

D R A F T
FOR DISCUSSION ONLY

DIVIDED TRUSTEESHIP ACT

NATIONAL CONFERENCE OF COMMISSIONERS
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DIVIDED TRUSTEESHIP ACT

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DIVIDED TRUSTEESHIP ACT

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1 **DIVIDED TRUSTEESHIP ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the [?Directed and?] Divided
3 Trusteeship Act.

4 **Discussion Notes**

5 *Prior draft.* This section corresponds to Section 1 in the Fall 2015 draft.

6
7 *Directed and Divided Trusteeship?* In accordance with the consensus at the end of the
8 last meeting, we have in brackets tentatively recast this act as the “Directed and Divided
9 Trusteeship Act.” The addition of the word “directed” reflects the fact that much of this act
10 addresses an arrangement that is commonly known as “directed trusteehip” within a “directed
11 trust.” The word “directed” also reflects the act’s use of term “trust director” to denote any
12 person who is given a power over the administration of a trust under Section 6.
13

14 Strictly speaking, changing the name of the act will require approval of the Executive
15 Committee. If at the upcoming meeting the drafting committee concludes that it prefers this or
16 another alternative, we will undertake to obtain approval for the change before the Annual
17 Meeting in July.
18

19 Another alternative is the “Directed Trusteeship Act.” Dropping the word “divided”
20 would make the title simpler and shorter, but perhaps less evocative of the full scope and
21 intention of the act. In addition to a “power of direction,” under Section 6 this act also covers a
22 “power of consent,” a “power of approval or ratification,” a “power of selection,” and a “power
23 of protection.” Moreover, under Section 12, a settlor may opt to apply the rules under this act to
24 a cotrustee, displacing the otherwise applicable rules of cotrusteeship. Including the word
25 “divided” in addition to “directed” might therefore do a better job of capturing this wide variety
26 of arrangements.
27

28 *Pending “Uniform” designation.* The normal practice within the Uniform Law
29 Commission is for an act to be designated as “Uniform” or “Model” by the ULC leadership
30 toward the end of the drafting process. The strong expectation is that this act will be designated
31 as a uniform act, making it the “Uniform Directed and Divided Trusteeship Act.”
32

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

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

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

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

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

6 (5) “Terms of a trust” means the manifestation of a settlor’s intent regarding a trust’s
7 provisions as expressed in the trust instrument, as may be established by other evidence that
8 would be admissible in a judicial proceeding, as may be determined or amended by court order
9 [or by nonjudicial settlement agreement under [Uniform Trust Code Section 111]], or as may be
10 amended by a trustee in accordance with the terms of the trust or a trust director acting under
11 Section 6(b)(5)(B).

12 (6) “Trust director” means a person other than a trustee that is given a power by the terms
13 of a trust under Section 6 whether or not the terms of the trust designate the person as a trust
14 director, trust protector, trust advisor, or otherwise.

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

16 Discussion Notes

17 *Prior draft.* This section corresponds to Section 2 in the Fall 2015 draft.
18

19 *Deleted definition of “vacancy in a trust directorship.”* Because in this draft a vacancy in
20 a trust directorship does not affect the powers or duties of a directed trustee (see Sections 9 and
21 10), and because the term “vacancy” now appears in only one other provision (Section 17), this
22 section no longer includes a definition of “vacancy in a trust directorship.” The use of the term
23 “vacancy” in Section 9 does not require a definition, because nothing in that section turns on the
24 meaning of the term. Section 9 provides that a vacancy in a trust directorship does not change the
25 rule prescribed in that section. Section 10 does not use the term vacancy. And Section 17 refers
26 to the law of the state governing vacancy in a trusteeship.
27

28 *Breach of trust.* This definition, which is based on Uniform Trust Code § 1001(a), is new
29 to this draft. By including within the meaning of the term a violation by a trust director of a duty
30 imposed by this act or by the terms of a trust, we resolve any doubt about whether such conduct

1 is a “breach of trust.” We use the term breach of trust in multiple sections to refer to such
2 conduct by a trust director.
3

4 *Directed trustee.* Other than updating the cross-reference, the definition of “directed
5 trustee” has not changed since the prior draft. However, under this draft, the definition will
6 operate differently for two reasons. First, Section 6 prescribes a subtly different regime of
7 powers that may be given to a trust director than that Section’s counterpart in the prior draft.
8 Second, paragraph (6) of this section now excludes a trustee from the definition of a “trust
9 director.” As such, a trustee that is subject to a power that would otherwise fall within Section 6
10 is not a directed trustee if the power is held by a cotrustee. Instead, under Section 12, the trustee
11 subject to the power and the cotrustee holding the power are subject to either: (i) the otherwise
12 applicable law of cotrusteeship, as under Uniform Trust Code § 703(g) (2000) and Restatement
13 (Third) of Trusts § 81 (2007), or (ii) the more permissive rules under this act applicable to a
14 directed trustee and trust director, in accordance with the settlor’s intent.
15

16 *Person.* The definition of “person” tracks the current Uniform Law Commission
17 boilerplate for that term except that it excludes an “estate” and a “trust.” The intention is to
18 exclude an “estate” and a “trust” from being named as a trust director.
19

20 *State.* The definition of “state” follows the standard Uniform Law Commission
21 boilerplate.
22

23 *Terms of a trust.* This definition has been revised further since the last meeting. This
24 version still takes Uniform Trust Decanting Act § 2(29) (2015) as its starting point, but makes
25 several improvements. The definition of “terms of a trust” in the Trust Decanting Act updates the
26 definition of that term in Uniform Trust Code § 103(18) (amended 2004) to take notice of court
27 orders and nonjudicial settlement agreements, both of which are of practical significance in
28 creating divided trusteeships.¹ Several existing divided trustee statutes make express reference to
29 nonjudicial settlements.² We have modified the Trust Decanting Act definition further, however,
30 to acknowledge that a court order or nonjudicial settlement might “amend” rather than merely
31 “establish” the settlor’s intent, and to put the nonjudicial settlement language in brackets and
32 with a further bracketed reference to Uniform Trust Code § 111 (2000). We also take notice of
33 the additional possibility that the “terms of a trust” might be amended by a trust director or by a
34 trustee. The following blackline shows our changes to the definition in the Trust Decanting Act:
35

36 “Terms of ~~the~~ trust” means the manifestation of ~~the~~ settlor’s intent regarding a
37 trust’s provisions as expressed in the trust instrument, as may be established by
38 other evidence that would be admissible in a judicial proceeding, ~~or~~ as may be
39 ~~established~~ determined or amended by court order [or by nonjudicial settlement
40 agreement under [Uniform Trust Code Section 111]], or as may be amended by a
41 trustee in accordance with the terms of the trust or a trust director acting under

¹ See Todd A. Flubacher & Kenneth F. Hunt, The Non-Judicial Settlement Agreement Wrapper, 152 Tr. & Est. 42, 42–51 (2013).

² See, e.g., 760 Ill. Comp. Stat. 5/16.3(j)(2)(B) (2015); N.H. Rev. Stat. Ann. §§ 564-B:12-1201(a) (2014), 12-1204(a) (2008); Tenn. Code Ann. § 35-15-710 (2013); Va. Code Ann. § 64.2-770(E) (2014); Wis. Stat. §§ 701.0808(2) (2014), 701.0818(1)–(3) (2014).

1 Section 7(b)(5)(B).
2

3 Collectively, these revisions to the original definition in the Uniform Trust Code are more
4 in the nature of conforming amendments given contemporary understandings than a change in
5 direction. *See* Restatement (Third) of Trusts § 76 cmt. b(1) (2007) (“References ... to the terms
6 of the trust ... also refer to trust terms as reformed or modified by court decree, and as modified
7 by the settlor or others or by consent of all beneficiaries.”) (internal cross-references omitted).
8

9 Two issues for discussion are (1) whether we need an explanatory legislative note that
10 addresses the bracketed language and recommends conforming amendments to the state’s
11 enactments of the Uniform Trust Code and the Uniform Trust Decanting Act, and (2) whether
12 the definition requires still further language, such as to recognize other lawful means of
13 amendment (an amendment under the terms of the trust would fall within the new last sentence).
14

15 *Trust director.* The definition of “trust director” has been revised in two important
16 respects. First, the revised definition no longer excludes the holder of a nonfiduciary power of
17 appointment. As remarked at the prior meeting, read literally this language would have excluded
18 a person who happened to hold an unrelated nonfiduciary power of appointment from being
19 deemed a trust director even if the person quite obviously also held some other power that
20 qualified as a power of a trust director under Section 6. Instead, Section 5 of this draft expressly
21 carves out a nonfiduciary power of appointment from the application of this act. In consequence,
22 a person who holds both a power of a trust director under Section 6 and a nonfiduciary power of
23 appointment is subject to this act to the extent of the person’s trust director powers but is
24 excluded from this act as to the person’s power of appointment.
25

26 Second, the revised definition excludes a trustee—that is, a trustee is not a trust director
27 even if the trustee has a power that otherwise falls within Section 6. Instead, as per the notes to
28 the definition of a “directed trustee” under Section 12, the trustee holding the power, and any
29 cotrustee subject to the power, are subject either to (i) the otherwise applicable law of
30 cotrusteeship, as under Uniform Trust Code § 703(g) (2000) and Restatement (Third) of Trusts §
31 81 (2007), or (ii) the more permissive rules under this act applicable to a trust director and a
32 directed trustee, in accordance with the settlor’s intent.
33

34 A further issue for discussion is whether to include bracketed language that would limit
35 the persons eligible to be a trust director to individuals and to persons, other than individuals,
36 that are authorized to hold trust powers. The rationale would be to prevent circumvention of bank
37 regulatory rules on which corporate or other entities may exercise trust powers by making an
38 entity that lacks such authorization a “trust director” instead of a trustee.
39

40 *Trustee.* The definition of “trustee” is drawn from Uniform Trust Code § 103(20)
41 (amended 2004).
42

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

44 (a) This [act] applies to a trust that has its principal place of administration in this state,

1 including a trust whose principal place of administration has been changed to this state.

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

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

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

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

10 **Discussion Notes**

11 *Prior draft.* This section corresponds to Section 3 in the Fall 2015 draft.

12
13 *Subsection (a).* Under this subsection, which has been simplified a bit since the prior
14 draft, this act applies to all trusts with a principal place of administration in the state regardless of
15 whether the trust was created before or after the adoption of this act and without regard to
16 whether the terms of the trust expressly reference this act.

17 *A matter of trust administration.* Because powers and duties in a directed or divided
18 trusteeship are matters of trust administration, this subsection follows the prevailing conflict of
19 laws rule by linking application of this act to the trust’s principal place of administration.
20 Restatement (Second) of Conflict of Laws § 271 cmt. a (1971) (citations omitted) provides in
21 pertinent part:

22 The term “administration of a trust” ... includes those matters which relate
23 to the management of the trust. Matters of administration include those relating to
24 the duties owed by the trustee to the beneficiaries. They include the powers of a
25 trustee, such as the power to lease, to sell and to pledge, the exercise of
26 discretionary powers, the requirement of unanimity of the trustees in the exercise
27 of powers, and the survival of powers. They include the liabilities which may be
28 incurred by the trustee for breach of trust. They include questions as to what are
29 proper trust investments. They include the trustee’s right to compensation. They
30 include the trustee’s right to indemnity for expenses incurred by him in the
31 administration of the trust. They include the removal of the trustee and the
32 appointment of successor trustees. They include the terminability of the trust.

33
34 As with other matters of administration, the parties are protected against inconsistent court orders
35 by the common law principle of “primary supervision.” *See* Restatement (Second) of Conflicts of

1 Law § 267 cmt. e (1971).

2

3 *Subsection (b)* - This provision, which derives from Uniform Trust Code § 108(a) (2000),
4 establishes a safe harbor for a settlor’s designation of a trust’s principal place of administration.
5 Such a designation is valid if: (1) a trustee is located in the designated jurisdiction; (2) a trust
6 director is located in the designated jurisdiction; or (3) at least some of the trust administration
7 occurs in the designated jurisdiction. Paragraphs (1) and (3) reproduce without change the safe
8 harbor under Uniform Trust Code § 108(a). Paragraph (2) is an innovation in that it expands the
9 safe harbor of § 108(a) to include also the location of a trust director as a sufficient connection
10 with the designated jurisdiction. This expansion reflects this act’s validation of directed and
11 divided trusteeship.

12 A question for discussion is whether we need a legislative note that recommends
13 conforming amendments to the state’s enactment of the Uniform Trust Code.

14 A further question for discussion is whether there are other principles of conflict of laws
15 that require updating in light of recognition of directed and divided trusteeship (within our
16 charge), as compared to generally problematic matters in conflict of laws in trust practice (not
17 within our charge). The key point is that our charge includes addressing new problems in conflict
18 of laws occasioned by recognition of directed and divided trusteeship. The additional safe harbor
19 in subsection (b) falls within this scope. Our charge does not include taking on problems in
20 conflict of trust laws that are of general applicability. Not even the Uniform Trust Code tries to
21 do so. *See* Uniform Trust Code § 108 cmt. (amended 2005) (“Because of the difficult and
22 variable situations sometimes involved, the Uniform Trust Code does not attempt to further
23 define principal place of administration.”)

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

27 **Discussion Notes**

28 *Prior draft.* This section corresponds to Section 4 in the Fall 2015 draft.

29

30 *Purpose.* This Section confirms that the common law and principles of equity of an
31 enacting state remain applicable to directed and divided trusteeship except as displaced by this
32 act. For example, other than the safe harbor under Section 3(b) for a term of the trust that
33 designates the trust’s principal place of administration, the law of an enacting state by which
34 principal place of administration is determined would continue to apply to a trust with directed or
35 divided trusteeship. Provisions such as this one are familiar from other uniform acts. *See, e.g.,*
36 Uniform Powers of Appointment Act § 104 (2003); Uniform Premarital and Marital Agreements
37 Act § 5 (2012); Uniform Trust Code § 106 (2000).

38 *What about background statute law?* A problem with the formulation of this section is
39 that it references only the common law and principles of equity. It does not reference statute law.

1 The question thus arises, what is the meaning of this section in a state that has adopted the
2 Uniform Trust Code? For the uniform acts cited in the prior paragraph, the background law was
3 predominantly common law and principles of equity. For this act, by contrast, other statutory law
4 such as the Uniform Trust Code remains highly relevant. In this regard, we observe that the
5 Uniform Trust Decanting Act (2015), which like this act operates within a context that includes
6 other statutory law, does not include a provision such as this one.

7 **SECTION 5. EXCLUSION OF POWERS OF APPOINTMENT.** This [Act] does
8 not apply to a nonfiduciary power of appointment.

9 **Discussion Notes**

10 *Prior drafts.* Earlier drafts excluded a holder of a nonfiduciary power of appointment
11 from the definition of a trust director. As remarked at the prior meeting, this language, if read
12 literally, would have prevented a person who happened to hold an unrelated nonfiduciary power
13 of appointment from being a trust director even if the person quite obviously also held a power
14 of a trust director under Section 6. Using the definitions section to exclude a holder of a
15 nonfiduciary power of appointment also ran the risk of mixing substance into the definitions.

16
17 *This draft.* To resolve the problem just noted, this new section carves out a nonfiduciary
18 power of appointment from the scope of this act. In consequence, a person who holds *both* a
19 power of a trust director under Section 6 *and* a nonfiduciary power of appointment is subject to
20 this act to the extent of the person's powers as a trust director, but is excluded from this act to the
21 extent of the person's power of appointment. Instead, a nonfiduciary power of appointment is
22 governed by other law, such as under the Uniform Powers of Appointment Act (2013) or
23 Restatement (Third) of Property: Wills and Other Donative Transfers §§17.1-23.1 (2011).

24
25 The basic insight motivating this change is to focus on the power at issue rather than on
26 the holder of the power.

27
28 **SECTION 6. POWERS OF TRUST DIRECTOR.**

29 (a) Subject to Section 7, a trust director has only those powers granted to the director by
30 the terms of a trust.

31 (b) The terms of a trust may give a trust director:

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

34 (2) a power of consent under which a trustee or another trust director must obtain
35 the consent of the director before exercising a power of the trustee or other trust director;

1 (3) a power of approval or ratification under which the director may approve an
2 action proposed by a trustee or another trust director or ratify a prior action by a trustee or
3 another trust director;

4 (4) a power of selection to appoint or remove a trustee or another trust director, or
5 a successor to either; or

6 (5) a power of protection:

7 (A) to bring an action for instructions, construction, or reformation, to
8 declare rights, to enforce the trust, to enforce claims of the trust, or to defend claims against the
9 trust;

10 (B) to amend or modify the terms of the trust or to terminate the trust;

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

13 (D) to determine the capacity of the settlor, a trustee, a trust director, a
14 beneficiary, or other party.

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

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

18 (2) trust directors with joint powers shall act by majority decision.

19 **Discussion Notes**

20 *Prior draft.* This section corresponds to Section 5(a) and (c) in the Fall 2015 draft.

21
22 *Authorization.* This most basic function of this section is to give a settlor the legal
23 authority to name a trust director in the terms of a trust. Although many states would allow the
24 appointment of a trust director even without specific statutory authorization, this section resolves
25 any doubt. *See, e.g.,* Eleanor Pierce (Marshall) Stevens Living Trust, 159 So.3d 1101 (La. 2015)
26 (upholding the appointment of a trust protector without specific statutory authorization).
27

1 *Powers versus duties.* This section addresses powers expressly given to a trust director by
2 the terms of a trust. Section 7 grants to a trust director incidental further powers appropriate to
3 the exercise of the director’s powers under this section. Together, this section and Section 7
4 therefore govern the powers of a trust director. The duties and potential liabilities of a trust
5 director are governed by Section 8.

6
7 *Enabling versus off-the-rack.* The existing divided trusteeship statutes enacted by the
8 states can be sorted roughly into two types: “enabling” or “off-the-rack.” In accordance with the
9 strong consensus at the prior meetings, this section provides for an enabling rather than off-the-
10 rack approach. Instead of creating several categories of trust directors and giving each category a
11 particular set of default powers, this section authorizes the appointment of a generic “trust
12 director,” which forces the settlor (and so the settlor’s lawyer) to specify in the terms of the trust
13 what powers the director will have (plus the incidental further powers granted by Section 7).

14
15 *Subsection (a)—no powers by default.* Subsection (a) confirms that a trust director has
16 only those powers expressly granted by the terms of the trust. This subsection, which is new to
17 this draft, makes express what is implicit in the structure of the rest of this section. The
18 prevailing view at the last meeting was that we should make this point express in the blackletter.

19
20 *Subsection (b)—powers rather than people.* In keeping with the consensus at prior
21 meetings, this section constructs its categories by sorting the different types of *powers*. This
22 approach stands in contrast to many existing state statutes, which instead construct their
23 categories by sorting different types of *directors* who hold the different types of powers. Rather
24 than distinguishing between powers of protection and powers of direction, for example, many
25 existing statutes distinguish between “trust protectors,” who hold powers of protection, and “trust
26 advisors,” who hold powers of direction. This section employs a power-based, rather than
27 director-based, categorization system, because the power-based system is clearer. In a director-
28 based system, if a single director holds more than one power, that director can end up having
29 several different labels under the same statute at the same time.

30
31 *Subsection (b)—reworked categories of powers.* This draft reworks the categories for the
32 powers of a trust director. In addition to powers of direction, consent, and protection as under the
33 prior draft, this version also includes a power of approval or ratification, and a power of
34 selection. The power of approval adds new substance. The other new categories cover powers
35 that in the prior draft had been classified differently. The guiding principle of the new
36 arrangement is practical rather than theoretical. We grouped powers together in this section
37 based on the way they are addressed in subsequent provisions of the act. Subsequent provisions
38 of the act differentiate among categories of powers in several ways:

- 39
40 • Section 8 applies different fiduciary duties to a trust director based on the category of
41 the director’s power at issue;
- 42 • Section 9 applies different limitations on the powers of a directed trustee based on the
43 category of power at issue;
- 44 • Section 10 applies different fiduciary duties and thresholds for liability to a directed
45 trustee based on the category of power at issue; and
- 46 • Section 12 allows the terms of a trust to apply the fiduciary duty provisions of this act

1 to cotrusteeship arrangements in which a trustee holds a power of direction, power of
2 consent, or power of approval or ratification over a cotrustee.
3

4 The new grouping is therefore driven by the functional purpose of simplifying the drafting of
5 later sections rather than by a clear differentiation of intrinsic attributes among each group.
6

7 *Subsection (b)(1)—power of direction.* A “power of direction” is one that allows a trust
8 director “to direct a trustee or another trust director in the exercise or nonexercise of any of its
9 powers in the administration of the trust.” This language incorporates the entire field of trustees’
10 powers. For example, a power in a trust director to direct a trustee in the investment of some or
11 all of the trust property would be a power of direction. A power to direct a trustee in the
12 distribution of assets would likewise be a power of direction. So too would be a power to direct
13 the trustee to make or take loans; to vote proxies for securities held in trust; to adopt a particular
14 valuation of trust property; to determine the frequency or methodology of valuation; to interpret
15 the trust; to adjust between principal and income or convert to a unitrust; or to decant the trust (in
16 the prior draft, decanting had been redundantly listed also as a power of protection, on which
17 more below). In sum, as regards a directed trustee, the “power of direction” category
18 encompasses any power in a trust director to direct the trustee in the trustee’s exercise or
19 nonexercise of any of the trustee’s powers.
20

21 *Subsection (b)(2)-power of consent.* If a trust director must give consent before a trustee
22 or another trust director may act, then the trust director has a “power of consent.” Thus, for
23 example, a trustee could be required to obtain the consent of a trust director before selling certain
24 trust property or before making a distribution. Any power of trusteeship can be subjected to a
25 power of consent. The core distinction between a “power of consent” and a “power of direction”
26 is that a power of consent contemplates initiative on the part of the party subject to the power,
27 whereas a “power of direction” contemplates initiative on the part of the party holding the power.
28

29 *Subsection (b)(3)—power of approval or ratification.* This draft creates a new category of
30 a power of approval or ratification. A power of approval is something subtly different from a
31 power of consent. A power of consent requires a trustee that is subject to the power to seek the
32 director’s consent before acting. A power of approval, by contrast, does not require a trustee to
33 seek a director’s approval before acting. The trustee is free to act without first obtaining
34 approval. Instead, a power of approval, if exercised, is a before-the-fact ratification. A trustee
35 who is subject to a power of approval may act without the director’s approval, but if the trustee
36 receives approval first, the trustee will be exonerated from liability for acting consistent with the
37 approval (see Section 10(c)).
38

39 A power of consent and a power of approval or ratification can be combined in the hands
40 of a single trust director. This would be the case, for example, if the terms of a trust prohibited a
41 trustee from acting without a director’s consent and also released the trustee from liability if the
42 trustee received that consent.
43

44 This section combines a power of approval and a power of ratification into a single
45 category, because subsequent sections of this act treat both powers the same way. Both powers
46 involve releasing a trustee from liability—they differ only in the timing. Both types of powers

1 thus call for the same kinds of fiduciary duty provisions for trustees and trust directors.

2
3 *Subsection (b)(4)—power of selection.* A power to appoint or remove a trustee or another
4 trust director, or a successor to either, has been moved to its own category called a “power of
5 selection.” Separating this power facilitates limiting or even eliminating the fiduciary duties of
6 the holder of such a power (see Section 8(b)).

7
8 *Subsection (b)(5)—power of protection.* The “power of protection” category includes four
9 enumerated kinds of powers that do not involve directing a trustee in the exercise of the trustee’s
10 authority and that are subject to similar treatment in subsequent provisions of this act. At the last
11 meeting, some members of the committee expressed concern about the use of the term
12 “protector.” No one suggested a better term, however, and we have yet to come up with one.
13 Regarding the objection that “protector” implies fiduciary status, the answer is that, under
14 Section 8(b), this implication is correct.

15
16 *The litigation power of subsection (b)(5)(A).* Subsection (b)(5)(A) enables a settlor to
17 give a trust director a power of protection to litigate matters pertaining to the trust. For example,
18 a settlor could give a trust director a power to enforce the trust, as might be apt if the
19 beneficiaries are unlikely to be able to do so or if the trust has a charitable purpose without a
20 discrete beneficiary.³ Likewise, as in *Schwartz v. Wellin*, No. 2:13-CV-3595-DCN, 2014 WL
21 1572767 (D.S.C. Apr. 17, 2014), a settlor could give a trust director (the “trust protector” in that
22 case) a power to bring or defend claims “for the protection of trust assets,” as might be apt if the
23 settlor wanted a party other than the trustee to manage such litigation. In *Schwartz*, the court held
24 that the trust director (i.e., the “trust protector”) lacked standing, because Rule 17(a)(1) of the
25 Federal Rules of Civil Procedure does not include such a person as a party who may bring
26 litigation if not the “real party in interest.” However, Rule 17(a)(1) does include “a party
27 authorized by statute,” hence this subsection would reverse the result in *Schwartz* in accordance
28 with the settlor’s express intent.

29
30 *The power to amend, modify, or terminate of subsection (b)(5)(B).* Consistent with the
31 consensus from last meeting, subsection (b)(5)(B) combines a power to amend or modify a trust
32 with the closely related power to terminate a trust.

33
34 *The power to determine the capacity of subsection (b)(5)(D).* Subsection (b)(5)(D) draws
35 into this act a provision that gives a person other than a trustee a power “to determine the
36 capacity of the settlor, a trustee, a trust director, a beneficiary, or other party.” It is common in a
37 revocable trust, for example, to name a committee of persons to determine the settlor’s capacity.
38 Under this act, the members of the committee would be trust directors, subject to fiduciary duty
39 under Section 8(b), unless the exception under Section 8(c) for “a licensed medical professional”
40 applied.

41
42 *Tax planning.* At the last meeting, we discussed the possibility of creating a separate
43 category for powers that for reasons of tax planning should sometimes be held in a nonfiduciary
44 capacity. In trying to draft language for a tax powers category, however, we discovered that the

³ At least two states have statutes that authorize a settlor of a charitable trust to designate persons who may enforce the trust. See Del. Code Ann. tit. 12, § 3303(b) (2015); Iowa Code § 633A.5106 (2008).

1 kinds of powers that might be included were too numerous to list, would overlap extensively
2 with our other categories of powers, and in many circumstances the powers should be subject to
3 fiduciary duties. We therefore addressed the problem of eliminating fiduciary duties as necessary
4 to achieve tax objectives in Section 8(d), which provides: “A trust director is not subject to any
5 fiduciary duty in the exercise or nonexercise of a power under Sections 6 or 7 if exercise or
6 nonexercise of the power in a fiduciary capacity will or may deprive the trust of a tax benefit or
7 impose a tax burden contrary to the settlor’s actual or probable intent.”
8

9 *Residual category.* At the prior meeting, the committee discussed whether to include a
10 residual category that would provide a catch-all for directed or divided trusteeship arrangements
11 that were not covered by the other categories. This draft does not include a residual category for
12 two main reasons. First, it is difficult to limit the scope of a residual category. And because this
13 section is enabling, authorizing a settlor to create any form of directed or divided trusteeship
14 recognized within it, an unlimited residual category could have the effect of inadvertently
15 overriding other limiting state laws. For example, some states do not permit a settlor to mandate
16 arbitration of disputes between a trustee and a beneficiary. But by enabling a settlor to appoint a
17 “residual” director with the exclusive power to resolve such disputes, an unlimited residual
18 category could be invoked to circumvent that rule. Second, subsection (b)(1) already functions
19 something like a residual, because it allows for directed or divided trusteeship as regards the
20 entire field of trustees’ powers.
21

22 *Overlap among categories.* It is important to draft the categories so that they do not
23 overlap. A single power should not appear in multiple categories. The risk of overlap is
24 especially acute with regard to powers that fall under subsection (b)(1)’s power of direction, as
25 that category is so expansive. An example from the prior draft is decanting, which had been
26 included as a “power of protection,” but also would be a power of direction, as a decanting
27 power, if recognized in the state, would be a power of the trustee. This draft resolves the
28 decanting overlap by removing it from the redundant listing as a power of protection. But an
29 issue for discussion is whether there are other areas of overlap that require reworking.
30

31 *Reconciling uniform laws on pet and other noncharitable purpose trusts.* A power to
32 enforce a trust, which falls under subsection (b)(5)(A), is also recognized in Uniform Trust Code
33 §§ 408(b), 409(2) (2000), and Uniform Probate Code § 2-907(c)(4) (amended 1993), in the
34 context of pet and other noncharitable purpose trusts. We will need to consider how to reconcile
35 those provisions with this act, and if appropriate, to recommend amendments to those provisions
36 accordingly, perhaps by way of legislative note.
37

38 *Nonbinding advice givers.* This section does not apply to a nonbinding advice giver, such
39 as a person with whom a settlor directs a trustee to consult in a way that is not binding on the
40 trustee. A nonbinding advice giver is not a “trust director,” which is defined in Section 2(6) as a
41 person who holds a power under this section, as nonbinding advice is not a power under this
42 section. Because a nonbinding advice giver does not have a binding power over the trust or its
43 administration, there is no need for the framework of duties, ancillary powers, and other
44 governance provisions in this act.
45

46 *Subsection (c)—default rules of construction.* Subsection (c) provides default rules of

1 construction for (1) settlor incapacity or death, and (2) majority decision for jointly held powers.

2
3 *Subsection (c)(1)—settlor incapacity or death.* The divided trusteeship statutes in several
4 states expressly address the question of whether a trust director’s powers continue after the
5 incapacity or death of the settlor. We reached a consensus at the last meeting that although such a
6 provision may not be strictly necessary, it would be useful for this act to specify a default rule
7 that a trust director’s powers survive the incapacity or death of the settlor unless the terms of the
8 trust provide otherwise. Subsection (c)(1) specifies that default.

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

20
21 **SECTION 7. INCIDENTAL POWERS OF TRUST DIRECTOR.** Unless the terms

22 of a trust provide otherwise, a trust director may exercise any further power appropriate to the
23 exercise of the director’s powers under Section 6, including a power:

24 (1) to delegate powers and duties;

25 (2) to incur reasonable costs and direct indemnification for those costs;

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

28 (4) to intervene in an action against a trustee, another trust director, beneficiary, or third
29 party to the extent the action pertains to the trust;

30 (5) to make a report or accounting to a beneficiary or other interested party[; and][.]

31 [(6) to direct a trustee to issue a Certification of Trust under [Uniform Trust Code Section
32 1013].]

1 **Discussion Notes**

2
3 *Prior draft.* This section corresponds to Section 5(b) in the Fall 2015 draft. We have
4 broken it off from the old Section 5 (which is now Section 6) and made it into its own section for
5 clarity and simplicity. We have also made two substantive changes, discussed below.
6

7 *Any “further” power that is “appropriate.”* This section creates a default rule under
8 which a trust director has any “further” power that is “appropriate” to the director’s exercise of
9 the director’s powers under the terms of the trust per Section 6. The term “appropriate” is based
10 on Uniform Trust Code § 815(a)(2)(B) (2000). The notion is that appropriateness will be judged
11 in relation to the purpose of function being carried out by the director.
12

13 *Default rule of construction.* The default nature of this provision is indicated by the
14 opening clause, which is new to this draft, and which recognizes that the terms of a trust might
15 provide otherwise.
16

17 *Illustrations not meant to be limiting.* The examples given in the blackletter—to delegate;
18 incur reasonable costs and direct indemnification of those costs; to bring certain kinds of actions;
19 to intervene in litigation pertaining to the trust; to make a report or accounting; and to direct
20 issuance of a Certification of Trust—are meant to be illustrative and not limiting. Thus, for
21 example, a trust director could direct a trustee to execute documents or make regulatory filings if
22 “appropriate” to the exercise of an express power of the trustee. Likewise, the power “to incur
23 reasonable costs and direct indemnification for those costs” would allow a trust director to direct
24 reimbursement of the director’s attorney’s fees if those fees were “reasonable” under the
25 circumstances and “appropriate” to the director’s exercise of the director’s powers.
26

27 *Paragraph 3 and 4—litigation powers distinct from those in Section 6(b)(5)(A).* Section
28 6(b)(5)(A) and paragraph 3 of this section both reference a power “to bring an action for
29 instructions, construction, or reformation, to declare rights, to enforce the trust, to enforce claims
30 of the trust, or to defend claims against the trust.” Paragraph 4 of this section adds a power “to
31 intervene in an action against a trustee, another trust director, beneficiary, or third party to the
32 extent the action pertains to the trust.” In spite of the common subject matter and overlapping
33 language, the litigation power under paragraphs 3 and 4 of this section are distinct from that
34 under Section 6(b)(5)(A).
35

36 Section 6(b)(5)(A) enables a settlor to give a trust director an express power of protection
37 to litigate matters pertaining to the trust. Paragraphs 3 and 4 of this section, by contrast, are
38 examples of “further power[s]” that might be “appropriate to exercise the powers given to the
39 director” under Section 6. Accordingly, these provisions authorize a trust director to bring or
40 intervene in litigation only to the extent the litigation is related to the trust director’s expressly
41 granted powers. For example, under paragraph 3 a trust director could bring an action against a
42 trustee that failed to comply with a direction under Section 6(b)(1). Likewise, if a trust director
43 had a power to direct investment, and the trust became involved in a contractual dispute with a
44 private equity fund in which the director had directed investment, under paragraphs 3 and 4 of
45 this section the director could bring or intervene in litigation to resolve the matter. Unlike the
46 litigation power under Section 6(b)(5)(A), which arises only if granted expressly by the terms of

1 the trust, the narrower powers to litigate under paragraphs 3 and 4 of this section arise by default.

2
3 *Paragraph 5—report or accounting.* The “report or accounting” language in paragraph
4 (5) is new to this draft, reflecting the availability to a trust director of a report or accounting
5 defense under Section 14(b). Under the structure of this section, unless the terms of the trust
6 provide otherwise, a trust director may obtain repose by reporting or accounting under Section
7 14(b) in accordance with the law of the enacting state governing reports or accountings by a
8 trustee.

9 10 **SECTION 8. DUTY AND LIABILITY OF TRUST DIRECTOR.**

11 (a) Subject to subsections (c)-(d), with respect to a power of direction under Section
12 6(b)(1) or a power under Section 7 appropriate to the power of direction:

13 (1) the director is subject to the same fiduciary duties as a trustee would be in the
14 exercise or nonexercise of the same power under the same circumstances; and

15 (2) the director’s duties and liabilities may be varied by the terms of the trust to
16 the same extent that the terms of the trust could vary the fiduciary duties of a trustee under the
17 same circumstances.

18 (b) Subject to subsections (c)-(d), with respect to a power of consent under Section
19 6(b)(2), power of approval or ratification under Section 6(b)(3), [**?power of selection under**
20 **Section 6(b)(4),?**] or power of protection under Section 6(b)(5), or a power under Section 7
21 appropriate to those powers:

22 (1) the director must act in good faith; and

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

26 (c) Unless the terms of a trust provide otherwise, if a trust director is a licensed medical
27 professional, and the director acts in the director’s capacity as a medical professional, then the
28 director is not subject to duty or liability under this [Act].

1 (d) A trust director is not subject to any fiduciary duty in the exercise or nonexercise of a
2 power under Sections 6 or 7 if exercise or nonexercise of the power in a fiduciary capacity will
3 or may deprive the trust of a tax benefit or impose a tax burden contrary to the settlor’s actual or
4 probable intent.

5 (e) The terms of a trust may impose duties and liabilities on a trust director trustee in
6 addition to those under this [act].

7 Discussion Notes

8 *Prior draft.* This section corresponds to Section 8 in the Fall 2015 draft.
9

10 *Powers versus duties.* In combination with Section 10, this section offers a simple but
11 principled model of fiduciary duties in a divided trusteeship: fiduciary duty follows power. If a
12 trust director has the relevant power, the director bears fiduciary obligation to the beneficiaries
13 and thus has fiduciary liability exposure in the exercise or nonexercise of that power. And if a
14 trustee has the relevant power, then the trustee bears fiduciary obligation to the beneficiaries in
15 the exercise or nonexercise of that power. This structure, which is intuitive and functional in
16 nature and is consistent with the sample instruments provided before and after the last meeting, is
17 an adaptation for divided trusteeship of the “basic principle of trust administration” that “a
18 trustee presumptively has comprehensive powers to manage the trust estate and otherwise to
19 carry out the terms and purpose of the trust, but that all powers held in the capacity of trustee
20 must be exercised, or not exercised, in accordance with the trustee’s fiduciary obligations.”
21 Restatement (Third) of Trusts § 70 cmt. a (2007).
22

23 *Subsection (a).* Subsection (a) addresses a power of direction. Because such a power
24 gives a trust director functional control over a matter that sits at the core of ordinary trust
25 administration (i.e., a power to direct a trustee in the trustee’s exercise or nonexercise of the
26 trustee’s powers of trusteeship), Subsection (a)(1) applies to the director the same fiduciary
27 duties that would ordinarily apply to a trustee. The theory is that within the scope of a power of
28 direction, the trust director is in function the trustee; and under Section 9(1), the trustee is
29 disempowered within the scope of the power of direction. Accordingly, Subsection (a) sets the
30 default duties of a trust director with a power of direction by absorbing the default fiduciary law
31 that would ordinarily apply to a trustee. Subsection (a)(2) sets the mandatory duties of a trust
32 director with a power of direction by absorbing the mandatory fiduciary law that would
33 ordinarily apply to a trustee in the same way.
34

35 In contrast to the corresponding provision in the prior draft, subsection (a)(2) now only
36 permits the terms of a trust to “vary” a trustee’s fiduciary duties and not to “eliminate” those
37 duties. This is consistent with the background law of trusteeship, which does not allow a settlor
38 to eliminate a trustee’s fiduciary duties completely. *See, e.g.,* Restatement (Third) of Trusts § 96
39 cmt. c (2012). (“Notwithstanding the breadth of language in a trust provision relieving a trustee

1 from liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on
2 the types and degree of misconduct for which the trustee can be excused from liability.”).

3
4 There are three main benefits to absorbing existing trust fiduciary law rather than
5 reinventing it for a trust director with a power of direction. First, absorption avoids the need to
6 spell out the entirety of trust fiduciary law. That is, it avoids the need to replicate something like
7 Article 8 of the Uniform Trust Code. Second, absorbing the trust fiduciary law of each enacting
8 state accommodates diversity across the states in the particulars of a trustee’s default and
9 mandatory fiduciary duties, such as on the scope of the duty to diversify or to give information to
10 the beneficiaries, both examples of areas in which the states are becoming increasingly
11 differentiated. Third, absorption allows for changes to the law of a trustee’s fiduciary duties to be
12 absorbed automatically without need for periodic conforming revision to this act.

13
14 In giving strong default fiduciary duties to a trust director, Subsection (a) follows the
15 great majority of the existing state statutes.⁴ It improves on the existing statutes, however, by
16 absorbing the state’s existing law on a trustee’s fiduciary duties. Many of the existing statutes
17 simply designate a trust director as a fiduciary without elaborating what that designation means.
18 The statutes thus tend not to spell out the nature or extent of a trust director’s fiduciary duties in
19 any detail. This draft is more complete, because it adopts the rich body of law already in
20 existence for trustees, including the state’s law on the mandatory core of trust fiduciary law, such
21 as under Uniform Trust Code § 105 (amended 2005).

22
23 “*Under the same circumstances.*” Subsection (a) references the law that applies to a
24 trustee acting “under the same circumstances” as a trust director. The phrase “under the same
25 circumstances” is designed to indicate that a trust director exercising a power of direction must
26 satisfy the same duties as a trustee that exercises powers of trusteeship directly. If a trust director
27 has a power to direct a trustee in the making of investments, for example, then in the exercise of
28 that power, the director must comply with the same duties as a trustee who makes investments
29 directly using the trustee’s powers. This reading of the phrase “under the same circumstances” is
30 to be distinguished from another possible reading, which this section is not meant to evoke. The
31 other possible reading is that a trust director must comply with the same duties as a trustee who
32 acts in a capacity as a trust director, rather than in the trustee’s capacity as a trustee. This reading
33 would be circular and incoherent, since a trustee cannot be a trust director under this act. One
34 question is whether the current black letter in combination with an appropriate comment would
35 be sufficient to state our intention, or whether we should revise the black letter to state our
36 intention more clearly.

37
38 *Directing another trust director.* This section applies the same duties to a trust director
39 regardless of whether the director has a power of direction over a trustee or over another trust
40 director. Subsection (a) imposes on a trust director the same duties that a trustee would have if
41 the trustee exercised the power directly, so that a trust director who directs another trust director

⁴ 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, Arizona, Idaho, and Wisconsin.

1 has the same duties that a trustee would have if the trustee simply acted on its own. For example,
2 if the settlor’s son has a power of direction over a family investment adviser, and the investment
3 adviser in turn has a power to direct the trustee’s investments, the settlor’s son would have the
4 same duties as a trustee with regard to investment management, and the investment adviser
5 would have the same duties of a directed trustee subject to a power of direction.
6

7 *Extended discretion and exculpation or exoneration.* Under the framework of subsection
8 (a), the terms of a trust could give a trust director extended discretion, such as in the form of
9 “sole,” “absolute,” or “uncontrolled” discretion, with the same effect as those terms would have
10 on the discretion of a trustee. Under prevailing law, “words such as ‘absolute’ or ‘unlimited’ or
11 ‘sole and uncontrolled’ are not interpreted literally. Even under the broadest grant of fiduciary
12 discretion, a trustee must act honestly and in a state of mind contemplated by the settlor. Thus,
13 the court will not permit the trustee to act in bad faith or for some purpose or motive other than
14 to accomplish the purposes of the discretionary power.” Restatement (Third) of Trusts § 50 cmt.
15 c (2003); *see also* Uniform Trust Code § 814(a) (amended 2004). Likewise, the terms of a trust
16 could give a trust director the protection of an exculpation or exoneration clause, but the clause
17 would only have the same effect as such a clause would have for a trustee. Under prevailing law,
18 such as under Uniform Trust Code § 1008 (2000) and Restatement (Third) of Trusts § 96 (2012),
19 an exculpation or exoneration clause cannot protect against liability for acting in bad faith or
20 with reckless indifference.
21

22 *Subsection (b).* Subsection (b) specifies the duties of a trust director holding a power of
23 consent, approval or ratification, or protection. Subsection (b) could also specify the duties of a
24 trust director holding a power of selection. Subsection (b) separates these powers from a power
25 of direction, because these powers have no analogue in the traditional law of trustees’ powers. A
26 trustee does not, for example, ordinarily have a power of consent over another person. Hence,
27 Subsection (b) departs from the absorption approach of Subsection (a), and instead cuts straight
28 to a mandatory minimum duty of “good faith” with a threshold of “bad faith or reckless
29 indifference” for liability.
30

31 *Distinction between duty and threshold for liability.* Subsection (b) distinguishes between
32 a trust director’s duty and the threshold for the trust director’s liability. The minimum standard of
33 duty in subsection (b)(1) is “good faith,” which is consistent with Uniform Trust Code §
34 105(b)(2) (amended 2005). The threshold for liability is “bad faith” or “reckless indifference,”
35 which is consistent with Uniform Trust Code § 1008(a)(1) (2000); *see also* Restatement (Third)
36 of Trusts § 96 cmt. c (2012) (“[A]n exculpatory clause cannot excuse a trustee for a breach of
37 trust committed in bad faith. Nor can the trustee be excused for a breach committed with
38 indifference to the interests of the beneficiaries or to the terms and purposes of the trust—that is,
39 committed without reasonable effort to understand and conform to applicable fiduciary duties.”).
40

41 The distinction between a trust director’s duty and its threshold for liability is useful,
42 because it preserves equitable remedies in a situation in which a trust director has breached its
43 duty, but failed to cross the threshold for liability. If a trust director acts in a manner inimical to
44 beneficiary welfare but not in bad faith, injunctive relief might be appropriate, even if damages
45 are not available.
46

1 *The malleability of “good faith.”* Subsection (b) relies heavily on the concept of “good
2 faith.” The concept of good faith is sensitive to context and, as such, it may apply differently to
3 the exercise versus the nonexercise of a power. A director who holds a power of amendment, for
4 example, may not have a duty actively to search for and anticipate problems that an amendment
5 could solve. But the director may nevertheless have a duty to respond in good faith to
6 information that shows that an amendment is warranted under the circumstances. If the director
7 has no reason to believe that the trust should be amended to permit better diversification, for
8 example, the director may have no duty to make such an amendment. But if the director receives
9 information that suggests such an amendment is necessary, the director must consider the
10 information and act (or not act) in good faith.

11
12 *Power of selection.* Subsection (b) includes a power of selection, but places it in brackets
13 with question marks to indicate that the duties applicable to a power of selection are an important
14 topic for discussion. Section 6(b)(4) authorizes the terms of a trust to give a trust director a
15 power of selection to appoint or remove a trustee or another trust director or a successor to either.
16 It is unclear what the default and mandatory minimum levels of fiduciary duty should be for the
17 exercise of such a power. At the last meeting, some members of the committee said that
18 sophisticated settlors frequently create powers of selection in a nonfiduciary capacity without
19 even a basic duty of good faith. Should this act authorize creation of this kind of nonfiduciary
20 selection power? One argument against allowing a nonfiduciary power of selection is that a
21 power of selection is not very different from some of the powers that Section 6 treats as powers
22 of protection, and which are thus subject to a mandatory duty of good faith under subsection (b)
23 of this section. A power to amend the trust, for example, could potentially be used like a power
24 of selection to remove or appoint a trustee. Since a power to amend the trust is subject to a
25 mandatory minimum duty of good faith, should a power of selection also be subject to a
26 mandatory minimum duty? More generally, it is not obvious that a beneficiary should have no
27 recourse if, for example, the holder of a power of selection acts on the basis of a bribe or
28 otherwise in bad faith.

29
30 *Removal and injunctive relief.* Section 17(6) governs removal of a trust director. It
31 provides for several grounds for removal, including “serious breach of trust” and “persistent
32 failure of the trust director to administer the trust effectively.” Nothing in this section reduces or
33 alters the inherent power of a court of appropriate jurisdiction to issue an order “enjoining [a
34 trust director] to take or refrain from taking certain action(s) or otherwise to avoid committing a
35 breach of trust” or other appropriate injunctive relief. Restatement (Third) of Trusts § 95 cmt. c
36 (2012); *see also* Uniform Trust Code § 1001 (2000).

37
38 *Subsection (c) and licensed medical professionals.* Subsection (c) responds to a concern,
39 expressed at the last meeting, that medical professionals might refuse to accept appointment as a
40 trust director if the associated powers involved an exercise of medical judgment. Subsection (c)
41 addresses this concern by specifying that a licensed medical professional is not subject to duty or
42 liability under this act when acting in his or her capacity as such. The solution in subsection (c) is
43 superior to the suggestion at the last meeting that we alter the definition of a “trust director” in
44 Section 2 to exclude a licensed medical professional. First, subsection (c) only excludes the
45 medical professional from duty and liability, and does not exclude the medical professional from
46 other provisions of the act, such as the provisions in Section 17 that provide helpful clarity on

1 mechanical issues such as acceptance, resignation, and vacancy. Second, excluding a licensed
2 medical professional from the definition of a trust director might unintentionally exclude from
3 the act any trust director who happens to be a licensed medical professional, regardless of
4 whether the trust calls for the director to act in his or her medical capacity. If the settlor gives his
5 nephew a power to direct the investment of the trust property, for example, we would not want to
6 exclude the nephew from this act simply because the nephew happens to be a dentist.

7
8 *Exclusion for tax objectives.* Subsection (d) addresses the concern raised at the last
9 drafting session that in some circumstances imposing a fiduciary duty on a trust director would
10 interfere with routine tax planning objectives. The suggestion was that we should try to carve out
11 tax-related powers. In trying to draft suitable language, however, we discovered that the kinds of
12 powers that might be included in the category were too numerous to list, and in many other
13 circumstances those powers should be subject to fiduciary duties. Instead of a rule-based
14 approach, therefore, we have tried for a standard. Drawing on the language of Revised Uniform
15 Principal and Income Act § 104(e) (1997), subsection (d) provides that “A trust director is not
16 subject to any fiduciary duty in the exercise or nonexercise of a power under Sections 6 or 7 if
17 exercise or nonexercise of the power in a fiduciary capacity will or may deprive the trust of a tax
18 benefit or impose a tax burden contrary to the settlor’s actual or probable intent.”

19
20 By way of illustration, if necessary to implement the settlor’s tax objectives, a power to
21 substitute assets (which would be a power of direction); a power to terminate a settlor’s power to
22 substitute assets (which would be a power of amendment); a power to add beneficiaries (which if
23 not a nonfiduciary power of appointment would be a power to amend the trust); or a power in a
24 surviving spouse to compel income productivity (a power of direction), could each be deemed
25 not to be held in a fiduciary capacity under this section.

26
27 It would be helpful at the upcoming meeting to discuss whether this standards-based
28 strategy works, and if so, to come up with further examples for the comments.

29
30 *No ceiling on duties.* Subsection (e) clarifies that the duties in this section are merely
31 defaults and minimums, not ceilings. The terms of a trust can specify further duties in addition to
32 the duties specified in this section.

33
34 **SECTION 9. LIMITATIONS ON POWERS OF DIRECTED TRUSTEE.** Unless
35 the terms of a trust provide otherwise:

36 (1) with respect to any matter for which a directed trustee is subject to a trust director’s
37 power of direction under Section 6(b)(1), the trustee may exercise only those powers appropriate
38 to carry out the directions of the trust director;

39 (2) with respect to any power for which a directed trustee is subject to a trust director’s
40 power of consent under Section 6(b)(2), the trustee may not exercise the power without the

1 consent of the trust director; and

2 (3) a directed trustee is subject to a trust director’s power of direction or power of consent
3 for purposes of this section even if at the time in question the trust directorship is vacant or the
4 trust director is unavailable, but the trustee may petition the court for instructions if the vacancy
5 or unavailability gives rise to reasonable doubt about the proper administration of the trust.

6 **Discussion Notes**

7 *Prior draft.* This section corresponds to Section 7 in the Fall 2015 draft.

8
9 *Powers versus duties.* This section protects the integrity of a trust director’s powers by
10 limiting the powers of a trustee to act if the trustee is subject to a trust director’s power of
11 direction (paragraph (1)) or is subject to a trust director’s power of consent (paragraph (2)). On
12 the assumption that a power of approval or ratification, power of selection, or power of
13 protection would not ordinarily overlap with a power of trusteeship, there is no similar provision
14 for those powers.

15
16 Conceptually, this section narrows the powers of a directed trustee. The duties of a
17 directed trustee are governed by Section 10. The central purpose of this section is to override the
18 background default rule of modern trust law under which a trustee has effectively unlimited
19 power. *See, e.g.,* Uniform Trust Code § 815(a)(2) (amended 2003) (“all powers over the trust
20 property which an unmarried competent owner has over individually owned property” and “any
21 other powers appropriate to achieve the proper investment, management, and distribution of the
22 trust property”); Restatement (Third) of Trusts § 85 (2007) (“all of the powers over trust property
23 that a legally competent, unmarried individual has with respect to individually owned property”).

24
25 This section should not be read to restrict a trustee’s incidental power to carry out the
26 directions of a trust director, actions for which a trust director has given consent, and actions
27 appropriate toward seeking such consent. Note also the preservation in paragraph 1 of “powers
28 appropriate to carry out the directions of the trust director.”

29
30 *Directed trust directors.* This section only limits the powers of a *trustee* that is subject to
31 a power of direction, and not the powers of a *trust director* that is subject to such a power. A
32 trust director possesses only those powers that are specifically granted to it by the terms of the
33 trust (Section 6) and such other powers that are “appropriate to the exercise” of those specifically
34 granted powers (Section 7). For example, the terms of a trust might give a power of direction
35 over investment to a professional investment adviser, but also make that adviser’s power subject
36 to a power of consent held by the settlor’s brother. In this case, there is no need to limit the
37 investment adviser’s power to act when the brother refuses consent, because by default the
38 adviser has no power to act other than in accordance with the powers specifically granted by the
39 terms of the trust. If the terms of the trust do not specifically empower the adviser to direct
40 investments in a particular circumstance, then the adviser cannot do so.

1 *Vacancy and unavailability.* The main change in this section since the prior draft appears
2 in paragraph 3, which continues the rule of trustee disempowerment even if the trust directorship
3 is vacant or the director is unavailable. This is, however, only a default rule; the settlor may
4 provide otherwise in the terms of the trust. At issue, therefore, is not a deep question of policy,
5 but rather a question of which rule should apply to trusts that are silent on the issue. Because we
6 lack definitive evidence about which option—continued disempowerment or reempowerment—
7 would be preferred by a majority of settlors, we looked to pragmatic considerations. Two such
8 considerations dominated our analysis.

9
10 First, a default rule of continued disempowerment is likely to be less disruptive to
11 existing relationships. Some trustees of existing trusts with directed or divided trusteeship that
12 are silent on this issue may have accepted the trusteeship on the assumption that, under prior law,
13 they would be disempowered even in the event of vacancy, unavailability, or emergent
14 circumstances. Second, a default rule of continued disempowerment allows for a simpler and
15 shorter act. This section on the powers of a directed trustee, and Section 10 on the duties of a
16 directed trustee, are much shorter and simpler than their counterparts in the prior draft. In
17 general, shorter and simpler acts have more enactment success than longer and more complicated
18 ones.

19
20 *Petition for instructions.* The last clause of paragraph 3 provides express confirmation
21 that, in spite of the general disempowerment language of this section, a trustee may nonetheless
22 petition the court for instructions if, owing to a vacancy in the trust directorship or the
23 unavailability of the trust director, there is reasonable doubt about the proper administration of
24 the trust. This provision is consistent with Section 10(e), which provides that a trustee that has
25 reasonable doubt about its duties in a directed or divided trusteeship may satisfy those duties by
26 timely petitioning the court for instructions or by joining the issue in already pending
27 proceedings. A petition for instruction is familiar trust law. *See, e.g.*, Restatement (Third) of
28 Trusts § 71 (2007).

29 **SECTION 10. DUTY AND LIABILITY OF DIRECTED TRUSTEE.**

30
31 (a) With respect to a matter for which a directed trustee is subject to a power of direction
32 under Section 6(b)(1), the trustee must act in accordance with the direction and in so acting is
33 liable only for the trustee's own willful misconduct.

34 (b) With respect to a matter for which a directed trustee is subject to a power of consent
35 under Section 6(b)(2), if the trustee timely proposes an action but fails to obtain consent, the
36 trustee is liable only for the trustee's own **[?gross negligence or?]** willful misconduct.

37 (c) A trustee is not liable for breach of trust if under Section 6(b)(3) a trust director
38 approved or ratified the conduct constituting the breach, unless:

- 1 (1) the breach involved the trustee’s own willful misconduct;
2 (2) the approval or ratification was induced by improper conduct of the trustee; or
3 (3) at the time of the approval or ratification, the director did not know of the
4 material facts relating to the breach.

5 (d) A directed trustee must take appropriate action to implement a trust director’s
6 exercise of a power of selection under Section 6(b)(4) or power of protection under Section
7 6(b)(5) and in so acting is liable only for the trustee’s own willful misconduct.

8 (e) A directed trustee that has reasonable doubt about its duties under this section may
9 satisfy those duties by timely petitioning the court for instructions or by joining the issue in
10 already pending proceedings.

11 (f) The terms of a trust may impose duties and liabilities on a directed trustee in addition
12 to those under this [act].

13 **Discussion Notes**

14 *Prior draft.* This section corresponds to Section 9 in the Fall 2015 draft.

15
16 *Powers versus duties.* This section prescribes the duties of a directed trustee in the
17 trustee’s exercise or nonexercise of its powers. It should be read in conjunction with Section 11,
18 which provides that a directed trustee has no duty to monitor or advise a trust director or to warn
19 or advise a beneficiary about the conduct of a trust director. Information sharing among directed
20 trustees and trust directors is governed by Section 13.

21
22 *Subsection (a)—duty of obedience.* Subsection (a) includes a duty of obedience to a trust
23 director in the director’s exercise of a power of direction. Many of the existing state statutes have
24 provisions to similar effect. *See, e.g.,* 760 Ill. Comp. Stat. § 5/16.3(f) (2015) (“The excluded
25 fiduciary [i.e., a directed trustee] shall act in accordance with the governing instrument and
26 comply with the directing party’s exercise of the powers granted to the directing party by the
27 governing instrument.”).

28
29 The phrase “with respect to a matter for which a directed trustee is subject to a power of
30 direction under Section 6(b)(1)” limits a directed trustee’s duty of obedience to circumstances in
31 which a direction is within the trust director’s power of direction. It follows, therefore, that a
32 trustee should not obey a direction that is outside of the trust director’s power of direction. To do
33 so would be a violation of the background duty of a trustee to act in accordance with the terms of

1 the trust as under Uniform Trust Code § 105(b)(2) (amended 2005) (making mandatory “the duty
2 of a trustee to act ... in accordance with terms ... of the trust”) and Restatement (Third) of Trusts
3 § 76 (2007) (“The trustee has a duty to administer the trust ... in accordance with the terms of
4 the trust.”). A direction rendered in a form contrary to that required by the terms of the trust,
5 such as an oral direction if the terms of the trust require a writing, is not within the trust
6 director’s power of direction.

7
8 *Subsection (a)—willful misconduct standard.* Consistent with the consensus at the last
9 meeting, this draft adopts a “willful misconduct” standard for the duty of a directed trustee. This
10 standard is based on the statutes of Delaware and several other states.⁵ The Delaware statute
11 provides:

12
13 If a governing instrument provides that a fiduciary is to follow the
14 direction of an adviser or is not to take specified actions except at the direction of
15 an adviser, and the fiduciary acts in accordance with such a direction, then except
16 in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary
17 shall not be liable for any loss resulting directly or indirectly from any such act.⁶

18
19 This draft’s “willful misconduct” standard, which uses the American spelling rather than the
20 British spelling favored by the Delaware statute, departs from the prior draft, which said that if a
21 directed trustee acted in accordance with direction, the trustee “is not liable for so acting.” The
22 approach of the prior draft was consistent with statutes in Alaska, Nevada, South Dakota, New
23 Hampshire, and other states.⁷ Both of these approaches are more protective of a directed trustee
24 than Uniform Trust Code § 808 (2000). A related issue for discussion is whether to include a
25 legislative note with directions for conforming amendments to that section in a state that has
26 adopted it.

27
28 At the previous meeting, several arguments were made in favor of the willful misconduct
29 standard. One was that, relative to the no-duty rule of the prior draft, the willful misconduct
30 standard is more consistent with traditional fiduciary policy. Several members of the committee
31 objected to permitting a fiduciary to act without liability in a manner that the fiduciary knows to
32 be inimical to the beneficiary’s welfare. Another argument was that the willful misconduct
33 standard was more politically acceptable than a complete waiver of liability. Members of the
34 committee were concerned that state legislators would not be willing to accept a standard that
35 completely released a directed trustee from liability for following directions.

⁵ Several other state statutes follow Delaware’s “wilful misconduct” formulation, or instead use “bad faith” or “reckless indifference.” These include Colo. Rev. Stat. § 15-16-807(1) (2014); Mo. Rev. Stat. § 456.8-808(8) (2012); N.C. Gen. Stat. § 36C-8A-4(a) (2012); Utah Code Ann. §§ 75-7-906(4), 5(b) (West 2004); Va. Code Ann. § 64.2-770(E)(2) (2014); and Wis. Stat. § 701.0808(2) (2014).

⁶ Del. Code Ann. tit. 12, § 3313(b) (2015).

⁷ Alaska Stat. § 13.36.375(c) (2013); Ga. Code Ann. § 53-12-303(b), (c) (2010); Idaho Code § 15-7-501(2), (5) (2007); 760 Ill. Comp. Stat. 5/16.3(f) (2015); Ky. Rev. Stat. Ann. § 286.3-275(1) (West 2006); Miss. Code Ann. § 91-8-1205 (2014); Nev. Rev. Stat. § 163.5549(1) (2015); N.H. Rev. Stat. Ann. § 564-B:12-1205 (2008); Ohio Rev. Code Ann. § 5815.25(C) (West 2013); S.D. Codified Laws §§ 55-1B-2 (2012), 55-1B-5 (1997); Tenn. Code Ann. §§ 35-3-122 (2007), 35-3-123 (2007), 35-15-1205 (2015).

1 Other members of the committee, however, made arguments in favor of the prior draft's
2 total exoneration approach. They argued that imposing fiduciary duties on a directed trustee
3 undermined the tie between duty and power. The theory behind this act is that if a power belongs
4 to a trust director, then all of the duty associated with the exercise of that power should also
5 belong to the trust director. On this view, given that the settlor could have named the director as
6 the trustee, the settlor should be able to locate all duty in the director, relegating the trustee to the
7 role of a functionary. Members of the committee also expressed concern that the willful
8 misconduct standard was vague and was perhaps not meaningfully different from a standard of
9 no liability. These members of the committee argued that the willful misconduct standard does
10 not clearly resolve the central question of whether a trustee can be liable for following a direction
11 that the trustee knows is in breach of a director's duty. Subsection (a) specifies that a directed
12 trustee is liable only for the trustee's "own willful misconduct" and not for the willful
13 misconduct or other misconduct of a trust director. But it nevertheless remains uncertain whether
14 following a direction that involves willful misconduct by a trust director can constitute "willful
15 misconduct" by the trustee.

16
17 The conclusion at the prior meeting was that this draft should use "willful misconduct,"
18 and that we would revisit the question at this next meeting. In this regard we should also take up
19 the question of whether to include a definition of the term. Delaware law defines it thus:

20
21 The term "wilful misconduct" shall mean intentional wrongdoing, not
22 mere negligence, gross negligence or recklessness and "wrongdoing" means
23 malicious conduct or conduct designed to defraud or seek an unconscionable
24 advantage.⁸

25
26 *Subsection (a)—powers versus duties.* Subsection (a) does not affect a directed trustee's
27 obligation to determine whether a direction is consistent with a trust director's *powers*, as distinct
28 from the director's *duties*. If a trust director issues a direction that is within its powers, the trustee
29 is obligated to "act in accordance with the direction" and in so acting is liable only for its "own
30 willful misconduct." Before the trustee follows the direction, however, the trustee must first
31 determine whether the direction is within the director's power. In determining whether a
32 direction is within a director's power, a trustee is subject to whatever fiduciary standard of care
33 applies to the trustee under the terms of the trust and otherwise applicable law.

34
35 For example, a trust instrument might give a trust director a power to direct the
36 investment of the trust property. A direction from this director to the trustee to invest the trust
37 property in a manner that aggravates an existing concentration would be within the director's
38 power of direction. Subsection (a)(1) would require the trustee to act in accordance with the
39 direction, and the trustee would not be liable unless following the direction would involve willful
40 misconduct by the trustee. By contrast, if the direction turned out to be inconsistent with the
41 directors' power—if, for example, the director only had a power to direct distribution and not
42 investment—then the trustee would be subject to its ordinary standard of care in interpreting the
43 terms of the trust.

⁸ Del. Code. Ann. tit. 12, § 3301(g) (2013).

1 *Subsection (b)—willful misconduct.* Subsection (b) prescribes a directed trustee’s duties
2 as regards any matter for which the trustee is subject to a trust director’s power of consent.
3 Subsection (b) leaves undisturbed the trustee’s otherwise applicable fiduciary duties, except that
4 the standard of a trustee’s liability is reduced to willful misconduct if the trustee timely sought
5 the director’s consent but failed to obtain it. Moreover, under Section 9(2), if a trustee’s power is
6 subject to consent by a director, then “the trustee may not exercise the power without the consent
7 of the trust director.”
8

9 A power of consent is different from a power of direction, because a power of consent
10 requires the initiative to come from the trustee, rather than the director. A power of consent
11 operates mainly to prevent the trustee from acting unless the director gives consent. A power of
12 consent also differs from a power of approval or ratification, because a power of approval or
13 ratification releases a trustee from liability for the relevant action, but a power of consent does
14 not.
15

16 Subsection (b) does not alter the trustee’s duties with respect to acts for which a director
17 granted consent. The theory is that, because the trustee is the person taking the initiative, the
18 trustee is the person ultimately responsible for the action. If the terms of a trust give a director a
19 power to release a trustee from liability by approving the trustee’s actions in advance, under
20 Section 6(b)(3) such a power is a power of approval, and subsection (c) applies.
21

22 *Subsection (b)—gross negligence?* In applying a “willful misconduct” standard to a
23 trustee that is subject to a power of consent, subsection (b) protects a trust director more strongly
24 than the Delaware statute, which provides (emphasis added):
25

26 If a governing instrument provides that a fiduciary is to make decisions
27 with the consent of an adviser, then except in cases of *wilful misconduct or gross*
28 *negligence* on the part of the fiduciary, the fiduciary shall not be liable for any
29 loss resulting directly or indirectly from any act taken or omitted as a result of
30 such adviser’s objection to such act or failure to provide such consent after having
31 been requested to do so by the fiduciary.⁹
32

33 We should discuss whether, following Delaware, this act should add gross negligence to the duty
34 of a trust director who holds a power of consent. It would be helpful to hear from our Delaware
35 members of the committee about why in this regard the Delaware statute treats a power of
36 direction differently from a power of consent.
37

38 *Subsection (b)—a duty to ask again?* Another question is what to do about a trustee’s
39 ongoing duties if a director has refused consent in the past. If a director refuses consent to a
40 proposed action on January 1, does the trustee have a duty to ask again on January 2? What
41 about July 2? Or the next year? Or five years later? One possible solution to this problem is not
42 to address it, leaving the matter to the background law of trusts and the terms of the trust. But
43 how would those principles interact with the willful misconduct standard? Another solution is to
44 say that a trustee does not have a duty to seek consent again unless there has been a material

⁹ Del. Code Ann. tit. 12, § 3313(c) (2015) (emphasis added).

1 change in circumstances. If we do decide to provide clarity on this issue, we should discuss
2 whether it would be best to do so in the blackletter or in a comment.
3

4 *Subsection (c)—approval or ratification.* Subsection (c) provides that a trustee is not
5 liable for breach of trust if a trust director approved or ratified the conduct constituting the
6 breach. There are, however, a few limitations on the trustee’s release from liability. The first, in
7 subsection (c)(1), is that a director cannot approve or ratify conduct by a trustee that involves the
8 trustee’s willful misconduct. The second and third limitations, in subsections (c)(2)–(3), are
9 process safeguards that are familiar from prevailing law governing consent, release, or
10 ratification by a beneficiary. The specific language of those provisions is drawn from Uniform
11 Trust Code § 1009 (2000), which denies effect to a consent, release, or ratification if it “was
12 induced by improper conduct by the trustee” or if “the beneficiary did not know of the
13 beneficiary’s rights or of the material facts,” and is similar in substance to Restatement (Third) of
14 Trusts § 97 (2012).
15

16 *Subsection (d)—powers of selection or protection.* Subsection (d) imposes on a directed
17 trustee a duty to “take appropriate action to implement” a trust director’s exercise of a power of
18 selection or protection. The issue arises because a trust director’s exercise of a power of selection
19 or protection will sometimes require assistance of a trustee. The term “appropriate” in this
20 subsection parallels the term’s appearance in Section 7, which draws on Uniform Trust Code §
21 815(a)(2)(B) (amended 2003).
22

23 This subsection also provides that a trustee is not liable for taking action to facilitate the
24 director’s exercise of a power of selection or protection unless the trustee’s own actions
25 constitute willful misconduct. The logic behind imposing a low standard of duty on a trustee the
26 trustee is the same as in Subsection (a): if a director holds the power in question, the director
27 should bear most of the corresponding duty. Like subsection (a), however, subsection (d) does
28 not change a trustee’s duties to determine whether a director’s exercise of a power of selection or
29 protection is within the director’s power. The trustee must exercise its ordinary duty of prudence
30 in determining whether a director has the particular power of selection or protection that it
31 claims.
32

33 *Subsection (e)—petition for instructions.* Subsection (e) provides that a directed trustee
34 may satisfy its duties under this section by petitioning for instructions. Subsection (e) responds to
35 the concern raised at an earlier drafting session that a directed trustee should have the option of
36 going to court if it has good reason to doubt the soundness of the actions of a trust director.
37

38 The specific language of this subsection parallels Restatement (Third) of Trusts § 71
39 (2007) (“A trustee or beneficiary may apply to an appropriate court for instructions regarding the
40 administration or distribution of the trust if there is reasonable doubt about the powers or duties
41 of the trusteeship or about the proper interpretation of the trust provisions.”). Subsection (e) is
42 bounded by two limits. First, a trustee must have “reasonable doubt” about its duties. Second, a
43 trustee’s petition for instructions must be “timely.” One question for the committee is whether
44 the “timely” filing requirement should be modified with some sort of reasonability requirement
45 (e.g., “within a reasonable time”).
46

1 Subsection (e) is intended to be permissive, rather than mandatory. It confirms that a
2 trustee may satisfy its duties by petitioning for instructions. It does not, by itself, require a trustee
3 to bring such a petition.
4

5 *Subsection (f)—no ceiling on duties.* Similar to Section 8(e), subsection (f) of this section
6 clarifies that there is no ceiling on a directed trustee’s fiduciary duties. The terms of a trust can
7 add further duties beyond the defaults and minimums specified in this section.
8

9 **SECTION 11. NO LIABILITY FOR FAILURE TO MONITOR, INFORM, OR**

10 **ADVISE.** Unless the terms of a trust provide otherwise, regardless of whether a directed trustee
11 monitors the actions of a trust director, informs or gives advice to a settlor, beneficiary, trustee,
12 or trust director about a trust director’s exercise or nonexercise of the director’s powers, the
13 trustee is not liable for a prior or subsequent failure to monitor, inform, or advise.

14 **Discussion Notes**

15 *Prior draft.* This section corresponds to Section 10 in the Fall 2015 draft.
16

17 *Following the weight of existing statute law.* This section provides that a directed trustee
18 is not liable for failing to monitor a trust director or for failing to warn or give advice to a
19 beneficiary, trustee, or trust director about a trust director’s actions, whether those actions
20 already happened in the past past or are likely to occur in the future. Many existing state statutes
21 have provisions to similar effect. The language in this section, however, is much simpler.
22

23 It appears that these provisions were meant to reverse the result in *Rollins v. Branch*
24 *Banking & Trust Company of Virginia*,¹⁰ in which the court held a trustee that was subject to
25 direction in investment liable for failing to warn the beneficiaries about the risks of a
26 concentration and the investment director’s failure to give a direction to diversify.
27

28 *Survival of trustee’s general duty of disclosure.* Although this section confirms that a
29 directed trustee has no duty to monitor, warn, or advise regarding a trust director’s exercise or
30 nonexercise of its powers, this section does not relieve a trustee of its ordinary duties to disclose
31 and report under otherwise applicable law. For example, although a directed trustee would not
32 have a duty to warn the beneficiaries about the risks of a portfolio concentration, the trustee
33 would remain under a duty to make periodic reports or accountings of the trust assets to the
34 beneficiaries, or to answer reasonable inquiries by the beneficiaries about the administration of
35 the trust, to the extent required by otherwise applicable state law, such as under Uniform Trust
36 Code § 813 (amended 2004) or Restatement (Third) of Trusts § 82 (2007).
37

38 This section does not relieve a trustee of the duty under Section 13 to provide a trust

¹⁰ 56 Va. Cir. 147 (2002).

1 director with information reasonably related to the director’s powers or duties.

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

13
14 *Administrative classification.* In addition to expressly waiving a directed trustee’s duties
15 to monitor and warn, many state statutes also go further and say that if a trustee for some reason
16 chooses to monitor or warn, those monitoring and warning activities will be deemed to be
17 “administrative actions.”¹¹ The apparent purpose of these provisions is to ensure that if a directed
18 trustee chooses for some reason to inform, monitor, or advise, the trustee does not assume a
19 continuing obligation to do so. This section dispenses with the opacity of an administrative
20 classification and achieves the intended result more directly by providing that if a trustee
21 monitors, informs, or advises, the trustee is not liable for a prior or subsequent failure to monitor,
22 inform, or advise.

23
24 **SECTION 12. APPLICATION TO COTRUSTEES.** The terms of a trust [created or
25 amended after [the enactment date of this act]] may provide that a trustee is subject only to the
26 duties and liabilities of a trust director under Sections 8 and 13, and that a cotrustee is subject
27 only to the duties and liabilities of a directed trustee under Sections 10-11 and 13, with respect
28 to:

29 (1) a power of direction granted to the trustee to direct the cotrustee in the exercise or

¹¹ The Delaware statute, for example, provides:

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 the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser’s authority.

Del. Code Ann. tit. 12, § 3313(e) (2015); *see also* Md. Code Ann., Est. & Trusts § 14.5-808(c)(2) (West 2015); Miss. Code Ann. § 91-8-1204(b) (2014); N.H. Rev. Stat. Ann. § 564-B:12-1204(b) (2008); Ohio Rev. Code Ann. § 5815.25(B), (D) (West 2013); S.D. Codified Laws § 55-1B-2 (2012); Tenn. Code Ann. § 35-15-1204(b); Va. Code Ann. § 64.2-770(E)(4) (2014); Wis. Stat. § 701.0808(4) (2014).

- 1 nonexercise of a power of the cotrustee in the administration of the trust;
- 2 (2) a power of consent granted to the trustee under which the cotrustee must obtain the
- 3 consent of the trustee before exercising a power of the cotrustee in the administration of the trust;
- 4 or
- 5 (3) a power of approval or ratification granted to the trustee under which the trustee may
- 6 approve an action proposed by the cotrustee or ratify a prior action by the cotrustee.

7 **Discussion Notes**

8 *Prior draft.* This section, which governs a settlor’s ability to opt for the more permissive

9 fiduciary regime of this act instead of the traditional rules of cotrusteeship, is new to this draft.

10 The closest relation in the prior draft was in the definition of trust director, which had included a

11 trustee. In this draft, by contrast, the definition of trust director in Section 2(6) excludes a trustee.

12

13 *The policy question.* The fundamental policy question is whether to allow a settlor to

14 subject cotrustees to the permissive fiduciary rules of directed and divided trusteeship under this

15 act rather than the stricter traditional fiduciary rules of cotrusteeship. Under traditional law, each

16 cotrustee “has a duty to use reasonable care to prevent a co-trustee from committing a breach of

17 trust and, if a breach of trust occurs, to obtain redress.” Restatement (Third) of Trusts § 81(2)

18 (2007). This rule applies even if the settlor limits the role or function of one of the cotrustees.

19 “Even in matters for which a trustee is relieved of responsibility, . . . if the trustee knows that a

20 co-trustee is committing or attempting to commit a breach of trust, the trustee has a duty to take

21 reasonable steps to prevent the fiduciary misconduct.” *Id.* cmt. b.

22

23 *Problems with the prior draft.* The solution in the prior draft was to apply the more

24 permissive rules of this act to any cotrusteeship in which one trustee had a power of a trust

25 director over another cotrustee. This solution was both overbroad and confusing. It was

26 overbroad, because it is hardly clear that a settlor acting in, say, 1960, meant to apply the more

27 permissive rules of this act rather than the traditional rules of cotrusteeship. If such a settlor had

28 sought contemporaneous legal counsel, she would have been advised that the traditional rules

29 would apply. The prior draft was also confusing, because it implemented this significant change

30 in the law by way of a few words in a definition plus an explanatory comment. Because the

31 substantive import could easily be overlooked, the draft violated the spirit of the Uniform Law

32 Commission drafting rule against locating substance in a definition.

33

34 *The solution in this draft.* This draft reconciles the rise of directed and divided trusteeship

35 with traditional cotrusteeship in a more transparent and nuanced manner. The solution in this

36 draft is more transparent, because instead of burying the issue in a definition with elaboration by

37 comment, the matter is now addressed by this standalone section, which includes more extensive

38 blackletter.

39

1 This section is also more nuanced than the prior draft in two ways. First, on the
2 fundamental policy question, this section carries forward the decision to allow a settlor to opt for
3 the more permissive fiduciary rules of this act. But this section requires that such an intent be
4 expressed in the terms of the trust. Given that a settlor could have opted into the permissive rules
5 of this act by naming a trust director and a directed trustee instead of naming two cotrustees,
6 there seems little reason to prevent the settlor from directing the application of the rules of this
7 act to a comparable arrangement that uses cotrusteeship labeling. On the other hand, a settlor
8 might consciously intend the traditional rules of cotrusteeship to apply. This section
9 accommodates both possibilities. Under this section the default rule is that, if the settlor names
10 cotrustees, the traditional law of cotrusteeship applies. But the terms of the trust can provide
11 instead that the duties and liabilities of a trust director and a directed trustee apply to cotrustees.
12

13 This section is also more nuanced than the prior draft in a second way. This section
14 includes bracketed language to address the transition problem of existing trusts that, by their
15 terms, give a trustee a power of direction, consent, or approval or ratification over a cotrustee.
16 Because existing trusts would have been drafted against the backdrop of the stricter traditional
17 rules of cotrusteeship, it seems less disruptive to assume that the settlor would have preferred the
18 more restrictive rules of traditional law, or would at least have drafted the trust with those more
19 restrictive rules in mind.
20

21 *No third-party effects.* Nothing in this section changes the rights of third parties who deal
22 with a cotrustee in the cotrustee’s capacity as such.
23

24 *Reconciling the Uniform Trust Code.* A question for discussion is how to reconcile this
25 provision with Article 7 of the Uniform Trust Code, and whether this section should be
26 accompanied by a legislative note suggesting conforming amendments.
27

28 **SECTION 13. INFORMING TRUSTEES AND TRUST DIRECTORS.**

29 (a) A directed trustee or trust director shall keep the other directed trustees and trust
30 directors reasonably informed about the administration of the trust and of the material facts
31 reasonably related to the powers and duties of the other trustees or trust directors.

32 (b) Each directed trustee and trust director must provide to every other directed trustee
33 and trust director information that the other trustee or director reasonably requests to the extent
34 that the information is reasonably related to the powers or duties of the other trustee or director.

35 **Discussion Notes**

36 *Prior draft.* This section corresponds to Section 11 in the Fall 2015 draft. This draft
37 changes the previous draft mainly by restructuring it. The previous draft used the term “trust
38 administrator” to include both a trustee and trust director. This draft eliminates the term. This

1 draft also separates the information requirement into two different subsections.

2
3 *An affirmative and a responsive duty to inform.* Subsections (a) and (b) impose two
4 separate duties. Subsection (a) imposes an affirmative duty to keep other trustees and trust
5 directors reasonably informed to the extent the information is reasonably related to the other
6 trustees' and trust directors' powers or duties. For example, if a trust director exercises a power
7 of protection to amend the terms of the trust, the director would have an affirmative duty to
8 inform the trustees and other trust directors whose powers or duties are reasonably related to the
9 amendment, whether or not the trustees and other trust directors inquire about the amendment.
10 Subsection (b) imposes a duty to respond within a reasonable time to a reasonable request by a
11 trustee or trust director for information reasonably related to the trustee's or director's powers or
12 duties. This duty is reactive in nature; it only applies when a trustee or director requests
13 information.

14
15 *Mandatory floor, not a ceiling.* This section imposes a mandatory floor on a trustee's or
16 director's duty to share information, rather than a ceiling. The terms of a trust can specify more
17 extensive duties of information sharing among trust administrators.

18
19 *Reasonableness.* This section relies heavily on the concept of reasonableness to govern
20 the scope of the obligation to share information. A trustee or trust director is under an affirmative
21 duty to keep another trustee or director "reasonably informed" of matters that are "reasonably
22 related" to the other administrator's powers and duties. The reasonability requirement may
23 require, without limitation, disclosure of the following items:

- 24
25
- 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.
- 26
27
28
29
30

31 We welcome suggestions for further examples.

32
33 *Narrowing cotrusteeship disclosure.* Section 12 authorizes a settlor to subject cotrustees
34 to the more narrow disclosure rules of this section, conditioning each cotrustee's access to
35 information on a reasonable relation to the cotrustee's powers or duties, instead of the broader
36 information rights under the common law as under Restatement (Third) of Trusts § 81 cmt. b
37 (2007) ("Furthermore, absent clear provision in the trust to the contrary, even in the absence of
38 any duty to intervene or grounds for suspicion, a trustee is entitled to request and receive
39 reasonable information regarding an aspect of trust administration in which the trustee is not
40 required to participate.").

41
42 *Shelton v. Tamposi.* In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), the terms of the
43 trust left distribution in the hands of the trustee but shifted power over investment to a trust
44 director (i.e., the "investment director"). In consequence, the trustee could not raise the cash
45 necessary to fund a distribution to one of the beneficiaries. Under the terms of this section, the
46 trust director would have been under a duty to give the trustee information about the liquidity

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

6
7 *Remedies.* This section imposes a set of duties that may be enforced by the normal
8 remedial structure associated with fiduciary duties.

9
10 **SECTION 14. LIMITATION OF ACTION AGAINST TRUST DIRECTOR.**

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

13 (b) A report or an accounting of the conduct of a trust director to a person shall have the
14 same effect on the limitations period for an action by the person against the director as if the
15 director were a trustee.

16 **Discussion Notes**

17 *Prior draft.* This section corresponds to Section 12 in the Fall 2015 draft.

18
19 “*Breach of trust.*” The term “breach of trust” is defined in Section 2(1) to include “a
20 violation by a trust director of a duty imposed by this [act] or the terms of a trust.”

21
22 *Establishing a limitations period.* The purpose of this section is to extend to a trust
23 director the same rules of limitations on liability that a trustee enjoys by way of a statutory
24 limitations period or by filing a report or accounting. Laches, which strictly speaking is an
25 equitable defense rather than a limitations period, is addressed by Section 15(1).

26
27 *Absorption.* The prior draft offered two alternative approaches to limitations. One was to
28 import the limitations period and reporting rules of Uniform Trust Code § 1005 (2000). The
29 other was to absorb the enacting state’s law for a trustee. The consensus at the prior meeting was
30 to absorb the enacting state’s law. This draft implements that strategy. The committee preferred
31 the absorption approach because it seemed easier to enact, because it avoids conflicts with the
32 Uniform Trust Code, and because it provides for automatic updating to align with changes in a
33 state’s other trust laws.

34
35 *Not limited to actions by a beneficiary.* Subsection (a) applies to an action without regard
36 to which party brought the action. This is a change from the prior draft, which had applied only
37 to an action by a beneficiary.

38
39 *Reportings and accountings.* Subsection (b) applies to a report or accounting regardless

1 of who made the report or filed the accounting. This is a change from the prior draft, which had
2 applied only to a report or accounting made by the trust director. Like subsection (a), subsection
3 (b) absorbs an enacting state’s law on reports or accountings as otherwise applicable to a trustee.
4

5 **SECTION 15. DEFENSES IN ACTION AGAINST TRUST DIRECTOR.** In an

6 action against a trust director for breach of trust, the director may assert the same defenses as
7 could a trustee in an action against the trustee for breach of trust, including:

8 (1) laches or estoppel;

9 (2) consent, release, or ratification;

10 (3) reasonable reliance on the terms of the trust; and

11 (4) reasonable care to ascertain the happening of a conditional event.

12 **Discussion Notes**

13
14 *Prior draft.* This section corresponds to Section 13 in the Fall 2015 draft.

15
16 *“Breach of trust.”* The term “breach of trust” is defined in Section 2(1) to include “a
17 violation by a trust director of a duty imposed by this [act] or the terms of a trust.”
18

19 *Absorption.* Consistent with the consensus at the previous meeting, this section applies to
20 an action for breach of trust against a trust director the law of an enacting state governing
21 defenses available to a trustee in a comparable action. This represents a return to the approach of
22 the first draft and a retreat from the approach of the second draft, which had attempted to provide
23 significant detail on the defenses available to a trust director by borrowing specific language
24 from the Uniform Trust Code’s provisions on defenses for a trustee. At the last meeting,
25 members of the committee argued that the absorption approach would better allow for variation
26 across the states and would avoid conflicts in language with the Uniform Trust Code.
27

28 *Paragraph (1)—laches or estoppel.* This paragraph addresses laches expressly, following
29 the suggestion made at the prior meeting, and it covers estoppel too, which is conceptually
30 similar to laches. It is important for this act to absorb and apply these doctrines for trust
31 directors, because the common law and principles of equity have not yet developed such an
32 application.
33

34 *Paragraph (2)—beneficiary consent, release or ratification.* This paragraph recognizes a
35 defense for a trust director of beneficiary consent, release or ratification. Under prevailing law,
36 such as provided by Uniform Trust Code § 1009 (amended 2001) and Restatement (Third) of
37 Trusts § 97(b)–(c) (2012), a beneficiary’s consent, release, or ratification is a defense for a
38 trustee to a claim of breach of trust if the consent, release, or ratification was informed and not
39 improperly obtained.

1 *Paragraph (3)—reasonable reliance on the terms of a trust.* The law in many statutes,
2 such as provided by Uniform Trust Code § 1006 (2000) and Uniform Prudent Investor Act § 1(b)
3 (1994), recognizes a defense for a trustee of reasonable reliance on the terms of the trust as
4 expressed in the trust instrument. This paragraph absorbs that law for application to a trust
5 director.
6

7 *Paragraph (4)—event affecting administration or distribution.* Prevailing law, such as
8 provided by Uniform Trust Code § 1007 (2000) and Restatement (Third) of Trusts § 76 cmt. f
9 (2007), recognizes a defense for a trustee of reasonable care in ascertaining the happening of an
10 event that affects the administration of a trust. This paragraph absorbs that law for application to
11 a trust director.
12

13 *What about an exculpation or exoneration clause?* The discussion notes to Section 8
14 address the effect of an exculpation or exoneration clause for a trust director.
15

16 *What about attorney’s fees?* The power of a trust director under Section 7(2) “to incur
17 reasonable costs and direct indemnification for those costs” would allow a trust director to direct
18 reimbursement of the director’s attorney’s fees if those fees were “reasonable” under the
19 circumstances and “appropriate” to the director’s exercise of the director’s powers.
20

21 **SECTION 16. JURISDICTION OVER TRUST DIRECTOR.**

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

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

27 **Discussion Notes**

28 *Prior draft.* This section corresponds to Section 14 in the Fall 2015 draft.
29
30

31 *Establishing personal jurisdiction.* Under this section, as under many existing state
32 statutes,¹² by accepting appointment as trust director of a trust subject to this act, the director
33 submits to the personal jurisdiction of the courts of the state. The specific language used in this
34 section is derived from Uniform Trust Code § 202(a), (c) (2000). Under Section 3(a), a trust is
35 subject to this act if it has its principal place of administration in the enacting state.

¹² See, e.g., Colo. Rev. Stat. § 15-16-809 (2014); Idaho Code § 15-7-501(7) (2007); 760 Ill. Comp. Stat. 5/16.3(g) (2015); Mich. Comp. Laws § 700.7809(7) (2010); Miss. Code Ann. § 91-8-1203 (2014); Mo. Rev. Stat. § 456.8-808(11) (2012); Nev. Rev. Stat. § 163.5555 (2009); N.H. Rev. Stat. Ann. § 564-B:12-1203 (2008); N.C. Gen. Stat. § 36C-8A-6 (2012); S.D. Codified Laws § 55-1B-7 (1997); Tenn. Code Ann. § 35-15-1203 (2013); Wis. Stat. §§ 701.0808(9) (2014), 701.0818(12) (2014); Wyo. Stat. Ann. § 4-10-714 (2003).

1 *Paragraph (2)—appointment.* This paragraph absorbs the law governing trustee
2 appointment, such as under Uniform Trust Code § 704(c), (e) (amended 2004) and Restatement
3 (Third) of Trusts § 34 (2003), for application to appointment of a trust director.
4

5 *Paragraph (3)—bond.* This paragraph absorbs for application to a trust director the law
6 that governs the giving of bond to secure performance by a trustee, such as under Uniform Trust
7 Code § 702(a)–(b) (2000) and Restatement (Third) of Trusts § 34(3) (2003).
8

9 *Paragraph (4)—compensation.* This paragraph absorbs for application to a trust director
10 the rules for compensation of a trustee, such as under Uniform Trust Code § 708 (2000) and
11 Restatement (Third) of Trusts § 38 cmt. i (2003). Just as in total “the reasonable fees for multiple
12 trustees may be higher than for a single trustee,” Restatement (Third) of Trusts § 38 cmt. i
13 (2003), so too the total reasonable fees in a trust with multiple trustees and trust directors may be
14 higher than for a single trustee. In both circumstances, the trust may benefit “from the enhanced
15 quality of decision-making.” Uniform Trust Code § 708 cmt. (2000).
16

17 On the other hand, the reasonable compensation of a trustee that is subject to a trust
18 director’s power of direction is likely to be less than that for a similarly situated trustee that is not
19 subject to such a power. An apt analogy is to a trustee who hires others to “render services
20 expected or normally to be performed by the trustee.” Restatement (Third) of Trusts § 38 cmt.
21 c(1) (2003); *see also* Uniform Prudent Investor Act § 9 cmt. (1994) (“If, for example, the
22 trustee’s regular compensation schedule presupposes that the trustee will conduct the investment
23 management function, it should ordinarily follow that the trustee will lower its fee when
24 delegating the investment function to an outside manager.”).
25

26 *Paragraph 5—resignation.* This paragraph absorbs for application to a trust director the
27 rules for resignation by a trustee, such as under Uniform Trust Code § 705 (amended 2001) and
28 Restatement (Third) of Trusts § 36 (2003).
29

30 *Paragraph (6)—removal.* This subsection absorbs for application to a trust director the
31 rules for removal of a trustee, such as under Uniform Trust Code § 706 (2000) and Restatement
32 (Third) of Trusts § 37 cmt. e (2003).
33

34 *Paragraph (7)—vacancy.* This section absorbs rules for application to a trust directorship
35 the rules applicable to a vacancy in a trusteeship, such as under Uniform Trust Code § 704
36 (amended 2004).
37

38 *Indemnification.* The power of a trust director to incur reasonable costs and direct
39 indemnification for expenses is addressed by Section 7(2).
40

