DIRECTED TRUST ACT

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DIRECTED TRUST ACT

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ON UNIFORM STATE LAWS
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June 6, October 7, 2016
DIRECTED TRUST ACT
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# DIRECTED TRUST ACT

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

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

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

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

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

DIRECTED TRUST ACT

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

Comment

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

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

SECTION 2. DEFINITIONS. In this act:

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

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

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

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

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

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

(A) as expressed in the trust instrument;

(B) as established by other evidence that would be admissible in a judicial proceeding;
(C) as amended by a trustee or trust director in accord with the terms of the trust;

[or]

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

[(E) as determined or amended by nonjudicial settlement agreement under

[Uniform Trust Code Section 111]].

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

Legislative Note: A state that has adopted Uniform Trust Code § 102 to come: guidance re
“breach of trust” and Section 103(18) (2004) or Uniform Trust Decanting Act Section 2(28)
(2015), defining “terms of a trust” should consider updating those definitions to conform
with paragraph (6) of this section. A state that has not adopted Uniform Trust Code §Section 111
(2000) should replace the bracketed language of subparagraph 6(E) with a cross reference to
the state’s law governing nonjudicial settlement. A state that has not authorized amendment by
nonjudicial settlement agreement or should omit paragraph 5 subparagraph 6(E) as indicated
by if the brackets state does not have such a law.

Comment

(1) Breach of trust. The definition of “breach of trust” in paragraph (1) expands the
comparable definition in clarifies that the term “includes” a breach by a trust director of a duty
imposed by this act or the terms of a trust. Historically, the term has been used to reference a
breach of duty by a trustee, as under Uniform Trust Code § 1001(a) (2000) to include a breach
by a trust director and Restatement (Third) of Trusts § 93 (2012). By including within expanding
the meaning of the term a violation to include a breach of duty by a trust director of a duty
imposed by this act or by the terms of a trust, this definition paragraph resolves any doubt about
whether such conduct is also a “breach of trust.” Under traditional law, by contrast, the term
“breach of trust” referred to “a failure by the trustee to comply with any duty that the trustee
owes[ ] as trustee.” Restatement (Third) of Trusts § 93 (2012).

(2) Directed trustee. The definition of “directed trustee” in paragraph (2) includes only a
trustee that is subject to a trust director’s power of direction by a trust director under Section 6. A
cotrustee that is subject to direction by another cotrustee is not for that reason a directed trustee,
because paragraph (67) excludes a trustee from the definition of a “trust director.” Since Because a cotrustee trustee cannot be a trust director, a trustee whether that is subject to
direction only by a cotrustee is not “subject to a power of a trust director” within the meaning of a
directed trustee under this definition paragraph. Section 11 addresses the relationship between
this act and cotrusteeship.

(3) Person. The definition of “person” in paragraph (3) tracks the current Uniform Law Commission boilerplate definition for that term except that in paragraph (3) excludes an “estate” and a “trust.” The intention is to exclude,” which has the effect of excluding an “estate” and a “trust” from being named as a trust director.

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

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

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

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

(6) Terms of a trust. The definition of “terms of a trust” in paragraph (5) takes as its starting point, but makes several improvements. The Uniform Trust Decanting Act, which updates the comparable definition in Uniform Trust Code § 103(18) (amended 2004)), to take notice of court orders and nonjudicial settlement agreements, both of which are of growing practical significance. Paragraph (5) further improves on the Uniform Trust Decanting Act by further expanding the definition to include amendments (in addition to determinations) by court order and nonjudicial settlement agreement and to include amendments by trustees and a trustee or trust directors.

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

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

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

SECTION 3. APPLICATION; PRINCIPAL PLACE OF ADMINISTRATION.

(a) This [act] applies to a trust, whenever created before, on, or after [the effective date of
this [act]] which, that has its principal place of administration in this state, including
subject to the following rules:

(1) If the trust whose principal place of administration has been changed to this
state. As to a trust was created before or on [the effective date of this [act]], this [act] applies only
to conduct after that date.

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

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

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

(2) a trust director’s principal place of business is located in or a trust director is a
resident of the designated jurisdiction; or
(3) all or part of the administration occurs in the designated jurisdiction.

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

**Comment**

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

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

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

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

**Comment**

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

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

(1) a nonfiduciary power of appointment;

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

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

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

Alternative A for Paragraph (5)

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

Alternative B for Paragraph (5)

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

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

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

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

Nonfiduciary power (1) Power of appointment. Paragraph (1) excludes a nonfiduciary “power of appointment,” that is, a discretionary, which is defined by Section 2(4) to mean “a power given by the terms of a trust to a person other than a trustee that enables the person in a nonfiduciary capacity to designate a recipient of an ownership interest in or a power of appointment in which “the donee over the trust property.” A nonfiduciary power of appointment that may exercise the power be exercised arbitrarily as long as the exercise is within the scope of the power.” Restatement (Third) of Property: Wills and Other Donative Transfers § 17.1 cmt. g (2011). A nonfiduciary or discretionary power of appointment is governed by other statutory law, such as the Uniform Powers of Appointment Act (2013), and by extensive common law, such as under Restatement (Third) of Property: Wills and Other Donative Transfers §§17.1-23.1 (2011). By contrast, a fiduciary distributive power in a person other than a trustee is a power of direction under Section 6(b)(1), and the person holding the power is a trust director under Section 2(6). Without the exclusion of this paragraph, Section 6(b)(1) could have been read to transform all nonfiduciary or discretionary powers of appointment into fiduciary powers of a trust director.

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

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

(2) Power to appoint or remove. Paragraph (2) excludes “a power to appoint or remove a trustee or trust director.” This exclusion is responsive to multiple suggestions to the drafting committee that such a power, in particular a power to remove a trustee and appoint a successor corporate trustee, is a normal and customary drafting practice that arose separately from the phenomenon of directed trusts. Under prevailing law, the only limit on the exercise of such a power is that it “must conform to any valid requirements or limitations imposed by the trust terms.” Restatement (Third) of Trusts § 37 cmt. c (2003). If the terms of the trust do not impose any requirements or limitations on the power to remove, then it may be exercised without cause. See Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 11.10.2 (5th ed. 2006) (“If the terms of the trust confer the power of removal without any limitation, it is unnecessary for the holder to show cause.”).
Paragraph (3) **Revocable trust.** Paragraph (2) excludes a power of a settlor with respect to a revocable trust. Because the settlor of a revocable trust may at any time revoke the trust and take back the trust property, under modern law the trustee’s duties run to the settlor rather than to the beneficiaries, see Uniform Trust Code § 603(a) (2004), and the trustee must “comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the trustee’s normal fiduciary duties.” Restatement (Third) of Trusts § 74(1)(a)(i) (2007). Without the exclusion of this paragraph, Section 6(b)(1) or (b)(3)(A) could have been read to transform all powers retained by a settlor in a revocable trust into fiduciary powers of a trust director. A nonfiduciary power in a person other than the settlor to withdraw the trust property is a power of appointment that would fall within paragraph (1) of this section.

Paragraph (4) **Power of a beneficiary.** Paragraph (3) excludes a power of a beneficiary to the extent that the exercise or nonexercise of the power affects only the interest of the beneficiary (or the interest of another beneficiary who is represented by the beneficiary under applicable virtual representation law). This exclusion follows traditional law, under which “[a] power that is for the sole benefit of the person holding the power is not a fiduciary power.” Restatement (Third) of Trusts § 75 cmt. d (2007). By contrast, if the exercise or nonexercise of a power held by a beneficiary affects the interests of another beneficiary, and the power falls within the scope of Section 6, then under this act the beneficiary is a trust director subject to the standards of conduct prescribed by this act to the extent that the effect on the other beneficiary’s powers affect the other beneficiary’s interests.

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

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

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

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

(a) A trust director has only those powers granted to the director by the terms of the trust.
(b) The terms of a trust may grant a trust director:

(1) a power of direction to invest, manage, or distribute under which the director may administer the trust property or to direct a trustee or another trust director in the trustee’s or director’s administration of the trust, including in the investment, management, or distribution of the trust property;

(2) a power of consent under which:

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

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

(3) a power of protection to:

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

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

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

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

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

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

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

(2(2) a power to designate a recipient of an ownership interest in or a power of appointment over trust property is a power of appointment and not a power of direction under subsection (b);

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

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

Legislative Note: A state that has adopted Uniform Probate Code § 2-907(c)(4) (1993) or Uniform Trust Code §§ 408(b) or 409(2) (2000) should revise those provisions to add a cross-reference to subsection (b)(3)(E) of this section.[For discussion: should an enforcer under those sections be a “trust director” under this act?]
prescribes three categories of power. This act does not provide any default powers to a trust director. Nor does the act specify the scope or parameters of any power that the terms of a trust might grant to a director. For a trust director to have any powers, the scope and content of those powers must be prescribed by the terms of a trust.

Subsection (b). By validating terms of a trust that authorize a trust director to “administer” the trust or direct a trustee in the “administration” of the trust, subsection (b) enables a broad array of director powers, including powers that go beyond those customarily held by a trustee. As used in this subsection, the term “administration” has a meaning at least as broad as it has in the context of determining a trust’s “principal place of administration,” such as under Section 3(b). For the avoidance of doubt, the last clause of subsection (b) confirms that the terms of a trust may grant to a trust director: (1) powers of direction, (2) powers of consent, and (3) powers of protection.

Subsection (b)(1) - power of direction. A power of direction includes any power to “invest, manage, or distribute” trust property. The trio of the kinds of investment, management, and distribution, which is taken from powers that are customarily given to a trustee, such as under Uniform Trust Code § 815(a)(2)(b) (2000), is meant to incorporate. The drafting committee further intended the entire field of trustee term to include other powers. For example, that might affect the administration of a trust, such as the power to modify a trust or to release a trustee from liability.

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

- direct a trustee in the investments, including a power to
  - acquire, dispose of, exchange, or retain any investment of some or all of the trust property would be a power of direction. A power to direct a trustee in the distribution of trust property would likewise be a power of direction. So too would be a power to direct the trustee to:
  - make or take loans;
  - vote proxies for securities held in trust;
  - adopt a particular valuation of trust property; or determine the frequency or methodology of valuation; to interpret the trust; to
  - adjust between principal and income or convert to a unitrust; or to decant the trust. In sum, as regards a directed trustee, the “power of direction” category encompasses any power in a trust director to direct the trustee in the trustee’s exercise of any of the trustee’s powers.
  - manage a trust-owned business; or
  - select custodians for trust assets;
- modify, reform, terminate, or decant a trust;
- direct a trustee’s or another director’s delegation of the trustee’s or other director’s powers;
- change the principal place of administration, situs, or governing law of the trust;
A power of direction can also take the form of a direct exercise of authority by a trust.
director. The terms of a trust may, for example, give a trust director a power to sign subscription
documents or to hold certain trust property. Such powers to act directly are powers of direction if
they involve the investment, management, or distribution of trust property.

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

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

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

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

- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;
- prosecute, defend, or join an action, claim, or judicial proceeding relating to the
  trust;
- grant permission before a trustee or another director may exercise a power of the
  trustee or other director; or
- release a trustee or another trust director from liability for an action proposed or
  previously taken by the trustee or other director.

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

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

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

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

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

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

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

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

Rule of construction for powers of appointment. Subsection (c)(2) prescribes a default rule of construction under which a power to designate a recipient of an ownership interest in or a power of appointment over trust property is a power of appointment unless the terms of the trust provide otherwise. Powers of appointment, the exercise of which are not subject to fiduciary duty but must be in accord with the terms of the power, are excluded from the scope of this act by Section 5(1).

Settlor
Subsection (c)(2)—settlor incapacity or death. Subsection (c)(23) specifies a default rule under which a trust director’s powers survive the incapacity or death of the settlor. Following the directed trust statutes in several states, including Nevada and South Dakota, see Nev. Rev. Stat. § 163.555, South Dakota SDCL (2015); S.D. Codified Laws § 55-1B-3, (2016), the drafting committee included this section to confirm that the common law rule of agency under which an agent’s authority terminates on the incapacity or death of the principal would not apply to a trust director. See Restatement (Third) of Agency §§ 3.07-3.08 (2006).

Majority decision. Subsection (c)(2)—majority decision. Subsection (c)(24) provides a default rule of majority action for multiple trust directors with “joint powers,” such as in the case of a three-person committee with a power of direction over investment or distribution. Majority rule action is the modern prevailing default for multiple trustees. See Uniform Trust Code § 703(a) (2000); Restatement (Third) of Trusts § 39 (2003). In the event of a deadlock among trust
directors with joint powers, by analogy to a deadlock among cotrustees, a court could “direct
exercise of the [joint] power or take other action to break the deadlock.” Id. cmt. e. The
question of information sharing among trust directors with related but not “joint” powers, such as
between a trust director with a power of direction over investment and a trust director with a
power of direction over distribution, is addressed by Section 9.e.

SECTION 7. DUTY AND LIABILITY OF TRUST DIRECTOR.

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

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

and

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

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

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

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

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

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

Comment

Subsection (a)—powers of direction and consent. For powers of direction and consent, subsection (a) imposes the same system of fiduciary duties on a trust director that would ordinarily apply to a trustee. Under subsection (a)(1), for example, a trust director with a power to make or direct investments, for example, has the same duties to act in the sole interest of the beneficiary and to act prudently that a trustee would have in making investments. The theory behind subsection (a) is that within the scope of a trust director exercises a power of direction, the director is the most appropriate person to bear the duty associated with the exercise or consent, the nonexercise of that power. Put differently, in a directed trust, a trust director functions much like a trustee in a trust that is not directed, non-directed trust, and thus should have the same duties as a trustee.

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

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

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

Springing powers without a duty to monitor. The drafting committee contemplated that a settlor could construct a director’s power to be springing and without an ongoing obligation to monitor the administration of the trust. For example, a settlor could grant a trust director a power to direct a distribution, but only if requested to do so by a beneficiary. A director holding such a power would not be under a duty to act unless requested to do so by a beneficiary. Moreover, because under subsection (a)(2) a settlor can vary the fiduciary duties of a trust director to the same extent that the settlor could vary the fiduciary duties of a trustee, in the example just given under Uniform Trust Code § 105(b)(2) (amended 2004) the settlor could waive all of the director’s otherwise applicable duties other than the duty to act in good faith. In such a situation, the director would be subject to the minimum duty to act in good faith in the director’s response to the beneficiary’s request for a distribution.

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

A trust director is likewise subject to the protection of same rules as a trustee with regard to an exculpation or exoneration clause, but only to the extent that a trustee could likewise be exculpated or exonerated. Under prevailing law, such as under Uniform Trust Code § 1008 (2000) and Restatement (Third) of Trusts § 96 (2012), an exculpation or exoneration clause cannot protect a trustee against liability for acting in bad faith or with reckless indifference. Under subsection (a)(2), the same rules would apply to an exculpation or exoneration clause for a trust director.

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

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

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

_subsection (c)—licensed medical professionals_. Subsection (c) prescribes a default rule that exempts(b) refers to a trust director who is a licensed medical professional “licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of the director’s business or practice of a profession.” This phrasing is based on the definition of “health-care provider” in Uniform Health-Care Decisions Act § 1(8) (1993). To the extent that a trust director acts in the director’s business or practice of a profession to provide health care, the director is relieved from duty or liability under this act unless the terms of the director acts in trust provide otherwise.

The rule of this subsection, which applies unless the director’s medical capacity. The provision is responsive to the concern that a medical health-care professional might refuse to accept appointment as a trust director if doing so would expose the professional to fiduciary duty under this act in addition to the other regulations and professional rules ordinarily applicable to such a professional. For example, a trust might call for a licensed medical health-care professional to determine a beneficiary’s capacity or sobriety or in a revocable trust to determine of a beneficiary or the capacity of the settlor. In making such a determination, the medical under subsection (b) the health-care professional would not be subject to the usual regulations applicable to the professional, but not to duty or liability under this act. Furthermore, this section only excludes the licensed medical professional from duty and liability. It does not exclude the licensed medical professional from the other provisions of the act, such as the provisions in Section 15 that provide helpful clarity on mechanical issues such as acceptance, resignation, and vacancy, instead the professional would be subject to the rules and regulations otherwise applicable to the professional.

Subsection (dc)—no ceiling on duties. Subsection (dc) confirms that the duties prescribed by this section are defaults and minimums, not ceilings. The terms of a trust can impose further duties in addition to those prescribed by this section.
SECTION 8. DUTY AND LIABILITY OF DIRECTED TRUSTEE.

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

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

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

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

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

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

———(2) If under the terms of the trust the director or another trust director may release the trustee from liability for breach of trust and the director grants such a release, the trustee or other director is not liable to the extent of the release unless:
(A) the breach involved the trustee’s own willful misconduct;

(B) or the other director’s own willful misconduct;

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

or

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

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

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

Legislative Note: A state that has adopted Uniform Trust Code §Section 808 to come: guidance re pointer to this act and changes to For discussion: what recommendation should we make about revision or repeal of UTC Section 808 .?

Comment

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

Subsection (a)—duty of a trust director—obedience. Subsection (a) requires a directed trustee to obey the terms of a power of direction. The sharing of information among directed trustees and trust directors is governed by Section 13. “terms of a power of direction” may impose a variety of demands on a directed trustee. The terms of a trust may require a trustee to follow the express directions of a trust director, such as if the terms of the trust allow the director to direct the trustee to invest trust assets in a particular security. The terms of a trust may require a trustee to request permission from a director before acting or to refrain from acting if the director so directs. The terms of a trust may also allow a director to modify the trust or to impose particular administrative procedures. The duty imposed by subsection (a) requires a trustee to comply with any such terms in a power of direction, subject to the limitation in subsection (b).
Traditional law. [To come: Discussion of traditional law, including Uniform Trust Code § 808 (2000) and Restatement (Third) of Trusts § 75 (2007).] [See the accompanying 2016 Annual Meeting memo.]

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

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

Subsection (a)—compliance with direction or protection. Paragraph (1) of this subsection imposes on a directed trustee a duty to comply with a trust director’s exercise of a power of direction or protection. For example, a directed trustee must take steps reasonably necessary to implement the director’s exercise of the director’s power. Paragraph (2) imposes a similar duty not to act in the absence of the director’s exercise of the director’s power if the terms of the trust so require. The duties of compliance prescribed by paragraphs (1) and (2) are qualified by paragraph (3), which imposes a duty on a directed trustee not to comply with a trust director’s exercise of a power of direction or protection, or a term of the trust that provides that the trustee may not act in the absence of the director’s exercise of such a power, to the extent that by complying the trustee would engage in willful misconduct.

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

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

Subsection (b)—effect of power of consent. Paragraph (1) of this willful misconduct.
Subsection (b) provides an exception to the duty of obedience prescribed by subsection (a). Under subsection (b), a trustee must not comply with the terms of a power of direction to the extent that by complying the trustee would engage in “willful misconduct.” The drafting committee settled upon the term willful misconduct after a review of the existing specialized directed trust statutes.

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

In the other group, which includes Delaware, Illinois, Colorado, North Carolina, and Virginia, are the statutes under which the directed trustee is not permitted to act without the permission of the trust director. Paragraph (1) provides that a directed trustee is not liable for complying with a direction of a trust director, unless by so doing the directed trustee would personally engage in “willful” or “intentional” misconduct. The policy rationale for these statutes is that, because a trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is directed. Although the settlor could have made the trust director the sole trustee, the settlor did not actually do so—and under traditional understandings of trust law, a trustee must always be accountable to a beneficiary in some way. See, e.g., Restatement (Third) of Trusts § 96 cmt. c (2012) (“Notwithstanding the breadth of language in a trust provision relieving a trustee from liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability.”).

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

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

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

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

Subsection (c)—release by trust director. Subsection (c) provides additional substantive and procedural safeguards for a release by a trust director of a trustee from liability. Under Section 6, the terms of a trust may empower a trust director to release a trustee or another trust director from liability for breach of trust. If the director grants such a release, the trustee or other director is not liable to the extent of the release. The terms of a trust may enable such a release to be given at any time, whether before or after the trustee or other director acts reasonably in proposing an action but the director does not grant permission, the trustee is liable only for.

This subsection imposes certain substantive and procedural limitations on a release by a trust director. First, consistent with the policy of subsection (b) as described above, a trustee cannot be released for a breach that involves the trustee’s own willful misconduct. In undertaking to obtain the director’s permission, however, the trustee is subject to the normal duties of trusteeship applicable under the terms of the trust and the enacting state’s law. Second, consistent with prevailing law governing a release of a trustee by a beneficiary, see, e.g., Uniform Trust Code § 1009 (amended 2001); Restatement (Third) of Trusts § 97 (2012), a release by a trust director is not enforceable if it was induced by improper conduct of the trustee or if at the time of the release the director did not know of the material facts relating to the breach.

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

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

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

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

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

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

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

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

Comment

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

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

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

Shelton v. Tamposi. In Shelton v. Tamposi, 62 A.3d 741 (N.H. 2013), the terms of the trust left distribution in the hands of the trustee, but shifted power over investment to a trust director (i.e., the “investment director”). In consequence, the trustee could not raise the cash necessary to fund a distribution to one of the beneficiaries. Under the terms of this section, the trust director would have been under a duty to give the trustee information about the liquidity effects of the director’s investment program on the trust’s cash position, and the trustee would have been under a duty to give the director information about the liquidity needs of the trust. Moreover, in making and implementing the investment program, under Section 7(a) the trust director would be subject to the same duties as a similarly situated trustee, in parallel to the trustee’s duties in making and implementing the distribution program.
Interaction with Section 10. Section 10 provides that a directed trustee does not have a duty to monitor, inform, or advise other parties about the actions of a trust director. Section 10 does not, however, eliminate the trustee’s duty to provide information related to its own powers and duties. This section, which requires a directed trustee to provide information “reasonably related to the powers or duties of the trustee” is therefore not inconsistent with Section 10.

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

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

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

SECTION 10. NO LIABILITY FOR FAILURE TO MONITOR, INFORM, OR ADVISE. Unless the terms of a trust provide otherwise, a directed trustee:

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

(2) does not become liable for a failure to assume the duty described in paragraph (1) because the directed trustee on another occasion monitors a trust director or informs or gives advice to a settlor, beneficiary, trustee, or trust director about a trust director’s exercise or nonexercise of the director’s powers.
Comment

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

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

Survival of trustee’s general duty of disclosure. Although this section confirms that a directed trustee is not liable for failing to monitor, inform, or advise regarding a trust director’s exercise or nonexercise of its powers, this section does not relieve a trustee of its ordinary duties to disclose and report under otherwise applicable law such as under Uniform Trust Code § 813 (amended 2004) or Restatement (Third) of Trusts § 82 (2007). For example, although a directed trustee would not be liable for failing to advise a beneficiary about the risks of a portfolio concentration, the trustee would remain under a duty to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust to the extent required by otherwise applicable state law.

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

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

Administrative classification. No assumption of duty. In addition to waiving a directed trustee’s duties to monitor, inform, or advise as under paragraph (1) of this section, many state statutes also go further and say also provide that if a trustee for some reason chooses to do so, those monitoring, informing, or advising activities will be deemed to be “administrative actions.” The purpose of these provisions is to ensure that if a directed trustee chooses for some
reason to inform, monitor, or advise, the trustee does not assume a continuing obligation to do so nor concede a prior duty to have done so. This section dispenses with the opacity of an administrative classification and achieves the intended result more directly in paragraph (2), which provides by providing that if a trustee monitors, informs, or advises about the actions of a trust director on one occasion, the trustee does not thereby become liable for a prior or subsequent failure assume a duty to monitor, inform, or advise on another occasion.

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

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

(2) another trustee’s power of consent under which:

(A) the cotrustee must obtain the permission of the other trustee before exercising a power of the cotrustee; or

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

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

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

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

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

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

prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust.

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

**Comment**

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

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

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

This section allows a settlor to choose either fiduciary regime for a cotrusteeship—the traditional rules of cotrusteeship or the more permissive rules of a directed trusteeship. Given that a settlor could have opted into the permissive rules of this act by naming a trust director and a directed trustee instead of naming cotrustees, there seems little reason to prevent the settlor from applying the application of the fiduciary rules of this act to an arrangement that uses the labeling of cotrustees, rather than trust directors, cotrusteeship because a settlor could choose the more permissive rules for a directed trusteeship by labeling one of the cotrustees as a trust director and another as a directed trustee.

*Mechanics of choosing directed trustee duties.* Whether this section applies to a given trust is a question of construing the terms of that trust. This section does not impose a requirement of express reference to this section or to this act. Under Section 3(a), this section may apply to a trust created before the effective date of this act, but only as to conduct occurring after that date.
**Cotrustees as directed trustees and trust directors.** The terms of a trust can place a cotrustee in a position of giving direction, like a trust director, or taking direction, like a directed trustee. This section only applies to a cotrustee who acts like a directed trustee. This section does not address the duties of a cotrustee who acts like a trust director. Because under Section 7, the duties of a trust director, under traditional law, are by definition comparable to the ordinary duties of a trust director under Section 7. [Placeholder: For further discussion, what about a power of protection in a cotrustee?]

**No third-party effects.** Nothing in this section changes the rights of third parties who deal with a cotrustee in the cotrustee’s capacity as such. Although this section changes the degree to which the terms of a trust may reduce a cotrustee’s duties to a beneficiary, it does not alter the rules that affect the rights of third parties who contract with or otherwise interact with a cotrustee.

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

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

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

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

Comment

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

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

Laches, which strictly speaking is an equitable defense rather than a limitations period, is addressed applicable to an action against a trust director by Section 13(1).

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

(1) laches or estoppel;
(2) consent, release, or ratification;
(3) reasonable reliance on the terms of the trust; and
(4) reasonable care to ascertain the happening of a conditional event.

Comment

Absorption. This section applies to an action for breach of trust against a trust director the law of an enacting state governing defenses available to a trustee in a comparable action. This approach is consistent with the more general absorption of the law of fiduciary duties under Section 7, and it offers the same advantages of allowing variation across the states and avoiding conflicts with the Uniform Trust Code or other applicable state law. The defenses listed in paragraphs (1)–(4) of this section are not exclusive. A trust director can assert any defense that would be available to a trustee in an action for breach of trust, including a defense not listed in this section, under existing state law, including: [For discussion: Should we move these examples into the blackletter, with bracketed UTC cross-references, and indicate that they are not exhaustive? We moved these examples to the comment in response to suggestions by several Commissioners at the Annual Meeting in July.]

Paragraph (1)—laches or estoppel. This paragraph addresses laches and estoppel. It is important for this act to absorb and apply these doctrines for trust directors, because the common law and principles of equity have not yet developed such an application.

● Paragraph (2)—beneficiary consent, release, or ratification. This paragraph recognizes a defense for a trust director of beneficiary consent, release, or ratification. Under prevailing law, such as provided by (see Uniform Trust Code § 1009 (amended 2001) and); Restatement (Third) of Trusts § 97(b)–(c) (2012), a beneficiary’s consent, release, or ratification is a defense
for a trustee to a claim of breach of trust if the consent, release, or ratification was 
informe\nd and not improperly obtained.);}

- Paragraph (3)—reasonable reliance on the terms of a trust. The law in many statutes, 
such as provided by (see Uniform Trust Code § 1006 (2000) and); Uniform Prudent 
Investor Act § 1(b) (1994), recognizes a defense for a trustee of reasonable reliance on 
the terms of the trust as expressed in the trust instrument. This paragraph absorbs that law 
for application to a trust director.); and 

- Paragraph (4)—event reasonable care in ascertaining the happening of an event 
affecting administration or distribution. Prevailing law, such as provided by (see 
Uniform Trust Code § 1007 (2000) and); Restatement (Third) of Trusts § 76 cmt. f 
(2007), recognizes a defense for a trustee of reasonable care in ascertaining the happening 
of an event that affects the administration of a trust. This paragraph absorbs that law for 
application to a trust director.)

Exculpation or exoneration. The discussion notes comments to Section 7 address the 
effect of an exculpation or exoneration clause for on the duty and liability of a trust director.

Attorney’s fees and indemnification. Attorney’s fees and indemnification for a trust 
director are governed by Section 6(c)(1), which establishes a default rule that allows a trust 
director to exercise “any further power appropriate to the exercise of the director’s express 
power” under Section 6(b). By default, therefore, a trust director has the power to incur 
attorney’s fees and other expenses and to direct indemnification for them so long as they are if 
“appropriate” to the exercise of the director’s express powers.

SECTION 14. JURISDICTION OVER TRUST DIRECTOR.

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

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

Comment

Under subsection (a), by accepting appointment as trust director of a trust subject to this 
act, the director submits to the personal jurisdiction of the courts of the state. This rule is 
mandatory. The terms of a trust or an agreement among the trust director and other parties cannot 
eliminat\negate a court’s personal jurisdiction over a trust director under this section. However, 
this section does not preclude a court from declining to exercise jurisdiction under the doctrine of 
forum non conveniens.
Subsection (b) confirms that subsection (a) does not prescribe the exclusive method of obtaining jurisdiction over a trust director.

SECTION 15. OFFICE OF TRUST DIRECTOR. The TRUST DIRECTORSHIP.

Unless the terms of a trust provide otherwise, the rules applicable to a trusteeship regarding the following matters apply to a trust directorship:

1. acceptance: [as prescribed by Uniform Trust Code Section 701];
2. appointment: [as prescribed by Uniform Trust Code Section 704];
3. giving of bond to secure performance: [as prescribed by Uniform Trust Code Section 702];
4. compensation: [as prescribed by Uniform Trust Code Section 708];
5. resignation: [as prescribed by Uniform Trust Code Section 705];
6. removal: [as prescribed by Uniform Trust Code Section 706]; and
7. vacancy [as prescribed by Uniform Trust Code Section 704].

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

Comments

This section applies to a trust directorship absorbs the state law of an enacting state applicable to a trusteeship for a trust directorship with regard to seven subjects. The default or mandatory character of the law as applied to a trusteeship governs whether the law is default or mandatory as applied to a trust directorship turns on the default or mandatory character as applied to a trusteeship.

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

Paragraph (2)—appointment. This paragraph absorbs an enacting state’s law governing trustee appointment, such as under Uniform Trust Code § 704(c) and (e) (amended 2004) and
Paragraph (3)—bond. This paragraph absorbs an enacting state’s law governing bond to secure performance by a trustee, such as under Uniform Trust Code § 702(a)–(b) (2000) and Restatement (Third) of Trusts § 34(3) (2003), for application to bond by a trust director.

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

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

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

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

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

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

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

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

SECTION 18. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .
(b) . . . .
(c) . . . .

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