

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
Uniform Directed Trust Act**

By Herb E. Tucker

Date: November 14, 2017

UDTA Section	Section 13 Subsections (a) and (b)
Section Title	Limitations of Action Against Trust Director
Statutory Language	<p>(a) An action against a trust director for breach of trust must be commenced within the same limitations period as an action against a trustee for a similar breach of trust [as prescribed by the Uniform Trust Code Section 1005].</p> <p>(b) A report or accounting has the same effect on the limitations period for an action against the director that the report or accounting would have if the director were a trustee [as prescribed by the Uniform Trust Code Section 1005].</p> <p><i>Legislative Note: A state that has adopted Uniform Trust Code Section 1005 (2000) should update the bracketed language to refer to that enactment. A state that has adopted a statute other than Uniform Trust Code Section 1005 to govern limitation of an action against a trustee should replace the bracketed language with a cross reference to that statute. A state that has not adopted a statutory limitation should delete the bracketed language.</i></p>
Uniform Law Commission Comment	<p>This section absorbs an enacting state's law governing limitations on an action against a trustee for application to an action against a trust director. The default and mandatory character of such law as applied to a trustee governs whether the law is default as applied to a trust director.</p> <p>Subsection (a) extends to a trust director the same limits on liability that a trustee enjoys under the law of an enacting state by way of a statutory limitations period, or mandatory such as under Uniform Trust Code § 1005(c) (2000). The limitations period absorbed by subsection (a) applies to all claims against a trust director for breach of trust, whether by a beneficiary, a trustee, another trust director, or some other party.</p> <p>Subsection (b) extends to a trust director the same limits on liability that a trustee enjoys under the law of an enacting state arising from the making of a report or accounting such as under Uniform Trust Code § 1005(a)--(b) (2000), except that the rule of subsection (b) applies regardless of whether the report or accounting was made by the trust director. A trust director may therefore be protected by a report or accounting made by a trustee</p>

	<p>or another trust director even though the director did not make the report or accounting, so long as the report or accounting fairly discloses the relevant facts of director's conduct.</p> <p>Laches, which strictly speaking is an equitable defense rather than a statute of limitations period, is applicable to an action against a trust director by Section 14.</p>
UTC 1005(a)(b) 2000 CUTC § 15-5-1005	<p>Limitations of Actions Against Trustee</p> <p>(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than 6 months after the date that the beneficiary or a representative of person who may represent and bind a beneficiary, as provided in Part 3 of this Article, was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.</p> <p>(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.</p> <p>(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach must be commenced within 3 years after the first to occur of:</p> <ol style="list-style-type: none"> (1) The removal, resignation, or death of trustee; (2) The termination of the beneficiary's interest in the trust; or (3) The termination of the trust. <p>(d) For purposes of subsection(a) of this Section, a beneficiary is deemed to have been sent a report if:</p> <ol style="list-style-type: none"> (1) In the case of a beneficiary having capacity, it is sent to the beneficiary; or (2) In the case of a beneficiary who under Part 3 of this Article may be represented and bound by another person, it is sent to the other person. <p>(e) This section does not preclude an action to recover for fraud or misrepresentation related to the report.</p>
UTC Uniform Law Commission Comments	<p>The one-year and five-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 1009. Claims may also be barred by principals such as estoppel and laches arising in equity under the common law of trusts. <i>See</i> Section 106.</p> <p>The representative referred to in subsection (a) is the person who</p>

	<p>may represent and bind a beneficiary as provided in Article 3. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. See Section 603(a) (rights of settlor of revocable trust).</p> <p>This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to Section 1009. For the provisions relating to the duty to report to beneficiaries, see Section 813.</p> <p>Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 813(d).</p> <p>Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the five-year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.</p> <p>If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.</p> <p>This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.</p>
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Restatement (Third) of Trusts § 98	<p>§ 98. Laches and Statutes of Limitations</p> <p>A beneficiary may not maintain a suit against a trustee for breach of trust if the beneficiary is barred from doing so by the doctrine of laches or by a statutory period of limitation.</p>
Colorado Case Law	<p>The Colorado Court of Appeals has consistently held that where the beneficiaries of a trust, after full disclosure, consented to the actions of the trustee, they cannot later bring a claim for surcharge. <i>Beyer v. First National Bank</i>, 843 P.2d 53 (Colo. App. 1992). Section 13-80-101, C.R.S., provides: (1) The following civil actions, regardless of the theory upon which suit is brought or against whom suit is brought shall be commenced within three years after the cause of actions accrues, and not thereafter: (f) all actions for breach of trust or breach of fiduciary duty. Section 15-10-106, C.R.S., provides that any action for fraud must be commenced within 5 years from the date after the discovery of the fraud.</p>
C.R.S. § 15-16-307	<p>C.R.S. § 15-16-307. Limitations on proceedings against trustees after final account. Unless previously barred by adjudication, consent, or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within six months after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure, an action for breach of trust against a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his or her examination must be brought within the time period prescribed in Section 13-80-101, C.R.S. A beneficiary is deemed to have received a final account or statement, if being an adult , it is received by him or her personally or if, being a minor or an individual with a disability, it is received by his or her representative as described in Section 15-10-403.</p>
Colorado Directed Trustees C.R.S. § 15-16-807	<p>C.R.S. § 15-16-807. Excluded trustee is not liable for action of trust advisor (1) If an excluded trustee is required to follow the direction of a trust advisor and the excluded trustee acts in accordance with such direction, the excluded trustee is not liable for any cause resulting from the act of complying therewith, except in cases of willful misconduct on part of the excluded trustee so directed.</p> <p>(2) An excluded trustee has no liability for any action of a trust advisor.</p>
CUTDA - Decanting C.R.S. § 15-16-917	<p>C.R.S. § 15-16-917. Relief from liability and indemnification. (1) Except as otherwise provided in this section, a second-trust instrument may not relieve an authorized fiduciary from liability</p>

	<p>for breach of trust to a greater extent than the first-trust instrument.</p> <p>(2) A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or other person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.</p> <p>(3) A second-trust instrument may not reduce fiduciary liability in the aggregate.</p> <p>(4) Subject to subsection (3) of this section, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of this state other than this part 9.</p>
Uniform Laws Commission Comment	<p>An authorized fiduciary should not be permitted to decant in order to insert the second-trust instrument a provision directly exculpating the authorized fiduciary or indemnifying the authorized fiduciary except to the extent such provision was contained in the first-trust instrument or applicable law would have provided such exculpation or indemnification. Nonetheless, decanting may appropriately reduce the authorized fiduciary's liability indirectly. For example, if the second trust is subject to the law of a different state, the law governing the second trust may provide additional protection to the authorized fiduciary.</p> <p>The terms of the second trust may reduce an authorized fiduciary's liability indirectly, for example, by modifying the rules for approving accounts or expressly permitting the retention of certain property. While such provisions may not violate Section 15-16-916, they could under certain circumstances violate the authorized fiduciary's general fiduciary duties. For example, while it may be appropriate in the second trust to expressly permit the retention of a residence used by a current beneficiary of the trust, it may not be appropriate to permit the retention of all of the current trust property without any liability.</p> <p>Section (2) recognizes that the trustee of the first trust may be unwilling to distribute the assets of the first trust to the second trust unless the trustee is indemnified for any liability or claim that may become payable from the first trust after its assets are distributed. Subsection (2) is consistent with Section 15-16-927, which provides that decanting does not relieve the trust property from any liability that otherwise attaches to the trust property. The indemnification described in subsection (2) may be contained in the second-trust instrument or may be contained in the record exercising the decanting power.</p>

	<p>An authorized fiduciary can decant to a trust that divides the trustee responsibilities (i.e. jobs) among various parties, but cannot eliminate the fiduciary duties that accompany those jobs. To the extent that the second trust assigns a fiduciary responsibility and the fiduciary duty that accompanies such responsibility to a particular fiduciary, the other fiduciaries may be relieved from liability for the actions of that particular fiduciary. For example, an investment advisor can be appointed and the authorized fiduciary can be relieved of fiduciary liability for the investment decisions to the extent permitted by the law of the enacting state so long as the investment advisor is acting in a fiduciary capacity and has fiduciary liability for the investment decisions. Section 15-16-917(3), (4).</p>
Colorado Subcommittee Comments	
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Directed Trust Act

By Herb E. Tucker

Date: November 14, 2017

UDTA Section	Section 14
Section Title	Defenses in Action Against Trust Director
Statutory Language	In an action against a trust director for breach of trust, the director may assert the same defenses a trustee could assert in an action against the trustee for similar breach of trust.
Uniform Law Commission Comment	<p><i>Absorption.</i> This section applies to an action for breach of trust against a trust director the law of an enacting state governing defenses available to a trustee in a comparable action. A trust director can assert any defense that would be available to a trustee in a comparable action for breach of trust under existing state law, including:</p> <ul style="list-style-type: none">- Laches or estoppel (see Restatement (Third) of Trusts § 98 (Am Law. Inst. 2012));- Beneficiary consent, release or ratification (see Uniform Trust Code § 1009 (2001); Restatement (Third) of Trusts § 97(b)-(c) (Am. Law Inst. 2012));- Reasonable reliance on the terms of a trust (see Uniform Trust Code § 1006 (2000); Uniform Prudent Investor Act § 1(b) (1994)); and- Reasonable care in ascertaining the happening of an event affecting administration or distribution (see Uniform Trust Code § 1007 (2000); Restatement (Third) of Trusts § 76 cmt.f (Am. Law Inst. 2007)). <p><i>Exculpation or exoneration.</i> The comments to Section 8 address the effect of an exculpation or exoneration clause on the duty and liability of a trust director.</p> <p><i>Attorney's fees and indemnification.</i> Attorney's fees and indemnification for a trust director are governed by Section 6(c)(1), which establishes a default rule that allows a trust director to exercise "any further power appropriate to the exercise of the director's power of direction." By default, therefore, a trust director has a power to incur attorney's fees and other expenses and to direct indemnification for them if "appropriate" to the exercise of the director's express powers.</p>

<p>CUTC § 15-5-1009 UTC § 1009</p>	<p>Beneficiary's Consent, Release, or Ratification</p> <p>(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction continuing the breach, unless:</p> <ol style="list-style-type: none"> (1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or (2) At the time of the consent, release or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.
<p>UTC Uniform Law Commissioner Comments</p>	<p>This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. <i>See</i> Restatement (Second) of Trusts § 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. <i>See</i> Restatement (Second) of Trusts § 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. <i>See</i> Restatement (Second) of Trusts § 216 cmt. k (1959). If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. <i>See</i> Restatement (Second) of Trusts §§ 170(2), 216(3) and cmt. n (1959).</p> <p>An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. <i>See</i> Section 603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Article 3.</p>
<p>Restatement (Third) of Trusts § 97</p>	<p>§ 97. Effect of Beneficiary Consent, Ratification, or Release</p> <p>A beneficiary who consented to or ratified, or released the trustee from liability for, an act or omission that constitutes a breach of trust cannot hold the trustee liable for that breach, provided:</p> <ol style="list-style-type: none"> (a) The beneficiary, at the time of consenting to or ratifying the breach or granting the release, had the capacity to do so or was bound in doing so by the act of or representation by another; and (b) The beneficiary (or the beneficiary's representative), at the time of the consent, ratification or release, was aware of the beneficiary's rights and of all material facts and implications that the trustee knew or should have known relating to the matter; and (c) The consent, ratification, or release was not induced by improper conduct of the trustee.

Restatement (Third) of Trusts § 98	<p>§ 98. Laches and Statutes of Limitations</p> <p>A beneficiary may not maintain a suit against a trustee for breach of trust if the beneficiary is barred from doing so by the doctrine of laches or by a statutory period of limitation.</p> <p>Laches, strictly speaking is an equitable defense rather than a limitations period, an applicable action against trust directors by Section 14.</p>
UTC 1006 CUTC §15-5-1006	<p>Reliance on Trust Instrument</p> <p>A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.</p>
Uniform Law Commissioners Comments	<p>This section provides that the trustee may rely on the apparent plain meaning of the written trust instrument to govern his fiduciary responsibilities concerning the administration of the trust. Section 103 (17) (Definition of “Terms of a Trust”) means “the manifestation of the settlor’s intent regarding a trust provision as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.” The terms of the trust as defined under the Code as well as under the Doctrine of Reformation reflect the principle that a trust should be administered and distributed according to the settlor’s intent. Further, the trustee should be permitted to reasonably rely on the terms of the trust with respect to the administration of the trust. This section protects the trustee who relies on a written trust instrument, but only to the extent that breach of trust resulted from such reliance. This section is similar to Section 2(b) of the Uniform Prudent Investor Act which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.</p>
UTC 1007	<p>Event Affecting Administration or Distribution</p> <p>If the happening of an event, including marriage, divorce performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee’s lack of knowledge.</p>
Uniform Law Commissioner Comments	<p>This section, which is based on Washington Revised Code § 11.98.100, is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this section, imposed absolute liability against a trustee for misdelivery regardless of the trustee’s level</p>

	<p>of care. See Restatement (Second) of Trusts §226 (1959). The events listed in this section are not exclusive. A trustee who has exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.</p>
Current Colorado Law	<p>Colorado Prudent Investment Rule C.R.S. § 15-1.1-101 generally provides that a trustee is not liable to a beneficiary to the extent that the trustee acted reasonably and with reasonable reliance under the provisions of the trust. In <i>Estate of McCart</i>, 847 P.2d 184 (Colo. App. 1992), the Court of Appeals held that the trustee abused his discretion in denying discretionary distributions to spouse/beneficiary that had remarried. The Court also held that, as a general rule, the trustee is entitled to defend litigation as an expense of the trust if the litigation is not the fault of the trustee.</p> <p>The ULC comment notes that a “power of direction” under the act may include a power to act independently in releasing a trustee from liability. This would be an expansion of the holding in <i>In re: Estate of Foiles</i>, 338 P.3d 1098 (Colo. App. 2014):</p> <p style="padding-left: 40px;">“... in the absence of a trust provision allowing ratification by a <u>co-trustee</u> of otherwise invalid actions, <u>only the consent of all beneficiaries</u>, who have proper capacity and who are fully informed of the facts can ratify an action taken in violation a trust agreement, and that ratification by a <u>co-trustee</u> is insufficient. Id. 1104.”</p> <p>In other words, if this Act is adopted by Colorado, ratification of a trustee’s action that would otherwise be a breach of trust would be permitted by:</p> <ul style="list-style-type: none"> (i) Consent of all beneficiaries that have capacity and are fully informed; (ii) A co-trustee if allowed by the terms of trust; and (iii) A trust director that is specifically authorized power to do this.
Colorado Directed Trustees C.R.S. § 15-16-807	<p>C.R.S. § 15-16-807. Excluded trustee is not liable for action of trust advisor (1) If an excluded trustee is required to follow the direction of a trust advisor and the excluded trustee acts in accordance with such direction, the excluded trustee is not liable for any cause of action resulting from the act of complying therewith, except in cases of willful misconduct on the part of the excluded trustee so directed.</p> <p>(2) An excluded trustee has no liability for any action of a trust advisor.</p>

Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

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**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
Uniform Directed Trust Act**

UDTA Section	Section 12
Section Title	Application to Cotrustee
Statutory Language	<p>The terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee’s exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director’s power of direction under Sections 9 through 11.</p> <p><i>Legislative Note:</i> <i>A state that has enacted Uniform Trust Code (Last Revised or Amended in 2010) Section 703(c) or (g) should revise those sections to make them subject to this section. In the alternative, the state could insert this section as a new subsection in Section 703, and make subsections (c) and (g) subject to that new subsection if the state also adds to its Uniform Trust Code the definitions of “directed trustee,” “power of direction,” and “trust director” from Section 2(3), (5), and (9).</i></p>
Uniform Law Commission Comment	<p><i>Traditional law.</i> Under traditional law, each cotrustee “has a duty to use reasonable care to prevent a cotrustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress.” Restatement (Third) of Trusts § 81(2) (2007). This rule applies even if the settlor limits the role or function of one of the cotrustees. “Even in matters for which a trustee is relieved of responsibility, ... if the trustee knows that a co-trustee is committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent the fiduciary misconduct.” <i>Id.</i> cmt. b. Moreover, “even in the absence of any duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable information regarding an aspect of trust administration in which the trustee is not required to participate.” <i>Id.</i> These rules for cotrusteeship contrast with the less demanding fiduciary standards for a directed trusteeship under Sections 9, 10, and 11 of this act.</p> <p><i>Settlor autonomy.</i> This section allows a settlor to choose either fiduciary regime for a cotrusteeship—the traditional rules of cotrusteeship or the more permissive rules of a directed trusteeship. There seems little reason to prohibit a settlor from applying the fiduciary rules of this act to a cotrusteeship given that the settlor could choose the more permissive rules of a directed trusteeship by labeling one of the cotrustees as a trust director and another as a directed trustee. The rationale for permitting the terms of a trust to reduce the duty of a cotrustee that is subject to direction by another trustee is the same as the rationale for permitting the terms of a trust to reduce the duty of a directed trustee in Section 9. In both instances</p>

	<p>a trustee must act according to directions from another person and therefore the other person, not the trustee, should bear the full fiduciary duty.</p> <p>Accordingly, if the terms of the trust so provide, a cotrustee may have only the duty required by the reasonable action and willful misconduct standards specified in Section 9 with respect to another cotrustee's exercise or nonexercise of a power of that other cotrustee. If the terms of a trust indicate that a directed cotrustee is to have no duty or is not a fiduciary, then the effect will be to reduce the cotrustee's duty to the willful misconduct standard of Section 9, just as would be the effect of similar language for a directed trustee.</p> <p><i>Mechanics of choosing directed trustee duties.</i> Under this section the default rule is that, if a settlor names cotrustees, the traditional law of cotrusteeship applies. The fiduciary duties of directed trusteeship will only apply to a cotrustee if the terms of the trust manifest such an intent. Whether this section applies to a given trust is thus a question of construction. This section does not impose a requirement of express reference to this section or to this act. Moreover, under Section 3(a), this section applies to a trust created before the effective date of this act, but only as to a decision or action on or after that date.</p> <p>For example, familiar drafting strategy is to name cotrustees but also to provide that in the event of disagreement about a particular matter the decision of a specified trustee controls and the other cotrustee has no liability in that event. Under traditional law, notwithstanding this provision, the other cotrustee would be liable if it did not take reasonable steps to prevent a breach by the controlling cotrustee. Under this section, on a prospective basis the other cotrustee would be liable only for its own willful misconduct akin to a directed trustee.</p> <p><i>Cotrustees as directed trustees and trust directors.</i> The terms of a trust can place a cotrustee in a position of either giving direction, like a trust director, or taking direction, like a directed trustee. This section only applies to a cotrustee that takes direction. This section does not address the duties of a cotrustee that is not directed. Nor does this section address the duties of a cotrustee that gives direction. Under Section 8, the background law of an enacting state that applies to a directing cotrustee also applies to a similarly situated trustee. The drafting committee intended that the language "with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee" would refer only to a power of another cotrustee and not a power held jointly with the directed cotrustee, because a cotrustee cannot be thought of as taking direction from another cotrustee if the two cotrustees exercise a power jointly.</p>
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	<p><i>No third-party effects.</i> Although this section changes the degree to which the terms of a trust may reduce a cotrustee’s duty and liability, it does not alter the rules that affect the rights of third parties who contract with or otherwise interact with a cotrustee. The principal difference between cotrusteeship and directed trusteeship is that in a cotrusteeship every cotrustee has title to the trust property, whereas in a directed trusteeship, title to trust property belongs only to the trustee, and not to the trust director. The placement of title can have important consequences for dealings with third parties and for tax, property, and other bodies of law outside of trust law. This section does not change the rights of third parties who deal with a cotrustee in the cotrustee’s capacity as such.</p>
Current Colorado Law	<p>Section 12 allows treatment of a co-trustee as a directed trustee or a trust director; however to be treated as such an “opt-in” by the governing instrument must be made, similar to Colorado’s requirement that directed trust treatment also be affirmatively stated.</p> <p>Colorado case law suggests that a co-trustee’s liability may be limited by the terms of the trust. <i>Poertner v. Razor</i> (Cert. Denied 9/25/1972). However, as this case was not selected for official publication, it cannot be relied upon.</p> <p style="padding-left: 40px;">Where there is more than one trustee, unless one is in a passive position as to the asset involved, legally incompetent or unless otherwise provided by terms of the trust, it is the duty of each to participate in the administration of the trust and one trustee should not be allowed to sit idly by while the cotrustee acts upon a matter and then takes advantage of that action at a later time.</p> <p>C.R.S. 15-16-803. Trust advisor and excluded trustee.</p> <p>4) If a governing instrument provides that a trustee must follow the direction of a trust advisor and the trustee acts in accordance with such direction, the trustee is an excluded trustee.</p> <p>C.R.S. 15-16-801(8) requires the government instrument to affirmatively state trust advisor treatment:</p> <p>(a) “Trust advisor” means a person who is:</p> <p>(I) Acting in a fiduciary capacity; and</p> <p>(II) Vested under a governing instrument with fiduciary powers to direct a trustee’s actual or proposed</p>

	<p>investment decisions or non-investment decisions.</p> <p>(2) “Excluded trustee” means any trustee that, under the terms of the governing instrument, is precluded from exercising certain powers, which powers may be exercised only by a trust advisor designated by the governing instrument.</p> <p>C. R. S. 15-16-803. Trust advisor and excluded trustee. * * *</p> <p>(2) The powers and duties of a trust advisor, and the extent of such powers and duties, are established by the governing instrument, and the nonexercise of such powers and duties is binding on all other persons.</p> <p>C. R. S. 15-16-805. No duty to review actions of trust advisor. An excluded trustee has no duty to review or monitor the actions of a trust advisor.</p> <p>C. R. S. 15-16-806 Duty to communicate - no duty to warn.* * * (3) A trust advisor has a duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration, to the extent that such information relates to a duty or function being performed by the trust advisor. This duty is governed by section 15-16-303.</p> <p>(4) A trust advisor has no duty to communicate with or warn any beneficiary or third party concerning any action or actions taken by any other trust advisor or trustee.</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
Uniform Directed Trust Act**

UDTA Section	Section 7
Section Title	Limitations on Powers of Trust Director
Statutory Language	<p>A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction regarding:</p> <p>(1) a payback provision in the terms of the trust necessary for compliance with the reimbursement requirements of Medicaid law in Section 1917 of the Social Security Act, 42 U.S.C. Section 1396p(d)(4)(A)[, as amended][, and regulations issued thereunder]; and</p> <p>(2) a charitable interest in the trust, including notice regarding the interest to [the Attorney General].</p> <p><i>Legislative Note:</i> A state that does not permit the phrase “as amended” when incorporating federal statutes, or that does not permit reference to “regulations issued thereunder,” should delete the bracketed language in paragraph (1) accordingly. In paragraph (2), “Attorney General” is in brackets to accommodate a state that grants enforcement authority over a charitable interest in a trust to another public official.</p>
Uniform Law Commission Comment	<p>This section applies to a trust director the same rules that apply to a trustee in two specific situations in which many states have particular regulatory interests. The first, in paragraph (1), concerns a payback provision necessary to comply with the reimbursement requirements of Medicaid law in a trust for a beneficiary with a disability. The second, in paragraph (2), concerns a charitable interest in a trust.</p> <p>In both circumstances, this section imposes all the same rules that would apply to a trustee in a like position and under similar circumstances. For example, many states require a trustee to give notice to the Attorney General before taking certain actions with respect to a charitable interest in a trust. Some states also disempower a trustee from taking certain actions with respect to a payback provision in a trust meant to comply with the reimbursement requirements of Medicaid law.</p> <p>The drafting committee referenced “rules” rather than “duties” in order to make clear that this section absorbs every provision of state law in the areas specified by paragraphs (1) and (2), regardless of whether the law in these areas is classified as a duty, a limit on a trustee’s powers, a regulation, or otherwise. In referencing rules, rather than duties, this section stands in contrast to Section 8(a) and the other sections of this act that apply a</p>

	<p>trustee’s duties to a trust director. Section 8(a) and these other sections absorb only duties of a fiduciary nature, whereas this section absorbs all rules, whether fiduciary, regulatory, or otherwise. Also unlike Section 8(a), this section applies only to two limited subject areas, rather than to the whole range of a director’s possible conduct.</p>
Current Colorado Law	<p>Colorado’s Directed Trustee statute does not impose any statutory limitations on the powers of a trust director, except those that would be considered a breach of the trust director’s duties.</p> <p>Colorado’s attorney general “has all powers conferred by statute, and by common law in accordance with section 2-4-211, C.R.S., regarding all trusts established for charitable, educational, religious, or benevolent purposes.” CRS 24-31-101. Notice to the attorney general related a charitable trust is specifically required where a charity is named in a will and the charity’s address cannot be located.</p> <p>Rule 17 of the Colorado Probate Code provides: “In a decedent’s estate, whenever it appears that *** the address of any heir or devisee is unknown, *** the personal representative shall promptly notify the attorney general. Thereafter, the attorney general shall be given the same information and notice required to be given to persons qualified to receive a devise or distributive share***”</p> <p>Under the Colorado Uniform Trust Decanting Act at CRS 15-16-914 the attorney general has the rights of a qualified beneficiary and may represent and bind the charitable interest. At least with regard to decanting a trust with a charitable interest, such as a charitable remainder trust, the attorney general, as a qualified beneficiary, is entitled to notice of the potential decanting, the right to petition the decanting, the right to consent to change in the compensation of an authorized fiduciary, consent to a change in the identity of who may remove or replace the authorized fiduciary or to block the change of the jurisdiction of a trust. CRS 15-16-914. (See also, Uniform Law Comments, Section 16 (<i>Attorney General Rights</i>.)</p> <p>CRS 15-16-206 regarding trust proceedings, requires notice to “interested parties pursuant to CRS 15-10-401.” CRS 15-10-401 gives the procedure for notice, but does not list who would be considered an “interested party.”</p> <p>The requirements of notice to the attorney general is further clarified under the proposed Colorado Uniform Trust Code (UTC) at CRS 15-5-110(d), which provides, “The attorney general has the rights of a qualified beneficiary with respect to a charitable trust having its place of administration in this state.” As a qualified beneficiary, a trustee has expanded duties to notify the attorney general of the existence of</p>

	<p>the trust, the identity of the trustee, and the right to request trustee reports (CRS 15-5-105(8)), notice of proposed transfer of a trust's principal place of administration, (CRS 15-5-108) and the other duties required under CRS 15-5-813.</p> <p>Proposed Colorado UTC at CRS 15-5-109(d) provides, "Notice of a judicial proceeding must be given as provided in the Colorado Rules of Probate Procedure, the Colorado Probate Code, and if applicable, the Colorado Rules of Civil Procedure."</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
Uniform Directed Trust Act**

UDTA Section	Section 11
Section Title	No Duty to Monitor, Inform, or Advise
Statutory Language	<p>(a) Unless the terms of a trust provide otherwise:</p> <p style="padding-left: 40px;">(1) a trustee does not have a duty to:</p> <p style="padding-left: 80px;">(A) monitor a trust director; or</p> <p style="padding-left: 80px;">(B) inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and</p> <p style="padding-left: 40px;">(2) by taking an action described in paragraph (1), a trustee does not assume a duty excluded by paragraph (1).</p> <p>(b) Unless the terms of a trust provide otherwise:</p> <p style="padding-left: 40px;">(1) a trust director does not have a duty to:</p> <p style="padding-left: 80px;">(A) monitor a trustee or another trust director; or</p> <p style="padding-left: 80px;">(B) inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director; and</p> <p style="padding-left: 40px;">(2) by taking an action described in paragraph (1), a trust director does not assume the duty excluded by paragraph (1).</p>
Uniform Law Commission Comment	<p><i>Following existing statutes.</i> Subsection (a) provides that a trustee does not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning instances in which the trustee might have acted differently than the director. Many existing state statutes are to similar effect, though the language in this section is simpler and more direct. Subsection (b) applies the same rule to a trust director regarding the actions of a trustee or another trust director.</p> <p>The existing statutes on which this section is based were meant to reverse the result in <i>Rollins v. Branch Banking & Trust Company of Virginia</i>, 56 Va. Cir. 147 (2002), in which the court considered the liability of a trustee that was subject to direction in investment. The court declined to hold the trustee liable for the investment director's failure to direct diversification of the trust's investments, but the court nevertheless held the trustee liable for failing to advise the beneficiaries about the risks of the investment director's actions.</p>

	<p><i>Survival of trustee’s and trust director’s general duty of disclosure.</i> Although this section confirms that a directed trustee has no duty to monitor a trust director or inform or give advice to others concerning instances in which the trustee might have acted differently than the director this section does not relieve a trustee of its ordinary duties to disclose, report, or account under otherwise applicable law such as under the Uniform Trust Code § 813 (2004) [Duty to Inform and Report] or Restatement (Third) of Trusts § 82 (2007) [Duty to Furnish Information to Beneficiaries]. The same is true for a trust director, on whom Section 8(a) imposes the fiduciary duties of a trustee.</p> <p>For example, if a trust director has a power to direct investments, this section would relieve a directed trustee of any duty to advise a beneficiary about the risks of the director’s decision to concentrate the investment portfolio. The trustee would remain under a duty, however, to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust to the extent required by other applicable law. The trustee would also remain under the duty imposed by Section 10 [Duty to Provide Information to Trust Director or Trustee] to provide a trust director with information reasonably related to its powers and duties.</p> <p><i>No assumption of duty.</i> In addition to waiving a directed trustee’s duty to monitor, inform, or give advice as under subsection (a)(1), many state statutes go further and also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these activities will be deemed to be “administrative actions.” <i>See, e.g.,</i> Del. Code Ann. Tit. 12, § 3313(e) (2017). The purpose of these provisions is to ensure that if a directed trustee chooses for some reason to monitor, inform, or give advice, the trustee does not assume a continuing obligation to do so or concede a prior duty to have done so. This section dispenses with the opacity of an administrative classification and achieves the intended result more directly. Subsection (a)(2) provides that if a trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not thereby assume a duty to do so. Subsection (b)(2) applies the same rule for a trust director.</p>
Current Colorado Law	<p>15-16-303 Duty to Inform and account to beneficiaries.</p> <p>(1) The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration.</p> <p>(3) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of trustee.</p>

15-16-806 (1) A trustee has a duty to keep a trust advisor reasonably informed about the administration of a trust with respect to any specific duty or function being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trust advisor to perform the duty or function. A trust advisor requesting or receiving any such information from a trustee has no duty to monitor the conduct of the trustee or to provide advice to or consult with the trustee.

15-16-806(2) A trust advisor has a duty to keep the trustee and any other trust advisors reasonably informed about the administration of the trust with respect to all duties or functions being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trustee and any other trust advisors to perform their duties or functions. A trustee requesting or receiving any such information from a trust advisor has no duty to monitor the conduct of the trust advisor or to provide advice to or consult with the trust advisor.

15-16-806(3) A trust advisor has a duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration, to the extent that such information relates to a duty or function being performed by the trust advisor. This duty is governed by section 15-16-303 [Duty to Inform and Account to Beneficiaries].

15-16-806 (4) A trust advisor has no duty to communicate with or warn any beneficiary or third party concerning any action or actions taken by any other trust advisor or trustee.

Beyer v. First Nat'l Bank, 843 P.2d 53, 61 (Colo. App. 1992):
“Since the trustee is in a fiduciary relation to the beneficiary, he should inform the beneficiary of his rights and of the material facts affecting a transaction which is a deviation from the terms of the trust, insofar as the trustee knows or should know these facts...It is not necessary that the trustee should inform the beneficiary of all the details of which the trustee knows, but he should see that the beneficiary is sufficiently informed so that he understands the character of the transaction and is in a position to form an opinion as to its advisability. Thus, if the trustee proposes to invest in speculative securities in which he is not permitted to invest by the terms of the trust, the trustee should inform the beneficiary not only that the securities are not a proper trust investment but should tell him of the nature of the risk involved. If, however, the trustee is led by the beneficiary to believe that the beneficiary is fully informed, the trustee cannot be held liable even though the beneficiary did not in fact have full information.” (Citing Restatement (Second) of Trusts § 216 comment K).

Weiss v. Weiss, 2002 Conn. Super. LEXIS 84, *10, 2002 WL 180902

	<p>“Only the beneficiaries of the trust, the cotrustees of a trust or a successor trustee have standing to sue for breach of trust by a trustee. “No one other than a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust.” 3 Scott, Trusts (4th Ed.) § 200, p. 209. HN7 The law "permits one trustee to bring an action against his cotrustees to compel the latter to perform their duties or enjoin them from committing a breach of trust or to compel them to redress a breach of trust . . . That principle . . . has as its basis the fiduciary duty owed to the beneficiaries by each trustee . . ." See also, <i>Richards v. Midkiff</i> 48 Haw. 32 (1964); <i>Thatcher Estate</i>, 1971 Pa. Dist. & Cnty. Dec. LEXIS 30, 59 Pa. D. & C.2d 277.</p>
<p>Colorado Subcommittee Comment</p>	<p>Does the phrase “might have acted” in 11(a)(1)(B) limit the duty to inform to actions that have occurred but open the door to a duty to warn for prospective actions? Example, what if the Investment Advisor directs a Trustee to enter into a purchase and sale agreement. If the Trustee would not otherwise sell the property subject to the agreement, does the Trustee have a duty to warn the beneficiaries of the proposed sale?</p> <p>What about a Trustee’s ability to bring a breach of trust action against a co-fiduciary. Does this mean if the Trustee is aware or believes the Trust Advisor has breached its duties, the Trustee must bring a breach of trust action?</p> <ul style="list-style-type: none"> • Restatement (Second) Trusts <ul style="list-style-type: none"> ○ § 185: If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power. <ul style="list-style-type: none"> ▪ e. Duty of trustee where holder of power is subject to fiduciary obligations. If the power is for the benefit of someone other than the holder of the power, the holder of the power is subject to a fiduciary duty in the exercise of the power. In such a case the trustee is under a duty similar to his duty with respect to the action of a co-trustee. See § 184. If the trustee has reason to suspect that the holder of a power is attempting to exercise it in violation of a fiduciary duty to which the holder is subject in the exercise of the power, the trustee is under a duty not to comply and may be liable if he does comply. If the holder of the power insists upon compliance notwithstanding the objection of the trustee, it is the duty of the trustee to apply to the court for instructions. ▪ Even though the person holding the power holds it as a fiduciary and in fact violates his duty as fiduciary in the exercise of the power, the trustee is not liable for acting in accordance with the exercise of the power if he has no notice that the holder of the

power is violating his duty as fiduciary. Thus, where by the terms of the trust it is provided that the trustee shall purchase such securities as a third person may direct, and the third person directs the trustee to purchase certain securities, the trustee is not liable merely because the third person had an interest in the securities purchased, if the trustee had no notice of this fact. His liability in such a situation is similar to the liability of a trustee for the actions of a co-trustee. See § 224.

- **§ 184: If there are several trustees, each trustee is under a duty to the beneficiary ...to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust.**

- (a) If a trustee has reason to suspect that a co-trustee is committing or attempting to commit a breach of trust, he must take reasonable steps to prevent him from so doing.
- (b) By the terms of the trust, where there are several trustees, it may be provided that one or more of the trustees may be permitted to have exclusive possession or control of the whole or a part of the trust property.

- **§ 224 (liability of a trustee for breach of trust committed by co-trustee)**

(1) Except as stated in Subsection (2), a trustee is not liable to the beneficiary for a breach of trust committed by a co-trustee.

(2) A trustee is liable to the beneficiary, if he

(a) participates in a breach of trust committed by his co-trustee; or

(b) improperly delegates the administration of the trust to his co-trustee; or

(c) approves or acquiesces in or conceals a breach of trust committed by his co-trustee; or

(d) by his failure to exercise reasonable care in the administration of the trust has enabled his co-trustee to commit a breach of trust; or

(e) neglects to take proper steps to compel his co-trustee to redress a breach of trust.

Comment:

a. Scope of the rule. Where several trustees are liable for a breach of trust committed by them jointly or for a breach of trust committed by one of them for which the others are liable under the rule stated in

	<p>Subsection (2), they are jointly and severally liable to the beneficiary for the breach of trust.</p> <p>Illustration to Clause (a):1. A and B are co-trustees. By the terms of the trust they are permitted to invest only in bonds. A suggests to B that he invest part of the funds in shares of stock which B does. A as well as B is liable for the breach of trust.</p> <p>Illustration to Clause (b):2. A and B are co-trustees. A directs B to invest the trust funds without consulting with A. In breach of trust B invests in shares of stock. A is liable for breach of trust.</p> <p>Illustration to Clause (c):3. A and B are co-trustees. B makes an improper investment and tells A that he has done so. A approves of the investment. A is liable for breach of trust.</p> <p>Illustration to Clause (d):4. A and B are co-trustees. A improperly permits B to have the sole custody and management of the trust property and makes no inquiry as to his conduct. B is thereby enabled to sell the trust property and embezzle the proceeds. A is liable for breach of trust.</p> <p>Illustration to Clause (e):5. A and B are co-trustees. A knows that B has embezzled a part of the trust property but makes no effort to compel him to make restitution. A is liable for breach of trust.</p> <p>Will need to address conforming changes to 15-10-501 et seq. and 15-10-601 et seq.</p>
Colorado Subcommittee Recommendation	Subcommittee will hold on making recommendations until it looks at Sections 13 and 14.

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
Uniform Directed Trust Act**

UDTA Section	Section 10
Section Title	Duty to Provide Information to Trust Director or Trustee
Statutory Language	<p>(a) Subject to Section 11 [No Duty to Monitor, Inform, or Advise], a trustee shall provide information to a trust director to the extent the information is reasonably related both to:</p> <ul style="list-style-type: none"> (1) the powers or duties of the trustee; and (2) the powers or duties of the director. <p>(b) Subject to Section 11[No Duty to Monitor, Inform, or Advise], a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:</p> <ul style="list-style-type: none"> (1) the powers or duties of the director; and (2) the powers or duties of the trustee or other director. <p>(c) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.</p> <p>(d) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.</p>
Uniform Law Commission Comment	<p><i>Subsections (a) and (b)- Duty to provide Information.</i> This section imposes duties on trustees and trust directors to provide information to each other. Subsection (a) imposes this duty on a directed trustee, and subsection (b) imposes this duty on a trust director. The drafting committee contemplated that the duties created by this section would provide trustees and trust directors with sufficient information to fulfill their obligations under trust law as well as other law, including banking, securities, and tax law.</p> <p><i>Disclosure to beneficiaries.</i> This section governs disclosure of information to trustees and trust directors. The duty of a trust director to disclose information to a beneficiary is governed by Section 8 (fiduciary duties of a trust director), subject to Section 11. The duty of a trustee to disclose information to a beneficiary is governed by the background law of an enacting state under Section 4 (Common Law and Principles of Equity) as modified by Section 11, which limits a directed trustee's duty to inform a beneficiary about the actions of a trust director.</p>

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

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

Interaction with Section 11. The duties of a trustee (in subsection (a)) and of a trust director (in subsection (b)) to disclose information are subject to the limitations of Section 11. Thus, although a trustee has a duty under this section to disclose information that is related to both the powers or duties of the trustee and the powers or duties of the director, a trustee does not have a duty to inform or give advice to the trust director concerning instances in which the trustee would have exercised the director's powers differently. The same is true for a trust director.

Shelton v. Tamposi, 62 A.3d 741 (N.H. 2013), the terms of the trust left distribution in the hands of the trustee, but shifted power over investment to a trust director (the "investment director"). As a result the trustee could not liquidate investments to raise the cash necessary to fund a distribution to one of the beneficiaries. Under subsection (b), the trust director would have been under a duty to

	<p>give the trustee information about the effects of the director’s investment program on the trust’s cash position, and the trustee would have been under a duty to give the director information about the cash requirements of the trustee’s distribution program. Moreover, in making and implementing the investment program, under Section 8(a) [Duty and Liability of Trust Director] the trust director would be subject to the same duties as a similarly situated trustee, just as a trustee would be subject to the duties of a trustee in making and implementing the distribution program.</p> <p><i>Subsections (c) and (d)</i>—Subsection (c) provides a safe harbor for a trustee that acts in reliance on information provided by a trust director. Subsection (d) provides a similar safe harbor for a trust director for information provided by a trustee or other trust director. Under both subsections, the safe harbor only applies if the trustee or trust director that acts in reliance on the information is not engaged in willful misconduct. For example, subsection (c) protects a trustee if the trustee acts in reliance on a trust director’s valuation of an asset, unless by accepting the valuation the trustee would engage in willful misconduct. As in Section 9 [Exculpation of Trustee except in cases of willful misconduct], the rationale for the safe harbor and willful misconduct limit is to implement the settlor’s division of labor subject to a mandatory fiduciary minimum.</p> <p><i>No ceiling on duties to share information.</i> This section imposes a mandatory floor, rather than a ceiling, on a directed trustee’s and a trust director’s duty to share information. The terms of a trust may specify more extensive duties of information sharing among directed trustees and trust directors.</p>
Current Colorado Law	<p>C.R.S 15-16-806 Duty to communicate- no duty to warn</p> <p>(1) A trustee has a duty to keep a trust advisor reasonably informed about the administration of the trust with respect to any specific duty or function being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trust advisor to perform the duty or function. A trust advisor requesting or receiving any such information from a trustee has not duty to monitor the conduct of the trustee or to provide advice to or consult with the trustee.</p> <p>(2) A trust advisor has a duty to keep the trustee and any other trust advisors reasonably informed about the administration of the trust with respect to all duties or functions being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trustee and any other trust advisors to perform their duties or functions. A trustee</p>

	<p>requesting or receiving any such information from a trust advisor has not duty to monitor the conduct of the trust advisor or to provide advice to or consult with the trust advisor.</p> <p>(3) A trust advisor has a duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration, to the extent that such information relates to a duty or function being performed by the trust advisor. This duty is governed by section 15-16-303 [Duty to inform and account to beneficiaries].</p> <p>(4) A trust advisor has no duty to communicate with or warn any beneficiary or third party concerning any action or actions taken by any other trust advisor or trustee.</p>
Colorado Subcommittee Comment	<p>Issues may arise where a Trustee is directed to make a distribution but the Investment Advisor refuses to create liquidity to allow the Trustee to make the discretion. Section 4 may provide a means to address such a situation. Stan will review Section 4 to determine if a recommended change to that Section is appropriate.</p> <p>Colorado's current statute, 15-16-806, provides that a trust advisor has no duty to communicate or warn any beneficiary or third party concerning any action or actions taken by any other trust advisor or trustee. The statute is silent as to whether a Trustee has a duty to communicate or warn.</p> <ul style="list-style-type: none"> • Wyo. Stat. § 4-10-715: No duty to review <ul style="list-style-type: none"> ○ The directed trust provisions are silent with respect to duty to warn and limitations of standard duty to inform and report pursuant to Wyo. Stat. § 4-10-813.
Colorado Subcommittee Recommendation	

UDTA Section	Section 4
Section Title	Law and Principles of Equity
Statutory Language	The law and principles of equity of this state, including the duty of a trustee and a trust director to exercise discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, supplement this [act], except to the extent modified by this [act] or law of this state other than this [act].

UDTA Section	Section 8
Section Title	Duty and Liability of Trust Director
Statutory Language	<p>SECTION 8. DUTY AND LIABILITY OF TRUST DIRECTOR.</p> <p>(a) Subject to subsection (b), with respect to a power of direction or a further power under Section 6(c)(1):</p> <p>(1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:</p> <p>(A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or</p> <p>(B) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and</p> <p>(2) Subject to sub paragraph (A) of this paragraph (2), the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.</p> <p>(A) [irrespective of the terms of the trust] the director must exercise all discretionary power in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries.</p> <p>(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this [act] to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this [act].</p> <p>(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this [act].</p>

It is awkward to insert a provision in the existing sections regarding the overarching duty of a trustee and a trust director to exercise discretionary power, good faith, etc...

Would it not be best to insert a new section in the Act? Something like this:

Fiduciary Duty. This Act does not alter the duty of a trustee and a trust director to exercise discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

Colorado T & E Section Statutory Revisions Committee Subcommittee on the Uniform Directed Trust Act

UDTA Section	Section 8
Section Title	Duty and Liability of Trust Director
Statutory Language	<p>SECTION 8. DUTY AND LIABILITY OF TRUST DIRECTOR.</p> <p>(a) Subject to subsection (b), with respect to a power of direction or a further power under Section 6(b)(1):</p> <p>(1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:</p> <p>(A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or</p> <p>(B) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and</p> <p>(2) the terms of the trust may vary the director’s duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.</p> <p>(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this [act] to provide health care in the ordinary course of the director’s business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this [act].</p> <p>(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.</p>
Uniform Law Commission Comment	<p><i>Subsection (a).</i> Subsection (a) imposes the same fiduciary duties on a trust director that would apply to a trustee in a like position and under similar circumstances. A trust director with a power to make or direct investments, for example, has the same duties that would apply to a trustee with the same power, including a duty to act prudently, in the sole interest of the beneficiaries, and impartially with due regard for the respective interests of the beneficiaries. <i>See, e.g.,</i> Restatement (Third) of Trusts §§ 77–79, 90–92 (2007). The theory behind subsection (a) is that if a trust director has a power of direction, the director is the most appropriate person to bear the duty associated with the exercise or nonexercise of that power. Put differently, in a directed trust, a trust director functions much like a trustee in a non-directed trust, and thus should have the same duties as a trustee.</p> <p>Accordingly, subsection (a)(1) sets the default duties of a trust director by absorbing the duties that would ordinarily apply to a trustee in a like position and under similar circumstances. Subsection (a)(2) sets the mandatory minimum duties of a trust director by absorbing the mandatory minimum duties that the terms</p>

of a trust cannot vary for a trustee in a like position and under similar circumstances. The default and mandatory rules applicable to a trustee include those prescribed by the other provisions of this act.

In making a trust director a fiduciary, subsection (a) follows the great majority of the existing state directed trust statutes. Subsection (a) is more specific than many state statutes, however, as the existing statutes tend to say only that a trust director is a “fiduciary,” without specifying which kind of fiduciary or which fiduciary duties apply. Subsection (a) provides greater clarity by specifically absorbing the fiduciary duty of a similarly situated trustee.

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

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

The trust director’s duty of disclosure. Under subsection (a), a trust director is subject to the same duties of disclosure as a trustee in a like position and under similar circumstances. For example, if a trust director intended to direct a nonroutine transaction, to change

“investment ... strategies,” or to take “significant actions ... involving hard-to-value assets or special sensitivity to beneficiaries,” the director would be under a duty of affirmative advance disclosure just like a trustee. Restatement (Third) of Trusts § 82 cmt. d (2007). A trust director’s disclosure duties are limited, however, by Section 11, which eliminates certain duties to monitor, inform, or give advice.

Sole versus joint powers. Under subsection (a), a trust director has the same fiduciary duties as a sole trustee when a power of direction is held individually and the same fiduciary duties as a cotrustee when a power of direction is held jointly. A trust director that individually holds a power to amend the trust, for example, does not have the duties of a cotrustee to monitor the actions of the trustee concerning investments or the actions of another trust director concerning the determination of a beneficiary’s capacity.

Subject to Section 11, a trust director that holds a power of direction jointly with a trustee or another trust director, by contrast, has the duties of a cotrustee regarding the actions of that trustee or other trust director that are within the scope of the jointly held power. Thus, a trust director that jointly exercises a power to direct investments with other trust directors has the same fiduciary duties as a cotrustee regarding its own actions and the actions of the other directors with respect of the power. Under subsection (a)(2), a settlor may vary the duty and liability of a trust director that holds a power of direction jointly to the same extent the settlor could vary the duty and liability of a cotrustee under Section 12 or otherwise.

Although a trust director that holds a power of direction jointly with a trustee or other trust director generally has the duties of a cotrustee with regard to that power, the director does not have the duties of a cotrustee with regard to other powers that are not held jointly. If a trust director jointly holds a power to direct investments with another director, for example, and the other director also individually holds a power to amend the trust, the first director has the duties of a cotrustee only with regard to the joint power to direct investments and not with regard to the other director’s individual power to amend the trust.

Springing powers without a duty to monitor. The drafting committee contemplated that a settlor could construct a trust director’s power to be springing such that the director would not be under a continuous obligation to monitor the administration of the trust. For example, a settlor could grant a trust director a power to direct a distribution, but only if the director was requested to do so by a beneficiary. A director holding such a power would not be under a duty to act unless requested to do so by a beneficiary.

Moreover, because under subsection (a)(2) a settlor can vary the fiduciary duties of a trust director to the same extent that the settlor could vary the fiduciary duties of a trustee, under Uniform Trust Code § 105(b)(2) (2004) the settlor could waive all of the director's otherwise applicable duties other than the duty "to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." A director with a power to direct a distribution upon a beneficiary's request, for example, would be subject to this mandatory duty when it responds to a beneficiary's request.

Extended discretion. Under subsection (a), if the terms of a trust give a trust director extended discretion, such as "sole," "absolute," or "uncontrolled" discretion, those terms would have the same effect on the duty and liability of the director as they would have for a trustee. Under prevailing law, a trustee with extended discretion may not "act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power." Restatement (Third) of Trusts § 50 cmt. c (2003); *see also* Uniform Trust Code § 814(a) (2004).

Exculpation or exoneration. A trust director is likewise subject to the same rules as a trustee with regard to an exculpation or exoneration clause. Under prevailing law, such as Uniform Trust Code § 1008 (2000) and Restatement (Third) of Trusts § 96 (2012), an exculpation or exoneration clause cannot protect a trustee against liability for acting in bad faith or with reckless indifference. Under subsection (a)(2), the same rules would apply to an exculpation or exoneration clause for a trust director. Thus, if the terms of a trust provide that a director can never be liable to a beneficiary, then the trust director would have the same liability as a trustee would have under a similar exculpatory clause.

Directed director. The terms of a trust may provide that a trust director has a power over a trust that requires another director to comply with the director's exercise or nonexercise of the power. In other words, a director may have the power to direct another director. In such a trust, subsection (a)(1) would absorb for the directed director the same fiduciary duties that would apply to a directed trustee. A directed director would thus be subject to the willful misconduct standard that Section 9 applies to a directed trustee. Under subsection (a)(2), the terms of a trust may vary the duty of a directed director to the same extent they could vary the duty of a directed trustee.

Subsection (b)—health-care professionals. Subsection (b) refers to a trust director who is "licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of

	<p>the director’s business or practice of a profession.” This phrasing is based on the definition of “health-care provider” in Uniform Health-Care Decisions Act § 1(8) (1993). To the extent that a trust director acts in the director’s business or practice of a profession to provide health care, the director is relieved from duty and liability under this act unless the terms of the trust provide otherwise.</p> <p>This subsection, which applies unless the terms of the trust provide otherwise, addresses the concern that a health-care professional might refuse appointment as a trust director if such service would expose the provider to fiduciary duty under this act. For example, the terms of a trust might call for a health-care professional to determine the capacity or sobriety of a beneficiary or the capacity of a settlor. In making such a determination, under subsection (b) the health-care professional would not be subject to duty or liability under this act.</p> <p>Although the professional would not be subject to duty or liability under this act, the professional would remain subject to any rules and regulations otherwise applicable to the professional, such as the rules of construction prescribed by Sections 6(b) and 16. Moreover, a trustee subject to a direction by a health-care professional under subsection (b) of this section is still subject to the duties under Section 9 to take reasonable action to comply with the professional’s direction and to avoid willful misconduct in doing so.</p> <p><i>Subsection (c)—no ceiling on duties.</i> Subsection (c) confirms that the duties under this section are defaults and minimums, not ceilings. The terms of a trust may impose further duties in addition to those prescribed by this section.</p>
Current Colorado Law	<p>§ 15-16-803. Trust advisor and excluded trustee</p> <p>Universal Citation: CO Rev Stat § 15-16-803 (2016)</p> <p>(1) A trust advisor with power over investment decisions is subject to the "Uniform Prudent Investor Act", article 1.1 of this title. A trust advisor who has special skills or expertise or who is named a trust advisor in reliance upon his or her representation that he or she has special skills or expertise has a duty to use those special skills or expertise.</p> <p>(2) The powers and duties of a trust advisor, and the extent of such powers and duties, are established by the governing instrument, and the exercise or nonexercise of such powers and duties is binding on all other persons.</p> <p>(3) The powers and duties of a trust advisor may include, but are</p>

	<p>not limited to:</p> <p>(a) The exercise of a specific power or the performance of a specific duty or function that would normally be performed by a trustee;</p> <p>(b) The direction of a trustee's actions regarding all investment decisions or one or more specific investment decisions; or</p> <p>(c) The direction of a trustee's actions relating to one or more specific non-investment decisions, including the exercise of discretion to make distributions to beneficiaries.</p> <p>(4) If a governing instrument provides that a trustee must follow the direction of a trust advisor and the trustee acts in accordance with such direction, the trustee is an excluded trustee.</p> <p>§ 15-16-805. No duty to review actions of trust advisor Universal Citation: CO Rev Stat § 15-16-805 (2016)</p> <p>An excluded trustee has no duty to review or monitor the actions of a trust advisor.</p> <p>§ 15-16-806. Duty to communicate - no duty to warn Universal Citation: CO Rev Stat § 15-16-806 (2016)</p> <p>(1) A trustee has a duty to keep a trust advisor reasonably informed about the administration of the trust with respect to any specific duty or function being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trust advisor to perform the duty or function. A trust advisor requesting or receiving any such information from a trustee has no duty to monitor the conduct of the trustee or to provide advice to or consult with the trustee.</p> <p>(2) A trust advisor has a duty to keep the trustee and any other trust advisors reasonably informed about the administration of the trust with respect to all duties or functions being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trustee and any other trust advisors to perform their duties or functions. A trustee requesting or receiving any such information from a trust advisor has no duty to monitor the conduct of the trust advisor or to provide advice to or consult with the trust advisor.</p> <p>(3) A trust advisor has a duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration, to the extent</p>
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	<p>that such information relates to a duty or function being performed by the trust advisor. This duty is governed by section 15-16-303.</p> <p>(4) A trust advisor has no duty to communicate with or warn any beneficiary or third party concerning any action or actions taken by any other trust advisor or trustee.</p> <p>§ 15-16-807. Excluded trustee not liable for action of trust advisor</p> <p>Universal Citation: CO Rev Stat § 15-16-807 (2016)</p> <p>(1) If an excluded trustee is required to follow the direction of a trust advisor and the excluded trustee acts in accordance with such direction, the excluded trustee is not liable for any cause of action resulting from the act of complying therewith, except in cases of willful misconduct on the part of the excluded trustee so directed.</p> <p>(2) An excluded trustee has no liability for any action of a trust advisor.</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

**Colorado T & E Section Statutory Revisions Committee Subcommittee on the Uniform
Directed Trust Act**

UDTA SECTION	Section 9
Section Title	Duty and Liability of Directed Trustee
Statutory Language	<p>SECTION 9. DUTY AND LIABILITY OF DIRECTED TRUSTEE.</p> <p>(a) Subject to subsection (b), a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1) and the trustee is not liable for the action.</p> <p>(b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1) to the extent that by complying the trustee would engage in willful misconduct.</p> <p>(c) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:</p> <p>(1) the breach involved the trustee's or other director's willful misconduct;</p> <p>(2) the release was induced by improper conduct of the trustee or other director in procuring the release; or</p> <p>(3) at the time of the release, the director did not know the material facts relating to the breach.</p> <p>(d) A directed trustee that has reasonable doubt about its duty under this section may petition the [court] for instructions.</p> <p>(e) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.</p> <p><i>Legislative Note:</i> A state that has enacted the Uniform Trust Code should move Section 808(a) 19 into Section 603, delete Section 808(b)-(d), and add "subject to [insert cite to Uniform Directed Trust Act Sections 9, 11, and 12.]" to the beginning of Section (b)(2) of Section 105. Section 105(b)(2) prescribes the mandatory minimum fiduciary duty of a trustee, which is superseded with respect to a directed trustee by the willful misconduct mandatory minimum of this section.</p> <p><i>The term "court" in subsection (d) should be revised as needed to refer to the appropriate court having jurisdiction over trust matters.</i></p>
Uniform Law Commission Comment	<p><i>Duties of a directed trustee.</i> This section addresses the duty and liability of a directed trustee. It should be read in conjunction with Section 10 which governs information sharing among directed trustees and trust directors, and Section 11 which eliminates certain duties to monitor, inform, or advise. The drafting committee contemplated that this section, along with Sections 10 and 11, would prescribe the mandatory minimum fiduciary duties of a</p>

	<p>directed trustee, displacing any contrary mandatory minimum such as under Uniform Trust Code § 105 (2005).</p> <p><i>Subsection (a)—duty of compliance and reasonable action; nonliability other than under 5 subsection (b).</i> Subject to subsection (b), subsection (a) requires a directed trustee to take reasonable action to comply with a trust director’s exercise or nonexercise of the director’s power of direction or further power under Section 6(b)(1) and provides that the trustee is not liable for so acting.</p> <p>The duty of a trustee in subsection (a) to take reasonable action is context dependent. A power of direction under which a trust director may give a trustee an express direction, for example, will require the trustee to comply by following the direction. A power that requires a trustee to obtain permission from a trust director before acting imposes a duty on the trustee to obtain the required permission. A power that allows a director to amend the trust imposes a duty on the trustee to take reasonable action to facilitate the amendment and then comply with its terms. The duty prescribed by subsection (a), in other words, is to take reasonable action to comply with whatever the terms of the trust require of a trustee in connection with a trust director’s exercise or nonexercise of the director’s power of direction or further power under Section 6(b)(1).</p> <p>A trustee’s duty to take reasonable action is limited by the scope of the trust director’s power of direction. A directed trustee should not comply with a direction that is outside of the director’s power of direction and beyond the director’s further powers under Section 6(b)(1). To do so would violate the trustee’s duty under subsection (a) and the trustee’s background duty to act in accordance with the terms of the trust. <i>See, e.g.,</i> Uniform Trust Code § 105(b)(2) (amended 2005) (making mandatory “the duty of a trustee to act ... in accordance with the terms ... of the trust”); Restatement (Third) of Trusts § 76 (2007) (“The trustee has a duty to administer the trust ... in accordance with the terms of the trust.”). For example, an attempt by a director to exercise a power in a form contrary to that required by the terms of the trust, such as an oral direction if the terms of the trust require a writing, is not within the trust director’s power.</p> <p>Subsection (a) requires a trustee to act reasonably as it carries out the acts necessary to comply with a trust director’s exercise or nonexercise of the director’s powers. If a trust director with a power to direct investments directs the trustee to purchase a particular security, for example, the trustee must take care to ensure the security is purchased within a reasonable time and at reasonable</p>
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cost and must refrain from self-dealing and conflicts of interest in doing so.

The duty to take reasonable action under subsection (a) does not, however, impose a duty to ensure that the substance of the director's action is reasonable. To the contrary, subject to subsection (b), a trustee that takes reasonable action to comply with a power of direction is not liable for so acting even if the substance of the direction is unreasonable. In other words, subject to the willful misconduct rule of subsection (b), a trustee is liable only for its own breach of trust in executing a direction, and not for the director's breach of trust in giving the direction. Returning to the example of a direction to purchase a security, the trustee is not required to assess whether the purchase of the security would be prudent in relation to the trust's investment portfolio; the trustee is only required to execute the purchase reasonably.

Powers jointly held with a trust director. A trustee may hold a power of direction jointly with a trust director. For example, the terms of a trust may confer a power to determine the capacity of a beneficiary upon a committee of people, and the committee may include both the trustee and the beneficiary's son, who is a trust director. When a trustee holds a power jointly with a trust director, the trustee continues to have the normal duties of a trustee regarding its own exercise or nonexercise of the joint power. Subsection (a), in other words, does not relieve the trustee from the trustee's normal duties as to powers that belong directly to the trustee, including powers held jointly with a trust director. In deciding how to vote as a member of the committee to determine a beneficiary's capacity, the trustee would be subject to the same duties as if it held its power jointly with another trustee instead of with another trust director.

A trustee's participation in joint decisionmaking with a trust director, however, must be distinguished from the trustee's execution of those joint decisions. Although the trustee is subject to the normal fiduciary duties of trusteeship in making a decision jointly with a trust director, the trustee is subject to the reduced duty of subsections (a) and (b) in executing the decision. Returning to the example in the prior paragraph of a committee including a trustee with power to determine a beneficiary's capacity, the trustee has its normal fiduciary duties in deciding how to cast its vote about whether the beneficiary lacks capacity. But the trustee has only the duties prescribed by subsections (a) and (b) when the trustee takes action to comply with the decision of the committee.

Powers to veto or approve. The terms of a trust may give a trust director a power to veto or approve the actions of a trustee. The

trustee, for example, may have the power to invest trust property, subject to the power of a trust director to review and override the trustee's decision. A trustee that operates under this kind of veto or approval power has the normal duties of a trustee regarding the trustee's exercise of its own powers, but has only the duties of a directed trustee regarding the trust director's exercise of its power to veto or approve. The trustee would be subject to the normal duty of prudence in deciding which investments to propose to a director, for example, but then would be subject only to the willful misconduct rule of subsection (b) under this section in choosing whether to comply with the director's veto or disapproval of the proposed investments.

Subsection (b)—willful misconduct. Subsection (b) provides an exception to the duty of compliance prescribed by subsection (a). Under subsection (b), a trustee must not comply with a power of direction or a further power of a trust director under Section 6(b)(1) to the extent that by complying the trustee would engage in "willful misconduct."

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

The willful misconduct standard in subsection (b) is a mandatory minimum. The terms of a trust may not reduce a trustee's duty below the standard of willful misconduct. Terms of a trust that attempt to give a trustee no duty or to indicate that a trustee is not a fiduciary or is an "excluded fiduciary" or other such language are not enforceable under subsection (b). Instead, such provisions would provide for the willful misconduct standard of subsection (b).

The drafting committee settled upon the "willful misconduct" standard after a review of the existing directed trust statutes. Roughly speaking, the existing statutes fall into two groups. In one group, which constitutes a majority, are the statutes that provide that a directed trustee has no duty or liability for complying with an exercise of a power of direction. This group includes Alaska, New Hampshire, Nevada, and South Dakota.

The policy rationale for these statutes is that duty should follow power. If a director has the exclusive authority to exercise a power of direction, then the director should be the exclusive bearer of fiduciary duty in the exercise or nonexercise of the power. Placing

the exclusive duty on a director does not diminish the total duty owed to a beneficiary, because a settlor of a directed trust could have chosen to make the trust director the sole trustee instead. Thus, on greater-includes-the-lesser reasoning, a settlor who could have named a trust director to serve instead as a trustee should also be able to give the trust director the duties of the trustee. Under the no duty statutes, a beneficiary's only recourse for misconduct by the trust director is an action against the director for breach of the director's fiduciary duty to the beneficiary.

In the other group of statutes, which includes Delaware, Illinois, Texas, and Virginia, a directed trustee is not liable for complying with a direction of a trust director unless by so doing the directed trustee would personally engage in "willful" or "intentional" misconduct. The policy rationale for these statutes is that, because a trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is acting under the direction of a director. Although the settlor could have made the trust director the sole trustee, the settlor did not actually do so—and under traditional understandings of trust law a trustee must always be accountable to a beneficiary in some way. *See, e.g.*, Restatement (Third) of Trusts § 96 cmt. c (2012) ("Notwithstanding the breadth of language in a trust provision relieving a trustee from liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability.").

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

After extensive deliberation and debate, the drafting committee opted to follow the second group of statutes on the grounds that this model is more consistent with traditional fiduciary policy. The popularity of directed trusts in Delaware, which also adopts the willful misconduct standard, establishes that a directed trust regime

that preserves a willful misconduct safeguard is workable and that a total elimination of duty in a directed trustee is unnecessary to satisfy the needs of directed trust practice.

The willful misconduct standard prescribed by this subsection changes the policy of Uniform Trust Code § 808 (2000), which provides the current uniform law treatment of directed trusts and is similar in substance to Restatement (Third) of Trusts § 75 (2007). Section 808(b) provides:

If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

In deciding to adopt a different standard, the drafting committee was deeply influenced by the fact that a growing number of states that had previously adopted Section 808 have since abandoned it or modified it to follow one of the two other models discussed above. The drafting committee was also strongly influenced by the fact that a review of every existing specialized state statute on directed trusts showed that no state that has legislated specifically on the issue of directed trustee fiduciary duties has chosen to follow Section 808.

Subsection (c)—release by trust director. The terms of a trust may empower a trust director to release a trustee or another trust director from liability for breach of trust. If the director grants such a release, the trustee or other director is not liable to the extent of the release. The terms of a trust may authorize such a release to be given at any time, whether before or after the trustee or other director acts. The precise scope of a power of release and the manner of its exercise must be determined based on the terms of the trust.

Although a settlor has wide latitude in designing a power of direction, subsection (c) provides three mandatory safeguards that limit a director's power to release a trustee or other director from liability. First, consistent with the policy of subsection (b), a trustee or other director cannot be released for a breach that involves the trustee's or the other director's own willful misconduct. Second, consistent with prevailing law governing a release of a trustee by a beneficiary, a release by a trust director is not enforceable if it was procured by the improper conduct of the trustee or other director.

	<p>Third, again consistent with prevailing law governing a release of a trustee by a beneficiary, a release by a trust director is not enforceable if at the time of the release the director did not know of the material facts relating to the breach. The drafting committee based the second and third of these safeguards on Uniform Trust Code § 1009 (2001), which is similar in substance to Restatement (Third) of Trusts § 97 (2012).</p> <p><i>Subsection (d)—petition for instructions.</i> Subsection (d) confirms that, in accordance with existing law, a directed trustee that has reasonable doubt about its duty under this section may petition the court for instructions. See, e.g., Restatement (Third) of Trusts § 71 (2007) (“A trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions.”) The safe harbor of this subsection is permissive rather than mandatory. Though a trustee may satisfy its duties by petitioning for instructions, this subsection does not, by itself, require a trustee to petition.</p> <p><i>Subsection (e)—no ceiling on duties.</i> Subsection (e) confirms that the duties prescribed by this section are defaults and minimums, not ceilings. The terms of a trust may impose further duties in addition to those prescribed by this section.</p>
Current Colorado Law	<p>§ 15-16-805. No duty to review actions of trust advisor Universal Citation: CO Rev Stat § 15-16-805 (2016)</p> <p>An excluded trustee has no duty to review or monitor the actions of a trust advisor.</p> <p>§ 15-16-806. Duty to communicate - no duty to warn Universal Citation: CO Rev Stat § 15-16-806 (2016)</p> <p>(1) A trustee has a duty to keep a trust advisor reasonably informed about the administration of the trust with respect to any specific duty or function being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trust advisor to perform the duty or function. A trust advisor requesting or receiving any such information from a trustee has no duty to monitor the conduct of the trustee or to provide advice to or consult with the trustee.</p> <p>(2) A trust advisor has a duty to keep the trustee and any other trust advisors reasonably informed about the administration of the trust with respect to all duties or functions being performed by the trust</p>

	<p>advisor to the extent that providing such information is reasonably necessary for the trustee and any other trust advisors to perform their duties or functions. A trustee requesting or receiving any such information from a trust advisor has no duty to monitor the conduct of the trust advisor or to provide advice to or consult with the trust advisor.</p> <p>(3) A trust advisor has a duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration, to the extent that such information relates to a duty or function being performed by the trust advisor. This duty is governed by section 15-16-303.</p> <p>(4) A trust advisor has no duty to communicate with or warn any beneficiary or third party concerning any action or actions taken by any other trust advisor or trustee.</p> <p>§ 15-16-807. Excluded trustee not liable for action of trust advisor</p> <p>Universal Citation: CO Rev Stat § 15-16-807 (2016)</p> <p>(1) If an excluded trustee is required to follow the direction of a trust advisor and the excluded trustee acts in accordance with such direction, the excluded trustee is not liable for any cause of action resulting from the act of complying therewith, except in cases of willful misconduct on the part of the excluded trustee so directed.</p> <p>(2) An excluded trustee has no liability for any action of a trust advisor.</p>
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