director to incur reasonable costs and direct  
6 indemnification for expenses is addressed by Section 5(b)(2).

7  
8 **SECTION 17. 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 **Discussion Notes**

12  
13 This section, which is uniform law boilerplate, corresponds to Section 501 in the Spring  
14 2015 draft.

15  
16 **SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**  
17 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic  
18 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not  
19 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize  
20 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.  
21 Section 7003(b).

22 **Discussion Notes**

23  
24 This section, which is uniform law boilerplate, corresponds to Section 502 in the Spring  
25 2015 draft.

26  
27 **SECTION 19. REPEALS; CONFORMING AMENDMENTS.**

28 (a) . . . .

29 (b) . . . .

30 (c) . . . .

31 **Discussion Notes**

32  
33 This section, which is uniform law boilerplate, corresponds to Section 503 in the Spring

1 2015 draft.

2

3 **SECTION 20. EFFECTIVE DATE.** This [act] takes effect . . . .

4

**Discussion Notes**

5

6 This section, which is uniform law boilerplate, corresponds to Section 504 in the Spring

7 2015 draft.