DIVIDED TRUSTEESHIP ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

October 23-24, 2015 Drafting Committee Meeting

Copyright © 2015
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

October 2, 2015
DIVIDED TRUSTEESHIP ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

ROBERT H. SITKOFF, Harvard Law School, 1575 Massachusetts, Ave., Cambridge, MA 02138, Chair
TURNERY P. BERRY, 500 W. Jefferson St., Suite 2800, Louisville, KY 40202, Vice-Chair
JACK BURTON, 119 E. Marcey St., Suite 200, Santa Fe, NM 87501-2046
DAVID M. ENGLISH, University of Missouri-Columbia School of Law, 203 Hulston Hall, Columbia, MO 65211
MICHAEL B. GETTY, 430 Cove Towers Dr., #503, Naples, FL 34110
HARRY HAYNSWORTH, 108 Addingtons, Williamsburg, VA 23188
JOHN H. LANGBEIN, Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215
BRADLEY MYERS, University of North Dakota, 215 Centennial Dr., Stop 9003, Room 201, Grand Forks, ND 58202-9003
RAYMOND P. PEPE, 17 N. Second St., 18th Floor, Harrisburg, PA 17101-1507
DREW L. SNYDER, Office of the Governor, P.O. Box 139, Jackson, MS 39205
MARTHA T. STARKEY, 11611 N. Meridian St., Suite 150, Carmel, IN 46032
ROBERT A. STEIN, University of Minnesota Law School, 229 19th Ave. South, Minneapolis, MN 55455
CHARLES A. TROST, Nashville City Center, 511 Union St., Suite 2700, Nashville, TN 37219-1760
SUZANNE B. WALSH, 185 Asylum St., CityPlace 1, 29th Floor, Hartford, CT 06103-3469
JOHN MORLEY, Yale Law School, P.O. Box 208215, New Haven, CT 06520, Reporter

EX OFFICIO

RICHARD T. CASSIDY, 100 Main St., P.O. Box 1124, Burlington, VT 05402, President
PAMELA W. BERTANI, 728 Texas St., Suite 4, Fairfield, CA 94533, Division Chair

AMERICAN BAR ASSOCIATION ADVISORS

JAMES P. SPICA, 500 Woodward Ave., Suite 4000, Detroit, MI 48226-5403, ABA Advisor
KAREN E. BOXX, University of Washington, 316 William H. Gates Hall, P.O. Box 353020, Seattle, WA 98195-3020, ABA Section Advisor
AMY E. HELLER, 340 Madison Ave., 17th Floor, New York, NY 10173-1922

EXECUTIVE DIRECTOR

LIZA KARSAI, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, Executive Director

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600/www.uniformlaws.org
DIVIDED TRUSTEESHIP ACT

TABLE OF CONTENTS

SECTION 1. SHORT TITLE. ................................................................. 1
SECTION 2. DEFINITIONS..................................................................... 1
SECTION 3. APPLICATION; GOVERNING LAW ....................................... 4
SECTION 4. COMMON LAW AND PRINCIPLES OF EQUITY ...................... 6
SECTION 5. POWERS OF TRUST DIRECTOR ........................................ 7
SECTION 7. LIMITATIONS ON POWERS OF DIRECTED TRUSTEE .......... 15
SECTION 8. DUTIES AND LIABILITY OF TRUST DIRECTOR .................... 17
SECTION 9. DUTIES AND LIABILITY OF DIRECTED TRUSTEE ................. 20
SECTION 10. NO LIABILITY FOR MONITORING, WARNING, OR ADVISING .... 25
SECTION 11. INFORMING TRUSTEES AND TRUST DIRECTORS .............. 27
SECTION 12. LIMITATION OF ACTION AGAINST TRUST DIRECTOR .......... 29
SECTION 13. DEFENSES IN ACTION AGAINST TRUST DIRECTOR ............ 30
SECTION 14. JURISDICTION OVER TRUST DIRECTOR .......................... 32
SECTION 15. ACCEPTANCE; BOND; COMPENSATION ............................ 33
SECTION 16. RESIGNATION; REMOVAL; VACANCY .............................. 34
SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION ........ 36
SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT .............................................. 36
SECTION 19. REPEALS; CONFORMING AMENDMENTS ............................ 36
SECTION 20. EFFECTIVE DATE ............................................................ 37
DIVIDED TRUSTEESHIP ACT

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

Discussion Notes

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

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

SECTION 2. DEFINITIONS. In this [act]:

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

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

(3) “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.

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

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

(6) “Trustee” includes an original, additional, and successor trustee, and a cotrustee.
(7) “Vacancy in a trust directorship” means a period of time in which a trust director is absent for any of the following reasons and no successor has been appointed under Section 16(c):

(A) a person designated as trust director rejects the directorship;

(B) a person designated as trust director cannot be identified or does not exist;

(C) a trust director resigns;

(D) a trust director is disqualified or removed;

(E) a trust director dies; or

(F) a [guardian] or [conservator] is appointed for an individual serving as trust director.

**Discussion Notes**

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

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

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

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

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

---

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

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

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

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

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

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

---


3 See, e.g., Va. Code Ann. § 64.2-770(E)(1) (“No person shall be a ‘trust director’ for purposes of this subsection merely by holding a general or limited power of appointment over the trust assets.”).
a trustee and a trust director. However, at the prior meeting several people pointed out that in
some circumstances a trust director or a trustee might not be a “fiduciary,” and also that adverse
state tax consequences might follow from identifying a trust director as a “trust fiduciary.” In this
draft, therefore, we refer to both trustees and trust directors as necessary without a single
umbrella term, except in Section 11, in which we have a single-use definition of “trust
administrator” as an umbrella to mean either. We should discuss whether to make “trust
administrator” a global definition and use the term throughout.

Additional definitions. If the drafting process points to the need for additional definitions,
we can look to the existing statutes for models.  

SECTION 3. APPLICATION; GOVERNING LAW.

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

(b) Without precluding other means for establishing a sufficient connection with the
designated jurisdiction, terms of a trust designating the principal place of administration 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.

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

---

5/16.3(a); S.D. Codified Laws § 55-1B-1.
Discussion Notes

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

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

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

Subsection (b) - This provision, which derives from Uniform Trust Code § 108(a) (2000), confirms the validity of a settlor’s designation of a trust’s principal place of administration if: (1) a trustee is located in the designated jurisdiction; (2) a trust director is located in the designated jurisdiction; or (3) at least some of the trust administration occurs in the designated jurisdiction.

Paragraphs (1) and (3) reproduce without change the safe harbor under Uniform Trust Code § 108(a). Paragraph (2), which is new since the prior draft, is an innovation in that it expands the

---

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

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

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

The term “administration of a trust” … includes those matters which relate to the management of the trust. Matters of administration include those relating to the duties owed by the trustee to the beneficiaries. They include the powers of a trustee, such as the power to lease, to sell and to pledge, the exercise of discretionary powers, the requirement of unanimity of the trustees in the exercise of powers, and the survival of powers. They include the liabilities which may be incurred by the trustee for breach of trust. They include questions as to what are proper trust investments. They include the trustee’s right to compensation. They include the trustee’s right to indemnity for expenses incurred by him in the administration of the trust. They include the removal of the trustee and the appointment of successor trustees. They include the terminability of the trust.
safe harbor of § 108(a) to include also the location of a trust director as a sufficient connection with the designated jurisdiction. This expansion reflects this act’s validation of fracturing trusteeship among trustees and trust directors.

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

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

Discussion Notes

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

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

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

The question frequently arises whether a testator or settlor has manifested an intention that the trust be administered in a state other than that of his domicil. It may be expressly provided in the will or trust instrument that the trust is to be administered in a particular state. In the absence of such a provision, it is reasonable to infer in most situations that the testator or settlor expected the trustee to administer the trust at his or its place of business or domicil. This is especially true of a corporate trustee which will ordinarily administer its trust business at its principal trust office. It is true even though the corporate trustee is or may be qualified to do business in the state of the testator’s domicil. In the case of an individual trustee, it may be inferred that the testator intended that the trust should be administered at the trustee’s place of business or domicil. Where the testator or settlor names two or more trustees who are domiciled in different states, he may manifest an intention that the trust should be administered at the domicil or place of business of one of them. Thus, if he names a corporate trustee and an individual trustee, he may thereby manifest an intention that the trust should be administered at the place of business of the corporate trustee.
SECTION 5. POWERS OF TRUST DIRECTOR.

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

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

(2) a power of protection

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

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

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

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

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

(F) to terminate the trust;

(G) to appoint some or all of the trust property to a new trust; or

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

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

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

(1) to delegate powers and duties;

---

(2) to incur and direct indemnification of reasonable costs;

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

(4) to intervene in an action against a trustee, another trust director, beneficiary, or third party to the extent the action pertains to the trust[; and][.]

[(5) to direct a trustee to issue a Certification of Trust under [Uniform Trust Code Section 1013].]

(c) Unless the terms of a trust provide otherwise, trust directors with joint powers shall act by majority decision.

Discussion Notes

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

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

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

The structure of this section. The structure of this section is as follows:

- Subsection (a) provides that a trust director may be given certain powers of “direction,” “protection,” or “consent” over the administration of a trust. This subsection is discussed in further depth below.

- Subsection (b) gives a trust director such additional powers as are appropriate to the director’s exercise of her express powers. This subsection is discussed in
further depth below.

- Subsection (c) 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 is the modern
default for multiple trustees, as under Uniform Trust Code § 703(a) and
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.” Restatement (Third) of Trusts § 39 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 11.

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

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

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

---

163.5537, 163.5543, 163.5545, 163.5547 (distribution trust adviser, investment trust adviser, trust adviser, trust
protector, custodial account owner); S.D. Codified Laws §§ 55-1B-1, 55-1B-4 (protector, advisor, investment trust
advisor, distribution trust advisor).
(a)(2): (i) a power to determine a trustee’s or another trust director’s compensation,\(^\text{11}\) and (ii) a
power to resolve disputes between or among trustees, trust directors, and beneficiaries.\(^\text{12}\) A
related question, noted below, is whether we can come up with a residual catch-all within the
protection power category.

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

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

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

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

---

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

\(^{12}\) See Wis. Stat. Ann. § 701.0818(2)(b)(1)(c) (“Resolve disputes between the trustee or a directing party and a
beneficiary.”).
eight enumerated kinds of powers, largely drawn from existing statutes per Appendix A, that are 
not customarily thought of as a power of trusteeship over which a trust director could be given a 
power of direction. Many of these powers are commonly associated with the term “trust 
protector.” As noted above, we should discuss whether to add (i) a power to determine a trustee’s 
or another trust director’s compensation, and (ii) a power to resolve disputes between or among 
trustees, trust directors, and beneficiaries. We should also discuss whether we can come up with 
a residual catch-all for powers of protection. The difficulty is that powers of protection is not a 
neat conceptual category like powers of direction.

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

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

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

For purposes of this agreement, I shall be considered to be unable to 
manage my affairs if I am under a legal disability or by reason of illness or mental 
or physical disability am unable to give prompt and intelligent consideration to 
financial matters. The determination as to my inability at any time shall be made 
by ___________ and my physician, or the survivor of them, and the trustee may 
rely upon written notice of that determination.13

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

Subsection (a)(3): “Power of consent.” If a trust director must give consent before a trustee or another trust director may act, then the trust director has a “power of consent.” Thus, for example, a trustee could be required to obtain the consent of a trust director before selling certain trust property or acquiring other property or making a distribution. Any power of trusteeship can be subjected to a power of consent. The core distinction between 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. Under Section 8(c), in the exercise of a power of consent, a trust director “must act in good faith and is not liable for breach of trust unless the trust director acted or failed to act in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.”

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

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

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

Subsection (a)(2)(B) enables a settlor to give a trust director a power of protection to litigate matters pertaining to the trust. For example, a settlor could give a trust director a power to enforce the trust, as might be apt if the beneficiaries are unlikely to be able to do so or if the trust has a charitable purpose without a discrete beneficiary. Likewise, as in Schwartz v. Wellin, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D. S.C. April 17, 2014), a settlor could give a trust director (the “trust protector” in that case) a power to bring or defend claims “for the protection of trust assets,” as might be apt if the settlor wanted a party other than the trustee to manage such litigation. In Schwartz, the court held that the trust director (i.e., the “trust protector”) lacked standing, because Rule 17(a)(1) of the Federal Rules of Civil Procedure does not allow a party to bring a suit in its own right unless the court determines that the party is”
not include such a person as a party who may bring litigation if not the “real party in interest.”

However, Rule 17(a)(1) does include “a party authorized by statute,” hence this subsection would reverse the result in that case in accordance with the settlor’s express intent.

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

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

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

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

SECTION 6. LIMITATIONS ON POWERS OF TRUST DIRECTOR.

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

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

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

3. reduce or eliminate an interest in income of a beneficiary of:
   
   (A) a trust for which a marital deduction was taken for federal tax purposes under 26 U.S.C. Sections 2056 or 2523, [as amended,] or for state tax purposes under any comparable provision of applicable state law, during the life of the settlor’s spouse;

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

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

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

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

Discussion Notes

Prior draft. This section corresponds to Section 203 in the Spring 2015 draft.
Under the capacious language of Section 5, there is little in the administration or terms of a trust that cannot be subject to the control of a trust director. At least four states, however, have specific statutory provisions that cut back on the powers that may be given to a trust director (see Appendix B). In general, these limits relate to charitable trusts, tax planning, or special needs trusts. The blackletter above, which is derived from Missouri Ann. Statutes § 456.8-808(4)-(5) and Tennessee Code Ann. § 35-15-1201(e), is a first pass at consolidating the existing provisions into a simpler synthesis that complies with Uniform Law Commission drafting norms. Whether to include a provision such as this, and if so, what provisions should be included, are both open questions for discussion at the meeting. The purpose of this first draft is meant to provide a starting point for that discussion, along with Appendix B, which extracts the existing state statutes on the topic.

SECTION 7. LIMITATIONS ON POWERS OF DIRECTED TRUSTEE.

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

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

Discussion Notes

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

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

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

---

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

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

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

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

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

Vacancy in a trust directorship. Disempowering a trustee that is subject to a power of direction or a power of consent creates the possibility that, during a vacancy in the trust directorship, there might be no one with the power to administer the trust. This section solves that problem by lifting the limit on a trustee’s powers during a vacancy in the trust directorship, a term that is defined in Section 2(7). However, in accordance with the consensus at the last meeting and the prevailing approach in the sample instruments provided by our advisers and observers after that meeting, under Sections 9(a)(2) and 9(c)(2) a trustee thrust into administration by reason of a vacancy in a trust directorship is subject to a lower fiduciary standard than would otherwise apply by default. Under those provisions, which are discussed in
further detail in the discussion notes to Section 9, “If there is a vacancy in the trust directorship, the trustee is not liable for breach of trust unless the trustee acted or failed to act in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.”

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

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

SECTION 8. DUTIES AND LIABILITY OF TRUST DIRECTOR.

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

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

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

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

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

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

There are three main benefits to absorbing existing trust fiduciary law rather than reinventing it for a trust director with a power of direction. First, absorption avoids the need to spell out the entirety of trust fiduciary law, that is, it avoids the need to replicate something like Article 8 of the Uniform Trust Code. Second, absorbing the trust fiduciary law of each enacting state accommodates diversity across the states in the particulars of a trustee’s default and mandatory fiduciary duties, such as on the scope of the duty to diversify or to give information to the beneficiaries, both examples of areas in which the states are becoming increasingly differentiated. Third, absorption allows for changes to the law of a trustee’s fiduciary duties to be absorbed automatically without need for periodic conforming revision to this act.

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

¹⁷ A majority of states treat at least some types of trust directors as fiduciaries by default. These include Alaska, Colorado, Delaware, Idaho, Illinois, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Ohio, South Dakota, Tennessee, Utah, Virginia, Wisconsin, and Wyoming. A minority of states exempts trust protectors (as distinct from other types of directors) from fiduciary duties by default. These include Alaska,
absorbing the state’s existing law on a trustee’s fiduciary duties. Many of the existing statutes simply designate a trust director as a fiduciary without elaborating what that designation means. The statutes thus tend not to spell out the nature or extent of a trust director’s fiduciary duties any detail. This draft is more complete because it adopts the rich body of law already in existence for trustees, including the state’s law on the mandatory core of trust fiduciary law, such as under Uniform Trust Code § 105 (amended 2005).

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

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

Extended discretion and exculpation or exoneration. Under the framework of Subsections (a)-(b), 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, the terms of a trust could give a trust director the protection of an exculpation or exoneration clause with the same effect as such a clause would have for a trustee. Under prevailing law, such as under the authorities referenced in the next paragraph, an exculpation or exoneration clause cannot protect against liability for acting in bad faith or with reckless indifference.

Subsection (c). Subsection (c) specifies the duties of a trust director holding a power of protection or a power of consent. Neither type of power has an analogue for an ordinary trustee. Instead, a power of protection is typically meant to provide additional flexibility, and a power of consent is typically meant to provide a further control on the trustee. Hence, Subsection (c) departs from the absorption approach of Subsections (a) and (b), and instead cuts straight to a mandatory minimum duty of “good faith” with a threshold of “bad faith or reckless indifference”
for liability. The minimum of “good faith” is consistent with Uniform Trust Code § 105(b)(2) (amended 2005). The threshold of “bad faith or reckless indifference” is consistent with 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.”).

Removal and injunctive relief. Section 16(b) governs removal of a trust director. It provides for several grounds for removal, including “serious breach of trust” and “persistent failure of the trust director to administer the trust effectively.” Nothing in this section reduces or otherwise alters the inherent power of a court of appropriate jurisdiction to issue an order “enjoining [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).

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

SECTION 9. DUTIES AND LIABILITY OF DIRECTED TRUSTEE.

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

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

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

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

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

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

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

Discussion Notes

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

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

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

The phrase “with respect to any matter in which the trustee is subject to the power of
direction” limits a directed trustee’s duty of obedience to circumstances in which a direction is
within the trust director’s power of direction. It follows, therefore, that a trustee should not obey
a direction that is outside of the trust director’s power of direction. To do so would be a violation
of the background duty of a trustee to act in accordance with the terms of the trust as under
Uniform Trust Code § 105(b)(2) (amended 2005) (making mandatory “the duty of a trustee to act
... in accordance with terms ... of the trust”) and Restatement (Third) of Trusts § 76 (2007)
(“The trustee has a duty to administer the trust ... in accordance with the terms of the trust.”). 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.

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

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

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

\(^{19}\) Alaska Stat. Ann. § 13.36.375(c); Ga. Code Ann. § 53-12-303(b), (c); Idaho Code Ann. § 15-7-501(2), (5);

\(^{20}\) Several other state statutes follow Delaware’s “wilful misconduct” formulation, or instead use “bad faith” or
Gen. Stat. Ann. § 36C-8A-4(a); Utah Code Ann. §§ 75-7-906(4), 5(b); Va. Code Ann. § 64.2-770(E)(2); and Wis.
(such as the “manifestly contrary to the terms of the trust” or “serious breach of a fiduciary duty” standard in Uniform Trust Code § 808 (2000)).

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

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

Petition for instructions. A directed trustee may satisfy its duty of obedience under Subsections (a)(1) and (b) by a timely petition for instructions (discussion issue: should “reasonable time” or “timely” be added to the blackletter?). See 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.”). A trustee might have “reasonable doubt” about whether a director’s instructions are within the director’s power of direction (Subsection (a)(1)) or protection (Subsection (b)). A trustee might also have doubt about whether an instruction is consistent with the director’s duties, though under Subsections (a)(1) and (b), a trustee is protected against liability if the trustee acts nonetheless. This provision is thus meant to be responsive to the suggestion made at the prior meeting that a trustee should be protected both for complying and for reasonably refusing to comply with a direction that is within the trust director’s power of direction but possibly in breach of the director’s duties.

Subsection (a)(2) and a vacancy in the trust directorship. Under Section 7(a), a directed trustee is not disempowered as regards a matter subject to a power of direction if there is “a vacancy in the trust directorship” (see Section 2(7)). The theory is that, if there is a vacancy in the trust directorship, the trustee should be empowered to act to protect the interests of the trust. Subsection (a)(2) prescribes a trustee’s (minimal) duties in such circumstances. Under Subsection (a)(2), during a period of vacancy in the trust directorship, “the trustee is not liable for breach of trust unless the trustee acted or failed to act in bad faith or with reckless indifference.” This low standard is meant to be protective of the trustee and, in consequence, protective of the settlor’s overall scheme. First, a trustee thrust into administration in a normally
directed area may lack information about the relevant circumstances, and should be protected
while ascertaining those circumstances and determining an appropriate course of conduct during
the vacancy. Second, the fact that the trustee would be subject to direction but for the vacancy
indicates an intent by the settlor that the trustee not be the normal decisionmaking agent within
the sphere of direction. Subsection (a)(2) resolves this tension by reassuring the trustee that it
will only be liable for acting or failing to act in bad faith or with reckless indifference. On the
other hand, this more lax standard will make more difficult a claim against the trustee for acting
in a manner that undermines the settlor’s design, a tradeoff that we should discuss at the
meeting. A similar analysis pertains to Subsection (c)(2), discussed in further detail below.

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

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

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

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

21 S.D. Codified Laws § 55-1B-2(2); see also Mich. Comp. Laws Ann. § 700.7809(4), 5(a); Miss. Code Ann. §
Subsection (c)(2) provides a parallel to Subsection (a)(2). It prescribes the duties of a trustee subject to a power of consent during a vacancy in the trust directorship. Under Section 7(b), a trustee who is otherwise subject to a power of consent is not disempowered from acting in the absence of consent if there is a vacancy in the trust directorship. The theory, as under Subsection (a)(2), is that in the event of a vacancy in the trust directorship, the trustee should be empowered to take actions necessary to protect the interests of the trust, but should not be liable for failing to comply with the full set of duties that would apply by default if the trustee originally had the exclusive power to manage the trust. For example, suppose a settlor creates a trust to hold the family business and provides that the trustee, an institution, may not divest the business without the consent of a familial trust director (perhaps the settlor’s brother). If the trust director dies, creating a vacancy, then in the absence of exigent circumstances the trustee should have more room to retain the business during the interim until a successor director takes office in accordance with the settlor’s design that retention be decided by a familial trust director rather than the institutional trustee.

SECTION 10. NO LIABILITY FOR MONITORING, WARNING, OR ADVISING. A directed trustee is not liable for failing to monitor the actions of a trust director or to warn or give advice to a beneficiary, trustee, or trust director about a trust director’s exercise or nonexercise of the director’s powers.

Discussion Notes

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

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

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

(1) Monitor the conduct of the adviser;

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

(3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary’s own discretion in a manner different from the manner directed by the adviser.\(^{23}\)

Reversing Rollins. It appears that these provisions were meant to reverse the result in Rollins v Branch Banking & Trust Company of Virginia,\(^{24}\) in which the court held a trustee that was subject to direction in investment liable for failing to warn the beneficiaries about the risks of a concentration and the investment director’s failure to give a direction to diversify.

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

The trust director’s specific duties of disclosure. Under Sections 8(a)-(b), a trust director holding a power of direction is subject to the same disclosure rules as a trustee would be in the exercise or nonexercise of the same power under the same circumstances. 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. Restatement (Third) of Trusts § 82 cmt. d (2007).

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

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

\(^{23}\) Del. Code Ann. tit. 12, § 3313(e).
\(^{24}\) 56 Va. Cir. 147 (2002).
the fiduciary to monitor the adviser or otherwise participate in actions within the
scope of the adviser’s authority.25

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

SECTION 11. INFORMING TRUSTEES AND TRUST DIRECTORS.

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

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

Discussion Notes

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

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

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

§ 91-8-1204(b); N.H. Rev. Stat. Ann. § 564-B:12-1204(b); Ohio Rev. Code Ann. § 5815.25(B), (D); S.D. Codified
701.0808(4).
This section imposes a mandatory floor on a trust administrator’s duty to share information, rather than a ceiling. The terms of a trust can specify more robust duties of information sharing among trust administrators.

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

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

- modifications to the terms of the trust;
- changes to investment policy or strategy;
- distributions of trust property;
- changes in accounting procedure or valuations; or
- removal or appointment of trustees or trust directors.

We welcome suggestions for further examples.

Narrowing cotrusteeship disclosure. Because Section 2(6) defines “trustee” to include a cotrustee; Section 2(1) defines “directed trustee” by reference to a “trustee”; and Section 2(5) defines a “trust director” as a person “whether or not the person is also a trustee,” under this draft one cotrustee could be subject to another cotrustee’s power of direction, power of protection, or power of consent. In such circumstances, by default the more narrow disclosure rules of this section would apply, conditioning each trust administrator’s access to information on a reasonable relation to the administrator’s powers or duties, instead of the broader default rule 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.”).

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, and the trustee would have been under a duty to give the director information about the liquidity needs of the trustee’s distribution program. Moreover, in making and implementing the investment program, under Sections 8(a)-(b) the trust
director would be subject to the same duties as a similarly situated trustee would have been, in parallel to the trustee’s duties in making and implementing the distribution program.

SECTION 12. LIMITATION OF ACTION AGAINST TRUST DIRECTOR.

Alternative A: Adapt Uniform Trust Code § 1005

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

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

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

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

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

(3) the termination of the trust.

Alternative B: Absorb Local Law

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

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

End of Alternatives
Discussion Notes

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

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

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

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

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

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

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

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

(3) If the happening of an event, including marriage, divorce, performance of educational
requirements, or death, affects the administration or distribution of a trust, a trust director who
has exercised reasonable care to ascertain the happening of the event is not liable for a loss
resulting from the trust director’s lack of knowledge.

Discussion Notes

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

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

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

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

Paragraph (3)—event affecting administration or distribution. This paragraph establishes
a defense for a trust director of “reasonable care” in ascertaining “the happening of an event” that
affects the administration or distribution of a trust” comparable to the same defense for a trustee

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

26 Cf. Va. Code Ann. § 64.2-770(E)(1) (“Unless the governing instrument provides otherwise, the trust director
may assert defenses to liability on the same basis as a trustee serving under the governing instrument, other than
defenses provided to the trustee under this subsection.”).
What about an exculpation or exoneration clause? The discussion notes to Section 8 address the effect of an exculpation or exoneration clause for a trust director.

What about attorney’s fees? The power of a trust director under Section 5(b) “to incur and direct indemnification of reasonable costs” would allow a trust director to direct reimbursement of the director’s attorney’s fees if those fees were “reasonable” under the circumstances and “appropriate” to the director’s exercise of the director’s powers.

SECTION 14. JURISDICTION OVER TRUST DIRECTOR.

(a) Notwithstanding an agreement to the contrary, 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.

Discussion Notes

Prior draft. This section corresponds to Section 208 in the Spring 2015 draft.

Establishing personal jurisdiction. Under this section, as under many existing state statutes, 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. The specific language used in this section is derived from Uniform Trust Code § 202(a) and (c) (2000). Under Section 3(a), a trust is subject to this act if it has its principal place of administration in the enacting state. Under Section 15(a), a person may refuse to accept a trust directorship.

Mandatory rule. Most of the jurisdiction provisions in the existing state statutes make personal jurisdiction over what this act calls a “trust director” mandatory. In accord with those statutes, and the consensus at the last drafting session, the first clause of Subsection (a) says that a trust director will be subject to personal jurisdiction in the courts of an enacting state “notwithstanding an agreement to the contrary.”


28 760 Ill. Comp. Stat. Ann. 5/16.3(g) is typical: “By accepting an appointment to serve as a directing party of a trust that is subject to the laws of this State, the directing party submits to the jurisdiction of the courts of this State even if investment advisory agreements or other related agreements provide otherwise, and the directing party may be made a party to any action or proceeding if issues relate to a decision or action of the directing party.”
SECTION 15. ACCEPTANCE; BOND; COMPENSATION.

(a) A person designated as a trust director accepts the trust directorship by substantially complying with a method of acceptance provided in the terms of the trust, by exercising powers or performing duties as trust director, or otherwise indicating acceptance of the directorship. A person designated as trust director that has not yet accepted the trust directorship may reject the directorship.

(b) A trust director shall give bond to secure performance of the trust director’s duties only if required by the terms of the trust or if the court finds that a bond is needed to protect the interests of the beneficiaries. The court may modify or specify the terms of the trust director’s bond.

(c) If the terms of a trust do not specify a trust director’s compensation, the director is entitled to compensation that is reasonable under the circumstances. If the terms of a trust specify a trust director’s compensation, the court may increase or decrease the compensation if there has been a change in circumstances not anticipated by the settlor or if the specified compensation would be unreasonably low or high.

Discussion Notes

Prior Draft. This section (plus Section 16) corresponds to Section 207 in the Spring 2015 draft.

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

Subsection (a). This subsection prescribes rules for acceptance of appointment as a trust director that are based on the rules applicable to a trustee under Uniform Trust Code § 701(a)-(b) (2000), but in a more simplified form. The rules prescribed in this subsection are also consistent
Subsection (b). This subsection prescribes the circumstances under which a trust director must give bond to secure performance. These rules are based on the rules applicable to a trustee under Uniform Trust Code § 702(a)-(b) (2000) and are consistent with those for a trustee under Restatement (Third) of Trusts § 34(3) (2003).

Subsection (c). This subsection prescribes rules for compensation of a trust director that are based on the rules applicable to a trustee under Uniform Trust Code § 708 (2000), but in a more simplified form, and with a tweak to the changed circumstances basis for a change in compensation to align it more closely with the deviation doctrine. 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 in a trust with with multiple trustees and trust directors may be higher than for a single trustee. In both circumstances, the trust may benefit “from the enhanced quality of decision-making.” Uniform Trust Code § 708 cmt. On the other hand, the reasonable compensation of a trustee that is subject to a trust director’s power of direction 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); 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.”).

SECTION 16. RESIGNATION; REMOVAL; VACANCY.

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

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

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

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

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

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

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

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

**Discussion Notes**

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

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

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

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

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

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

SECTION 17. 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.

Discussion Notes
This section, which is uniform law boilerplate, corresponds to Section 501 in the Spring
2015 draft.

SECTION 18. 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).

Discussion Notes
This section, which is uniform law boilerplate, corresponds to Section 502 in the Spring
2015 draft.

SECTION 19. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

Discussion Notes
This section, which is uniform law boilerplate, corresponds to Section 503 in the Spring
SECTION 20. EFFECTIVE DATE. This [act] takes effect . . . .

Discussion Notes

This section, which is uniform law boilerplate, corresponds to Section 504 in the Spring 2015 draft.