

D R A F T  
FOR DISCUSSION ONLY

# UNIFORM DIRECTED TRUST ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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March 17-18, 2017 Drafting Committee Meeting

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February 24, 2017

## **UNIFORM DIRECTED TRUST ACT**

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1 **PREFATORY NOTE**

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

14 Under the Uniform Directed Trust Act, a power over a trust held by a nontrustee is called  
15 a “power of direction.” The holder of a power of direction is called a “trust director.” A trustee  
16 that is subject to a power of direction is called a “directed trustee.” The main contribution of the  
17 act is to address the many complications created by giving a power of direction to a trust  
18 director, including the fiduciary duty of a trust director (Section 8) and the fiduciary duty of a  
19 directed trustee (Sections 9 and 11).  
20

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

29 *Structure of the Act.* The heart of the Uniform Directed Trust Act appears in Sections 5  
30 through 11, which address the powers and duties of a trust director and directed trustee. Sections  
31 5 through 8 address the kinds of powers that the terms of a trust can grant to a trust director and  
32 the resulting default and mandatory fiduciary duties of the director. Sections 9 through 11  
33 address the fiduciary duty of a directed trustee, prescribing the ways in which the existence of a  
34 power of direction in a trust director changes the trustee’s powers and duties. Section 12  
35 addresses the relationship between a directed trust and a trust with cotrustees. The remaining  
36 sections address a variety of important technical issues in the administration of a directed trust,  
37 including rules of construction for recurring matters that might be overlooked in the drafting of a  
38 directed trust, and in this act’s relationship to existing law.  
39

40 *Fiduciary Duty in a Directed Trust.* Under the Uniform Directed Trust Act, a trust  
41 director has the same default and mandatory fiduciary duties with respect to a power of direction  
42 that would apply to a trustee if a trustee held the same powers (Section 8), and a directed trustee  
43 is liable only for the trustee’s own “willful misconduct” (Section 9). The drafting committee  
44 reasoned that, as regards a power of direction, the trust director functions much like a trustee in

1 an undirected trust and thus should have the same duties as a trustee in the exercise or  
2 nonexercise of the director’s power of direction. To facilitate the settlor’s intent that the trust  
3 director be the primary or even sole decisionmaker as regards a power of direction, the fiduciary  
4 duty of the trustee is reduced with respect to issues over which the director holds the power of  
5 direction.

6  
7 In preserving some minimal fiduciary duty in the directed trustee, the drafting committee  
8 was influenced by the prominent directed trust statute in Delaware, which does likewise. *See*  
9 Del. Code Ann. tit. 12, § 3313 (2016). The popularity of directed trusts in Delaware establishes  
10 that a directed trust statute that preserves a “willful misconduct” safeguard is workable in  
11 directed trust practice. The drafting committee therefore declined the suggestion that the  
12 Uniform Directed Trust Act should eliminate completely the fiduciary duty of a directed trustee.

13  
14 In summary, under the Uniform Directed Trust Act a beneficiary’s main recourse for  
15 misconduct by a trust director is an action against the director for breach of the director’s  
16 fiduciary duty to the beneficiary. The beneficiary also has recourse against the trustee, but only  
17 to the extent of the trustee’s own willful misconduct. Relative to a non-directed trust, the act  
18 increases the total fiduciary duties owed to a beneficiary. All of the usual duties of trusteeship  
19 are preserved in the trust director, and in addition the directed trustee also has a duty to avoid  
20 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 rough terms,  
6 a directed trust is a trust in which a person other than a trustee holds a power to direct 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,” and a trustee that is subject to the  
9 power is called a “directed trustee” (see Section 2(2), (4), and (7)). This act covers any  
10 arrangement that exhibits the functional features of a directed trust, even if the terms of the trust  
11 use other terminology, such as a “trust protector” or a “trust advisor.”  
12

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

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

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

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

21 (4) “Power of direction” means a power over a trust granted by the terms of the trust to a  
22 trust director. The term includes a power over the administration of the trust or the investment,  
23 management, or distribution of the trust property.

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

27 (6) “Terms of a trust” means:

1 (A) the manifestation of a settlor’s intent regarding a trust’s provisions as:

2 (i) expressed in the trust instrument; or

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

5 (B) the trust’s provisions as determined or amended by:

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

7 (ii) court order[; or

8 (iii) nonjudicial settlement agreement under [Uniform Trust Code Section  
9 111]].

10 (7) “Trust director” means a person other than a trustee that is granted a power of  
11 direction by the terms of a trust whether or not the terms of the trust refer to the person as a trust  
12 director, and, subject to Section 5, whether or not the person is a beneficiary or a settlor of the  
13 trust.

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

20 **Comment**

21  
22 (1) *Breach of trust.* The definition of “breach of trust” in paragraph (1) clarifies that the  
23 term “includes” a breach by a trust director of a duty imposed by the terms of a trust, this act, or  
24 other law. Historically, the term has been used to reference a breach of duty by a trustee, as  
25 under Uniform Trust Code § 1001(a) (2000) and Restatement (Third) of Trusts § 93 (Am. Law  
26 Inst. 2012). By expanding the meaning of the term to include a breach of duty by a trust director,  
27 this paragraph resolves any doubt about whether such conduct is also a “breach of trust.” In  
28 defining a breach of trust to include a breach of a duty imposed by this act, it is important to  
29 recognize that some of the duties imposed by this act are default rules that may be varied by the  
30 terms of the trust. The drafting committee contemplated that a trust director or a trustee would  
31 not be in breach of trust for conduct that was authorized by the terms of a trust to the extent that  
32 those terms are permissible under this act or other law.  
33



1           (2) *Directed trustee.* The definition of “directed trustee” in paragraph (2) includes only a  
2 trustee that is subject to a trust director’s power of direction. A trustee that is subject to direction  
3 by a cotrustee is not for that reason a directed trustee, as paragraph (7) excludes a trustee from  
4 the definition of a “trust director.” Because a trustee cannot be a trust director, a trustee that is  
5 subject to direction by a cotrustee is not on that basis a directed trustee under paragraph (2).  
6 Section 12 addresses the relationship between this act and cotrusteeship.

7  
8           (3) *Person.* The definition of “person” in paragraph (3) tracks the current Uniform Law  
9 Commission definition.

10  
11           (4) *Power of direction.* The definition of “power of direction” in paragraph (4) is  
12 expansive. It includes any “power over a trust” held by a trust director. A power of direction may  
13 be structured as a power to direct the trustee in the exercise of the trustee’s powers, for example,  
14 a power to direct the trustee in the investment or management of the trust property. A power over  
15 a trust may also be structured as a power to act independently, for example, by amending the  
16 terms of a trust or releasing a trustee from liability. The definition clarifies that a power of  
17 direction may include a power over “administration” as well as a power over “investment,  
18 management, or distribution of the trust property.” These examples are meant to illustrate the  
19 potential scope of a power of direction; they do not limit it. In using the term “administration,”  
20 the drafting committee intended a meaning at least as broad as in the context of determining a  
21 trust’s “principal place of administration,” such as under Section 3(b). The drafting committee  
22 also intended the terms “investment, management, or distribution” to have a meaning at least as  
23 broad as in Uniform Trust Code § 815(a)(2)(b) (2000), which specifies a trustee’s powers. The  
24 comment to Section 6 provides further examples of the kinds of specific powers that the drafting  
25 committee contemplated would fall within the definition of a power of direction.

26  
27           (5) *State.* The definition of state in paragraph (5) tracks the current Uniform Law  
28 Commission definition.

29  
30           (6) *Terms of a trust.* The definition of “terms of a trust” in paragraph (6) updates the  
31 comparable definition in Uniform Trust Code § 103(18) (2004) to take notice of court orders and  
32 nonjudicial settlement agreements, both of which are of growing practical significance, and  
33 which may sometimes be employed to vary the terms of a trust from a settlor’s original intent. In  
34 so doing, paragraph (6) is consistent with the Restatement, which likewise recognizes the  
35 possibility that the terms of a trust may later be varied from the settlor’s initial expression. *See*  
36 Restatement (Third) of Trusts § 76 cmt. b(1) (Am. Law Inst. 2007) (“References ... to the terms  
37 of the trust ... also refer to trust terms as reformed or modified by court decree, and as modified  
38 by the settlor or others or by consent of all beneficiaries.”) (internal cross-references omitted).  
39 The definition of “terms of a trust” is also consistent with Uniform Trust Decanting Act § 2(28)  
40 (2015), which similarly defines the term to include manifestations of a settlor’s intent “as may be  
41 established by court order or nonjudicial settlement agreement.”

42  
43           (7) *Trust director.* The definition of a “trust director” in paragraph (7) includes any  
44 person other than a trustee who is granted a power of direction by the terms of a trust. A person  
45 other than a trustee that is granted a power over a trust by the terms of the trust is a trust director  
46 even if the terms of the trust or the parties call the person an “adviser” or “protector” or

1 otherwise purport to disclaim trust director status. A person may also be a trust director even if  
2 the person is a beneficiary or settlor of the trust, though certain powers of a beneficiary and a  
3 settlor are excluded by Section 5. The definition of “trust director” does not include a trustee.  
4 Relations between multiple trustees are governed by the law of cotrusteeship, subject to Section  
5 12, which enables a settlor by the terms of a trust to relieve a cotrustee from liability in a manner  
6 similar to a directed trustee under certain circumstances.

7  
8 **SECTION 3. APPLICATION; PRINCIPAL PLACE OF ADMINISTRATION.**

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

11 (1) If the trust was created before or on [the effective date of this [act]], this [act]  
12 applies only to decisions or actions occurring after that date.

13 (2) As to a trust whose principal place of administration is changed to this state on  
14 or after [the effective date of this [act]], this [act] applies only to decisions or actions occurring  
15 after the change.

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

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

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

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

24 **Legislative Note:** *A state that has adopted Uniform Trust Code Section 108(a) (2000) could omit*  
25 *subsection (b) and instead add subsection (b)(2) to Section 108 of the state’s Uniform Trust*  
26 *Code.*

27 **Comment**

28  
29 *Subsection (a).* Subsection (a) addresses two matters. First, because powers and duties in  
30 a directed trust are matters of trust administration, *see* Restatement (Second) of Conflict of Laws

1 § 271 cmt. a (Am. Law Inst. 1971), this subsection follows the prevailing conflict of laws rule by  
2 linking application of this act to the trust’s principal place of administration. As with other  
3 matters of administration, the parties are protected against inconsistent court orders by the  
4 common law principle of “primary supervision.” *See id.* § 267 cmt. e.  
5

6 Second, this subsection applies this act to a trust administered in an enacting state  
7 regardless of whether the trust was in existence on the effective date of this act. However, under  
8 subsections (a)(1) and (2), this act applies only with respect to decisions or actions occurring  
9 after the effective date or, if the trust’s principal place of administration was changed to the  
10 enacting state after the effective date, only with respect to decisions or actions occurring after  
11 that change. Because some of the standards of conduct prescribed by this act depart from  
12 Uniform Trust Code § 808 (2000) and the common law as codified by Restatement (Third) of  
13 Trusts § 75 (Am. Law Inst. 2007), the drafting committee reasoned that the act should apply  
14 prospectively, following the model of Uniform Prudent Investor Act § 11 (1994).  
15

16 *Subsection (b).* Subsection (b), which derives from Uniform Trust Code § 108(a) (2000),  
17 establishes a safe harbor for a settlor’s designation of a trust’s principal place of administration.  
18 Such a designation is valid if (1) a trustee is located in the designated jurisdiction, (2) a trust  
19 director is located in the designated jurisdiction, or (3) at least some of the trust administration  
20 occurs in the designated jurisdiction. Subsections (b)(1) and (b)(3) reproduce without change the  
21 safe harbor prescribed by Uniform Trust Code § 108(a) (2000). Subsection (b)(2) expands the  
22 safe harbor of Section 108(a) to include the location of a trust director, in addition to the location  
23 of a trustee, as a sufficient connection with the designated jurisdiction. Other than this expansion  
24 in subsection (b)(2), the drafting committee followed the Uniform Trust Code in “not  
25 attempt[ing] to further define principal place of administration.” Uniform Trust Code § 108 cmt.

26 **SECTION 4. LAW AND PRINCIPLES OF EQUITY.** The law and principles of  
27 equity of this state supplement this [act], except to the extent modified by this [act] or law of this  
28 state other than this [act].

#### 29 **Comment**

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

1           **SECTION 5. EXCLUSIONS.**

2           (a) In this section, “power of appointment” means a power that enables a person in a  
3 nonfiduciary capacity to designate a recipient of an ownership interest in or a power of  
4 appointment over trust property.

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

6                   (1) a power of appointment;

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

8                   (3) a power of a settlor over a trust to the extent the settlor has a power to revoke  
9 the trust;

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

13                  (5) a power over a trust to the extent the power must be held in a nonfiduciary  
14 capacity to achieve the settlor’s tax objectives under the United States Internal Revenue Code of  
15 1986[, as amended][, and regulations issued thereunder].

16           (c) Unless the terms of the trust indicate a contrary intent, a power granted to a person  
17 other than a trustee to designate a recipient of an ownership interest in or a power of appointment  
18 over trust property is a power of appointment and not a power of direction.

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

22  
23 *A state that does not permit the phrase “as amended” when incorporating federal statutes, or*  
24 *that does not permit reference to “regulations issued thereunder,” should delete the bracketed*  
25 *language in subsection (b)(5).*  
26

1 **Comment**

2 This section excludes five categories of powers that the drafting committee concluded  
3 should not be covered by this act for reasons of policy, coverage by other law, or both. A power  
4 that falls within one of these exclusions is governed by law other than this act.  
5

6 (1) *Power of appointment.* Subsection (b)(1) excludes a “power of appointment,” which  
7 is defined by subsection (a) to mean “a power that enables a person in a nonfiduciary capacity to  
8 designate a recipient of an ownership interest in or a power of appointment over trust property.”  
9 This definition of “power of appointment” is based on the definition in Uniform Powers of  
10 Appointment Act § 102(13) (2013). The definition is consistent with what Restatement (Third)  
11 of Property: Wills and Other Donative Transfers § 17.1 cmt. g (Am. Law Inst. 2011), refers to as  
12 a “discretionary” power of appointment, that is, one in which “the donee may exercise the power  
13 arbitrarily as long as the exercise is within the scope of the power.”  
14

15 In consequence of this exclusion, the terms of a trust may grant to a person a  
16 nonfiduciary power over distribution of the trust property—that is, a power of appointment—  
17 without that person becoming a trust director subject to this act. A nonfiduciary power of  
18 appointment, which may be exercised arbitrarily within the scope of the power, is governed by  
19 other law such as the Uniform Powers of Appointment Act (2013) and Restatement (Third) of  
20 Property: Wills and Other Donative Transfers §§ 17.1–23.1 (Am. Law Inst. 2011).  
21

22 The exclusion of subsection (b)(1) applies only to a nonfiduciary power of appointment.  
23 If the terms of a trust indicate that a power over distribution is held in a fiduciary capacity, then  
24 the power is not a power of appointment and is not excluded from this act. In the hands of a  
25 person other than a trustee, such a fiduciary power of distribution would be a power of direction.  
26

27 To resolve doubt about whether a power over distribution granted to a person other than a  
28 trustee falls within the exclusion of subsection (b)(1), subsection (c) prescribes a rule of  
29 construction under which such a power is a power of appointment, and so is not held in a  
30 fiduciary capacity, unless the terms of the trust indicate otherwise.  
31

32 A power in a trustee to designate a recipient of an ownership interest in or a power of  
33 appointment over trust property can never be a power of direction, because a trustee can never be  
34 a trust director (see Section 2(4) and (7)). Such a power is a fiduciary distributive power or a  
35 power of appointment or depending on the intent of the settlor. *See, e.g.*, Restatement (Third) of  
36 Trusts § 50 cmt. a (Am. Law Inst. 2003).  
37

38 (2) *Power to appoint or remove.* Subsection (b)(2) excludes “a power to appoint or  
39 remove a trustee or trust director.” This exclusion addresses the compelling suggestion to the  
40 drafting committee that such a power, at least as regards a trustee, is normal and customary in  
41 drafting practice and arose separately from the phenomenon of directed trusts. Under prevailing  
42 law, the only limit on the exercise of a power to appoint or remove a trustee is that it “must  
43 conform to any valid requirements or limitations imposed by the trust terms.” Restatement  
44 (Third) of Trusts § 37 cmt. c (Am. Law Inst. 2003). If the terms of the trust do not impose any  
45 requirements or limitations on the power to remove, then “it is unnecessary for the holder to

1 show cause” before exercising the power. Austin Wakeman Scott, William Franklin Fratcher &  
2 Mark L. Ascher, *Scott and Ascher on Trusts* § 11.10.2 (5th ed. 2006).

3  
4 (3) *Revocable trust.* Subsection (b)(3) excludes a power of a settlor over a trust to the  
5 extent the settlor has a power to revoke the trust.

6  
7 Because the settlor of a revocable trust may at any time revoke the trust and take back the  
8 trust property, under modern law the trustee’s duties run to the settlor rather than to the  
9 beneficiaries. *See* Uniform Trust Code § 603(a) (2004). The trustee must “comply with a  
10 direction of the settlor even though the direction is contrary to the terms of the trust or the  
11 trustee’s normal fiduciary duties.” Restatement (Third) of Trusts § 74(1)(a)(i) (Am. Law Inst.  
12 2007). Without the exclusion of this subsection, Section 6(b) could have been read to transform  
13 all powers retained by a settlor in a revocable trust into fiduciary powers of a trust director and to  
14 subject the trustee to the modified fiduciary duties under Sections 9 through 11.

15  
16 To the extent that a conservator or agent of the settlor may exercise the settlor’s power to  
17 revoke, as under Uniform Trust Code § 602(e)–(f) (2001), this subsection would apply to the  
18 conservator or agent. A nonfiduciary power in a person other than the settlor to withdraw the  
19 trust property is a power of appointment that would fall within subsection (b)(1).

20  
21 (4) *Power of a beneficiary.* Paragraph (4) excludes a power of a beneficiary to the extent  
22 that the exercise or nonexercise of the power affects only the interest of the beneficiary (or the  
23 interest of another beneficiary who is represented by the beneficiary under applicable virtual  
24 representation law). This exclusion follows traditional law, under which “[a] power that is for the  
25 sole benefit of the person holding the power is not a fiduciary power.” Restatement (Third) of  
26 Trusts § 75 cmt. d (Am. Law Inst. 2007).

27  
28 By contrast, if the exercise or nonexercise of a power held by a beneficiary (other than by  
29 virtual representation) affects the interests of another beneficiary, and the power is otherwise a  
30 power of direction, then under this act the beneficiary is a trust director subject to the standards  
31 of conduct prescribed by this act to the extent of the effect on the other beneficiary’s interests.

32  
33 For example, a power in a beneficiary to release a trustee from a claim by the beneficiary  
34 is excluded from this act. But a power in a beneficiary to release the trustee from a claim by  
35 another beneficiary (other than by virtual representation) is a power of direction, and the  
36 beneficiary would be a trust director to the extent the beneficiary’s power to release the trustee  
37 affects the claims of the other beneficiary.

38  
39 The same is true if the beneficiary’s power is jointly held. Thus, for example, if the terms  
40 of a trust provide that a trustee may be released from liability by a majority of the beneficiaries,  
41 and a majority of the beneficiaries grants such a release, then those beneficiaries would be acting  
42 as trust directors to the extent the release affected the interests of other beneficiaries not bound  
43 by virtual representation. This act would therefore reverse the result in *Vena v. Vena*, 899 N.E.2d  
44 522 (Ill. App. 2008), which refused to enforce such a provision on the grounds that the minority  
45 beneficiaries did not have recourse against the majority for an abusive release. Under this act, by  
46 contrast, the minority beneficiaries would have recourse against the majority for breach of

1 fiduciary duty.

2

3 (5) *The settlor's tax objectives.* Subsection (b)(5) excludes a power to the extent the  
4 power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under  
5 federal tax law. This exclusion is responsive to multiple suggestions to the drafting committee  
6 that certain powers in a person other than a trustee must be nonfiduciary to achieve the settlor's  
7 federal tax objectives. The clearest example is a retained power to substitute assets meant to  
8 ensure grantor trust status under Treas. Reg. § 1.675(b)(4). Given the evolving nature of tax  
9 planning, the frequency of amendments to the tax law, and the potential for disagreement about  
10 which powers must be nonfiduciary to achieve the settlor's federal tax objectives, the drafting  
11 committee reasoned that a standard was preferable to a prescribed list that would have to be  
12 continuously updated and would likely be over- and underinclusive.

13

14

## SECTION 6. POWERS OF TRUST DIRECTOR.

15 (a) Subject to Section 7, the terms of a trust may grant a trust director a power of

16 direction.

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

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

19 (1) a trust director may exercise any further powers appropriate to the exercise of  
20 the director's power of direction;

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

23 (3) trust directors with joint powers must act by majority decision.

24 ***Legislative Note:*** *A state that has adopted Uniform Probate Code Section 2-907(c)(4) (1993) or*  
25 *Uniform Trust Code Sections 408(b) or 409(2) (2000) should revise those provisions to [to be*  
26 *resolved after final approval.]*

27

28

### Comment

29 *Validating a trust director.* Subsection (a) validates a provision for a trust director in the  
30 terms of a trust. Although the common law would recognize a trust director without statutory  
31 authorization, subsection (a) resolves any doubt. *See, e.g., In re Eleanor Pierce (Marshall)*  
32 *Stevens Living Trust*, 159 So. 3d 1101 (La. App. 2015) (upholding the appointment of a trust  
33 protector without specific statutory authorization). A specific trust director may be named by the  
34 terms of a trust, by a procedure prescribed by the terms of the trust, or in accordance with  
35 Section 16(1).

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 trusts, 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 (Am. Law Inst. 2003).

6  
7           *Breadth of subsection (a).* Without limiting the definition of a “power of direction” in  
8 Section 2(4), the drafting committee specifically contemplated that subsection (a) would validate  
9 terms of a trust that create a power in a trust director to:

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

31  
32           *Exclusions.* Like the other provisions of this act, subsection (a) does not apply to matters  
33 that are excluded by Section 5. Thus, because Section 5(b)(2) excludes a power “to appoint or  
34 remove a trustee or trust director,” this act does not govern such a power. Likewise, because  
35 Section 5(b)(1) excludes a power of appointment, a nonfiduciary power of distribution is not  
36 governed by this act. The validity and construction of a power excluded by Section 5 is governed  
37 by law other than this act.

38  
39           *Subsection (b).* Subsection (b) confirms that a trust director has only those powers  
40 expressly granted to the director by the terms of the trust. This act does not provide any powers  
41 to a trust director by default. Nor does this act generally specify the scope or parameters of any  
42 power, which instead must be specified by the terms of a trust.

43  
44           *Subsection (c).* Subsection (c) prescribes three rules of construction that apply unless the  
45 terms of a trust provide otherwise.  
46



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

10  
11           *Delegation by trust director.* In some circumstances, it may be appropriate for a trust  
12 director to delegate the director’s powers, much as it may sometimes be appropriate for a trustee  
13 to do so. Under Section 8, a trust director is subject to the same fiduciary rules regarding the  
14 exercise of a power to delegate as a trustee. In most states, therefore, a trust director would be  
15 required to exercise reasonable care, skill, and caution in selecting, instructing, and monitoring  
16 an agent. A director who did so would not be liable for the action of the agent. In performing that  
17 function, the agent would owe a duty to exercise reasonable care. *See, e.g.,* Uniform Trust Code  
18 § 807 (2000); Uniform Prudent Investor Act § 9 (1994); Restatement (Third) of Trusts § 80 (Am.  
19 Law. Inst. 2007).

20  
21           *Trust director’s standing to sue.* In *Schwartz v. Wellin*, No. 2:13-CV-3595-DCN, 2014  
22 WL 1572767 (D.S.C. Apr. 17, 2014), the court held that a trust director (which the terms of the  
23 trust referred to as a “trust protector”) lacked standing to bring a lawsuit because under Rule  
24 17(a)(1) of the Federal Rules of Civil Procedure the director was neither a real party in interest  
25 nor a party that could pursue a claim if not a real party in interest. However, Rule 17(a)(1) does  
26 allow “a party authorized by statute” to bring litigation. Subsection (c)(1) supplies the requisite  
27 statutory authorization if enabling a trust director to prosecute, defend, or join an action, claim,  
28 or judicial proceeding pertaining to the trust would be “appropriate” under the circumstances in  
29 light of the terms of the trust. For example, it would normally be “appropriate” for a trust  
30 director to bring an action against a directed trustee if the trustee refused to comply with a  
31 direction from the director. Subsection (a) would also provide the requisite statutory  
32 authorization if the terms of the trust expressly confer a power of litigation on the director.

33  
34           *Settlor incapacity or death.* Subsection (c)(2) specifies a default rule under which a trust  
35 director’s powers survive the incapacity or death of the settlor. Following the directed trust  
36 statutes in several states, including Nevada and South Dakota, see Nev. Rev. Stat. § 163.555  
37 (2016); S.D. Codified Laws § 55-1B-3 (2016), the drafting committee included this section to  
38 confirm that the common law rule of agency under which an agent’s authority terminates on the  
39 incapacity or death of the principal would not apply to a trust director. *See* Restatement (Third)  
40 of Agency §§ 3.07–3.08 (Am. Law Inst. 2006).

41  
42           *Majority decision.* Subsection (c)(3) provides a default rule of majority action for  
43 multiple trust directors with “joint powers,” such as a three-person committee with a power of  
44 direction over investment or distribution. Majority action is the prevailing default for multiple  
45 trustees. *See* Uniform Trust Code § 703(a) (2000); Restatement (Third) of Trusts § 39 (Am. Law  
46 Inst. 2003). In the event of a deadlock among trust directors with joint powers, by analogy to a

1 deadlock among cotrustees, a court could “direct exercise of the [joint] power or take other  
2 action to break the deadlock.” *Id.* cmt. e. The duty and liability of a trust director for jointly held  
3 powers is governed by Section 8, which absorbs the existing fiduciary duty and liability of  
4 trusteeship for a trust director. Thus, in a state that protects a dissenting cotrustee from liability,  
5 as under Uniform Trust Code § 703(h) (2000), so too would a dissenting trust director with a  
6 jointly held power be protected.

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

9 director may not:

10 (1) remove from a trust created to meet the requirements of 42 U.S.C. Section  
11 1396p(d)(4) [as amended][, and regulations issued thereunder] a requirement to pay back a  
12 governmental entity for benefits provided to a beneficiary at the death of that beneficiary;

13 (2) in a trust for which all of the beneficiaries are charitable organizations, grant a  
14 beneficial interest to a person that is not a charitable organization or use the trust assets for a  
15 noncharitable purpose; or

16 (3) reduce or eliminate the charitable interest in a charitable remainder trust under 26  
17 U.S.C. Section 664[, as amended][, and regulations issued thereunder].

18 *Legislative Note: A state that does not permit the phrase “as amended” when incorporating*  
19 *federal statutes, or that does not permit reference to “regulations issued thereunder,” should*  
20 *delete the bracketed language in paragraphs (1) and (3) accordingly.*

21  
22 **Comment**

23 The capacious language of Section 6 permits a broad array of powers to be given to a  
24 trust director. Following the directed trust legislation in a handful of states, this section imposes  
25 three public policy limits on the scope of such powers. Paragraph (1) protects the integrity of the  
26 pay back obligation in a special needs trust. Paragraphs (2) and (3) protect the integrity of a  
27 charitable trust from the later insertion of a noncharitable interest or the reduction of a charitable  
28 interest.

29  
30 **SECTION 8. DUTY AND LIABILITY OF TRUST DIRECTOR.**

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

1 (1) a trust director is subject to the same fiduciary duty and liability as:

2 (A) a sole trustee if the power is held individually; or

3 (B) a cotrustee if the power is held jointly with a trustee or another trust  
4 director; and

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

7 (b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified,  
8 or otherwise authorized or permitted by law to provide health care in the ordinary course of the  
9 director’s business or practice of a profession, and the director acts in that capacity, the director  
10 is not subject to duty or liability under this [act].

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

13 **Comment**

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

23  
24 Accordingly, subsection (a)(1) sets the default duties of a trust director by absorbing the  
25 duties that would ordinarily apply to a similarly situated trustee. Subsection (a)(2) sets the  
26 mandatory minimum duties of such a director by absorbing the mandatory minimum duties that a  
27 settlor cannot waive for a similarly situated trustee. In making a trust director a fiduciary,  
28 subsection (a) follows the great majority of the existing state directed trust statutes. Subsection  
29 (a) is more specific than many state statutes, however, as the existing statutes tend to say only  
30 that a trust director is a “fiduciary,” without specifying the duties that apply. Subsection (a)  
31 provides greater specificity by specifically absorbing the fiduciary duty and liability of a trustee.

32  
33 *Absorption of existing trust fiduciary law.* Subsection (a) operates by absorbing existing

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

10  
11 *Absorption and circumstances of trust directors.* In applying the law of trustee fiduciary  
12 duties to a trust director, a court must make use of the flexibility built into trust fiduciary law.  
13 Courts have long applied the duties of loyalty and prudence across a wide array of  
14 circumstances, including many different kinds of trusts as well as other fiduciary relationships,  
15 such as corporations and agencies. Trust fiduciary principles are thus amenable to application in  
16 a contextual manner that is sensitive to the particular circumstances and structure of each  
17 directed trust. In assessing the actions of a director that holds a power to modify a trust, for  
18 example, a court should apply the standards of loyalty and prudence in a manner that is  
19 appropriate to the particular context, including the trust’s terms and purposes and the director’s  
20 particular powers.

21  
22 *The trust director’s duty of disclosure.* Under subsection (a), a trust director is subject to  
23 the same duties of disclosure as a trustee would be. Thus, for example, if a trust director intended  
24 to direct a nonroutine transaction, to change “investment ... strategies,” or to take “significant  
25 actions ... involving hard-to-value assets or special sensitivity to beneficiaries,” the director  
26 might be under a duty of affirmative advance disclosure. Restatement (Third) of Trusts § 82 cmt.  
27 d (Am. Law Inst. 2007); *see also Allard v. Pacific Nat’l Bank*, 663 P.2d 104, 110 (Wash. 1983)  
28 (“The trustee must inform beneficiaries, however, of all material facts in connection with a  
29 nonroutine transaction which significantly affects the trust estate and the interests of the  
30 beneficiaries prior to the transaction taking place.”).

31  
32 *Joint and sole powers.* Under subsection (a), a trust director has the same fiduciary duties  
33 as a sole trustee for a power of direction held individually and as a cotrustee for a power of  
34 direction held jointly. Thus, a trust director that holds a power of direction individually does not  
35 have the duties of a cotrustee as regards other trust directors or trustees. A trust director that  
36 individually holds a power to amend the trust, for example, does not have the duty of a cotrustee  
37 to monitor the actions of the trustee concerning investments or the actions of another trust  
38 director concerning the determination of a beneficiary’s capacity. A trust director that holds a  
39 power of direction jointly with a trustee or another trust director, however, has the duty of a  
40 cotrustee as regards the actions of that trustee or other trust director that are within the scope of  
41 the jointly held power. Thus, a trust director that jointly exercises a power to direct investments  
42 with other trust directors has the same fiduciary duty and liability regarding the actions of itself  
43 and the other trust directors as a cotrustee.

44  
45 A trust director that holds a power of direction jointly with a trustee or other trust director  
46 does not have the duties of a cotrustee as regards another power of direction that the director

1 holds individually or any power that the trustee or other director holds individually. Thus, if a  
2 trust director holds a power to direct investments with another trust director jointly and the other  
3 director also holds a power to amend the trust individually, the first director has the duty of a  
4 cotrustee only as regards the joint power to direct investments and not the other director's  
5 individual power to amend the trust.  
6

7 *Springing powers without a duty to monitor.* The drafting committee contemplated that a  
8 settlor could construct a director's power to be springing such that they do not create a  
9 continuous obligation to monitor the administration of the trust. For example, a settlor could  
10 grant a trust director a power to direct a distribution, but only if the director was requested to do  
11 so by a beneficiary. A director holding such a power would not be under a duty to act unless  
12 requested to do so by a beneficiary. Moreover, because under subsection (a)(2) a settlor can vary  
13 the fiduciary duties of a trust director to the same extent that the settlor could vary the fiduciary  
14 duties of a trustee, under Uniform Trust Code § 105(b)(2) (2004) the settlor could waive all of  
15 the director's otherwise applicable duties other than the duty "to act in good faith and in  
16 accordance with the terms and purposes of the trust and the interests of the beneficiaries." The  
17 director would be subject to this mandatory duty in the director's response to the beneficiary's  
18 request for a distribution.  
19

20 *Extended discretion and exculpation or exoneration.* Under the framework of subsection  
21 (a), the terms of a trust could give a trust director extended discretion, such as in the form of  
22 "sole," "absolute," or "uncontrolled" discretion, with the same effect as those terms would have  
23 on the discretion of a trustee. Under prevailing law, "words such as 'absolute' or 'unlimited' or  
24 'sole and uncontrolled' are not interpreted literally. Even under the broadest grant of fiduciary  
25 discretion, a trustee must act honestly and in a state of mind contemplated by the settlor. Thus,  
26 the court will not permit the trustee to act in bad faith or for some purpose or motive other than  
27 to accomplish the purposes of the discretionary power." Restatement (Third) of Trusts § 50 cmt.  
28 c (Am. Law Inst. 2003); *see also* Uniform Trust Code § 814(a) (2004). Under subsection (a)(2),  
29 the same rules would apply to a grant of extended discretion to a trust director.  
30

31 A trust director is likewise subject to the same rules as a trustee with regard to an  
32 exculpation or exoneration clause. Under prevailing law, such as Uniform Trust Code § 1008  
33 (2000) and Restatement (Third) of Trusts § 96 (Am. Law Inst. 2012), an exculpation or  
34 exoneration clause cannot protect a trustee against liability for acting in bad faith or with reckless  
35 indifference. Under subsection (a)(2), the same rules would apply to an exculpation or  
36 exoneration clause for a trust director.  
37

38 *Subsection (b)—health-care professionals.* Subsection (b) refers to a trust director who is  
39 "licensed, certified, or otherwise authorized or permitted by law to provide health care in the  
40 ordinary course of the director's business or practice of a profession." This phrasing is based on  
41 the definition of "health-care provider" in Uniform Health-Care Decisions Act § 1(8) (1993). To  
42 the extent that a trust director acts in the director's business or practice of a profession to provide  
43 health care, the director is relieved from duty or liability under this act unless the terms of the  
44 trust provide otherwise.  
45

46 This subsection, which applies unless the terms of the trust provide otherwise, addresses

1 the concern that a health-care professional might refuse appointment as a trust director if such  
2 service would expose the provider to fiduciary duty under this act. For example, a trust might  
3 call for a health-care professional to determine the capacity or sobriety of a beneficiary or the  
4 capacity of the settlor. In making such a determination, under subsection (b) the health-care  
5 professional would not be subject to duty or liability under this act. However, the professional  
6 would remain subject to any rules and regulations otherwise applicable to the professional.

7  
8 *Subsection (c)—no ceiling on duties.* Subsection (c) confirms that the duties prescribed  
9 by this section are defaults and minimums, not ceilings. The terms of a trust can impose further  
10 duties in addition to those prescribed by this section.

11  
12 **SECTION 9. DUTY AND LIABILITY OF DIRECTED TRUSTEE.**

13 (a) Subject to subsection (b), a directed trustee must take reasonable action to comply  
14 with a power of direction or a further power of a trust director under Section 6(c)(1) and is not  
15 liable for so acting.

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

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

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

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

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

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

29 (e) The terms of a trust may impose a duty or liability on a directed trustee in addition to

1 the duties and liabilities prescribed by this [act].

2 **Legislative Note:** *A state that has adopted Uniform Trust Code Section 808 (2000) [pending*  
3 *final resolution to 808]. The term “court” in subsection (d) should be revised as needed to refer*  
4 *to the appropriate court having jurisdiction over trust matters.*

5 **Comment**

6 *Duties of a directed trustee.* This section addresses the duty and liability of a directed  
7 trustee. It should be read in conjunction with Section 10 (governing information sharing among  
8 directed trustees and trust directors) and Section 11 (eliminating certain duties to monitor,  
9 inform, or advise). The drafting committee contemplated that this section, along with Sections 10  
10 and 11, would prescribe the mandatory minimum fiduciary duties of a directed trustee,  
11 displacing any contrary mandatory minimum such as under Uniform Trust Code § 105 (2005).  
12

13 *Subsection (a)—duty of compliance and reasonable action; nonliability other than under*  
14 *subsection (b).* Subject to subsection (b), subsection (a) requires a directed trustee to take  
15 reasonable action to comply with a power of direction or a further power of a trust director under  
16 Section 6(c)(1) and provides that the trustee is not liable for so acting.  
17

18 A power of direction may impose a variety of obligations on a directed trustee. Such a  
19 power may require a trustee to follow the express directions of a trust director, for example, if  
20 the power allows the director to direct the trustee in the investment management of the trust  
21 property. A power of direction may also require a trustee to request permission from a director  
22 before acting, to refrain from acting if the director so directs, or to act independently in the  
23 absence of a contrary direction. Thus, for example, a power of direction might provide that a  
24 trustee may not sell certain property without the approval of the trust director. A power of  
25 direction may also allow a director to modify the trust or to impose particular administrative  
26 procedures. The duty “to comply with a power of direction” imposed by subsection (a) requires a  
27 trustee to comply with all such powers of direction, subject to subsection (b).  
28

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

40 Subject to subsection (b), subsection (a) requires that a directed trustee take “reasonable  
41 action” to comply with a power of direction or a trust director’s further powers under Section  
42 6(c)(1). The trustee is not liable for so acting. If a trust director with a power to direct  
43 investments directs the trustee to purchase a particular security, for example, the trustee must  
44 take reasonable care and must refrain from self-dealing and conflicts of interest in selecting a

1 broker or executing the trade.

2  
3 The duty to act reasonably in complying with the terms of a power of direction does not,  
4 however, impose a duty to ensure that the substance of a direction is reasonable. In executing a  
5 direction to purchase a security, for example, a trustee must take reasonable care to ensure that  
6 the security is purchased with reasonable promptness and at reasonable cost, but the trustee is not  
7 required to assess whether the purchase of that security would be prudent in relation to the trust's  
8 investment portfolio. Instead, subject to the "willful misconduct" standard prescribed by  
9 subsection (b), a trustee that takes reasonable action to comply with a power of direction or a  
10 further power of a trust director under Section 6(c)(1) is not liable for so acting.

11  
12 *Powers jointly held with a trust director.* A trustee may hold a power of direction jointly  
13 with a trust director. For example, the terms of a trust may confer a power to determine the  
14 capacity of a beneficiary upon a committee of people, and the committee may include both the  
15 trustee and the beneficiary's son, the latter of whom is a trust director. When a trustee holds a  
16 power jointly with a trust director, the trustee continues to have the normal duties of a trustee as  
17 regards its own exercise or nonexercise of the joint power. Subsection (a), in other words, does  
18 not relieve the trustee from the trustee's normal duties as to the trustee's own powers, including  
19 powers held jointly with a trust director. In deciding how to vote as a member of the committee  
20 to determine a beneficiary's capacity, for instance, the trustee has the same duties that it would  
21 have if it held its power jointly with another trustee instead of with another trust director.

22  
23 A trustee's participation in joint decisionmaking with a trust director, however, must be  
24 distinguished from the trustee's execution of those joint decisions. Although the trustee is subject  
25 to the normal fiduciary duties of trusteeship in making a decision jointly with a trust director, the  
26 trustee is subject to the reduced duty of subsections (a) and (b) in executing such a decision.  
27 Thus, returning to the example given in the prior paragraph, if the committee to determine a  
28 beneficiary's capacity exercises its power by deciding that the beneficiary lacks capacity, the  
29 trustee has a duty to take reasonable action to comply with the decision (even if the trustee did  
30 not agree with it) and is not liable for such action except as provided in subsection (b).

31  
32 *Subsection (b)—willful misconduct.* Subsection (b) provides an exception to the duty of  
33 compliance prescribed by subsection (a). Under subsection (b), a trustee must not comply with a  
34 power of direction or a further power of a trust director under Section 6(c)(1) to the extent that  
35 by complying the trustee would engage in "willful misconduct." The drafting committee settled  
36 upon the "willful misconduct" standard after a review of the existing directed trust statutes.

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



1 beneficiary’s only recourse for misconduct by the trust director is an action against the director  
2 for breach of the director’s fiduciary duty to the beneficiary.  
3

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

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

29 After extensive deliberation and debate, the drafting committee opted to follow the  
30 second group of statutes, which includes the prominent Delaware act, on the grounds that this  
31 model does more to protect a beneficiary and is more consistent with traditional fiduciary policy.  
32 The popularity of directed trusts in Delaware establishes that a directed trust regime that  
33 preserves a “willful misconduct” safeguard is workable and that a total elimination of duty in a  
34 directed trustee is unnecessary to satisfy the needs of directed trust practice.  
35

36 The willful misconduct standard prescribed by this subsection changes the policy of  
37 Uniform Trust Code § 808 (2000), which provides the current uniform law treatment of directed  
38 trusts and is similar in substance to Restatement (Third) of Trusts § 75 (Am. Law Inst. 2007).  
39 Section 808(b) provides: “If the terms of a trust confer upon a person other than the settlor of a  
40 revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance  
41 with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of  
42 the trust or the trustee knows the attempted exercise would constitute a serious breach of a  
43 fiduciary duty that the person holding the power owes to the beneficiaries of the trust.” In  
44 deciding to change this standard, the drafting committee was deeply influenced by the fact that a  
45 growing number of states that had previously adopted Section 808 have since abandoned it or  
46 modified it to follow one of the two other models discussed above. The drafting committee was

1 also strongly influenced by the fact that a review of every existing specialized state statute on  
2 directed trusts showed that no state that has legislated specifically on the issue of directed trustee  
3 fiduciary duties has chosen to follow Section 808.  
4

5 The willful misconduct standard in subsection (b) is to be distinguished from the duty to  
6 take reasonable action in subsection (a). The reasonable action rule of subsection (a) applies to  
7 the manner by which a trustee complies with a power of direction. The willful misconduct  
8 standard of subsection (b) applies to the decision of whether to comply with a power of direction.  
9

10 *Powers to veto or approve.* The terms of a trust may give a trust director a power to veto  
11 or approve the actions of a trustee. The trustee, for example, may have the power to invest trust  
12 property, subject to the power of a trust director to review and override the trustee’s decision e.  
13 A trustee that operates under this kind of veto or approval power has the normal duties of a  
14 trustee as regards the trustee’s exercise of its own powers, but has only the duties of a directed  
15 trustee as regards the trust director’s exercise of its power to veto or approve. The trustee would  
16 be subject to the normal duty of prudence in deciding which investments to propose to a director,  
17 for example, but then would be subject only to the willful misconduct rule for a directed trustee  
18 under this section in choosing whether to comply with the director’s veto or disapproval.  
19

20 *Subsection (c)—release by trust director.* The terms of a trust may empower a trust  
21 director to release a trustee or another trust director from liability for breach of trust. If the  
22 director grants such a release, the trustee or other director is not liable to the extent of the release.  
23 The terms of a trust may enable such a release to be given at any time, whether before or after  
24 the trustee or other director acts.  
25

26 Subsection (c) provides three additional safeguards for a release by a trust director of a  
27 trustee or other director from liability. First, consistent with the policy of subsection (b), a trustee  
28 or other director cannot be released for a breach that involves the trustee’s or the other director’s  
29 own willful misconduct. Second, consistent with prevailing law governing a release of a trustee  
30 by a beneficiary, a release by a trust director is not enforceable if it was procured by the  
31 improper conduct of the trustee or other director. Third, again consistent with prevailing law  
32 governing a release of a trustee by a beneficiary, a release by a trust director is not enforceable if  
33 at the time of the release the director did not know of the material facts relating to the breach.  
34 The drafting committee based the second and third of these safeguards on Uniform Trust Code §  
35 1009 (2001), which is similar in substance to Restatement (Third) of Trusts § 97 (Am. Law Inst.  
36 2012).  
37

38 *Subsection (d)—petition for instructions.* Subsection (d) provides that a directed trustee  
39 may satisfy its duty under this section by petitioning for instructions. The protection of this  
40 subsection is bounded by two limits: a trustee must have “reasonable doubt” about its duty, and  
41 the trustee’s petition for instructions must be “timely.” The requirement of “reasonable doubt”  
42 follows from Restatement (Third) of Trusts § 71 (Am. Law Inst. 2007), which provides: “A  
43 trustee or beneficiary may apply to an appropriate court for instructions regarding the  
44 administration or distribution of the trust if there is reasonable doubt about the powers or duties  
45 of the trusteeship or about the proper interpretation of the trust provisions.”  
46

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

4  
5           *Subsection (d)—no ceiling on duties.* Subsection (d) confirms that the duties prescribed  
6 by this section are merely defaults and minimums, not ceilings. The terms of a trust can impose  
7 further duties in addition to those prescribed by this section.

## 8           **SECTION 10. DUTY TO PROVIDE INFORMATION TO TRUSTEE OR TRUST**

### 9           **DIRECTOR.**

10           (a) Subject to Section 11, a trustee shall provide information to a trust director to the  
11 extent the information is reasonably related to:  
12

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

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

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

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

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

### 19                                   **Comment**

20  
21           *Duty to provide information.* This section imposes a duty on a trustee and a trust director  
22 to provide information to each other. Subsection (a) imposes this duty on a directed trustee, and  
23 subsection (b) imposes this duty on a trust director.

24  
25           *Disclosure to beneficiaries.* This section governs disclosure of information to trustees and  
26 trust directors rather than to beneficiaries. The duty of a trust director to disclose information to a  
27 beneficiary is governed by Section 8, which prescribes the fiduciary duties of a trust director.  
28 The duty of a trustee to disclose information to a beneficiary is governed by the background law  
29 of an enacting state under Section 4 as modified by Section 11, which limits a directed trustee's  
30 duty to inform a beneficiary about the actions of a trust director.

31  
32           *Reasonableness.* This section relies heavily on the concept of reasonableness.  
33 Information must be disclosed only if it is reasonably related both to the powers or duties of the  
34 person making the disclosure and to the powers or duties of the person receiving the disclosure.  
35 The information must be reasonably related to the powers or duties of the person making the  
36 disclosure, because otherwise that person cannot be expected to possess the information. The

1 information must also be reasonably related to the powers or duties of the person receiving the  
2 disclosure, because otherwise that person would not need the information. Examples of matters  
3 that might require disclosure under this section include modifications to the terms of a trust,  
4 changes to investment policy or strategy, distributions, changes in accounting procedure or  
5 valuations, and removal or appointment of trustees and trust directors.  
6

7 *An affirmative and a responsive duty to inform.* This section imposes an affirmative duty  
8 to provide information even in the absence of a request for that information and a responsive  
9 duty to reply to requests for information. For example, if a trust director exercises a power to  
10 modify the terms of a trust, the director would have an affirmative duty to inform the trustees and  
11 other trust directors whose powers or duties are reasonably related to the amendment whether or  
12 not the trustees or other trust directors inquired about it. Similarly, the director would have a  
13 responsive duty to provide information about the amendment upon a request by a trustee or  
14 another trust director whose powers or duties were reasonably related to the amendment.  
15

16 *Interaction with Section 11.* The duty in subsection (a) of a trustee to disclose information  
17 is subject to the limitations on a directed trustee's duty in Section 11. Section 11 provides that "a  
18 trustee does not have a duty to monitor a trust director or inform or give advice to a settlor,  
19 beneficiary, trustee, or trust director concerning instances in which the trustee might have  
20 exercised or not exercised the director's powers differently."  
21

22 Thus, a trustee has a duty under this section to disclose information about the actions of a  
23 trust director only if the information is related to both the duties of the trustee and the duties of  
24 the director to whom disclosure is provided. A trustee does not, however, have a duty to inform  
25 or give advice to a trust director concerning instances in which the trustee would have exercised  
26 another trust director's powers differently. If, for example, one trust director has a power to  
27 direct investments and another trust director has a power to allocate between principal and  
28 income, the trustee would have a duty under this section to disclose the contents of the trust's  
29 investment portfolio to both directors, but would not have a duty to advise the director with the  
30 power over principal and income that the other director has exercised its power over investments  
31 unwisely.  
32

33 *Shelton v. Tamposi.* In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), the terms of the  
34 trust left distribution in the hands of the trustee, but shifted power over investment to a trust  
35 director (the "investment director"). In consequence, the trustee could not raise the cash  
36 necessary to fund a distribution to one of the beneficiaries. Under subsection (b), the trust  
37 director would have been under a duty to give the trustee information about the effects of the  
38 director's investment program on the trust's cash position, and the trustee would have been under  
39 a duty to give the director information about the cash requirements of the trustee's distribution  
40 program. Moreover, in making and implementing the investment program, under Section 8(a) the  
41 trust director would be subject to the same duties as a similarly situated trustee, in parallel to the  
42 trustee's duties in making and implementing the distribution program.  
43

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

1 directors.

2

3 **SECTION 11. NO DUTY TO MONITOR, INFORM, OR ADVISE.** Unless the

4 terms of a trust provide otherwise:

5 (1) a trustee does not have a duty to monitor a trust director or inform or give advice to a  
6 settlor, beneficiary, trustee, or trust director concerning instances in which the trustee might have  
7 exercised or not exercised the director's powers differently; and

8 (2) if a trustee monitors, informs, or gives advice about the actions of a trust director, the  
9 trustee does not thereby assume the duty described in paragraph (1).

10

### Comment

11 *Following the weight of existing statute law.* This section provides that a directed trustee  
12 does not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary,  
13 trustee, or trust director concerning instances in which the trustee might have exercised or not  
14 exercised the director's powers differently. Many existing state statutes have provisions to  
15 similar effect, though the language in this section is simpler and more direct.

16

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

23

24 *Survival of trustee's general duty of disclosure.* Although this section confirms that a  
25 directed trustee has no duty to monitor a trust director or inform or give advice to others  
26 concerning instances in which the trustee might have exercised or not exercised the trust  
27 director's powers differently, this section does not relieve a trustee of its ordinary duties to  
28 disclose and report under otherwise applicable law such as under Uniform Trust Code § 813  
29 (2004) or Restatement (Third) of Trusts § 82 (Am. Law Inst. 2007). For example, if a trust  
30 director has a power to direct investments, this section would relieve a directed trustee of any  
31 duty to advise a beneficiary about the risks of a concentration in the investment portfolio. The  
32 trustee would remain under a duty, however, to make periodic reports or accountings to the  
33 beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the  
34 trust to the extent required by otherwise applicable law. The trustee would also remain under the  
35 duty imposed by Section 10 to provide any trust directors with information reasonably related to  
36 their powers or duties.

37

38 *No assumption of duty.* In addition to waiving a directed trustee's duty to monitor,

1 inform, or give advice as under paragraph (1) of this section, many state statutes go further and  
2 also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these  
3 activities will be deemed to be “administrative actions.” *See, e.g.*, Del. Code Ann. Tit. 12, §  
4 3313(e) (2016). The purpose of these provisions is to ensure that if a directed trustee chooses for  
5 some reason to inform, monitor, or give advice, the trustee does not assume a continuing  
6 obligation to do so or concede a prior duty to have done so. This section dispenses with the  
7 opacity of an administrative classification and achieves the intended result more directly in  
8 paragraph (2) by providing that if a trustee monitors, informs, or gives advice about the actions  
9 of a trust director on one occasion, the trustee does not thereby assume a duty to monitor, inform,  
10 or give advice on another occasion.

11  
12 **SECTION 12. APPLICATION TO COTRUSTEE.** The terms of a trust may relieve a

13 cotrustee from duty and liability with respect to a power of another cotrustee to the same extent

14 the terms of a trust may relieve a directed trustee from duty and liability with respect to a trust

15 director’s power of direction under Sections 9 through 11.

16 ***Legislative Note:*** *A state that has adopted Uniform Trust Code Section 703(c), (f), and (g)*  
17 *(2000) should revise those sections by [to be resolved].*

18 **Comment**

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

22  
23 *Settlor autonomy.* Under traditional law governing cotrustees, each cotrustee “has a duty  
24 to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach  
25 of trust occurs, to obtain redress.” Restatement (Third) of Trusts § 81(2) (Am. Law Inst. 2007).  
26 This rule applies even if the settlor limits the role or function of one of the cotrustees. “Even in  
27 matters for which a trustee is relieved of responsibility, ... if the trustee knows that a co-trustee is  
28 committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable  
29 steps to prevent the fiduciary misconduct.” *Id.* cmt. b. Moreover, “even in the absence of any  
30 duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable  
31 information regarding an aspect of trust administration in which the trustee is not required to  
32 participate.” *Id.* These rules for cotrusteeship contrast with the less demanding fiduciary rules  
33 for a directed trusteeship under Sections 9, 10, and 11 of this act.

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

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

6  
7           *Cotrustees as directed trustees and trust directors.* The terms of a trust can place a  
8 cotrustee in a position of either giving direction, like a trust director, or taking direction, like a  
9 directed trustee. This section only applies to a cotrustee who takes direction. This section does  
10 not address the duties of a cotrustee that gives direction because under Section 8, the duties of a  
11 trust director are the duties of a trustee. The drafting committee intended that the language “with  
12 respect to a power of another cotrustee” would exclude a power held jointly with the directed  
13 cotrustee.

14  
15           *No third-party effects.* Although this section changes the degree to which the terms of a  
16 trust may reduce a cotrustee’s duties to a beneficiary, it does not alter the rules that affect the  
17 rights of third parties who contract with or otherwise interact with a cotrustee. The principal  
18 difference between cotrusteeship and directed trusteeship is that every cotrustee holds title to the  
19 trust property. In a directed trust, title to trust property belongs only to the trustee, and not to the  
20 trust director. The placement of title can have important consequences for dealings with third  
21 parties and for tax, property, and other bodies of law outside of trust law. This section does not  
22 change the rights of third parties who deal with a cotrustee in the cotrustee’s capacity as such.

23  
24           **SECTION 13. LIMITATION OF ACTION AGAINST TRUST DIRECTOR.**

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

28           (b) A report or accounting has the same effect on the limitations period for an action  
29 against the director that the report or accounting would have if the director were a trustee[ as  
30 prescribed by Uniform Trust Code Section 1005].

31           ***Legislative Note:*** *A state that has adopted Uniform Trust Code Section 1005 (2000) should*  
32 *update the bracketed language to refer to that enactment. A state that has adopted a statute other*  
33 *than Uniform Trust Code Section 1005 to govern limitation of an action against a trustee should*  
34 *replace the bracketed language with a cross reference to that statute. A state that has not*  
35 *adopted a statutory limitation should delete the bracketed language.*

1 **Comment**

2 This section absorbs an enacting state’s law governing limitations on an action against a  
3 trustee for application to an action against a trust director. The default or mandatory character of  
4 such law as applied to a trustee governs whether the law is default or mandatory as applied to a  
5 trust director  
6

7 Subsection (a) extends to a trust director the same limits on liability that a trustee enjoys  
8 under the law of an enacting state by way of a statutory limitations period, such as under  
9 Uniform Trust Code § 1005(c) (2000). The limitations period absorbed by subsection (a) applies  
10 to all claims against a trust director for breach of trust, whether by a beneficiary, a trustee,  
11 another trust director, or some other party.  
12

13 Subsection (b) extends to a trust director the same limits on liability that a trustee enjoys  
14 under the law of an enacting state arising from the making of a report or accounting, such as  
15 under Uniform Trust Code § 1005(a)–(b) (2000), except that the rule of subsection (b) applies  
16 regardless of whether the report or accounting was made by the trust director. A trust director  
17 may therefore be protected by a report or accounting made by a trustee or another trust director  
18 even though the director did not make the report or accounting, so long as the report or  
19 accounting fairly discloses the relevant facts of the director’s conduct.  
20

21 Laches, which strictly speaking is an equitable defense rather than a limitations period, is  
22 made applicable to an action against a trust director by Section 14.  
23

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

25 action against a trust director for breach of trust, the director may assert the same defenses a  
26 trustee could assert in an action against the trustee for a similar breach of trust.

27 **Comment**

28  
29 *Absorption.* This section applies to an action for breach of trust against a trust director the  
30 law of an enacting state governing defenses available to a trustee in a comparable action. A trust  
31 director can assert any defense that would be available to a trustee in a comparable action for  
32 breach of trust under existing state law, including:  
33

- 34 • *laches or estoppel* (see Restatement (Third) of Trusts § 98 (Am Law. Inst. 2012));
- 35 • *beneficiary consent, release, or ratification* (see Uniform Trust Code § 1009 (2001);  
36 Restatement (Third) of Trusts § 97(b)–(c) (Am. Law Inst. 2012));
- 37 • *reasonable reliance on the terms of a trust* (see Uniform Trust Code § 1006 (2000);  
38 Uniform Prudent Investor Act § 1(b) (1994)); and
- 39 • *reasonable care in ascertaining the happening of an event affecting administration or*  
40 *distribution* (see Uniform Trust Code § 1007 (2000); Restatement (Third) of Trusts §  
41 76 cmt. f (Am. Law Inst. 2007)).  
42





1 702];

2 (4) compensation[ as prescribed by Uniform Trust Code Section 708];

3 (5) resignation[ as prescribed by Uniform Trust Code Section 705];

4 (6) removal[ as prescribed by Uniform Trust Code Section 706]; and

5 (7) vacancy[ as prescribed by Uniform Trust Code Section 704].

6 **Legislative Note:** A state that has adopted the Uniform Trust Code sections cited in this section  
7 should update the bracketed language to refer to the appropriate portions of that enactment. A  
8 state that has adopted relevant statutory provisions other than the sections of the Uniform Trust  
9 Code cited in this section should replace the bracketed language with cross references to those  
10 provisions. A state that has not adopted relevant statutory provisions should delete the bracketed  
11 language accordingly.

## 12 **Comments**

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

16  
17 *Paragraph (1)—appointment.* This paragraph absorbs an enacting state’s law governing  
18 trustee appointment, such as under Uniform Trust Code § 704(c) and (e) (2004) and Restatement  
19 (Third) of Trusts § 34 (2003), for application to appointment of a trust director.

20  
21 *Paragraph (2)—acceptance.* This paragraph absorbs an enacting state’s law governing  
22 acceptance of a trusteeship, such as under Uniform Trust Code § 701(a)–(b) (2000) or  
23 Restatement (Third) of Trusts § 35 (Am. Law Inst. 2003), for application to acceptance of a trust  
24 directorship.

25  
26 *Paragraph (3)—bond.* This paragraph absorbs an enacting state’s law governing bond to  
27 secure performance by a trustee, such as under Uniform Trust Code § 702(a)–(b) (2000) and  
28 Restatement (Third) of Trusts § 34(3) (Am. Law Inst. 2003), for application to bond by a trust  
29 director.

30  
31 *Paragraph (4)—compensation.* This paragraph absorbs an enacting state’s law governing  
32 compensation of a trustee, such as under Uniform Trust Code § 708 (2000) and Restatement  
33 (Third) of Trusts § 38 cmt. i (Am. Law Inst. 2003), for application to compensation of a trust  
34 director. The drafting committee contemplated that, just as in total “the reasonable fees for  
35 multiple trustees may be higher than for a single trustee,” *id.*, so too the total reasonable fees for  
36 a trust with a directed trustee and a trust director may be higher than for a single trustee.

37  
38 On the other hand, the reasonable compensation of a directed trustee is likely to be less  
39 than that for a trustee that is not directed. An apt analogy is to a trustee that hires others to  
40 “render services expected or normally to be performed by the trustee.” Restatement (Third) of

1 Trusts § 38 cmt. c(1) (Am. Law Inst. 2003); *see also* Uniform Prudent Investor Act § 9 cmt.  
2 (1994) (“If, for example, the trustee’s regular compensation schedule presupposes that the trustee  
3 will conduct the investment management function, it should ordinarily follow that the trustee will  
4 lower its fee when delegating the investment function to an outside manager.”).

5  
6 *Paragraph (5)—resignation.* This paragraph absorbs an enacting state’s law governing  
7 resignation by a trustee, such as under Uniform Trust Code § 705 (2001) and Restatement  
8 (Third) of Trusts § 36 (Am. Law Inst. 2003), for application to resignation by a trust director.

9  
10 *Paragraph (6)—removal.* This subsection absorbs an enacting state’s law governing  
11 removal of a trustee, such as under Uniform Trust Code § 706 (2000) and Restatement (Third) of  
12 Trusts § 37 cmt. e (Am. Law Inst. 2003), for application to removal of a trust director.

13  
14 *Paragraph (7)—vacancy.* This section absorbs an enacting state’s law applicable to a  
15 vacancy in a trusteeship, such as under Uniform Trust Code § 704 (2004), for application to a  
16 vacancy in a trust directorship.

17  
18 *Costs and indemnification.* The power of a trust director to incur reasonable costs and  
19 direct indemnification for expenses would in most cases be covered by Section 6(c)(1).

20  
21 **SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

22 applying and construing this uniform act, consideration must be given to the need to promote  
23 uniformity of the law with respect to its subject matter among states that enact it.

24 **SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**

25 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic  
26 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not  
27 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize  
28 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.  
29 Section 7003(b).

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

31 (a) . . . .

32 (b) . . . .

33 (c) . . . .

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