



MEMORANDUM

From: Robert H. Sitkoff, Chair
Turney Berry, Vice-Chair
John D. Morley, Reporter

To: Members, Advisors, and Observers
Drafting Committee for the Uniform Directed Trust Act

Re: Bethesda Meeting (March 17-18, 2017)

Date: February 24, 2017

This memo provides an overview of the status of our project as we head into our final drafting session in Bethesda on Friday and Saturday, March 17 and 18, 2017. It also provides a brief overview of important changes to the draft since our Fall 2016 drafting session in Philadelphia and takes note of several discussion issues.

Logistics and Remaining Sequence. Although the Bethesda meeting will be our final in-person drafting session, we can schedule one or more conference calls following the meeting if further group discussion is necessary. In May, our next draft will be reviewed by the Joint Editorial Board for Uniform Trusts and Estates Acts (JEB-UTEA). In July, we will read our proposed final draft at the Annual Meeting of the Uniform Law Commission, to be held in San Diego, California. At the San Diego meeting, we will ask the plenary session to approve our act for promulgation to the states. Following approval, the text will be finalized in coordination with the Style Committee and the comments will be finalized by the Chair and the Reporter.

Prefatory Note. The Prefatory Note has been revised for scope and clarity. Suggestions for further revisions, including ideas about content that should be added, is invited.

Uniform Directed Trust Act (Section 1). Our act is now known as the Uniform Directed Trust Act. Since our last drafting session, the Executive Committee approved our recommendation for Uniform rather than Model status.

Definitions (Section 2). Several definitions have been revised either to track Uniform Law Commission boilerplate, such as the definition of “person,” or for clarity, es-

pecially the definition of “terms of the trust.” Those revisions reflect extensive comments from the JEB-UTEA.

Exclusions (Section 5). The exclusions carved out of our act by Section 5 have been revised for clarity, in particular the exclusion of powers of appointment. The treatment within our act of powers of appointment is now consolidated within this one section.

Power of Trust Director (Section 6). The provision validating a grant of a power of direction to a trust director, and of any further power appropriate to the exercise of a power of direction, has been made crisper and easier to follow. We have also extensively revised the comments to include a comprehensive list of exemplary powers that would qualify as a power of direction under this act. We believe that this list covers every example raised during the drafting process other than matters excluded by Section 5.

Limits on a Trust Director’s Powers (Section 7). The consensus at the last drafting session was that we should include a section with mandatory limits on a trust director’s powers to protect the integrity of the payback obligation in a special needs trust and to prevent the addition of a noncharitable beneficiary or the reduction of a charitable remainder interest in a charitable trust. Section 7 in the current draft is our effort to implement this consensus. Section 7 is based in part on several existing state statutes (see Appendix A). Section 7 is, however, more modest than these existing statutes, and it is also more modest than the tax and charity limits in the Uniform Trust Decanting Act (2015).

Our rationale for imposing fewer limits than these other statutes was two-fold. First, unlike the decanting act, our act does not create any new powers by default. Instead, our act merely validates the grant of a power by the terms of the trust (plus any further “appropriate” power). The decanting act granted many existing trustees a decanting power that they may not previously have had and thus potentially created tax and charity problems that settlors might not have previously foreseen. Our act, by contrast, does not create any new tax or charity problems on its own. Any powers in a trust director that might pose these difficulties must have come from the terms of the trust and thus were foreseeable by the settlor.

A second reason we chose not to adopt more expansive limits was settlor autonomy. Some well-advised settlors might reasonably choose to violate the kinds of limits that now appear in other state statutes, and the consensus at our prior meeting was that it would be unwise to restrict these settlors’ autonomy in the absence of a public policy basis for categorically doing so. In this regard, we observe that the handful of directed trustee statutes that contain these limits are not prominent directed trust states. The leading directed trust statutes, such as in Delaware, Nevada, and South Dakota, do not contain these sorts of limits.

Duty and Liability of a Trust Director (Section 8). This section has been rewritten not only for clarity but also to address the difference between a power of direction held individually and a power of direction held jointly with another trust director or trustee.

Duty and Liability of a Directed Trustee (Section 9). This section has been revised in several ways. First, subsection (a) now more clearly provides that, subject to the willful misconduct rule of subsection (b), a directed trustee has a duty to take reasonable action to comply with a power of direction – and that the trustee is not liable for so acting. Second, the safeguards in subsection (c) on a release of a trustee by a trust director have been rewritten for clarity and simplicity (though without substantive change).

Information Sharing Among Trustees and Trust Directors (Section 10). This section has been restructured and rewritten for clarity as per our discussion at the last drafting session. In addition, to address the concern raised about the interaction of this section with Section 11, the blackletter of this section now expressly provides that it is subject to Section 11.

No Duty to Monitor (Section 11). This section has been revised for clarity and to hew more closely to the language in the existing statutes, such as in Delaware, on which this section is based. The key new language is the reference to “instances in which the trustee might have exercised or not exercised the director’s powers differently.”