

D R A F T
FOR APPROVAL

UNIFORM DIRECTED TRUST ACT

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ON UNIFORM STATE LAWS

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UNIFORM DIRECTED TRUST ACT

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 12, 2017

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1 **UNIFORM DIRECTED TRUST ACT**

2 **PREFATORY NOTE**

3 *Background.* The Uniform Directed Trust Act addresses an increasingly common
4 arrangement in contemporary estate planning and asset management known as a directed trust. A
5 directed trust is typically created by naming a person that is not a trustee to hold a power over the
6 trust, such as a power over the investment, distribution, or administration functions that would
7 otherwise have belonged to the trustee. There is no consistent vocabulary to describe the
8 nontrustee powerholder in a directed trust. Several terms are common in practice, including
9 “trust protector,” “trust adviser,” and “trust director.” There is much uncertainty in existing law
10 about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary
11 responsibility of a trustee (sometimes called an “administrative trustee” or “directed trustee”)
12 with regard to actions taken or directed by the nontrustee. Existing uniform trusts and estates acts
13 address the issue inadequately. Existing nonuniform state laws are in disarray.
14

15 Under the Uniform Directed Trust Act, a power over a trust held by a nontrustee is called
16 a “power of direction.” The holder of a power of direction is called a “trust director.” A trustee
17 that is subject to a power of direction is called a “directed trustee.” The main contribution of the
18 act is to address the many complications created by giving a power of direction to a trust
19 director, including the fiduciary duty of a trust director and the fiduciary duty of a directed
20 trustee.
21

22 *Enabling Settlor Autonomy Consistent with Fiduciary Minimums.* By validating terms of
23 a trust that provide for a trust director with a power of direction, the Uniform Directed Trust Act
24 promotes the settlor’s autonomy in accordance with the principle of freedom of disposition. At
25 the same time, the act imposes a mandatory minimum of fiduciary duty on both a directed trustee
26 and a trust director in accordance with the traditional principle that a trust is a fiduciary
27 relationship. *See, e.g.,* Restatement (Third) of Trusts § 96 cmt. c (2012) (“[F]or reasons of policy
28 trust fiduciary law imposes limitations on the types and degree of misconduct for which the
29 trustee can be excused from liability.”).
30

31 *Structure of the Act.* The heart of the Uniform Directed Trust Act appears in Sections 6
32 through 11, which address the powers and duties of a trust director and a directed trustee.
33 Sections 6 through 8 address the kinds of powers that the terms of a trust can grant to a trust
34 director and the default and mandatory fiduciary duties of the director. Sections 9 through 11
35 address the fiduciary duty of a directed trustee and prescribe the ways in which a power of
36 direction in a trust director changes the trustee’s powers and duties. Section 12 addresses
37 cotrusteeship, enabling the settlor to apply the fiduciary standards of conduct for a directed trust
38 under this act to a cotrusteeship. The remaining sections address a variety of important technical
39 issues in this act’s relationship to existing law and in the administration of a directed trust,
40 including rules of construction for recurring matters that might be overlooked in the drafting of a
41 directed trust.
42

1 *Fiduciary Duty in a Directed Trust.* Under the Uniform Directed Trust Act, a trust
2 director has the same default and mandatory fiduciary duties with respect to a power of direction
3 that would apply to a trustee if a trustee held the same powers (Section 8), and a directed trustee
4 is liable only for the trustee’s own “willful misconduct” in complying with a trust director’s
5 exercise or nonexercise of a power of direction (Section 9). Regarding a power of direction, the
6 trust director functions much like a trustee in an undirected trust and thus should have the same
7 duties as a trustee in the exercise or nonexercise of the director’s power of direction. To facilitate
8 the settlor’s intent that the trust director be the primary or even sole decisionmaker regarding a
9 power of direction, the fiduciary duty of the directed trustee is reduced with respect to issues
10 over which the director holds the power of direction.

11
12 In preserving some minimal fiduciary duty in a directed trustee, the drafting committee
13 was influenced by the prominent directed trust statute in Delaware, which provides likewise. *See*
14 *Del. Code Ann. tit. 12, § 3313 (2017)*. The popularity of directed trusts in Delaware establishes
15 that a directed trust statute that preserves in a directed trustee a duty to avoid “willful
16 misconduct” is workable in directed trust practice. The drafting committee therefore declined the
17 suggestion that the Uniform Directed Trust Act should eliminate completely the fiduciary duty of
18 a directed trustee.

19
20 In summary, under the Uniform Directed Trust Act a beneficiary’s main recourse for
21 misconduct by a trust director is an action against the director for breach of the director’s
22 fiduciary duty to the beneficiary. The beneficiary also has recourse against the directed trustee,
23 but only to the extent of the trustee’s own willful misconduct. Compared with a non-directed
24 trust, the act increases the total fiduciary duties owed to a beneficiary. All of the usual duties of
25 trusteeship are preserved in the trust director, and in addition the directed trustee has a duty to
26 avoid willful misconduct.

1 **UNIFORM DIRECTED TRUST ACT**

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

3 Act.

4 **Comment**

5 This act governs an arrangement commonly known as a “directed trust.” In a directed
6 trust, the terms of the trust grant a person other than a then-serving trustee a power over some
7 aspect of the trust’s administration. Under this act, such a power is called a “power of direction,”
8 the person that holds the power is called a “trust director,” a trustee that is subject to the power is
9 called a “directed trustee,” and the trust is a “directed trust” (see Section 2(5), (9), (3), and (2)
10 respectively). This act covers any arrangement that exhibits the functional features of a directed
11 trust, even if the terms of the trust use other terminology, such as “trust protector,” “trust
12 advisor,” or “administrative trustee.”
13

14 **SECTION 2. DEFINITIONS.** In this [act]:

15 (1) “Breach of trust” includes a violation by a trust director or trustee of a duty imposed
16 on that director or trustee by the terms of the trust, this [act], or law of this state other than this
17 [act] pertaining to trusts.

18 (2) “Directed trust” means a trust for which the terms of the trust grant a power of
19 direction.

20 (3) “Directed trustee” means a trustee that is subject to a trust director’s power of
21 direction.

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

24 (5) “Power of direction” means a power over a trust granted to a person by the terms of
25 the trust to the extent the power is exercisable while the person is not then serving as a trustee.
26 The term includes a power over the investment, management, or distribution of trust property or
27 other matters of trust administration. The term excludes the powers described in Section 5(b).

28 (6) “Settlor” means a person, including a testator, that creates, or contributes property to,

1 a trust. If more than one person creates or contributes property to a trust, each person is a settlor
2 of the portion of the trust property attributable to that person’s contribution except to the extent
3 another person has the power to revoke or withdraw that portion.

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

7 (8) “Terms of a trust” means:

8 (A) except as otherwise provided in subparagraph (B), the manifestation of the
9 settlor’s intent regarding a trust’s provisions as:

10 (i) expressed in the trust instrument; or

11 (ii) established by other evidence that would be admissible in a judicial
12 proceeding; or

13 (B) the trust’s provisions as established, determined, or amended by:

14 (i) a trustee or trust director in accord with applicable law; [or]

15 (ii) court order[; or

16 (iii) nonjudicial settlement agreement under [Uniform Trust Code Section
17 111]].

18 (9) “Trust director” means a person that is granted a power of direction by the terms of a
19 trust to the extent the power is exercisable while the person is not then serving as a trustee. The
20 person is a trust director whether or not the terms of the trust refer to the person as a trust director
21 and whether or not the person is a beneficiary or settlor of the trust.

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

23 **Legislative Note:** A state that has enacted Uniform Trust Code Section 103(18) (2004), defining
24 “terms of a trust,” or Uniform Trust Decanting Act Section 2(28) (2015), defining “terms of the

1 *trust,” should update those definitions to conform to paragraph (8). A state that has enacted*
2 *Uniform Trust Code Section 103(15) and (20) could replace paragraphs (6) and (10) of this*
3 *section with cross-references to those provisions of the Uniform Trust Code. A state that has not*
4 *enacted Uniform Trust Code Section 111 (2000) should replace the bracketed language of*
5 *paragraph (8)(B)(iii) with a cross reference to the state’s law governing nonjudicial settlement*
6 *or should omit paragraph (8)(B)(iii) if the state does not have such a law.*

7 **Comment**

8
9 (1) *Breach of trust.* The definition of “breach of trust” in paragraph (1) makes clear that
10 the term includes a breach by a trust director or a trustee of a duty imposed on that director or
11 trustee by the terms of a trust, this act, or other law pertaining to trusts. Historically, the term has
12 been used to reference a breach of duty by a trustee, as under Uniform Trust Code § 1001(a)
13 (2000) and Restatement (Third) of Trusts § 93 (2012). By expanding the meaning of the term to
14 include a breach of duty by a trust director, this paragraph resolves any doubt about whether such
15 conduct is also a “breach of trust.”
16

17 In defining a breach of trust to include a breach of a duty imposed by this act, it is
18 important to recognize that some of the duties imposed by this act are default rules that may be
19 varied by the terms of the trust. The drafting committee contemplated that a trust director or a
20 trustee would not be in breach of trust for conduct that was authorized by the terms of a trust to
21 the extent that those terms are permissible under this act or other applicable law.
22

23 (2) *Directed trust.* Under paragraph (2), a “directed trust” is a trust in which the terms of
24 the trust grant a power of direction. A “power of direction” is defined by paragraph (5).
25

26 (3) *Directed trustee.* The definition of “directed trustee” in paragraph (3) refers only to a
27 trustee that is subject to a trust director’s power of direction. A trustee that is subject to direction
28 by a cotrustee is not for that reason a directed trustee, as paragraphs (5) and (9) exclude a trustee
29 from holding a power of direction or being a trust director. Because a trustee cannot be a trust
30 director with a power of direction, a trustee that is subject to direction by a cotrustee is not on
31 that basis a directed trustee. Section 12 addresses the relationship between this act and
32 cotrusteeship. The term “directed trustee” thus includes many but not all trustees that in practice
33 are sometimes called “administrative trustees.”
34

35 (4) *Person.* The definition of “person” in paragraph (4) tracks the current Uniform Law
36 Commission definition.
37

38 (5) *Power of direction.* The definition of “power of direction” in paragraph (5) is
39 expansive. It includes any “power over a trust” to the extent the power is exercisable at a time
40 the power holder is not serving as a trustee. A power of direction may be structured as a power to
41 direct the trustee in the exercise of the trustee’s powers—for example, a power to direct the
42 trustee in the investment or management of the trust property. A power over a trust may also be
43 structured as a power to act independently—for example, by amending the terms of a trust or
44 releasing a trustee from liability.
45

46 The definition includes a power only to the extent the power is exercisable at a time the

1 power holder is not then serving as a trustee. The purpose of this limitation is to exclude a trustee
2 from the definition of a trust director, even though the trustee will inevitably have a “power over
3 a trust.” A trust director, in other words, is someone other than a trustee. The contribution of this
4 act is to address the complications raised by a nontrustee—that is, a trust director—with a power
5 over a trust. A power over a trust held by a trustee is governed by existing trust fiduciary law.
6

7 The reference in the definition to timing—that the power is included only if the holder is
8 “not then serving as a trustee”—is designed to be consistent with the definition of “trustee” in
9 paragraph (10). Under paragraph (10), “trustee” includes an original, additional, and successor
10 trustee. The definition of power of direction is designed to clarify that a person that qualifies as a
11 trustee under paragraph (10) by virtue of having served as an original trustee in the past or
12 having been named as a successor trustee in the future may nevertheless be a “trust director”
13 while the person is not then serving as a trustee if the person has a power over the trust. An
14 original trustee that has ceased serving as a trustee but continues to hold a power over
15 investments, for example, is a trust director.
16

17 The definition clarifies that a power of direction may include a power over “matters of
18 trust administration” as well as a power over “investment, management, or distribution of trust
19 property.” These examples are meant to illustrate the potential scope of a power of direction;
20 they do not limit it. In using the term “administration,” the drafting committee intended a
21 meaning at least as broad as that found in the context of determining a trust’s “principal place of
22 administration,” such as under Section 3(b). The drafting committee also intended the terms
23 “investment, management, or distribution” to have a meaning at least as broad as that found in
24 Uniform Trust Code § 815(a)(2)(b) (2000), which specifies a trustee’s default powers. The
25 comment to Section 6 provides examples of the kinds of specific powers that the drafting
26 committee contemplated would fall within the definition of a power of direction.
27

28 (6) *Settlor*. Following Uniform Trust Code § 103(15) (2004), paragraph (6) defines the
29 term “settlor” to mean “a person, including a testator, who creates, or contributes property to, a
30 trust.”
31

32 (7) *State*. The definition of state in paragraph (7) tracks the current Uniform Law
33 Commission definition.
34

35 (8) *Terms of a trust*. The definition of “terms of a trust” in paragraph (8) updates the
36 comparable definition in Uniform Trust Code § 103(18) (2004) to take notice of court orders and
37 nonjudicial settlement agreements, both of which are of growing practical significance, and
38 which are sometimes used to vary the terms of a trust from a settlor’s original intent. The
39 definition also takes notice of a power in a trustee or a trust director under applicable law to
40 modify the terms of a trust—for example, under this act the terms of a trust could grant a trust
41 director such a power.
42

43 The expanded definition of “terms of a trust” in this paragraph is consistent with the
44 Restatement, which recognizes the possibility that the terms of a trust may later be varied from
45 the settlor’s initial expression. *See* Restatement (Third) of Trusts § 76 cmt. b(1) (2007)
46 (“References . . . to the terms of the trust . . . also refer to trust terms as reformed or modified by

1 court decree, and as modified by the settlor or others or by consent of all beneficiaries.”)
2 (internal cross-references omitted).

3
4 (9) *Trust director.* The definition of a “trust director” in paragraph (9) includes any
5 person other than a then-serving trustee that is granted a power of direction by the terms of a
6 trust. Such a person is a trust director even if the terms of the trust or the parties call the person a
7 “trust adviser” or “trust protector” or otherwise purport to disclaim trust director status. A person
8 may be a trust director even if the person is a beneficiary or settlor of the trust, though certain
9 powers of a beneficiary and a settlor are excluded by Section 5.

10
11 A then-serving trustee cannot be a “trust director,” for the same reasons that a power
12 exercisable while a person is then-serving as a trustee cannot be a “power of direction” under
13 paragraph (5). Relations between multiple trustees are governed by the law of cotrusteeship as
14 modified by Section 12, which validates terms of a trust that relieve a cotrustee from duty or
15 liability with respect to the exercise or nonexercise of a cotrustee’s powers in a manner similar to
16 a directed trustee.

17
18 (10) *Trustee.* Following Uniform Trust Code § 103(20) (2004), paragraph (10) provides
19 that the term “trustee” includes an original, additional, and successor trustee, and a cotrustee.

20
21 **SECTION 3. APPLICATION; PRINCIPAL PLACE OF ADMINISTRATION.**

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

24 (1) If the trust was created before [the effective date of this [act]], this [act]
25 applies only to a decision or action on or after that date.

26 (2) If the principal place of administration of the trust is changed to this state on
27 or after [the effective date of this [act]], this [act] applies only to a decision or action on or after
28 the date of the change.

29 (b) Without precluding other means to establish a sufficient connection with the
30 designated jurisdiction, the terms of a trust that is a directed trust designating the principal place
31 of administration of the trust are valid and controlling if:

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

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

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

4 **Legislative Note:** A state that has enacted Uniform Trust Code Section 108(a) (2000) could omit
5 subsection (b) and instead add subsection (b)(2) to Section 108 of the state’s Uniform Trust
6 Code.

7 **Comment**

8
9 *Subsection (a).* Subsection (a) addresses two matters. First, because powers and duties in
10 a directed trust are matters of trust administration, *see* Restatement (Second) of Conflict of Laws
11 § 271 cmt. a (1971), this subsection follows the prevailing conflict of laws rule by linking
12 application of this act to the trust’s principal place of administration. As with other matters of
13 administration, the parties are protected against inconsistent court orders by the common law
14 principle of “primary supervision.” *See id.* § 267 cmt. e.
15

16 Second, this subsection applies this act to a trust administered in an enacting state
17 regardless of whether the trust was in existence on the effective date of this act. However, under
18 subsections (a)(1) and (2), this act applies only with respect to a decision or action occurring on
19 or after the effective date or, if the trust’s principal place of administration was changed to the
20 enacting state after the effective date, only with respect to a decision or action occurring on or
21 after that change. Because some of the standards of conduct prescribed by this act depart from
22 Uniform Trust Code § 808 (2000) and Restatement (Third) of Trusts § 75 (2007), the drafting
23 committee reasoned that the act should apply prospectively, following the model of Uniform
24 Prudent Investor Act § 11 (1994).
25

26 *Subsection (b).* Subsection (b), which derives from Uniform Trust Code § 108(a) (2000),
27 establishes a safe harbor for a settlor’s designation of the principal place of administration for a
28 directed trust. Such a designation is valid if (1) a trustee is located in the designated jurisdiction,
29 (2) a trust director is located in the designated jurisdiction, or (3) at least some of the trust
30 administration occurs in the designated jurisdiction. Subsections (b)(1) and (b)(3) reproduce
31 without change the safe harbor prescribed by Uniform Trust Code § 108(a) (2000). Subsection
32 (b)(2) expands the safe harbor of Section 108(a) to include the location of a trust director, in
33 addition to the location of a trustee, as a sufficient connection with the designated jurisdiction.

34 Other than the expansion in subsection (b)(2) of the Uniform Trust Code’s safe harbor for
35 a settlor’s designation of a trust’s principal place of administration, the drafting committee did
36 not undertake to prescribe rules for ascertaining a trust’s principal place of administration. In this
37 respect, the drafting committee followed the Uniform Trust Code in “not attempt[ing] to further
38 define principal place of administration.” Uniform Trust Code § 108 cmt. Accordingly, for a
39 directed trust in an enacting state, just as for all trusts in a Uniform Trust Code state, if the safe
40 harbor of subsection (b) is not applicable, the question of a trust’s principal place of
41 administration will be governed by the state’s then-existing law on principal place of
42 administration. *See, e.g.,* Restatement (Second) of Conflict of Laws §§ 271-72, 279 (1971).

1 **SECTION 4. LAW AND PRINCIPLES OF EQUITY.** The common law and

2 principles of equity supplement this [act], except to the extent modified by this [act] or law of

3 this state other than this [act].

4 **Comment**

5 This section confirms that the common law and principles of equity remain applicable to
6 a directed trust except to the extent modified by this act or other law. For example, other than the
7 safe harbor under Section 3(b) for a term of a trust that designates the trust’s principal place of
8 administration, the law of an enacting state by which principal place of administration is
9 determined would continue to apply to a directed trust. Provisions such as this one are familiar
10 from other uniform acts. *See, e.g.*, Uniform Powers of Appointment Act § 104 (2013); Uniform
11 Trust Code § 106 (2000). The drafting committee contemplated that, by ordinary principles of
12 statutory interpretation, other statutes pertaining to trusts such as the Uniform Trust Code (2000),
13 Uniform Trust Decanting Act (2015), Uniform Principal and Income Act (1997), and Uniform
14 Prudent Investor Act (1994) would continue to apply to a directed trust except as modified by
15 this act.

16 **SECTION 5. EXCLUSIONS.**

17 (a) In this section, “power of appointment” means a power that enables a person acting in
18 a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of
19 appointment over trust property.

20 (b) This [act] does not apply to a:

21 (1) power of appointment;

22 (2) power to appoint or remove a trustee or trust director;

23 (3) power of a settlor over a trust to the extent the settlor has a power to revoke
24 the trust;

25 (4) power of a beneficiary over a trust to the extent the exercise or nonexercise of
26 the power affects:

27 (A) the beneficial interest of the beneficiary; or

28 (B) the beneficial interest of another beneficiary represented by the
29 beneficiary under [Uniform Trust Code Sections 301 through 305] with respect to the exercise or

1 nonexercise of the power; or

2 (5) power over a trust if:

3 (A) the terms of the trust provide that the power is held in a nonfiduciary
4 capacity; and

5 (B) the power must be held in a nonfiduciary capacity to achieve the
6 settlor’s tax objectives under the United States Internal Revenue Code of 1986[, as amended][,
7 and regulations issued thereunder].

8 (c) Unless the terms of a trust provide otherwise, a power granted to a person other than a
9 then-serving trustee to designate a recipient of an ownership interest in or power of appointment
10 over trust property is a power of appointment and not a power of direction.

11 **Legislative Note:** *A state that has not enacted Uniform Trust Code Sections 301 through 305*
12 *(2000) should replace the bracketed language in subsection (b)(4)(B) with a cross reference to*
13 *the state’s law governing virtual representation.*

14
15 *A state that does not permit the phrase “as amended” when incorporating federal statutes, or*
16 *that does not permit reference to “regulations issued thereunder,” should delete the bracketed*
17 *language in subsection (b)(5).*

18
19

Comment

20 This section excludes five categories of powers that the drafting committee concluded
21 should not be covered by this act for reasons of policy, coverage by other law, or both. Questions
22 regarding a power that falls within one of these exclusions, such as the duty and liability of the
23 holder of the power and the duty and liability of a trustee or other person subject to the power, is
24 governed by law other than this act.

25

26 (1) *Power of appointment.* Subsection (b)(1) excludes a “power of appointment,” which
27 is defined by subsection (a) to mean “a power that enables a person acting in a nonfiduciary
28 capacity to designate a recipient of an ownership interest in or a power of appointment over trust
29 property.” This definition of “power of appointment” is based on the definition in Uniform
30 Powers of Appointment Act § 102(13) (2013). The definition is consistent with what
31 Restatement (Third) of Property: Wills and Other Donative Transfers § 17.1 cmt. g (2011), refers
32 to as a “discretionary” power of appointment, that is, one in which “the donee may exercise the
33 power arbitrarily as long as the exercise is within the scope of the power.”

1 Accordingly, if the terms of a trust purport to grant to a trust director a nonfiduciary
2 power to direct distributions of trust property, under this act that power will be construed as a
3 power of appointment governed by law other than this act. A nonfiduciary power of
4 appointment, which may be exercised arbitrarily within the scope of the power, is governed by
5 other law such as the Uniform Powers of Appointment Act (2013) and Restatement (Third) of
6 Property: Wills and Other Donative Transfers §§ 17.1–23.1 (2011).

7
8 The exclusion prescribed by subsection (b)(1) applies only to a nonfiduciary power of
9 appointment. If the terms of a trust provide that a power to direct a distribution of trust property
10 granted to a person other than a then-serving trustee is held in a fiduciary capacity, that power
11 would be a power of direction subject to this act.

12
13 To resolve doubt about whether a power over distribution granted to a person who is not
14 then-serving as a trustee is a power of appointment or a power of direction, subsection (c)
15 prescribes a rule of construction under which such a power is a power of appointment, and so is
16 not held in a fiduciary capacity, unless the terms of the trust provide that the power is held in a
17 fiduciary capacity.

18
19 A power in a then-serving trustee to designate a recipient of an ownership interest in or a
20 power of appointment over trust property can never be a power of direction, because a then-
21 serving trustee can never be a trust director (see Section 2(5) and (8)). Whether a power over
22 distribution granted to a then-serving trustee is held in a fiduciary capacity (making it a fiduciary
23 distributive power) or is instead a nonfiduciary power of appointment is governed by law other
24 than this act, such as under Restatement (Third) of Trusts § 50 cmt. a (2003).

25
26 (2) *Power to appoint or remove.* Subsection (b)(2) excludes “a power to appoint or
27 remove a trustee or trust director.” This exclusion addresses the compelling suggestion to the
28 drafting committee that such a power, at least as regards appointment or removal of a trustee, is a
29 common drafting practice that arose separately from the phenomenon of directed trusts. Under
30 prevailing law, the only limit on the exercise of a power to appoint or remove a trustee is that it
31 “must conform to any valid requirements or limitations imposed by the trust terms.” Restatement
32 (Third) of Trusts § 37 cmt. c (2003). If the terms of the trust do not impose any requirements or
33 limitations on the power to remove, then “it is unnecessary for the holder to show cause” before
34 exercising the power. Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher,
35 Scott and Ascher on Trusts § 11.10.2 (5th ed. 2006).

36
37 (3) *Revocable trust.* Subsection (b)(3) excludes a power of a settlor over a trust to the
38 extent the settlor has a power to revoke the trust. The drafting committee intended that this
39 exception would apply only to that portion of a trust over which the settlor has a power to
40 revoke, that is, “to the extent” of the settlor’s power to revoke.

41
42 Because the settlor of a revocable trust may at any time revoke the trust and take back the
43 trust property, under modern law, including Uniform Trust Code § 603(a) (2004), the trustee’s
44 duties run to the settlor rather than to the beneficiaries. The trustee must “comply with a
45 direction of the settlor even though the direction is contrary to the terms of the trust or the
46 trustee’s normal fiduciary duties.” Restatement (Third) of Trusts § 74(1)(a)(i) (2007).

1 Without the exclusion of this subsection, Section 2(3) and 2(5) could have been read to
2 transform a settlor’s power to direct the trustee in the administration of a revocable trust, whether
3 granted expressly or arising by implication from the revocable nature of the trust, into fiduciary
4 powers of a trust director and to subject the trustee to the modified fiduciary duties under
5 Sections 9 through 11.
6

7 To the extent that a conservator or agent of the settlor may exercise the settlor’s power to
8 revoke, as under Uniform Trust Code § 602(e)–(f) (2001), this subsection would apply to the
9 conservator or agent. A nonfiduciary power in a person other than the settlor to withdraw the
10 trust property is a power of appointment that would fall within subsection (b)(1).
11

12 (4) *Power of a beneficiary.* Paragraph (4) excludes a power of a beneficiary to the extent
13 that the exercise or nonexercise of the power affects (A) the beneficial interest of the beneficiary
14 or (B) the beneficial interest of another beneficiary who is represented by the beneficiary under
15 applicable virtual representation law.
16

17 Subparagraph (A) follows from traditional law, under which “[a] power that is for the
18 sole benefit of the person holding the power is not a fiduciary power.” Restatement (Third) of
19 Trusts § 75 cmt. d (2007). By contrast, if the exercise or nonexercise of a power held by a
20 beneficiary affects the beneficial interest of another beneficiary other than by virtual
21 representation (per subparagraph (B)), and the power is otherwise a power of direction, then
22 under this act the beneficiary is a trust director subject to the standards of conduct prescribed by
23 this act to the extent of the effect on the other beneficiary’s interest.
24

25 Thus, for example, a power in a beneficiary to release a trustee from a claim by the
26 beneficiary is excluded from this act. But a power in a beneficiary to release the trustee from a
27 claim by another beneficiary (other than by virtual representation per subparagraph (B)) is a
28 power of direction, and the beneficiary would be a trust director to the extent the beneficiary’s
29 power to release the trustee affects the claims of the other beneficiary.
30

31 The same is true if the beneficiary’s power is jointly held. Thus, for example, if the terms
32 of a trust provide that a trustee may be released from liability by a majority of the beneficiaries,
33 and a majority of the beneficiaries grants such a release, then those beneficiaries would be acting
34 as trust directors to the extent the release affected the interests of other beneficiaries not bound
35 by virtual representation. This act would therefore reverse the result in *Vena v. Vena*, 899 N.E.2d
36 522 (Ill. App. 2008), in which the court refused to enforce such a provision on the grounds that
37 the minority beneficiaries did not have recourse against the majority for an abusive release.
38 Under this act, the minority beneficiaries would have recourse against the majority for breach of
39 fiduciary duty.
40

41 Subparagraph (B) carves out virtual representation by a beneficiary of another
42 beneficiary. This exclusion reflects the drafting committee’s intent not to overlay upon the law of
43 virtual representation, which contains its own limits and safeguards, the fiduciary rules
44 prescribed by this act. Without this exclusion, in light of Sections 2(3) and 2(5), Section 6(a)
45 could have been read to transform a beneficiary who represented another beneficiary by virtual
46 representation into a trust director.

1 For example, under Uniform Trust Code § 304 (2000), “a minor, incapacitated, or unborn
2 individual, or a person whose identity or location is unknown and not reasonably ascertainable,
3 may be represented by and bound by another having a substantially identical interest with respect
4 to the particular question or dispute, but only to the extent there is no conflict of interest between
5 the representative and the person represented.” Subparagraph (B) implements the drafting
6 committee’s intent to leave undisturbed the law of virtual representation, including in this
7 example the safeguard against representation by a person with a conflict of interest.
8

9 (5) *The settlor’s tax objectives.* Subsection (b)(5) excludes a power if (A) the terms of the
10 trust provide that the power is to be held in a nonfiduciary capacity, and (B) the power must be
11 held in a nonfiduciary capacity to achieve the settlor’s tax objectives under federal tax law. This
12 exclusion is responsive to multiple suggestions to the drafting committee that certain powers in a
13 person other than a trustee must be nonfiduciary to achieve the settlor’s federal tax objectives.
14 The clearest example is a retained power to substitute assets meant to ensure grantor trust status
15 under Internal Revenue Code § 675(4)(C). Given the evolving nature of tax planning, the
16 frequency of amendments to the tax law, and the potential for disagreement about which powers
17 must be nonfiduciary to achieve the settlor’s federal tax objectives, the drafting committee
18 reasoned that a standard referring broadly to a settlor’s tax objectives was preferable to a
19 prescribed list of sections of the tax code that would have to be continuously updated and would
20 likely be over- and underinclusive.
21

22 SECTION 6. POWERS OF TRUST DIRECTOR.

23 (a) Subject to Section 7, the terms of a trust may grant a power of direction to a trust
24 director.

25 (b) A power of direction includes only those powers granted by the terms of the trust.

26 (c) Unless the terms of a trust provide otherwise:

27 (1) a trust director may exercise any further power appropriate to the exercise or
28 nonexercise of the director’s power of direction; and

29 (2) trust directors with joint powers must act by majority decision.

30 Comment

31 *Validating a trust director.* Subsection (a) validates a provision for a trust director in the
32 terms of a trust. Although the common law in most states recognizes a trust director without
33 statutory authorization, subsection (a) resolves any doubt. *See, e.g., In re Eleanor Pierce*
34 *(Marshall) Stevens Living Trust*, 159 So. 3d 1101 (La. App. 2015) (upholding the appointment of
35 a trust protector without specific statutory authorization). A trust director may be named by the
36 terms of a trust, by a procedure prescribed by the terms of the trust, or in accordance with
37 Section 16(6).

1 *Background law on trust purposes.* Although this section validates terms of a trust that
2 provide for a trust director, it does not override the background law that regulates the formation
3 of a trust, such as the requirements that a trust be lawful, not contrary to public policy, and
4 possible to achieve. *See, e.g.,* Uniform Trust Code § 404 (2000); Restatement (Third) of Trusts
5 §§ 29–30 (2003).
6

7 *Breadth of subsection (a).* Without limiting the definition of a “power of direction” in
8 Section 2(5), the drafting committee specifically contemplated that subsection (a) would validate
9 terms of a trust that grant a power to a trust director to:
10

- 11 • direct investments, including a power to:
 - 12 ○ acquire, dispose of, exchange, or retain any investment;
 - 13 ○ make or take loans;
 - 14 ○ vote proxies for securities held in trust;
 - 15 ○ adopt a particular valuation of trust property or determine the frequency or
16 methodology of valuation;
 - 17 ○ adjust between principal and income or convert to a unitrust;
 - 18 ○ manage a business held in the trust; or
 - 19 ○ select a custodian for trust assets;
- 20 • modify, reform, terminate, or decant a trust;
- 21 • direct a trustee’s or another director’s delegation of the trustee’s or other director’s
22 powers;
- 23 • change the principal place of administration, situs, or governing law of the trust;
- 24 • ascertain the happening of an event that affects the administration of the trust;
- 25 • determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- 26 • determine the compensation to be paid to a trustee or trust director;
- 27 • prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;
- 28 • grant permission before a trustee or another director may exercise a power of the
29 trustee or other director; or
- 30 • release a trustee or another trust director from liability for an action proposed or
31 previously taken by the trustee or other director.

32
33 *Pet and other noncharitable purpose trust enforcers.* Statutes in every state validate a
34 trust for a pet animal or other noncharitable purposes. Following Uniform Probate Code § 2-
35 907(c)(4) (1993) and Uniform Trust Code Sections §§ 408(b) and 409(2) (2000), most of these
36 statutes authorize enforcement of such a trust by a person named in the terms of the trust. In a
37 state that enacts this act, such a person would be a trust director.
38

39 *Exclusions.* Like the other provisions of this act, this section does not apply to matters
40 that are excluded by Section 5. Thus, because Section 5(b)(1)-(2) excludes a power “to appoint
41 or remove a trustee or trust director” and a “power of appointment,” subsection 6(a) does not
42 authorize the granting of such powers. Instead, such a power is governed by law other than this
43 act.
44

45 *Subsection (b).* Subsection (b) confirms that a trust director has only those powers
46 expressly granted by the terms of the trust. This act does not provide any powers to a trust

1 director by default. Nor does this act specify the scope or parameters of a power of direction,
2 which instead must be specified by the terms of a trust.

3
4 *Subsection (c).* Subsection (c) prescribes two rules of construction that apply unless the
5 terms of a trust provide otherwise.

6
7 *(1) Further appropriate powers.* Subsection (c)(1) prescribes a default rule under which a
8 trust director may exercise any “further” power that is “appropriate” to the director’s exercise of
9 the director’s express powers under the terms of the trust. The term “appropriate” is drawn from
10 Uniform Trust Code § 815(a)(2)(B) (2000). Appropriateness should be judged in relation to the
11 purpose or function being carried out by the director. Examples of further powers that might be
12 appropriate include a power to: (1) incur reasonable costs and direct indemnification for those
13 costs; (2) make a report or accounting to a beneficiary or other interested party; (3) direct a
14 trustee to issue a certification of trust under Uniform Trust Code § 1013 (2000); (4) prosecute,
15 defend, or join an action, claim, or judicial proceeding relating to a trust; or (5) employ a
16 professional to assist or advise the director in the exercise or nonexercise of the director’s
17 powers.

18
19 *Delegation by trust director.* In some circumstances, it may be appropriate under
20 subsection (c)(1) for a trust director to exercise a further power to delegate the director’s powers,
21 much as it may sometimes be appropriate for a trustee to delegate its powers. Under Section 8, a
22 trust director is subject to the same fiduciary duty regarding delegation as a trustee in a like
23 position and under similar circumstances. In most states, therefore, a trust director would be
24 required to exercise reasonable care, skill, and caution in selecting, instructing, and monitoring
25 an agent, and a director who did so would not be liable for the action of the agent. In accordance
26 with prevailing law governing delegation by a trustee, see, e.g., Uniform Trust Code § 807
27 (2000); Uniform Prudent Investor Act § 9 (1994); Restatement (Third) of Trusts § 80 (2007), the
28 drafting committee contemplated that in performing a function delegated by a trust director, the
29 person to whom the power was delegated would owe a duty to exercise reasonable care.

30
31 *Trust director’s standing to sue.* Subsection (c)(1) addresses the situation that arose in
32 *Schwartz v. Wellin*, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014), in
33 which the court held that a trust director (which the terms of the trust referred to as a “trust
34 protector”) lacked standing to bring a lawsuit under Rule 17(a)(1) of the Federal Rules of Civil
35 Procedure, because the director was neither a real party in interest nor a party that could pursue a
36 claim if not a real party in interest. In some circumstances, subsection (c)(1) may produce a
37 different outcome by providing standing for a director by statute. Rule 17(a)(1) allows “a party
38 authorized by statute” to bring litigation, even if the party is not a real party in interest.
39 Subsection (c)(1) supplies the requisite statutory authorization if participating in a lawsuit would
40 be “appropriate” to a director’s exercise or nonexercise of a power granted by the terms of the
41 trust. It would normally be “appropriate,” for example, for a trust director to bring an action
42 against a directed trustee if the trustee refused to comply with a director’s exercise of a power of
43 direction. Subsection (a) would also provide the requisite statutory authorization if the terms of
44 the trust expressly confer a power of litigation on the director.

1 (2) *Majority decision.* Subsection (c)(2) provides a default rule of majority action for
2 multiple trust directors with “joint powers,” such as a three-person committee with a power of
3 direction over investment or distribution. Majority action is the prevailing default for cotrustees.
4 *See* Uniform Trust Code § 703(a) (2000); Restatement (Third) of Trusts § 39 (2003). In the event
5 of a deadlock among trust directors with joint powers, by analogy to a deadlock among
6 cotrustees, a court could “direct exercise of the [joint] power or take other action to break the
7 deadlock.” *Id.* cmt. e. The duty and liability of a trust director for jointly held powers is governed
8 by Section 8, which absorbs the existing fiduciary duty and liability of trusteeship for a trust
9 director. Thus, in a state that protects a dissenting cotrustee from liability, as under Uniform
10 Trust Code § 703(h) (2000), a dissenting trust director with a jointly held power would also be
11 protected.

12
13 **SECTION 7. LIMITATIONS ON POWERS OF TRUST DIRECTOR.** A trust

14 director is subject to the same rules as a trustee in a like position and under similar circumstances
15 in the exercise or nonexercise of a power of direction regarding:

16 (1) a payback provision in the terms of the trust necessary for compliance with the
17 reimbursement requirements of Medicaid law in Section 1917 of the Social Security Act, 42
18 U.S.C. Section 1396p(d)(4)(A)[, as amended][, and regulations issued thereunder]; and

19 (2) a charitable interest in the trust, including notice regarding the interest to [the
20 Attorney General].

21 ***Legislative Note:*** *A state that does not permit the phrase “as amended” when incorporating*
22 *federal statutes, or that does not permit reference to “regulations issued thereunder,” should*
23 *delete the bracketed language in paragraph (1) accordingly.*

24
25 *In paragraph (2), “Attorney General” is in brackets to accommodate a state that grants*
26 *enforcement authority over a charitable interest in a trust to another public official.*

27
28 **Comment**

29 The capacious language of Section 6 permits a broad array of powers to be given to a
30 trust director with the exercise or nonexercise of such a power subject to the director’s fiduciary
31 duty and liability under Section 8. This section goes further. It imposes on the exercise or
32 nonexercise of two types of powers by a trust director whatever other rules would apply to the
33 exercise or nonexercise of such a power by a trustee in a like position and under similar
34 circumstances. Paragraph (1) does so with respect to a payback provision in a trust for a
35 beneficiary with a disability necessary for compliance with the reimbursement requirements of
36 Medicaid law. Paragraph (2) does so with respect to a charitable interest in the trust (including
37 specifically rules requiring notice to the Attorney General or other public official with

1 supervisory power over charities). In consequence of this provision, a settlor cannot avoid state
2 law that limits the power of a trustee in a supplemental needs trust or charitable trust by granting
3 the power to a trust director.

4
5 **SECTION 8. DUTY AND LIABILITY OF TRUST DIRECTOR.**

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

8 (1) a trust director has the same fiduciary duty and liability in the exercise or
9 nonexercise of the power:

10 (A) if the power is held individually, as a sole trustee in a like position and
11 under similar circumstances; or

12 (B) if the power is held jointly with a trustee or another trust director, as a
13 cotrustee in a like position and under similar circumstances; and

14 (2) the terms of the trust may vary the director's duty or liability to the same
15 extent the terms of the trust could vary the duty or liability of a trustee in a like position and
16 under similar circumstances.

17 (b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified,
18 or otherwise authorized or permitted by law other than this [act] to provide health care in the
19 ordinary course of the director's business or practice of a profession, to the extent the director
20 acts in that capacity, the director has no duty or liability under this [act] .

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

23 **Comment**

24 *Subsection (a).* Subsection (a) imposes the same fiduciary duties on a trust director that
25 would apply to a trustee in a like position and under similar circumstances. A trust director with
26 a power to make or direct investments, for example, has the same duties that would apply to a
27 trustee with the same power, including a duty to act prudently, in the sole interest of the

1 beneficiaries, and impartially with due regard for the respective interests of the beneficiaries.
2 *See, e.g.*, Restatement (Third) of Trusts §§ 77–79, 90–92 (2007). The theory behind subsection
3 (a) is that if a trust director has a power of direction, the director is the most appropriate person
4 to bear the duty associated with the exercise or nonexercise of that power. Put differently, in a
5 directed trust, a trust director functions much like a trustee in a non-directed trust, and thus
6 should have the same duties as a trustee.
7

8 Accordingly, subsection (a)(1) sets the default duties of a trust director by absorbing the
9 duties that would ordinarily apply to a trustee in a like position and under similar circumstances.
10 Subsection (a)(2) sets the mandatory minimum duties of such a director by absorbing the
11 mandatory minimum duties that a settlor cannot waive for a trustee in a like position and under
12 similar circumstances. In making a trust director a fiduciary, subsection (a) follows the great
13 majority of the existing state directed trust statutes. Subsection (a) is more specific than many
14 state statutes, however, as the existing statutes tend to say only that a trust director is a
15 “fiduciary,” without specifying what kind of fiduciary or which fiduciary duties apply.
16 Subsection (a) provides greater clarity by specifically absorbing the fiduciary duty and liability
17 of a trustee.
18

19 *Absorption of existing trust fiduciary law.* Subsection (a) operates by absorbing existing
20 state law rather than inventing a new body of law. Incorporating existing state law in this manner
21 offers several advantages. First, it avoids the need to spell out the entirety of trust fiduciary law.
22 That is, it avoids the need to replicate something like Article 8 of the Uniform Trust Code for
23 trust directors. Second, absorbing the trust fiduciary law of each enacting state accommodates
24 diversity across the states in the particulars of a trustee’s default and mandatory fiduciary duties,
25 such as the duties to diversify and to give information to the beneficiaries, both of which have
26 become increasingly differentiated across the states. Third, absorption allows for changes to the
27 law of a trustee’s fiduciary duties to be absorbed automatically into the duties of a trust director
28 without need for periodic conforming revisions to this act.
29

30 *Absorption and circumstances of trust directors.* In applying the law of trustee fiduciary
31 duties to a trust director, a court must make use of the flexibility built into fiduciary law. Courts
32 have long applied the duties of loyalty and prudence across a wide array of circumstances,
33 including many different kinds of trusts as well as other fiduciary relationships, such as
34 corporations and agencies. Trust fiduciary principles are thus amenable to application in a
35 context-specific manner that is sensitive to the particular circumstances and structure of each
36 directed trust. In assessing the actions of a director that holds a power to modify a trust, for
37 example, a court should apply the standards of loyalty and prudence in a manner that is
38 appropriate to the particular context, including the trust’s terms and purposes and the director’s
39 particular powers.
40

41 *The trust director’s duty of disclosure.* Under subsection (a), a trust director is subject to
42 the same duties of disclosure as a trustee in a like position and under similar circumstances.
43 Thus, for example, if a trust director intended to direct a nonroutine transaction, to change
44 “investment ... strategies,” or to take “significant actions ... involving hard-to-value assets or
45 special sensitivity to beneficiaries,” the director would be under a duty of affirmative advance
46 disclosure. Restatement (Third) of Trusts § 82 cmt. d (2007); *see also Allard v. Pacific Nat’l*

1 *Bank*, 663 P.2d 104, 110 (Wash. 1983) (“The trustee must inform beneficiaries, however, of all
2 material facts in connection with a nonroutine transaction which significantly affects the trust
3 estate and the interests of the beneficiaries prior to the transaction taking place.”).
4

5 *Joint and sole powers.* Under subsection (a), a trust director has the same fiduciary duties
6 as a sole trustee when a power of direction is held individually and the same fiduciary duties as a
7 cotrustee when a power of direction is held jointly. Thus, a trust director that holds a power of
8 direction individually does not have the duties of a cotrustee regarding other trust directors or
9 trustees. A trust director that individually holds a power to amend the trust, for example, does not
10 have the duty of a cotrustee to monitor the actions of the trustee concerning investments or the
11 actions of another trust director concerning the determination of a beneficiary’s capacity. A trust
12 director that holds a power of direction jointly with a trustee or another trust director, however,
13 has the duty of a cotrustee regarding the actions of that trustee or other trust director that are
14 within the scope of the jointly held power. Thus, a trust director that jointly exercises a power to
15 direct investments with other trust directors has the same fiduciary duty and liability regarding
16 the investment actions of itself and the other trust directors as a cotrustee.
17

18 Although a trust director that holds a power of direction jointly with a trustee or other
19 trust director generally has the duty of a cotrustee with regard to that power, the director does not
20 have the duties of a cotrustee with regard to other powers that are not held jointly. If a trust
21 director holds a power to direct investments with another trust director jointly, for example, and
22 the other director also holds a power to amend the trust individually, the first director has the
23 duty of a cotrustee only with regard to the joint power to direct investments and not with regard
24 to the other director’s individual power to amend the trust.
25

26 *Springing powers without a duty to monitor.* The drafting committee contemplated that a
27 settlor could construct a trust director’s power to be springing such that the director would not be
28 under a continuous obligation to monitor the administration of the trust. For example, a settlor
29 could grant a trust director a power to direct a distribution, but only if the director was requested
30 to do so by a beneficiary. A director holding such a power would not be under a duty to act
31 unless requested to do so by a beneficiary. Moreover, because under subsection (a)(2) a settlor
32 can vary the fiduciary duties of a trust director to the same extent that the settlor could vary the
33 fiduciary duties of a trustee, under Uniform Trust Code § 105(b)(2) (2004) the settlor could
34 waive all of the director’s otherwise applicable duties other than the duty “to act in good faith
35 and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”
36 A director with a power to direct a distribution upon a beneficiary’s request, for example, would
37 be subject to this mandatory duty when it responds to a beneficiary’s request.
38

39 *Extended discretion.* Under subsection (a), if the terms of a trust give a trust director
40 extended discretion, such as “sole,” “absolute,” or “uncontrolled” discretion, those terms would
41 have the same effect on the duty and liability of the director as they would have for a trustee.
42 Under prevailing law, a trustee with extended discretion may not “act in bad faith or for some
43 purpose or motive other than to accomplish the purposes of the discretionary power.”
44 Restatement (Third) of Trusts § 50 cmt. c (2003); *see also* Uniform Trust Code § 814(a) (2004).
45

1 *Exculpation or exoneration.* A trust director is likewise subject to the same rules as a
2 trustee with regard to an exculpation or exoneration clause. Under prevailing law, such as
3 Uniform Trust Code § 1008 (2000) and Restatement (Third) of Trusts § 96 (2012), an
4 exculpation or exoneration clause cannot protect a trustee against liability for acting in bad faith
5 or with reckless indifference. Under subsection (a)(2), the same rules would apply to an
6 exculpation or exoneration clause for a trust director. Thus, if the terms of a trust provide that a
7 director has no duty or is not a fiduciary or can never be liable to a beneficiary, then the trust
8 director would have the same duty and liability as a trustee would have under a similar
9 exculpatory clause.

10
11 *Directed director.* The terms of a trust may provide that a trust director has a power over
12 a trust that requires another director to comply with the director’s exercise or nonexercise of the
13 power. In other words, a director may have the power to direct another director. In such a trust,
14 subsection (a)(1) would absorb for the directed director the same fiduciary duties that would
15 apply to a directed trustee. A directed director would thus be subject to the willful misconduct
16 standard that Section 9 applies to a directed trustee. Under subsection (a)(2), the terms of a trust
17 may vary the duty of a directed director to the same extent they could vary the duty of a directed
18 trustee.

19
20 *Subsection (b)—health-care professionals.* Subsection (b) refers to a trust director who is
21 “licensed, certified, or otherwise authorized or permitted by law to provide health care in the
22 ordinary course of the director’s business or practice of a profession.” This phrasing is based on
23 the definition of “health-care provider” in Uniform Health-Care Decisions Act § 1(8) (1993). To
24 the extent that a trust director acts in the director’s business or practice of a profession to provide
25 health care, the director is relieved from duty or liability under this act unless the terms of the
26 trust provide otherwise.

27
28 This subsection, which applies unless the terms of the trust provide otherwise, addresses
29 the concern that a health-care professional might refuse appointment as a trust director if such
30 service would expose the provider to fiduciary duty under this act. For example, the terms of a
31 trust might call for a health-care professional to determine the capacity or sobriety of a
32 beneficiary or the capacity of the settlor. In making such a determination, under subsection (b)
33 the health-care professional would not be subject to duty or liability under this act.

34
35 Although the professional would not be subject to duty or liability under this act, the
36 professional would remain subject to any rules and regulations otherwise applicable to the
37 professional, such as the rules of medical ethics. The professional would also be subject to the
38 other provisions of this act that do not create a duty or liability, such as the rules regarding the
39 office of a trust director prescribed by Section 15. Moreover, a trustee subject to a direction by a
40 healthcare professional under subsection (b) is still subject to the duties to act reasonably and
41 avoid willful misconduct in complying with a trust director’s exercise of its powers under
42 Section 9.

43
44 *Subsection (c)—no ceiling on duties.* Subsection (c) confirms that the duties prescribed
45 by this section are defaults and minimums, not ceilings. The terms of a trust may impose further
46 duties in addition to those prescribed by this section.

1 **SECTION 9. DUTY AND LIABILITY OF DIRECTED TRUSTEE.**

2 (a) Subject to subsection (b), a directed trustee shall take reasonable action to comply
3 with the exercise or nonexercise of a power of direction or further power of a trust director under
4 Section 6(c)(1) and is not liable for the action.

5 (b) A directed trustee must not comply with the exercise or nonexercise of a power of
6 direction or further power of a trust director under Section 6(c)(1) to the extent that by
7 complying the trustee would engage in willful misconduct.

8 (c) An exercise of a power of direction under which a trust director may release a trustee
9 or another trust director from liability for breach of trust is not effective if:

10 (1) the breach involved the trustee's or other director's willful misconduct;

11 (2) the release was induced by improper conduct of the trustee or other director in
12 procuring the release; or

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

15 (d) A directed trustee that has reasonable doubt about its duty under this section may
16 petition the [court] for instructions.

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

19 ***Legislative Note:** A state that has enacted the Uniform Trust Code should move Section 808(a)*
20 *into Section 603, delete Section 808(b)-(d), and add to the end of Section 105(b)(2) the following*
21 *text: "except as otherwise provided in Uniform Directed Trust Act Sections 9, 11, and 12." The*
22 *term "court" in subsection (d) should be revised as needed to refer to the appropriate court*
23 *having jurisdiction over trust matters.*

24 **Comment**

25 *Duties of a directed trustee.* This section addresses the duty and liability of a directed
26 trustee. It should be read in conjunction with Section 10 (governing information sharing among
27 directed trustees and trust directors) and Section 11 (eliminating certain duties to monitor,

1 inform, or advise). The drafting committee contemplated that this section, along with Sections 10
2 and 11, would prescribe the mandatory minimum fiduciary duties of a directed trustee,
3 displacing any contrary mandatory minimum such as under Uniform Trust Code § 105 (2005).
4

5 *Subsection (a)—duty of compliance and reasonable action; nonliability other than under*
6 *subsection (b).* Subject to subsection (b), subsection (a) requires a directed trustee to take
7 reasonable action to comply with a power of direction or a further power of a trust director under
8 Section 6(c)(1) and provides that the trustee is not liable for so acting.
9

10 A power of direction may impose a variety of obligations on a directed trustee. For
11 example, a power of direction may require a trustee to follow the express directions of a trust
12 director, such as if the power allows the director to direct the trustee in the investment
13 management of trust property. A power of direction may also require a trustee to request
14 permission from a director before acting, to refrain from acting if the director so directs, or to act
15 independently in the absence of a contrary direction. For example, a power of direction might
16 provide that a trustee may not sell certain property without the approval of the trust director. A
17 power of direction may also allow a director to modify the trust or to impose particular
18 administrative procedures. The duty “to comply with a power of direction” imposed by
19 subsection (a) requires a trustee to comply with all such powers of direction, subject to
20 subsection (b).
21

22 Compliance may require different actions depending on the exact nature of a particular
23 power of director. A power that a director exercises by express direction, for example, will
24 require a trustee to comply by following the direction. A power that requires a trustee to obtain
25 permission to act from a trust director imposes a duty on the trustee to obtain such permission
26 before acting. A power that allows a director to amend the trust imposes a duty on the trustee to
27 take reasonable action to facilitate the amendment and then comply with its terms. The duty
28 prescribed by subsection (a), in other words, is not just a duty to follow express directions but to
29 take reasonable action to comply with whatever the terms of the trust require of a trustee in
30 connection with a trust director’s exercise or nonexercise of the director’s power of direction.
31

32 The duty to comply with a power of direction is limited by the scope of the power. A
33 directed trustee should not comply with a direction that is outside of the director’s power of
34 direction and beyond the director’s further powers under Section 6(c)(1). To do so would violate
35 the trustee’s duty under subsection (a) and the trustee’s background duty to act in accordance
36 with the terms of the trust. *See, e.g.*, Uniform Trust Code § 105(b)(2) (amended 2005) (making
37 mandatory “the duty of a trustee to act ... in accordance with terms ... of the trust”); Restatement
38 (Third) of Trusts § 76 (2007) (“The trustee has a duty to administer the trust ... in accordance
39 with the terms of the trust.”). For example, an attempt by a director to exercise a power in a form
40 contrary to that required by the terms of the trust, such as an oral direction if the terms of the
41 trust require a writing, is not within the trust director’s power of direction.
42

43 Subject to subsection (b), subsection (a) requires that a directed trustee take “reasonable
44 action” to comply with a power of direction or a trust director’s further powers under Section
45 6(c)(1). Subsection (a) thus requires a trustee to act reasonably as it carries out the acts necessary
46 to comply with and execute a director’s exercise of its powers. If a trust director with a power to

1 direct investments directs the trustee to purchase a particular security, for example, the trustee
2 must take care to ensure the security is purchased within a reasonable time and at reasonable cost
3 and must refrain from self-dealing and conflicts of interest in doing so.
4

5 The duty under subsection (a) to act reasonably in complying with the terms of a power
6 of direction does not, however, impose a duty to ensure that the substance of a direction is
7 reasonable. To the contrary, subject to subsection (b), a trustee that takes reasonable action to
8 comply with a power of direction or a further power of a trust director under Section 6(c)(1) is
9 not liable for so acting even if the substance of the direction is unreasonable. In other words,
10 subject to the willful misconduct rule of subsection (b), a trustee is liable only for its own breach
11 of trust in executing a direction, and not for the director's breach of trust in giving the direction.
12 Returning to the example in the prior paragraph of a direction to purchase a security, the trustee
13 is not required to assess whether the purchase of the security would be prudent in relation to the
14 trust's investment portfolio. Liability for the substance of a direction instead rests with a trust
15 director under Section 8.
16

17 *Powers jointly held with a trust director.* A trustee may hold a power of direction jointly
18 with a trust director. For example, the terms of a trust may confer a power to determine the
19 capacity of a beneficiary upon a committee of people, and the committee may include both the
20 trustee and the beneficiary's son, the latter of whom is a trust director. When a trustee holds a
21 power jointly with a trust director, the trustee continues to have the normal duties of a trustee
22 regarding its own exercise or nonexercise of the joint power. Subsection (a), in other words, does
23 not relieve the trustee from the trustee's normal duties as to powers that belong directly to the
24 trustee, including powers held jointly with a trust director. Thus, the drafting committee
25 contemplated that in deciding how to vote as a member of the committee to determine a
26 beneficiary's capacity, the trustee would be subject to the same duties as if it held its power
27 jointly with another trustee instead of with another trust director.
28

29 A trustee's participation in joint decisionmaking with a trust director, however, must be
30 distinguished from the trustee's execution of those joint decisions. Although the trustee is subject
31 to the normal fiduciary duties of trusteeship in making a decision jointly with a trust director, the
32 trustee is subject to the reduced duty of subsections (a) and (b) in executing such a decision.
33 Returning to the example in the prior paragraph of a committee including a trustee with power to
34 determine a beneficiary's capacity, the trustee has its normal fiduciary duties in deciding how to
35 cast its vote about whether the beneficiary lacks capacity. But the trustee has only the duties
36 prescribed by subsections (a) and (b) when the trustee takes action to comply with the decision of
37 the committee. The trustee must comply with the decision of the committee (even if the trustee
38 disagrees) and must act reasonably in carrying out that decision, but the trustee is not liable for
39 the substance of the decision, except to the extent of the trustee's own breach in the trustee's vote
40 as a member of the committee.
41

42 *Subsection (b)—willful misconduct.* Subsection (b) provides an exception to the duty of
43 compliance prescribed by subsection (a). Under subsection (b), a trustee must not comply with a
44 power of direction or a further power of a trust director under Section 6(c)(1) to the extent that
45 by complying the trustee would engage in "willful misconduct." The drafting committee settled
46 upon the "willful misconduct" standard after a review of the existing directed trust statutes.

1 Roughly speaking, the existing directed trust statutes fall into two groups. In one group,
2 which constitutes a majority, are the statutes that provide that a directed trustee has no duty or
3 liability for complying with an exercise of a power of direction. This group includes Alaska,
4 New Hampshire, Nevada, and South Dakota. The policy rationale for these statutes is that duty
5 should follow power. If a director has the exclusive authority to exercise a power of direction,
6 then the director should be the exclusive bearer of fiduciary duty in the exercise or nonexercise
7 of the power. A related policy rationale is that placing the liability on a director does not
8 diminish the total liability available to a beneficiary, because a settlor of a directed trust could
9 have chosen to make the trust director the sole trustee instead. Thus, on greater-includes-the-
10 lesser reasoning, a settlor who could have replaced a directed trustee with a trust director should
11 also be able to replace a directed trustee’s duty and liability with the duty and liability of a trust
12 director. Under these statutes, a beneficiary’s only recourse for misconduct by the trust director
13 is an action against the director for breach of the director’s fiduciary duty to the beneficiary.
14

15 In the other group of statutes, which includes Delaware, Illinois, Colorado, North
16 Carolina, Texas, and Virginia, a directed trustee is not liable for complying with a direction of a
17 trust director, unless by so doing the directed trustee would personally engage in “willful” or
18 “intentional” misconduct. The policy rationale for these statutes is that, because a trustee stands
19 at the center of a trust, the trustee must bear at least some duty even if the trustee is acting under
20 the direction of a director. Although the settlor could have made the trust director the sole
21 trustee, the settlor did not actually do so—and under traditional understandings of trust law, a
22 trustee must always be accountable to a beneficiary in some way. *See, e.g.*, Restatement (Third)
23 of Trusts § 96 cmt. c (2012) (“Notwithstanding the breadth of language in a trust provision
24 relieving a trustee from liability for breach of trust, for reasons of policy trust fiduciary law
25 imposes limitations on the types and degree of misconduct for which the trustee can be excused
26 from liability.”).
27

28 The states in the second group also recognize, however, that to facilitate the settlor’s
29 intent that the trust director rather than the directed trustee be the primary or even sole
30 decisionmaker, it is appropriate to reduce the trustee’s duty and liability below the usual level
31 with respect to a matter subject to a power of direction. Accordingly, under these statutes a
32 beneficiary’s main recourse for misconduct by the trust director is an action against the director
33 for breach of the director’s fiduciary duty to the beneficiary. The beneficiary also has recourse
34 against the trustee, but only if the trustee’s compliance with the terms of the power of direction
35 amounted to “willful misconduct” by the trustee. Relative to a non-directed trust, this second
36 approach has the effect of increasing the total fiduciary duties owed to a beneficiary. All of the
37 usual duties of trusteeship are preserved in the trust director, but in addition the directed trustee
38 also has a duty to avoid willful misconduct.
39

40 After extensive deliberation and debate, the drafting committee opted to follow the
41 second group of statutes, which includes the prominent Delaware act, on the grounds that this
42 model does more to protect a beneficiary and is more consistent with traditional fiduciary policy.
43 The popularity of directed trusts in Delaware establishes that a directed trust regime that
44 preserves a “willful misconduct” safeguard is workable and that a total elimination of duty in a
45 directed trustee is unnecessary to satisfy the needs of directed trust practice.
46

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

15
16 The willful misconduct standard in subsection (b) is to be distinguished from the duty to
17 take reasonable action in subsection (a). The reasonable action rule of subsection (a) applies to
18 the manner by which a trustee complies with a power of direction. The willful misconduct
19 standard of subsection (b) applies to the decision of whether to comply with a power of direction.

20
21 The willful misconduct standard in subsection (b) is a mandatory minimum. The terms of
22 a trust may not reduce a trustee’s duty below the standard of willful misconduct. Terms of a trust
23 that attempt to give a trustee no duty or to indicate that a trustee is not a fiduciary or is an
24 “excluded fiduciary” are not enforceable under subsection (b). Instead, such provisions would
25 provide for the willful misconduct standard of subsection (b).

26
27 *Powers to veto or approve.* The terms of a trust may give a trust director a power to veto
28 or approve the actions of a trustee. The trustee, for example, may have the power to invest trust
29 property, subject to the power of a trust director to review and override the trustee’s decision. A
30 trustee that operates under this kind of veto or approval power has the normal duties of a trustee
31 regarding the trustee’s exercise of its own powers, but has only the duties of a directed trustee
32 regarding the trust director’s exercise of its power to veto or approve. The trustee would be
33 subject to the normal duty of prudence in deciding which investments to propose to a director,
34 for example, but then would be subject only to the willful misconduct rule for a directed trustee
35 under this section in choosing whether to comply with the director’s veto or disapproval of the
36 proposed investments.

37
38 *Subsection (c)—release by trust director.* The terms of a trust may empower a trust
39 director to release a trustee or another trust director from liability for breach of trust. If the
40 director grants such a release, the trustee or other director is not liable to the extent of the release.
41 The terms of a trust may enable such a release to be given at any time, whether before or after
42 the trustee or other director acts. Under Section 6(b), which provides that a trust director has only
43 those powers granted by the terms of a trust, the precise scope of a power of release and the
44 manner of its exercise must be determined based on the terms of the trust.

1 Although this act generally permits a settlor to design a power of direction as it wishes,
2 subsection (c) provides three mandatory safeguards that limit a director’s power to release a
3 trustee or other director from liability. First, consistent with the policy of subsection (b), a trustee
4 or other director cannot be released for a breach that involves the trustee’s or the other director’s
5 own willful misconduct. Second, consistent with prevailing law governing a release of a trustee
6 by a beneficiary, a release by a trust director is not enforceable if it was procured by the
7 improper conduct of the trustee or other director. Third, again consistent with prevailing law
8 governing a release of a trustee by a beneficiary, a release by a trust director is not enforceable if
9 at the time of the release the director did not know of the material facts relating to the breach.
10 The drafting committee based the second and third of these safeguards on Uniform Trust Code §
11 1009 (2001), which is similar in substance to Restatement (Third) of Trusts § 97 (2012).
12

13 *Subsection (d)—petition for instructions.* Subsection (d) provides that a directed trustee
14 that has reasonable doubt about its duty under this section may petition the court for instructions.
15 This section thus confirms that, in accordance with existing law, a trustee with reasonable doubt
16 about its duties under this section may petition the court for instructions. The requirement that a
17 trustee’s doubt be “reasonable” follows from Restatement (Third) of Trusts § 71 (2007), which
18 provides: “A trustee or beneficiary may apply to an appropriate court for instructions regarding
19 the administration or distribution of the trust if there is reasonable doubt about the powers or
20 duties of the trusteeship or about the proper interpretation of the trust provisions.”
21

22 The safe harbor of this subsection is permissive rather than mandatory. Though a trustee
23 may satisfy its duties by petitioning for instructions, this subsection does not, by itself, require a
24 trustee to petition.
25

26 *Subsection (e)—no ceiling on duties.* Subsection (e) confirms that the duties prescribed
27 by this section are merely defaults and minimums, not ceilings. The terms of a trust may impose
28 further duties in addition to those prescribed by this section.
29

30 **SECTION 10. DUTY TO PROVIDE INFORMATION TO TRUST DIRECTOR**

31 **OR TRUSTEE.**

32 (a) Subject to Section 11, a trustee shall provide information to a trust director to the
33 extent the information is reasonably related both to:

34 (1) the powers or duties of the trustee; and

35 (2) the powers or duties of the director.

36 (b) A trust director shall provide information to a trustee or another trust director to the
37 extent the information is reasonably related both to:

38 (1) the powers or duties of the director; and

1 (2) the powers or duties of the trustee or other director.

2 (c) A trustee that acts in reliance on information provided by a trust director is not liable
3 for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the
4 trustee engages in willful misconduct.

5 (d) A trust director that acts in reliance on information provided by a trustee or another
6 trust director is not liable for a breach of trust to the extent the breach resulted from the reliance,
7 unless by so acting the trust director engages in willful misconduct.

8 **Comment**
9

10 *Subsections (a) and (b)—Duty to provide information.* This section imposes a duty on a
11 trustee and a trust director to provide information to each other. Subsection (a) imposes this duty
12 on a directed trustee, and subsection (b) imposes this duty on a trust director. The drafting
13 committee contemplated that the duties created by this section would provide trust directors and
14 trustees with sufficient information to fulfill their obligations under trust law as well as other
15 law, including banking regulation, securities regulation, and tax law.
16

17 *Disclosure to beneficiaries.* This section governs disclosure of information to trustees and
18 trust directors rather than to beneficiaries. The duty of a trust director to disclose information to a
19 beneficiary is governed by Section 8, which prescribes the fiduciary duties of a trust director.
20 The duty of a trustee to disclose information to a beneficiary is governed by the background law
21 of an enacting state under Section 4 as modified by Section 11, which limits a directed trustee's
22 duty to inform a beneficiary about the actions of a trust director.
23

24 *Reasonableness.* This section relies heavily on the concept of reasonableness.
25 Information must be disclosed only if it is reasonably related both to the powers or duties of the
26 person making the disclosure and to the powers or duties of the person receiving the disclosure.
27 The information must be reasonably related to the powers or duties of the person making the
28 disclosure, because otherwise that person cannot be expected to possess the information. The
29 information must also be reasonably related to the powers or duties of the person receiving the
30 disclosure, because otherwise that person would not need the information. Examples of matters
31 that might require disclosure under this section include asset valuations, modifications to the
32 terms of a trust, changes to investment policy or strategy, distributions, changes in accounting
33 procedure or valuations, and removal or appointment of trustees and trust directors.
34

35 *An affirmative and a responsive duty to inform.* This section imposes an affirmative duty
36 to provide information (even in the absence of a request for that information) as well as a
37 responsive duty to reply to requests for information. For example, if a trust director exercises a
38 power to modify the terms of a trust, the director would have an affirmative duty to inform the
39 trustees and other trust directors whose powers or duties are reasonably related to the amendment

1 whether or not the trustees or other trust directors inquired about it. Similarly, the director would
2 have a responsive duty to provide information about the amendment upon a request by a trustee
3 or another trust director whose powers or duties were reasonably related to the amendment.
4

5 *Interaction with Section 11.* The duty in subsection (a) of a trustee to disclose information
6 is subject to the limitations on a directed trustee's duty in Section 11. Thus, although a trustee
7 has a duty under this section to disclose information about the actions of a trust director if the
8 information is related to both the duties of the trustee and the duties of the director, a trustee does
9 not have a duty to inform or give advice to a trust director concerning instances in which the
10 trustee would have exercised another trust director's powers differently. If, for example, one trust
11 director has a power to direct investments and another trust director has a power to allocate
12 between principal and income, the trustee would have a duty under this section to disclose the
13 contents of the trust's investment portfolio to both directors. But the trustee would not have a
14 duty to advise the director with the power over principal and income that the director with the
15 power over investments has exercised its power unwisely.
16

17 *Shelton v. Tamposi.* In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), the terms of the
18 trust left distribution in the hands of the trustee, but shifted power over investment to a trust
19 director (the "investment director"). As a result, the trustee could not liquidate investments to
20 raise the cash necessary to fund a distribution to one of the beneficiaries. Under subsection (b),
21 the trust director would have been under a duty to give the trustee information about the effects
22 of the director's investment program on the trust's cash position, and the trustee would have been
23 under a duty to give the director information about the cash requirements of the trustee's
24 distribution program. Moreover, in making and implementing the investment program, under
25 Section 8(a) the trust director would be subject to the same duties as a similarly situated trustee,
26 just as the trustee would be subject to the duties of a trustee in making and implementing the
27 distribution program.
28

29 *Mandatory floor, not ceiling.* This section imposes a mandatory floor, rather than a
30 ceiling, on a directed trustee's and a trust director's duty to share information. The terms of a
31 trust may specify more extensive duties of information sharing among directed trustees and trust
32 directors.
33

34 *Subsections (c) and (d)*—Subsection (c) provides a safe harbor for a trustee that acts on
35 information provided by a trustee. Subsection (d) provides a similar safe harbor for a trust
36 director. In both subsections, the safe harbor only applies if a trustee or trust director that acts in
37 reliance on information is not engaged in willful misconduct. For example, subsection (c)
38 protects a trustee if the trustee acts in reliance on a trust director's valuation of an asset, unless
39 by accepting the valuation the trustee would engage in willful misconduct. The logic of the safe
40 harbor parallels the logic for the willful misconduct standard in section 9. The safe harbor
41 implements the division of labor established by a settlor by not holding a trustee or director fully
42 responsible for information that it receives from another person. The safe harbor extends to a
43 trust director as well as a trustee in recognition of the fact that the same policy logic that applies
44 to a trustee also applies to a trust director. In either case, a person ought not to face full fiduciary
45 liability for acting on information that came from another person.
46

1 **SECTION 11. NO DUTY TO MONITOR, INFORM, OR ADVISE.**

2 (a) Unless the terms of a trust provide otherwise:

3 (1) a trustee does not have a duty to:

4 (A) monitor a trust director; or

5 (B) inform or give advice to a settlor, beneficiary, trustee, or trust director

6 concerning an instance in which the trustee might have acted differently than the director; and

7 (2) by taking an action described in paragraph (1), a trustee does not assume the
8 duty excluded by paragraph (1).

9 (b) Unless the terms of a trust provide otherwise:

10 (1) a trust director does not have a duty to:

11 (A) monitor a trustee or another trust director; or

12 (B) inform or give advice to a settlor, beneficiary, trustee, or another trust

13 director concerning an instance in which the director might have acted differently than a trustee

14 or another trust director; and

15 (2) by taking an action described in paragraph (1), a trust director does not assume
16 the duty excluded by paragraph (1).

17 **Comment**

18 *Following existing statutes.* Subsection (a) provides that a trustee does not have a duty to
19 monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director
20 concerning instances in which the trustee might have acted differently than the director.
21 Subsection (b) applies the same rule to a trust director regarding the actions of a trustee or
22 another trust director. Many existing state statutes are to similar effect, though the language in
23 this section is simpler and more direct.

24
25 The existing statutes on which this section is based were meant to reverse the result in
26 *Rollins v. Branch Banking & Trust Company of Virginia*, 56 Va. Cir. 147 (2002), in which the
27 court considered the liability of a trustee that was subject to direction in investment. The court
28 declined to hold the trustee liable for the investment director's failure to direct diversification of
29 the trust's investments, but the court nevertheless held the trustee liable for failing to advise the

1 beneficiaries about the risks of the investment director’s actions.

2
3 *Survival of trustee’s general duty of disclosure.* Although this section confirms that a
4 directed trustee has no duty to monitor a trust director or inform or give advice to others
5 concerning instances in which the trustee might have acted differently than the director, this
6 section does not relieve a trustee of its ordinary duties to disclose and report under otherwise
7 applicable law such as under Uniform Trust Code § 813 (2004) or Restatement (Third) of Trusts
8 § 82 (2007). The same is true for a trust director, on whom Section 8(a) imposes the fiduciary
9 duties of a trustee regarding the director’s powers.

10
11 For example, if a trust director has a power to direct investments, this section would
12 relieve a directed trustee of any duty to advise a beneficiary about the risks of a director’s
13 decision to concentrate the investment portfolio. The trustee would remain under a duty,
14 however, to make periodic reports or accountings to the beneficiary and to answer reasonable
15 inquiries by the beneficiary about the administration of the trust to the extent required by
16 otherwise applicable law. The trustee would also remain under the duty imposed by Section 10 to
17 provide any trust directors with information reasonably related to their powers or duties.

18
19 *No assumption of duty.* In addition to waiving a directed trustee’s duty to monitor,
20 inform, or give advice as under subsections (a)(1) and (b)(1), many state statutes go further and
21 also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these
22 activities will be deemed to be “administrative actions.” *See, e.g.,* Del. Code Ann. Tit. 12, §
23 3313(e) (2017). The purpose of these provisions is to ensure that if a directed trustee chooses for
24 some reason to monitor, inform, or give advice, the trustee does not assume a continuing
25 obligation to do so or concede a prior duty to have done so. This section dispenses with the
26 opacity of an administrative classification and achieves the intended result more directly through
27 subsections (a)(2) and (b)(2). Subsection (a)(2) provides that if a trustee monitors, informs, or
28 gives advice about the actions of a trust director on one occasion, the trustee does not thereby
29 assume a duty to monitor, inform, or give advice on another occasion. Subsection (b)(2) applies
30 the same rule for a trust director.

31
32 **SECTION 12. APPLICATION TO COTRUSTEE.** The terms of a trust may relieve a
33 cotrustee from duty and liability with respect to another cotrustee’s exercise or nonexercise of a
34 power of the other cotrustee to the same extent that in a directed trust a directed trustee is
35 relieved from duty and liability with respect to a trust director’s power of direction under
36 Sections 9 through 11.

37 **Legislative Note:** A state that has enacted Uniform Trust Code Section 703(c) or (g) (2000)
38 should revise those sections to make them subject to this section. In the alternative, the state
39 could insert this section as subsection (i) in Uniform Trust Code Section 703 and make
40 subsections (c) and (g) subject to that new subsection (i).

1 **Comment**

2 *Cotrusteeship by default.* Under this section the default rule is that, if a settlor names
3 cotrustees, the traditional law of cotrusteeship applies. The fiduciary duties of directed
4 trusteeship will only apply to a cotrustee if the terms of the trust manifest such an intent.
5

6 *Settlor autonomy.* Under traditional law, each cotrustee “has a duty to use reasonable care
7 to prevent a co-trustee from committing a breach of trust and, if a breach of trust occurs, to
8 obtain redress.” Restatement (Third) of Trusts § 81(2) (2007). This rule applies even if the settlor
9 limits the role or function of one of the cotrustees. “Even in matters for which a trustee is
10 relieved of responsibility, . . . if the trustee knows that a co-trustee is committing or attempting to
11 commit a breach of trust, the trustee has a duty to take reasonable steps to prevent the fiduciary
12 misconduct.” *Id.* cmt. b. Moreover, “even in the absence of any duty to intervene or grounds for
13 suspicion, a trustee is entitled to request and receive reasonable information regarding an aspect
14 of trust administration in which the trustee is not required to participate.” *Id.* These rules for
15 cotrusteeship contrast with the less demanding fiduciary rules for a directed trusteeship under
16 Sections 9, 10, and 11 of this act.
17

18 This section allows a settlor to choose either fiduciary regime for a cotrusteeship—the
19 traditional rules of cotrusteeship or the more permissive rules of a directed trusteeship. There
20 seems little reason to prohibit a settlor from applying the fiduciary rules of this act to an
21 arrangement that uses the labeling of cotrusteeship given that the settlor could choose the more
22 permissive rules of a directed trusteeship by labeling one of the cotrustees as a trust director and
23 another as a directed trustee. The rationale for permitting the terms of a trust to reduce the duty
24 of a directed cotrustee is thus similar to the rationale for permitting the terms of a trust to reduce
25 the duty of a directed trustee in Section 9. In both instances a trustee must act according to
26 directions from another person and therefore the other person, not the trustee, should bear the full
27 fiduciary responsibility.
28

29 A familiar drafting strategy, for example, is to name cotrustees but also to provide that in
30 the event of disagreement about a particular matter the decision of a specified trustee controls
31 and that the other cotrustee has no liability in that event. Under traditional law, notwithstanding
32 this provision, the other cotrustee would be liable if it did not take reasonable steps to prevent a
33 breach by the controlling cotrustee. Under this section, the other cotrustee would be liable only
34 for its own wilful misconduct akin to a directed trustee if the terms of the trust so provided.
35

36 In summary, by default a cotrustee under this act has the ordinary duties of a cotrustee.
37 However, if the terms of the trust provide otherwise, a cotrustee may have only the duty required
38 by the willful misconduct standard specified in Section 9 with respect to another cotrustee’s
39 exercise or nonexercise of a power of that other cotrustee. If the terms of a trust indicate that a
40 directed cotrustee is to have no duty or is not a fiduciary, then the effect will be to reduce the
41 cotrustee’s duty to the willful misconduct standard of Section 9, just as similar language would
42 for a directed trustee.
43

44 *Mechanics of choosing directed trustee duties.* Whether this section applies to a given
45 trust is a question of construction. This section does not impose a requirement of express

1 reference to this section or to this act. Under Section 3(a), this section applies to a trust created
2 before the effective date of this act, but only as to a decision or action on or after that date.
3

4 *Cotrustees as directed trustees and trust directors.* The terms of a trust can place a
5 cotrustee in a position of either giving direction, like a trust director, or taking direction, like a
6 directed trustee. This section only applies to a cotrustee that takes direction. This section does
7 not address the duties of a cotrustee that is not directed. Nor does this section address the duties
8 of a cotrustee that gives direction, because under Section 8 the background law of an enacting
9 state applicable to a directing cotrustee is the law applicable to a similarly situated trust director.
10 The drafting committee intended that the language “with respect to a power of another cotrustee”
11 would refer only to a power of another cotrustee and not a power held jointly with the directed
12 cotrustee, because a cotrustee cannot be thought of as taking direction from another cotrustee if
13 the two cotrustees exercise a power jointly.
14

15 *Duty of noncompliance.* Section 9(b) imposes a duty on a directed trustee not to comply
16 with a trust director’s exercise or nonexercise of its power to the extent that by complying the
17 directed trustee would engage in willful misconduct. For a cotrustee, the background law of
18 cotrusteeship already imposes a similar duty not to comply with a direction from a cotrustee that
19 would result in a breach of trust. The effect of this section is not to impose such a duty, since the
20 duty already exists in the background law of cotrusteeship, but rather to permit the terms of a
21 trust to relieve a cotrustee from liability if it complies with a direction from another cotrustee
22 unless by complying the trustee would engage in willful misconduct.
23

24 *No third-party effects.* Although this section changes the degree to which the terms of a
25 trust may reduce a cotrustee’s duty and liability, it does not alter the rules that affect the rights of
26 third parties who contract with or otherwise interact with a cotrustee. The principal difference
27 between cotrusteeship and directed trusteeship is that in a cotrusteeship every cotrustee has title to
28 the trust property, whereas in a directed trusteeship, title to trust property belongs only to the
29 trustee, and not to the trust director. The placement of title can have important consequences for
30 dealings with third parties and for tax, property, financial regulation, and other bodies of law
31 outside of trust law. This section does not change the rights of third parties who deal with a
32 cotrustee in the cotrustee’s capacity as such.
33

34 **SECTION 13. LIMITATION OF ACTION AGAINST TRUST DIRECTOR.**

35 (a) An action against a trust director for breach of trust must be commenced within the
36 same limitation period as an action for breach of trust against a trustee in a like position and
37 under similar circumstances[as under Uniform Trust Code Section 1005].

38 (b) A report or accounting has the same effect on the limitation period for an action
39 against a trust director for breach of trust that the report or accounting would have in an action
40 for breach of trust against a trustee in a like position and under similar circumstances[under

1 Uniform Trust Code Section 1005].

2 **Legislative Note:** *A state that has enacted Uniform Trust Code Section 1005 (2000) should*
3 *update the bracketed language to refer to that enactment. A state that has enacted a statute other*
4 *than Uniform Trust Code Section 1005 to govern limitation of an action against a trustee should*
5 *replace the bracketed language with a cross reference to that statute. A state that has not*
6 *enacted a statutory limitation should delete the bracketed language.*

7 **Comment**

8 This section absorbs for a trust director the law of an enacting state governing limitations
9 on an action against a trustee. Whether the law is default or mandatory as applied to a trust
10 director is determined by whether it is default or mandatory as applied to a trustee. A limitation
11 applies to a trust director as it would to a trustee “in a like position and under similar
12 circumstances.”

13
14 Subsection (a) extends to a trust director the same limits on liability that a trustee enjoys
15 under the law of an enacting state by way of a statutory limitations period, such as under
16 Uniform Trust Code § 1005(c) (2000). The limitations period absorbed by subsection (a) applies
17 to all claims against a trust director for breach of trust, whether by a beneficiary, a trustee,
18 another trust director, or some other party.

19
20 Subsection (b) extends to a trust director the same limitation period that a trustee enjoys
21 under the law of an enacting state arising from the making of a report or accounting, such as
22 under Uniform Trust Code § 1005(a)–(b) (2000). The rule of subsection (b) applies regardless of
23 whether the report or accounting was made by the trust director. A trust director may therefore
24 be protected by a report or accounting made by a trustee or another trust director even though the
25 director did not make the report or accounting, so long as the report or accounting fairly
26 discloses the relevant facts of the director’s conduct.

27
28 Laches, which strictly speaking is an equitable defense rather than a limitations period, is
29 made applicable to an action against a trust director by Section 14.

30
31 **SECTION 14. DEFENSES IN ACTION AGAINST TRUST DIRECTOR.** In an

32 action against a trust director for breach of trust, the director may assert the same defenses a
33 trustee in a like position and under similar circumstances could assert in an action for breach of
34 trust against the trustee.

35 **Comment**

36
37 *Absorption.* This section makes available to a trust director the same defenses that are
38 available to a trustee in a like position and under similar circumstances in an action for breach of
39 trust. A trust director can assert any defense that would be available to a trustee in a comparable
40 action for breach of trust under existing state law, including:

- 1 • *laches or estoppel* (see Restatement (Third) of Trusts § 98 (2012));
- 2 • *beneficiary consent, release, or ratification* (see Uniform Trust Code § 1009 (2001);
- 3 Restatement (Third) of Trusts § 97(b)–(c) (2012));
- 4 • *reasonable reliance on the terms of a trust* (see Uniform Trust Code § 1006 (2000);
- 5 Uniform Prudent Investor Act § 1(b) (1994)); and
- 6 • *reasonable care in ascertaining the happening of an event affecting administration or*
- 7 *distribution* (see Uniform Trust Code § 1007 (2000); Restatement (Third) of Trusts §
- 8 76 cmt. f (2007)).
- 9

10 *Exculpation or exoneration.* The comments to Section 8 address the effect of an
11 exculpation or exoneration clause on the duty and liability of a trust director.

12
13 *Attorney’s fees and indemnification.* Attorney’s fees and indemnification for a trust
14 director are governed by Section 6(c)(1), which establishes a default rule that allows a trust
15 director to exercise “any further power appropriate to the exercise or nonexercise of the
16 director’s power of direction.” By default, therefore, a trust director has a power to incur
17 attorney’s fees and other expenses and to direct indemnification for them if “appropriate” to the
18 exercise of the director’s express powers.

19
20 **SECTION 15. JURISDICTION OVER TRUST DIRECTOR.**

21 (a) By accepting appointment as a trust director of a trust subject to this [act], the director
22 submits personally to jurisdiction in this state regarding any matter related to a power or duty of
23 the director.

24 (b) This section does not preclude use of another method to obtain jurisdiction over a
25 trust director.

26 **Comment**

27
28 Under subsection (a), by accepting appointment as a trust director of a trust subject to this
29 act, the director submits to the personal jurisdiction of this state with respect to “any matter
30 related to a power or duty of the director.” This subsection does not apply, therefore, to a person
31 that has not accepted appointment as a trust director (the question of whether a person has
32 accepted appointment is governed by Section 16(1)). The drafting committee contemplated that a
33 purported director could contest acceptance, and therefore jurisdiction, in the normal course of a
34 judicial proceeding in which the matter arose, as under Fed. R. Civ. P. § 12 (b)(2).

35
36 Jurisdiction over a person that has accepted appointment as trust director is mandatory.
37 The terms of a trust or an agreement among the trust director and other parties cannot negate
38 personal jurisdiction over a trust director under this section. However, this section does not
39 preclude a court from declining to exercise jurisdiction under the doctrine of forum non
40 conveniens.

1 Subsection (b) confirms that subsection (a) does not prescribe the exclusive method of
2 obtaining jurisdiction over a trust director.

3
4 **SECTION 16. OFFICE OF TRUST DIRECTOR.** Unless the terms of a trust provide
5 otherwise, the rules applicable to a trusteeship apply to a trust directorship regarding the
6 following matters:

7 (1) acceptance[under Uniform Trust Code Section 701];

8 (2) giving of bond to secure performance[under Uniform Trust Code Section 702];

9 (3) reasonable compensation[under Uniform Trust Code Section 708];

10 (4) resignation[under Uniform Trust Code Section 705];

11 (5) removal[under Uniform Trust Code Section 706]; and

12 (6) vacancy and appointment of successor[under Uniform Trust Code Section 704].

13 **Legislative Note:** *A state that has enacted the Uniform Trust Code provisions cited in this*
14 *section should update the bracketed language to refer to the appropriate provisions of that*
15 *enactment. A state that has enacted relevant statutory provisions other than the provisions of the*
16 *Uniform Trust Code cited in this section should replace the bracketed language with cross*
17 *references to those provisions, except that a state that allows statutory commissions rather than*
18 *reasonable compensation for a trustee is advised for the reasons given in the comments below to*
19 *apply a rule of reasonable compensation to a trust director. A state that has not enacted relevant*
20 *statutory provisions should delete the bracketed language.*

21 22 **Comments**

23 This section applies the law of trusteeship to a trust directorship with regard to seven
24 subjects. The default or mandatory character of the law as applied to a trusteeship governs
25 whether the law is default or mandatory as applied to a trust directorship.

26
27 *Paragraph (1)—acceptance.* This paragraph absorbs an enacting state’s law governing
28 acceptance of a trusteeship, such as under Uniform Trust Code § 701(a)–(b) (2000) or
29 Restatement (Third) of Trusts § 35 (2003), for application to acceptance of a trust directorship.
30 The application of this law to a trust director is, however, likely to be more varied than its
31 application to a trustee. Whereas a trustee is expected to participate actively in the administration
32 of the trust, signaling acceptance by conduct, some trust directors, such as a director with a
33 power to determine the settlor’s competence, may not take any action for long stretches of time,
34 if ever.

1 *Paragraph (2)—bond.* This paragraph absorbs an enacting state’s law governing bond to
2 secure performance by a trustee, such as under Uniform Trust Code § 702(a)–(b) (2000) and
3 Restatement (Third) of Trusts § 34(3) (2003), for application to bond by a trust director. The
4 drafting committee assumed that bond would seldom be required for a trust director, as in the
5 usual case the director would not have custody of the trust property.
6

7 *Paragraph (3)—reasonable compensation.* This paragraph absorbs an enacting state’s
8 law governing reasonable compensation of a trustee, such as under Uniform Trust Code § 708
9 (2000) and Restatement (Third) of Trusts § 38 cmt. i (2003), for application to compensation of a
10 trust director. The drafting committee contemplated that, just as in total “the reasonable fees for
11 multiple trustees may be higher than for a single trustee,” *id.*, so too the total reasonable fees for
12 a trust with a directed trustee and a trust director may be higher than for a single trustee.
13

14 On the other hand, reasonable compensation for a trust director will vary based on the
15 nature of the director’s powers, and in some circumstances may well be zero. Moreover, the
16 reasonable compensation of a directed trustee is likely to be less than that for a trustee that is not
17 directed. An apt analogy is to a trustee that hires others to “render services expected or normally
18 to be performed by the trustee.” Restatement (Third) of Trusts § 38 cmt. c(1) (2003); *see also*
19 Uniform Prudent Investor Act § 9 cmt. (1994) (“If, for example, the trustee’s regular
20 compensation schedule presupposes that the trustee will conduct the investment management
21 function, it should ordinarily follow that the trustee will lower its fee when delegating the
22 investment function to an outside manager.”).
23

24 *Paragraph (4)—resignation.* This paragraph absorbs an enacting state’s law governing
25 resignation by a trustee, such as under Uniform Trust Code § 705 (2001) and Restatement
26 (Third) of Trusts § 36 (2003), for application to resignation by a trust director.
27

28 *Paragraph (5)—removal.* This subsection absorbs an enacting state’s law governing
29 removal of a trustee, such as under Uniform Trust Code § 706 (2000) and Restatement (Third) of
30 Trusts § 37 cmt. e (2003), for application to removal of a trust director.
31

32 *Paragraph (6)—vacancy.* This section absorbs an enacting state’s law applicable to a
33 vacancy in a trusteeship for application to a vacancy in a trust directorship. For example, under
34 Uniform Trust Code § 704 (2004), “a vacancy in a trusteeship need not be filled” if “one or more
35 cotrustees remain in office.” So too, if three of five trust directors with a joint power to
36 determine the settlor’s capacity remain in office, the court “need not” fill the vacancies, though
37 the vacancies should be filled if doing so would be more consistent with the settlor’s plan.
38 Likewise, if the sole trust director with power over investment of the trust property ceases to
39 serve, in most circumstances the vacancy should be filled, and this is true even if other directors
40 with unrelated powers remain in office. An apt analogy is to a trust with several cotrustees, each
41 of whom has controlling authority over different aspects of the trust’s administration. If any of
42 those trustees ceased to serve, in many circumstances a court should appoint a successor even
43 though other cotrustees remain in office.
44

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

1 **SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
2 applying and construing this uniform act, consideration must be given to the need to promote
3 uniformity of the law with respect to its subject matter among states that enact it.

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

10 **SECTION 19. REPEALS; CONFORMING AMENDMENTS.**

11 (a)

12 (b)

13 (c)

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