

D R A F T

FOR DISCUSSION ONLY

DIRECTED TRUST ACT

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ON UNIFORM STATE LAWS

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DIRECTED TRUST ACT

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 6, 2016

DIRECTED TRUST ACT

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1 **PREFATORY NOTE**

2 **Introduction.** This act addresses an increasingly common arrangement in contemporary
3 estate planning and asset management known as a directed trust. A directed trust involves the
4 naming of a trustee to hold custody of the trust property and another person who is not a trustee
5 to perform one or more of the investment, distribution, and administration functions that would
6 otherwise have belonged to the trustee. There is no consistent vocabulary for the nontrustee
7 powerholder in a directed trust. Several terms are common in practice, including “trust
8 protector,” “trust adviser,” and “trust director.” There is much uncertainty about the fiduciary
9 status of a nontrustee who has control or potential control over a function of trusteeship and
10 about the fiduciary responsibility of a trustee with regard to actions taken or directed by such a
11 nontrustee. Existing uniform trust and estate statutes address the issue inadequately. Existing
12 nonuniform state laws are in disarray.

13
14 **[Remainder to come.]**

1 **DIRECTED TRUST ACT**

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

3 **Comment**

4 This act governs a set of trust arrangements that are commonly known as “directed
5 trusts.” In rough terms, a directed trust is a trust in which a person other than a trustee holds a
6 fiduciary power to direct some aspect of the trust’s management or administration. Under this
7 act, such a powerholder is called a “trust director,” and a trustee that is subject to a fiduciary
8 power of a trust director is called a “directed trustee” (see Section 2(2) and (6)). In addition to
9 covering a trust director, this act also covers a variety of similar actors who may be called by
10 different names, such as a trust protector and a trust advisor, both of which are treated as “trust
11 directors” under this act. Section 6 schedules the kinds of fiduciary powers that may be given to
12 a trust director.
13

14 The title of this act uses the term “Trust,” rather than “Trusteeship,” because the purpose
15 of this act is to address the complications created by giving a fiduciary power over a trust to a
16 person who is not a trustee, and so a title focused exclusively on trusteeship would be inaccurate.
17 The usage of the term “trust” is also consistent with other uniform trust laws, including the
18 Uniform Trust Code (2000) and the Uniform Trust Decanting Act (2015).
19

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

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

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

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

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

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

- 1 (A) as expressed in the trust instrument;
- 2 (B) as established by other evidence that would be admissible in a judicial
3 proceeding;
- 4 (C) as amended by a trustee or trust director in accord with the terms of the trust;
- 5 [or]
- 6 (D) as determined or amended by court order[; or]
- 7 [(E) as determined or amended by nonjudicial settlement agreement under
8 [Uniform Trust Code Section 111]].

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

12 **Legislative Note:** *A state that has adopted Uniform Trust Code § 102 [to come: guidance re*
13 *“breach of trust” and “terms of a trust”]. A state that has not adopted Uniform Trust Code §*
14 *111 (2000) should replace the bracketed language with a cross reference to the state’s law*
15 *governing nonjudicial settlement. A state that has not authorized amendment by nonjudicial*
16 *settlement agreement should omit paragraph 5(E) as indicated by the brackets.*

17 **Comment**

18

19 *Breach of trust.* The definition of breach of trust in paragraph (1) expands the comparable
20 definition in Uniform Trust Code § 1001(a) (2000) to include a breach by a trust director. By
21 including within the meaning of the term a violation by a trust director of a duty imposed by this
22 act or by the terms of a trust, this definition resolves any doubt about whether such conduct is a
23 “breach of trust.” Under traditional law, by contrast, the term “breach of trust” referred to “a
24 failure by the trustee to comply with any duty that the trustee owes[] as trustee.” Restatement
25 (Third) of Trusts § 93 (2012).

26

27 *Directed trustee.* The definition of directed trustee in paragraph (2) includes only a
28 trustee that is subject to a direction by a trust director. A cotrustee that is subject to direction by
29 another cotrustee is not for that reason a directed trustee, because paragraph (6) excludes a
30 trustee from the definition of a “trust director.” Since a cotrustee cannot be a trust director, a
31 trustee who is subject to direction only by a cotrustee is not “subject to a power of a trust
32 director” within the meaning of this definition. Section 11 addresses the relationship between this
33 act and cotrusteeship.

34

35 *Person.* The definition of person in paragraph (3) tracks the current Uniform Law

1 Commission boilerplate for that term except that it excludes an “estate” and a “trust.” The
2 intention is to exclude an “estate” and a “trust” from being named as a trust director.
3

4 *State.* The definition of state in paragraph (4) follows the standard Uniform Law
5 Commission boilerplate.
6

7 *Terms of a trust.* The definition of terms of a trust in paragraph (5) takes Uniform Trust
8 Decanting Act § 2(28) (2015) as its starting point, but makes several improvements. The
9 Uniform Trust Decanting Act updates the comparable definition in Uniform Trust Code §
10 103(18) (amended 2004) to take notice of court orders and nonjudicial settlement agreements,
11 both of which are of growing practical significance. Paragraph (5) further expands the definition
12 to include amendments (in addition to determinations) by court order and nonjudicial settlement
13 agreement and to include amendments by trustees and trust directors.
14

15 The Restatement likewise recognizes the possibility that the terms of a trust may later be
16 varied from the settlor’s initial expression, though it does not mention as many mechanisms for
17 variance as paragraph (5). *See* Restatement (Third) of Trusts § 76 cmt. b(1) (2007) (“References
18 ... to the terms of the trust ... also refer to trust terms as reformed or modified by court decree,
19 and as modified by the settlor or others or by consent of all beneficiaries.”) (internal cross-
20 references omitted).
21

22 *Trust director.* The definition of a trust director in paragraph (6) includes any person
23 other than a trustee who is given a power under Section 6. A person with a power under Section
24 6 is a trust director even if the terms of the trust or the parties call the person an “adviser” or
25 “protector” or otherwise purport to disclaim trust director status. However, because the term
26 excludes a trustee, a trustee is not a trust director even if the trustee has a power over another
27 trustee that falls under Section 6. Such a trustee, and the cotrustee over which the trustee has a
28 power, are instead governed by the otherwise applicable law of cotrusteeship as modified by
29 Section 11.
30

31 If a person other than a trustee has a power over a trust that is not included in Section 6,
32 that person is not a trust director with respect to that power, and the person’s exercise or
33 nonexercise of the power is not governed by this act.
34

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

36 (a) This [act] applies to a trust created before, on, or after [the effective date of this [act]]
37 which has its principal place of administration in this state, including a trust whose principal
38 place of administration has been changed to this state. As to a trust created before or on [the
39 effective date of this [act]], this [act] applies only to conduct after that date.

40 (b) Without precluding other means to establish a sufficient connection with the

1 designated jurisdiction, terms of a trust designating the principal place of administration of the
2 trust are valid and controlling if:

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

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

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

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

11 **Comment**

12
13 *Subsection (a)* - This subsection prescribes two rules. First, because powers and duties in
14 a directed trust are matters of trust administration, see Restatement (Second) of Conflict of Laws
15 § 271 cmt. a (1971), this subsection follows the prevailing conflict of laws rule by linking
16 application of this act to the trust’s principal place of administration. As with other matters of
17 administration, the parties are protected against inconsistent court orders by the common law
18 principle of “primary supervision.” *See id.*, § 267 cmt. e. Second, this subsection applies this act
19 to all trusts administered in an enacting state regardless of whether the trust was in existence on
20 the effective date of this act, but only with respect to conduct occurring after the effective date.
21 Because some of the standards of conduct prescribed by this act depart from Uniform Trust Code
22 § 808 (2000) and the common law, see Restatement (Third) of Trusts § 75 (2007), the drafting
23 committee reasoned that the act should apply prospectively, following the model of Uniform
24 Prudent Investor Act § 11 (1994).

25
26 *Subsection (b)* - This subsection, which derives from Uniform Trust Code § 108(a)
27 (2000), establishes a safe harbor for a settlor’s designation of a trust’s principal place of
28 administration. Such a designation is valid if (1) a trustee is located in the designated
29 jurisdiction, (2) a trust director is located in the designated jurisdiction, or (3) at least some of the
30 trust administration occurs in the designated jurisdiction. Subsections (b)(1) and (b)(3) reproduce
31 without change the safe harbor prescribed by Uniform Trust Code § 108(a) (2000). Subsection
32 (b)(2) is an innovation in that it expands the safe harbor of Section 108(a) to include also the
33 location of a trust director as a sufficient connection with the designated jurisdiction. This
34 expansion reflects this act’s validation of a directed trust with a trust director.

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

1 **Comment**

2 This section confirms that the law and principles of equity of an enacting state remain
3 applicable to a directed trust except to the extent modified or displaced by this act. For example,
4 other than the safe harbor under Section 3(b) for a term of a trust that designates the trust’s
5 principal place of administration, the law of an enacting state by which principal place of
6 administration is determined would continue to apply to a directed trust. Provisions such as this
7 one are familiar from other uniform acts. *See, e.g.,* Uniform Powers of Appointment Act § 104
8 (2013); Uniform Trust Code § 106 (2000). This section departs from other uniform acts,
9 however, by referencing “the law” rather than the “common law.” In making this change, the
10 drafting committee intended to reference both common law and statute law, given that so much
11 relevant background trust law has now been codified by statutes such as the Uniform Trust Code
12 (2000) as well as the Uniform Trust Decanting Act (2015), Uniform Principal and Income Act
13 (1997), and Uniform Prudent Investor Act (1994).

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

15 (1) a nonfiduciary power of appointment;

16 (2) a power of a settlor with respect to a revocable trust;

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

20 (4) a power to substitute in place of trust property other property of equivalent value to
21 the extent the power must be held in a nonfiduciary capacity to achieve the settlor’s tax
22 objectives;

23 (5) a power with respect to a trust other than a power under Section 6.

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

27 **Comment**

28 This section prescribes five categories of exclusions from this act. A power that falls
29 within one of these exclusions is governed by law other than this act.

30 *Nonfiduciary power of appointment.* Paragraph (1) excludes a nonfiduciary power of
31 appointment, that is, a discretionary power of appointment in which “the donee may exercise the
32 power arbitrarily as long as the exercise is within the scope of the power.” Restatement (Third)
33

1 of Property: Wills and Other Donative Transfers § 17.1 cmt. g (2011). A nonfiduciary or
2 discretionary power of appointment is governed by other statutory law, such as the Uniform
3 Powers of Appointment Act (2013), and by extensive common law, such as under Restatement
4 (Third) of Property: Wills and Other Donative Transfers §§17.1-23.1 (2011). By contrast, a
5 fiduciary distributive power in a person other than a trustee is a power of direction under Section
6 6(b)(1), and the person holding the power is a trust director under Section 2(6). Without the
7 exclusion of this paragraph, Section 6(b)(1) could have been read to transform all nonfiduciary
8 or discretionary powers of appointment into fiduciary powers of a trust director.

9
10 *Revocable trust.* Paragraph (2) excludes a power of a settlor with respect to a revocable
11 trust. Because the settlor of a revocable trust may at any time revoke the trust and take back the
12 trust property, under modern law the trustee’s duties run to the settlor rather than to the
13 beneficiaries, see Uniform Trust Code § 603(a) (2004), and the trustee must “comply with a
14 direction of the settlor even though the direction is contrary to the terms of the trust or the
15 trustee’s normal fiduciary duties.” Restatement (Third) of Trusts § 74(1)(a)(i) (2007). Without
16 the exclusion of this paragraph, Section 6(b)(1) or (b)(3)(A) could have been read to transform
17 all powers retained by a settlor in a revocable trust into fiduciary powers of a trust director. A
18 nonfiduciary power in a person other than the settlor to withdraw the trust property is a power of
19 appointment that would fall within paragraph (1) of this section.

20
21 *Power of a beneficiary.* Paragraph (3) excludes a power of a beneficiary to the extent that
22 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 (2007). By contrast, if the exercise or nonexercise of a power held by a
27 beneficiary affects the interests of another beneficiary, and the power falls within the scope of
28 Section 6, then under this act the beneficiary is a trust director subject to the standards of conduct
29 prescribed by this act to the extent that the beneficiary’s powers affect the other beneficiary. For
30 example, a power in a beneficiary to release a trustee from a claim by the beneficiary is excluded
31 from this act. But a power in a beneficiary to release the trustee from a claim by another
32 beneficiary (other than by virtual representation) is a power of consent under Section 6, and the
33 beneficiary would be a trust director under Section 2(6) to the extent the beneficiary’s power to
34 release the trustee affects the claims of the other beneficiary.

35
36 Paragraph (4) excludes a power to substitute in place of trust property other property of
37 equivalent value to the extent that the power must be held in a nonfiduciary capacity to achieve
38 the settlor’s tax objectives. This paragraph is meant to preserve the viability of [insert]. Without
39 this exception, [insert]. **[Relevant tax law is IRC 675(4)(C), Treas. Reg. 1.675(b)(4), and Rev.**
40 **Rul. 2008-22.]**

41
42 Paragraph (5) excludes a power with respect to a trust other than a power under Section
43 6(b)-(c). This exclusion confirms that the list of powers prescribed in Section 6(b)-(c) is
44 exclusive. This act does not affect the ability of a settlor to give a person other than a trustee a
45 power affecting the management or administration of a trust other than those listed in Section
46 6(b)-(c) to the extent that the power is permissible under otherwise applicable law.

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

2 (a) A trust director has only those powers granted by the terms of a trust under this
3 section.

4 (b) The terms of a trust may grant a trust director:

5 (1) a power of direction to invest, manage, or distribute the trust property or to
6 direct a trustee or another trust director in the trustee's or director's investment, management or
7 distribution of the property;

8 (2) a power of consent under which:

9 (A) a trustee or another trust director must obtain the permission of the
10 director before exercising a power of the trustee or other director; or

11 (B) the director may release a trustee or another trust director from
12 liability for an action proposed or previously taken by the trustee or other director;

13 (3) a power of protection to:

14 (A) amend or modify the terms of the trust or terminate the trust;

15 (B) change the principal place of administration, situs, or governing law of
16 the trust; or

17 (C) determine the capacity of the settlor or a trustee, trust director,
18 beneficiary, or other party.

19 (D) appoint or remove a trustee or another trust director, or a successor to
20 either; or

21 (E) prosecute, defend, or join an action, claim, or judicial proceeding
22 relating to the trust.

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

1 (1) a trust director may exercise any further power appropriate to the exercise of
2 the director’s express powers under subsection (b);

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

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

6 **Legislative Note:** A state that has adopted Uniform Probate Code § 2-907(c)(4) (1993) or
7 Uniform Trust Code §§ 408(b) or 409(2) (2000) should revise those provisions to add a cross-
8 reference to subsection (b)(3)(E) of this section.

9
10 **Comment**

11 *Validating a trust director.* This section validates a provision for a trust director in the
12 terms of a trust. Although many states would allow a trust director without specific statutory
13 authorization, *see, e.g., In re Eleanor Pierce (Marshall) Stevens Living Trust*, 159 So. 3d 1101
14 (La. Ct. App. 2015) (upholding the appointment of a trust protector without specific statutory
15 authorization), this section resolves any doubt. A specific trust director may be named by the
16 terms of a trust, by the action of a trustee or another trust director acting in accordance with the
17 terms of the trust, as in *Minassian v. Rachins*, 152 So. 3d 719 (Fla. Dist. Ct. App. 2014), or in
18 accordance with Section 15(2).

19
20 *Background law on trust purposes.* Although this section recognizes a trust director, this
21 section does not override the background law that regulates the formation of trusts, such as the
22 requirements that a trust be lawful, not contrary to public policy, and possible to achieve. *See*
23 Uniform Trust Code § 404 (2000); Restatement (Third) of Trusts §§ 29-30 (2003).

24
25 *Exclusivity.* The list of powers that may be given to a trust director under this section is
26 exclusive. A person who holds a power that does not fall within this section is not a trust director
27 (see Section 2(6)). The validity, meaning, and effect of a power that does not fall within this
28 section is therefore governed by law other than this act. For example, a power to arbitrate a
29 dispute between or among trustees and beneficiaries is not included in this section. The holder of
30 such a power is thus not a trust director and the power is valid only to the extent authorized by
31 other law.

32
33 *Subsections (a) and (b) -* Subsection (a) confirms that a trust director has only those
34 powers expressly granted by the terms of the trust. Subsection (b) prescribes three categories of
35 powers that the terms of a trust may grant to a trust director: (1) powers of direction, (2) powers
36 of consent, and (3) powers of protection.

37
38 *Subsection (b)(1) - power of direction.* A power of direction includes any power to
39 “invest, manage, or distribute” trust property. The trio of investment, management, and
40 distribution, which is taken from Uniform Trust Code § 815(a)(2)(b) (2000), is meant to

1 incorporate the entire field of trustee powers. For example, a power in a trust director to direct a
2 trustee in the investment of some or all of the trust property would be a power of direction. A
3 power to direct a trustee in the distribution of trust property would likewise be a power of
4 direction. So too would be a power to direct the trustee to make or take loans; to vote proxies for
5 securities held in trust; to adopt a particular valuation of trust property; to determine the
6 frequency or methodology of valuation; to interpret the trust; to adjust between principal and
7 income or convert to a unitrust; or to decant the trust. In sum, as regards a directed trustee, the
8 “power of direction” category encompasses any power in a trust director to direct the trustee in
9 the trustee’s exercise of any of the trustee’s powers.

10
11 A power of direction can also take the form of a direct exercise of authority by a trust
12 director. The terms of a trust may, for example, give a trust director a power to sign subscription
13 documents or to hold certain trust property. Such powers to act directly are powers of direction if
14 they involve the investment, management, or distribution of trust property.

15
16 *Nonfiduciary power of appointment.* Because Section 5(1) excludes a nonfiduciary power
17 of appointment from this act, a settlor can give a nontrustee a nonfiduciary power over
18 distribution of the trust property, which would be a power of appointment, without subjecting the
19 power holder to this act. By contrast, if the settlor intends for the holder of the power to be
20 subject to fiduciary duty, then the holder is a trust director and the power is a power of direction
21 subject to this act.

22
23 *Subsection (b)(2) - power of consent.* A power of consent can include two related but
24 distinct kinds of powers. One is a power to grant or withhold permission before a trustee or other
25 trust director may act. For example, a trustee could be required to obtain the consent of a trust
26 director before selling certain trust property or before making a distribution. Any power held by
27 a trustee or another trust director can be subjected to this kind of power of consent. The core
28 distinction between this kind of a power of consent and a power of direction is that a power of
29 consent contemplates initiative on the part of the party subject to the power, whereas a “power of
30 direction” contemplates initiative on the part of the party holding the power.

31
32 The other form of consent power is a power to release a trustee or other trust director
33 from liability. Under this kind of power of consent, a trustee or trust director that is subject to the
34 power may act without the director’s permission, but if the trustee or trust director receives
35 permission, the trustee or director will be exonerated from liability for acting consistently with
36 the permission.

37
38 Both kinds of power of consent can be combined in the hands of a single trust director.
39 For example, the terms of a trust may prohibit a trustee from acting without a director’s consent
40 and may also release the trustee from liability if the trustee receives that consent. The precise
41 scope and effect of a power of consent, such as whether it may be exercised prospectively or
42 retrospectively, is a question of construction of the terms of the trust.

43
44 *Subsection (b)(3)—power of protection.* A “power of protection” category includes five
45 specific kinds of powers. **[Placeholder pending further committee review of this list in light
46 of questions about trustee removal and amendment/termination.]**

1 The language in subsection (b)(3)(E), which validates a power in a trust director to
2 “prosecute, defend, or join an action, claim, or judicial proceeding,” is based on Uniform Trust
3 Code § 816(24). Paragraph (E) thus enables a settlor to give a trust director a power of protection
4 to litigate matters pertaining to the trust. Paragraph (E) would therefore reverse the result in
5 *Schwartz v. Wellin*, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014). In that
6 case, the court held that a trust director (i.e., the “trust protector”) lacked standing because Rule
7 17(a)(1) of the Federal Rules of Civil Procedure does not include a trust director as a party who
8 may bring litigation if not the “real party in interest.” However, Rule 17(a)(1) does allow “a
9 party authorized by statute” to bring such litigation, and this subsection provides the requisite
10 statutory authorization.

11
12 *Pet and other noncharitable purpose trusts.* Most states have enacted statutes, often
13 based on Uniform Probate Code § 2-907(c)(4) (1993) or Uniform Trust Code §§ 408(b) and
14 409(2) (2000), that authorize a settlor or the court to name a person with standing to enforce a
15 trust for a pet animal or other noncharitable purpose. Because the enforcement power of such a
16 person falls under subsection (b)(3)(E), upon the effective date of this act the person would be a
17 trust director subject to this act.

18
19 *Subsection (c)* - This subsection prescribes three rules of construction that apply unless
20 the terms of a trust provide otherwise. These rules concern (1) further appropriate powers, (2)
21 settlor incapacity or death, and (3) joint powers.

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

35
36 The further powers granted to a trust director by subsection (c)(1) extend only as far as is
37 appropriate to the exercise of the director’s powers expressly granted by the terms of the trust
38 under subsection (b). Thus, for example, a trust director who under the terms of a trust has a
39 power to direct the trustee in the making of investments would also have a further power under
40 subsection (c)(1) to bring an action against the trustee to remedy the trustee’s failure to
41 implement such a direction. But such a director would not normally have a power under
42 subsection (c)(1) to sue the trustee for imprudence in the distribution of trust property.

43
44 *Subsection (c)(2)—settlor incapacity or death.* Subsection (c)(2) specifies a default rule
45 that a trust director’s powers survive the incapacity or death of the settlor. Following the directed
46 trust statutes in several states, including Nevada and South Dakota, see Nevada N.R.S. §

1 163.555, South Dakota SDCL § 55-1B-3, the drafting committee included this section to confirm
2 that the common law rule of agency under which an agent’s authority terminates on the
3 incapacity or death of the principal would not apply to a trust director. *See* Restatement (Third)
4 of Agency §§ 3.07-3.08 (2006).

5
6 *Subsection (c)(2)—majority decision.* Subsection (c)(2) provides a default rule of
7 majority action for multiple trust directors with “joint powers,” such as in the case of a three-
8 person committee with a power of direction over investment or distribution. Majority rule is the
9 modern default for multiple trustees. *See* Uniform Trust Code § 703(a) (2000); Restatement
10 (Third) of Trusts § 39 (2003). In the event of a deadlock among trust directors with joint powers,
11 by analogy to a deadlock among cotrustees, a court could “direct exercise of the [joint] power or
12 take other action to break the deadlock.” *Id.*, cmt. e. The question of information sharing among
13 trust directors with related but not “joint” powers, such as between a trust director with a power
14 of direction over investment and a trust director with a power of direction over distribution, is
15 addressed by Section 9.

16
17 **SECTION 7. DUTY AND LIABILITY OF TRUST DIRECTOR.**

18 (a) Subject to subsection (c), with respect to a power of direction under Section 6(b)(1), a
19 power of consent under Section 6(b)(2), or a further power under Section 6(c)(1) appropriate to
20 the power of direction or consent:

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

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

24 (b) Subject to subsection (c), with respect to a power of protection under Section 6(b)(3)
25 or a further power under Section 6(c)(1) appropriate to the power of protection, the trust director:

26 (1) must act in accord with the terms and purposes of the trust; and

27 (2) is not liable for breach of trust unless the director’s exercise or nonexercise of
28 the power was done in bad faith or with reckless indifference to the purposes of the trust or the
29 interests of the beneficiaries.

30 (c) Unless the terms of a trust provide otherwise, if a trust director is a licensed medical
31 professional and acts in the director’s capacity as such, the director is not subject to a duty or

1 liability under this [act].

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

4 **Comment**

5 *Subsection (a)—powers of direction and consent.* For powers of direction and consent,
6 subsection (a) imposes the same system of fiduciary duties on a director that would ordinarily
7 apply to a trustee. Under subsection (a)(1), for example, a director with a power to make or direct
8 investments has the same duties to act in the sole interest of the beneficiary and to act prudently
9 that a trustee would have in making investments. *See, e.g.,* Restatement (Third) of Trusts §§ 77-
10 78, 90 (2007). The theory behind subsection (a) is that within the scope of a power of direction
11 or consent, the trust director functions much like a trustee in a trust that is not directed.
12 Accordingly, subsection (a)(1) sets the default duties of a trust director with respect to a power of
13 direction or a power of consent by absorbing the default fiduciary law that would ordinarily
14 apply to a trustee, and subsection (a)(2) sets the mandatory minimum duties of such a director by
15 absorbing the mandatory fiduciary rules that a settlor cannot waive for a trustee. In giving strong
16 default fiduciary duties to a trust director, subsection (a) follows the great majority of the
17 existing state directed trust statutes.

18
19 **[Placeholder for discussion about trustee’s general duties of loyalty and prudence,
20 and how those general duties can be applied to a variety of circumstances.]**

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

32
33 *Extended discretion and exculpation or exoneration.* Under the framework of subsection
34 (a), the terms of a trust could give a trust director extended discretion, such as in the form of
35 “sole,” “absolute,” or “uncontrolled” discretion, with the same effect as those terms would have
36 on the discretion of a trustee. Under prevailing law, “words such as ‘absolute’ or ‘unlimited’ or
37 ‘sole and uncontrolled’ are not interpreted literally. Even under the broadest grant of fiduciary
38 discretion, a trustee must act honestly and in a state of mind contemplated by the settlor. Thus,
39 the court will not permit the trustee to act in bad faith or for some purpose or motive other than
40 to accomplish the purposes of the discretionary power.” Restatement (Third) of Trusts § 50 cmt.
41 c (2003); *see also* Uniform Trust Code § 814(a) (amended 2004). Likewise, the terms of a trust
42 could give a trust director the protection of an exculpation or exoneration clause, but only to the

1 extent that a trustee could likewise be exculpated or exonerated. Under prevailing law, such as
2 under Uniform Trust Code § 1008 (2000) and Restatement (Third) of Trusts § 96 (2012), an
3 exculpation or exoneration clause cannot protect against liability for acting in bad faith or with
4 reckless indifference.

5
6 *Subsection (b)—power of protection.* For a power of protection, subsection (b)
7 distinguishes between a trust director’s duty in paragraph (1) and the threshold for the trust
8 director’s liability in paragraph (2). Subsection (b)(1) imposes a duty on a trust director to “act in
9 accord with the terms and purposes of the trust.” **[To come: discussion of the drafting
10 committee’s reasoning, and the problem of “latent” powers, subject to the drafting
11 committee’s further deliberations at the next drafting session in light of questions in
12 particular about powers to amend or terminate the trust and to replace the trustee.]**

13
14 Subsection (b)(2) prescribes a threshold for liability of “bad faith” or “reckless
15 indifference,” which is consistent with the maximum exoneration allowed by Uniform Trust
16 Code § 1008(a)(1) (2000). *See also* Restatement (Third) of Trusts § 96 cmt. c (2012) (“[A]n
17 exculpatory clause cannot excuse a trustee for a breach of trust committed in bad faith. Nor can
18 the trustee be excused for a breach committed with indifference to the interests of the
19 beneficiaries or to the terms and purposes of the trust—that is, committed without reasonable
20 effort to understand and conform to applicable fiduciary duties.”).

21
22 The distinction between a trust director’s duty and its threshold for liability is
23 meaningful, because it preserves equitable remedies in a situation in which a trust director has
24 breached its duty but failed to cross the threshold for liability. If a trust director acts in a manner
25 that is inconsistent with the terms and purposes of the trust, but not in bad faith, injunctive relief
26 might be appropriate, even if damages are not available. Section 15(6) absorbs the law governing
27 trustee removal for removal of a trust director. And nothing in this section limits the inherent
28 power of the court to issue an order enjoining a trust fiduciary, such as a trust director, “to take
29 or refrain from taking certain action(s) or otherwise to avoid committing a breach of trust” or
30 other appropriate injunctive relief. Restatement (Third) of Trusts § 95 cmt. c (2012); *see also*
31 Uniform Trust Code § 1001 (2000).

32
33 *Subsection (c)—licensed medical professionals.* Subsection (c) prescribes a default rule
34 that exempts a trust director who is a licensed medical professional from duty or liability under
35 this act to the extent the director acts in the director’s medical capacity. The provision is
36 responsive to the concern that a medical professional might refuse to accept appointment as a
37 trust director if doing so would expose the professional to fiduciary duty under this act in
38 addition to the other regulations and professional rules ordinarily applicable to such a
39 professional. For example, a trust might call for a licensed medical professional to determine a
40 beneficiary’s capacity or sobriety or in a revocable trust to determine the capacity of the settlor.
41 In making such a determination, the medical professional would be subject to the usual
42 regulations applicable to the professional, but not to duty or liability under this act. Furthermore,
43 this section only excludes the licensed medical professional from duty and liability. It does not
44 exclude the licensed medical professional from the other provisions of the act, such as the
45 provisions in Section 15 that provide helpful clarity on mechanical issues such as acceptance,
46 resignation, and vacancy.

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

5 **SECTION 8. DUTY AND LIABILITY OF DIRECTED TRUSTEE.**

6 (a) With respect to a matter for which a directed trustee is subject to a power of direction
7 under Section 6(b)(1) or a power of protection under Section 6(b)(3), the following rules apply:

8 (1) Except as otherwise provided in paragraph (3), if the director exercises the
9 power, or a further power under Section 6(c)(1) appropriate to the exercise of the power, the
10 trustee must comply with the exercise, including by taking reasonable action to implement the
11 exercise.

12 (2) Except as otherwise provided in paragraph (3), if the director does not exercise
13 the power and a term of the trust provides that the trustee may not act in the absence of an
14 exercise of the power, the trustee must comply with that term.

15 (3) The trustee must not comply with an exercise of a power of direction or
16 protection, or a term of the trust providing that the trustee may not act in absence of an exercise
17 of such a power, to the extent that by complying with the exercise or the term the trustee would
18 engage in willful misconduct.

19 (b) With respect to a matter for which a directed trustee is subject to a power of consent
20 under Section 6(b)(2), the following rules apply:

21 (1) If under the terms of the trust the trustee may not act without the permission of
22 the director, and the trustee acts reasonably in proposing an action but the director does not grant
23 permission, the trustee is liable only for the trustee's own willful misconduct.

24 (2) If under the terms of the trust the director may release the trustee from liability
25 for breach of trust and the director grants such a release, the trustee is not liable to the extent of

1 the release unless:

2 (A) the breach involved the trustee’s own willful misconduct;

3 (B) the director’s release was induced by improper conduct of the trustee;

4 or

5 (C) at the time of the release, the director did not know of the material
6 facts relating to the breach.

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

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

12 ***Legislative Note:*** *A state that has adopted Uniform Trust Code § 808 [to come: guidance re*
13 *pointer to this act and changes to 808.].*

14 **Comment**

15 *Duties of a directed trustee.* This section addresses the fundamental question of the duties
16 of a directed trustee. It should be read in conjunction with Section 10, which provides that a
17 directed trustee has no duty to monitor or advise a trust director or to warn or advise a
18 beneficiary about the conduct of a trust director. The sharing of information among directed
19 trustees and trust directors is governed by Section 13.

20
21 *Traditional law.* **[To come: Discussion of traditional law, including Uniform Trust**
22 **Code § 808 (2000) and Restatement (Third) of Trusts § 75 (2007).]** **[See the accompanying**
23 **2016 Annual Meeting memo.]**

24
25 *The specialized modern legislation.* **[To come: Discussion of the two kinds of**
26 **specialized legislation, and the policy arguments for each.]**

27
28 *This act—willful misconduct.* **[To come: Discussion of the decision of the drafting**
29 **committee to follow the states that preserve some fiduciary duty, employing the common**
30 **“willful misconduct” standard to that end.]**

31
32 *Subsection (a)—compliance with direction or protection.* Paragraph (1) of this subsection
33 imposes on a directed trustee a duty to comply with a trust director’s exercise of a power of
34 direction or protection. For example, a directed trustee must take steps reasonably necessary to

1 implement the director’s exercise of the director’s power. Paragraph (2) imposes a similar duty
2 not to act in the absence of the director’s exercise of the director’s power if the terms of the trust
3 so require. The duties of compliance prescribed by paragraphs (1) and (2) are qualified by
4 paragraph (3), which imposes a duty on a directed trustee not to comply with a trust director’s
5 exercise of a power of direction or protection, or a term of the trust that provides that the trustee
6 may not act in the absence of the director’s exercise of such a power, to the extent that by
7 complying the trustee would engage in willful misconduct.
8

9 The reference in the first clause of this subsection to “a matter for which a directed
10 trustee is subject to a power of direction under Section 6(b)(1) or a power of protection under
11 Section 6(b)(3)” limits a directed trustee’s duty to comply to circumstances in which a direction
12 is within the trust director’s power of direction or protection. It follows, therefore, that a trustee
13 should not comply with an action of a trust director that is outside of the director’s power of
14 direction or protection. To do so would violate the background duty of a trustee to act in
15 accordance with the terms of the trust. *See* Uniform Trust Code § 105(b)(2) (amended 2005)
16 (making mandatory “the duty of a trustee to act ... in accordance with terms ... of the trust”);
17 Restatement (Third) of Trusts § 76 (2007) (“The trustee has a duty to administer the trust ... in
18 accordance with the terms of the trust.”). For example, a direction rendered in a form contrary to
19 that required by the terms of the trust, such as an oral direction if the terms of the trust require a
20 writing, is not within the trust director’s power of direction.
21

22 *Subsection (b)—effect of power of consent.* Paragraph (1) of this subsection addresses a
23 power of consent under which the directed trustee is not permitted to act without the permission
24 of the trust director. Paragraph (1) provides that if the trustee acts reasonably in proposing an
25 action but the director does not grant permission, the trustee is liable only for the trustee’s own
26 willful misconduct. In undertaking to obtain the director’s permission, however, the trustee is
27 subject to the normal duties of trusteeship applicable under the terms of the trust and the enacting
28 state’s law.
29

30 Paragraph (2) provides that a trustee is not liable for breach of trust if in accordance with
31 the terms of the trust a trust director approved or ratified the conduct constituting the breach.
32 Such an approval or ratification is only permissible, however, if the conduct constituting the
33 breach does not involve willful misconduct (paragraph (2)(A)), and if the director’s release was
34 not induced by improper conduct of the trustee and the director knew of the material facts
35 relating to the breach (paragraph(2)(B)-(C)). These limits on release are drawn from Uniform
36 Trust Code § 1009 (2000) and are similar in substance to those stated in Restatement (Third) of
37 Trusts § 97 (2012).
38

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

1 The safe harbor of this subsection is permissive, rather than mandatory. This subsection
2 confirms that a trustee may satisfy its duties by petitioning for instructions. It does not, by itself,
3 require a trustee to bring such a 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

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

10 **DIRECTOR.**

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

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

17 **Comment**

18
19 *Duty to provide information.* This section imposes a duty on directed trustees and trust
20 directors to provide information to each other. Subsection (a) imposes this duty on a directed
21 trustee and subsection (b) imposes this duty on a trust director.
22

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

35 *An affirmative and a responsive duty to inform.* This section imposes both an affirmative
36 and a responsive duty to inform. In other words, it imposes a duty both to provide information
37 independently and to reply to requests for information. For example, if a trust director exercises a
38 power of protection to amend the terms of the trust, the director would have an affirmative duty

1 to inform the trustees and other trust directors whose powers or duties are reasonably related to
2 the amendment, whether or not the trustees or other trust directors inquired about the
3 amendment. Similarly, the director would have a responsive duty to provide information about
4 the amendment upon a request by a trustee or another trust director whose powers or duties were
5 reasonably related to the amendment.
6

7 *Shelton v. Tamposi.* In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), the terms of the
8 trust left distribution in the hands of the trustee, but shifted power over investment to a trust
9 director (i.e., the “investment director”). In consequence, the trustee could not raise the cash
10 necessary to fund a distribution to one of the beneficiaries. Under the terms of this section, the
11 trust director would have been under a duty to give the trustee information about the liquidity
12 effects of the director’s investment program, and the trustee would have been under a duty to
13 give the director information about the liquidity needs of the trustee’s distribution program.
14 Moreover, in making and implementing the investment program, under Section 7(a) the trust
15 director would be subject to the same duties as a similarly situated trustee, in parallel to the
16 trustee’s duties in making and implementing the distribution program.
17

18 *Interaction with Section 10.* Section 10 provides that a directed trustee does not have a
19 duty to monitor, inform, or advise other parties about the actions of a trust director. Section 10
20 does not, however, eliminate the trustee’s duty to provide information related to its own powers
21 and duties. This section, which requires a directed trustee to provide information “reasonably
22 related to the powers or duties of the trustee” is therefore not inconsistent with Section 10.
23

24 *Interaction with Section 11.* Section 11 authorizes a settlor to subject cotrustees to the
25 more narrow disclosure rules of this section, conditioning each cotrustee’s access to information
26 on a reasonable relation to the cotrustee’s powers or duties, instead of the broader information
27 rights under the common law, as under Restatement (Third) of Trusts § 81 cmt. b (2007)
28 (“Furthermore, absent clear provision in the trust to the contrary, even in the absence of any duty
29 to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable
30 information regarding an aspect of trust administration in which the trustee is not required to
31 participate.”).
32

33 *Disclosure to beneficiaries.* This section governs disclosure of information to trustees and
34 trust directors, rather than to beneficiaries. The duty of a trust director to disclose information to
35 a beneficiary is governed by Section 7, which prescribes the fiduciary duties of a trust director.
36 The duty of a directed trustee to disclose information to a beneficiary is governed by the
37 background law of an enacting state by way of Section 4.
38

39 *Mandatory floor, not a ceiling.* This section imposes a mandatory floor on a directed
40 trustee’s and a trust director’s duty to share information, rather than a ceiling. The terms of a
41 trust can specify more extensive duties of information sharing among directed trustees and trust
42 directors.
43

1 *The trust director’s specific duties of disclosure.* Under Section 7(a), a trust director
2 holding a power of direction or consent is subject to the same disclosure duties as a trustee would
3 be in the exercise or nonexercise of the same power under the same circumstances. For example,
4 if a trust director intended to direct a nonroutine transaction, to change “investment ...
5 strategies,” or to take “significant actions ... involving hard-to-value assets or special sensitivity
6 to beneficiaries,” the director might be under a duty of affirmative advance disclosure.
7 Restatement (Third) of Trusts § 82 cmt. d (2007); *see also Allard v. Pacific Nat’l Bank*, 663 P.2d
8 104, 110 (Wash. 1983) (“The trustee must inform beneficiaries, however, of all material facts in
9 connection with a nonroutine transaction which significantly affects the trust estate and the
10 interests of the beneficiaries prior to the transaction taking place.”).

11
12 *Administrative classification.* In addition to waiving a directed trustee’s duties to monitor,
13 inform, or advise, many state statutes also go further and say that if a trustee for some reason
14 chooses to do so, those monitoring, informing, or advising activities will be deemed to be
15 “administrative actions.” The purpose of these provisions is to ensure that if a directed trustee
16 chooses for some reason to inform, monitor, or advise, the trustee does not assume a continuing
17 obligation to do so nor concede a prior duty to have done so. This section dispenses with the
18 opacity of an administrative classification and achieves the intended result more directly in
19 paragraph (2), which provides that if a trustee monitors, informs, or advises about the actions of
20 a trust director on one occasion, the trustee does not thereby become liable for a prior or
21 subsequent failure to monitor, inform, or advise on another occasion.

22
23 **SECTION 11. APPLICATION TO COTRUSTEE.** The terms of a trust may provide
24 that a cotrustee is subject only to the duty and liability of a directed trustee under Sections 8, 9,
25 and 10 with respect to:

26 (1) another trustee’s power of direction to invest, manage, or distribute the trust property
27 or to direct the cotrustee in the cotrustee’s or trust director’s investment, management, or
28 distribution of the property; or

29 (2) another trustee’s power of consent under which:
30 (A) the cotrustee must obtain the permission of the other trustee before exercising
31 a power of the cotrustee; or

32 (B) the other trustee may release the cotrustee from liability for an action
33 proposed or previously taken by the cotrustee.

34 (3) another trustee’s power of protection to:

- 1 (A) amend or modify the terms of the trust or terminate the trust;
- 2 (B) change the principal place of administration, situs, or governing law of the
- 3 trust;
- 4 (C) determine the capacity of the settlor, a trustee, a trust director, a beneficiary,
- 5 or other party;
- 6 (D) appoint or remove a trustee or another trust director, or a successor to either;
- 7 or
- 8 (E) prosecute, defend, or join an action, claim, or judicial proceeding relating to
- 9 the trust.

10 **Legislative Note:** *A state that has adopted Uniform Trust Code § 703(c), (f), and (g) should*

11 *revise those sections by [to discuss at next committee meeting].*

12 **Comment**

13 *Cotrusteeship by default.* Under this section the default rule is that, if a settlor names

14 cotrustees, the traditional law of cotrusteeship applies. The fiduciary duties of directed

15 trusteeship will only apply if the terms of the trust so provide.

16

17 *Settlor autonomy.* Under traditional law governing cotrustees, each cotrustee “has a duty

18 to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach

19 of trust occurs, to obtain redress.” Restatement (Third) of Trusts § 81(2) (2007). This rule applies

20 even if the settlor limits the role or function of one of the cotrustees. “Even in matters for which

21 a trustee is relieved of responsibility, . . . if the trustee knows that a co-trustee is committing or

22 attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent

23 the fiduciary misconduct.” *Id.* cmt. b. This rule contrasts with Sections 8 and 10 of this act,

24 which impose a less demanding fiduciary standard on a directed trustee.

25

26 This section allows a settlor to choose either fiduciary regime for a cotrusteeship—the

27 traditional rules of cotrusteeship or the more permissive rules of a directed trusteeship. Given

28 that a settlor could have opted into the permissive rules of this act by naming a trust director and

29 a directed trustee instead of naming cotrustees, there seems little reason to prevent the settlor

30 from directing the application of the rules of this act to an arrangement that uses the labeling of

31 cotrustees, rather than trust directors.

32

33 *Mechanics of choosing directed trustee duties.* Whether this section applies to a given

34 trust is a question of construing the terms of that trust. This section does not impose a

35 requirement of express reference to this section or to this act. Under Section 3(a), this section

36 may apply to a trust created before the effective date of this act, but only as to conduct occurring

1 after that date.

2
3 *Cotrustees as directed trustees and trust directors.* The terms of a trust can place a
4 cotrustee in a position of acting like a trust director or a directed trustee. This section only
5 applies to a cotrustee who acts like a directed trustee. This section does not address the duties of
6 a cotrustee who acts like a trust director, because the duties of a cotrustee under traditional law
7 are by definition comparable to the duties of a trust director under Section 7. **[Placeholder: For
8 further discussion, what about a power of protection in a cotrustee?]**
9

10 *No third-party effects.* Nothing in this section changes the rights of third parties who deal
11 with a cotrustee in the cotrustee's capacity as such.
12

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

14 (a) An action against a trust director for breach of trust must be commenced within the
15 same limitations period as an action against a trustee for breach of trust.

16 (b) A report or accounting to a person of the conduct of a trust director has the same
17 effect on the limitations period for an action by the person against the director that the report or
18 accounting would have if the director were a trustee.

19 **Comment**

20 Subsection (a) extends to a trust director the same limits on liability that a trustee enjoys
21 under the law of an enacting state by way of a statutory limitations period, such as under
22 Uniform Trust Code § 1005(c) (2000). The limitations period absorbed by subsection (a) applies
23 to all claims against a trust director for breach of trust, whether by a beneficiary, a trustee,
24 another trust director, or some other party.
25

26 Subsection (b) extends to a trust director the same limits on liability that a trustee enjoys
27 under the law of an enacting state arising from the making of a report or accounting, such as
28 under Uniform Trust Code § 1005(a)-(b) (2000), except that the rule of subsection (b) applies
29 regardless of whether the report or accounting was made by the trust director. A trust director
30 may therefore be protected by a report or accounting made by a trustee or another trust director
31 even though the director is not responsible for the content of the report or accounting, so long as
32 the report or accounting fairly discloses the director's actions.
33

34 Laches, which strictly speaking is an equitable defense rather than a limitations period, is
35 addressed by Section 13(1).
36

1 a trust director.

2
3 *Exculpation or exoneration.* The discussion notes to Section 7 address the effect of an
4 exculpation or exoneration clause for a trust director.

5
6 *Attorney's fees and indemnification.* Attorney's fees and indemnification for a trust
7 director are governed by Section 6(c)(1), which establishes a default rule that allows a trust
8 director to exercise "any further power appropriate to the exercise of the director's express
9 power" under Section 6(b). By default, therefore, a trust director has the power to incur
10 attorney's fees and other expenses and to direct indemnification for them so long as they are
11 "appropriate" to the exercise of the director's express powers.

12
13 **SECTION 14. JURISDICTION OVER TRUST DIRECTOR.**

14 (a) By accepting appointment as trust director of a trust subject to this [act], the director
15 submits personally to the jurisdiction of the courts of this state regarding any matter related to a
16 power or duty of the director.

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

19 **Comment**

20
21 Under subsection (a), by accepting appointment as trust director of a trust subject to this
22 act, the director submits to the personal jurisdiction of the courts of the state. This rule is
23 mandatory. The terms of a trust or an agreement among the trust director and other parties cannot
24 eliminate a court's personal jurisdiction over a trust director under this section. However, this
25 section does not preclude a court from declining to exercise jurisdiction under the doctrine of
26 forum non conveniens.

27
28 Subsection (b) confirms that subsection (a) does not prescribe the exclusive method of
29 obtaining jurisdiction over a trust director.

30
31 **SECTION 15. OFFICE OF TRUST DIRECTOR.** The rules applicable to a
32 trusteeship regarding the following matters apply to a trust directorship:

33 (1) acceptance;

34 (2) appointment;

35 (3) giving of bond to secure performance;

- 1 (4) compensation;
- 2 (5) resignation;
- 3 (6) removal; and
- 4 (7) vacancy.

5 **Comments**

6 This section applies to a trust directorship the law of an enacting state applicable to a
7 trusteeship with regard to seven subjects. The character of that law as default or mandatory as
8 applied to a trust directorship turns on the default or mandatory character as applied to a
9 trusteeship.

10
11 *Paragraph (1)—acceptance.* This paragraph absorbs an enacting state’s law governing
12 acceptance of a trusteeship, such as under Uniform Trust Code § 701(a)–(b) (2000) or
13 Restatement (Third) of Trusts § 35 (2003), for application to acceptance of a trust directorship.

14
15 *Paragraph (2)—appointment.* This paragraph absorbs an enacting state’s law governing
16 trustee appointment, such as under Uniform Trust Code § 704(c) and (e) (amended 2004) and
17 Restatement (Third) of Trusts § 34 (2003), for application to appointment of a trust director.

18
19 *Paragraph (3)—bond.* This paragraph absorbs an enacting state’s law governing bond to
20 secure performance by a trustee, such as under Uniform Trust Code § 702(a)–(b) (2000) and
21 Restatement (Third) of Trusts § 34(3) (2003), for application to bond by a trust director.

22
23 *Paragraph (4)—compensation.* This paragraph absorbs an enacting state’s law governing
24 compensation of a trustee, such as under Uniform Trust Code § 708 (2000) and Restatement
25 (Third) of Trusts § 38 cmt. i (2003), for application to compensation of a trust director. Just as in
26 total “the reasonable fees for multiple trustees may be higher than for a single trustee,”
27 Restatement (Third) of Trusts § 38 cmt. i (2003), so too the total reasonable fees in a trust with
28 multiple trustees and trust directors may be higher than for a single trustee.

29
30 On the other hand, the reasonable compensation of a trustee that is subject to a trust
31 director’s power of direction or power of consent is likely to be less than that for a similarly
32 situated trustee that is not subject to such a power. An apt analogy is to a trustee who hires others
33 to “render services expected or normally to be performed by the trustee.” Restatement (Third) of
34 Trusts § 38 cmt. c(1) (2003); *see also* Uniform Prudent Investor Act § 9 cmt. (1994) (“If, for
35 example, the trustee’s regular compensation schedule presupposes that the trustee will conduct
36 the investment management function, it should ordinarily follow that the trustee will lower its fee
37 when delegating the investment function to an outside manager.”).

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

1 *Paragraph (6)—removal.* This subsection absorbs an enacting state’s law governing
2 removal of a trustee, such as under Uniform Trust Code § 706 (2000) and Restatement (Third) of
3 Trusts § 37 cmt. e (2003), for application to removal of a trust director.
4

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

8 *Costs and indemnification.* The power of a trust director to incur reasonable costs and
9 direct indemnification for expenses would in most cases be covered by Section 6(c).
10

11 **SECTION 16. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

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

14 **SECTION 17. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**

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

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

21 (a)

22 (b)

23 (c)

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