

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

UDTA Section	Section 3
Section Title	Application: Principal Place of Administration
Statutory Language	<p>(a) This [act] applies to a trust, whenever created, that has its principal place of administration in this state, subject to the following rules:</p> <p>(1) If the trust was created before or on [the effective date of this [act]], this [act] applies only to decisions or actions occurring after that date.</p> <p>(2) As to a trust whose principal place of administration is changed to this state on or after [the effective date of this [act]], this [act] applies only to decisions or actions occurring after the change.</p> <p>(b) Without precluding other means to establish a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration of the trust are valid and controlling if:</p> <p>(1) a trustee’s principal place of business is located in or a trustee is a resident of the designated jurisdiction;</p> <p>(2) a trust director’s principal place of business is located in or a trust director is a resident of the designated jurisdiction; or</p> <p>(3) all or part of the administration occurs in the designated jurisdiction.</p>
Uniform Law Commission Comment	<p><i>Subsection (a).</i> Subsection (a) addresses two matters. First, because powers and duties in a directed trust are matters of trust administration, see Restatement (Second) of Conflict of Laws § 271 cmt. a (Am. Law Inst. 1971), this subsection follows the prevailing conflict of laws rule by linking application of this act to the trust’s principal place of administration. As with other matters of administration, the parties are protected against inconsistent court orders by the common law principle of “primary supervision.” See id. § 267 cmt. e. 4</p> <p>Second, this subsection applies this act to a trust administered in an enacting state regardless of whether the trust was in existence</p>

	<p>on the effective date of this act. However, under subsections (a)(1) and (2), this act applies only with respect to decisions or actions occurring after the effective date or, if the trust’s principal place of administration was changed to the enacting state after the effective date, only with respect to decisions or actions occurring after that change. Because some of the standards of conduct prescribed by this act depart from Uniform Trust Code § 808 (2000) and the common law as codified by Restatement (Third) of Trusts § 75 (Am. Law Inst. 2007), the drafting committee reasoned that the act should apply prospectively, following the model of Uniform Prudent Investor Act § 11 (1994).</p> <p>Subsection (b). Subsection (b), which derives from Uniform Trust Code § 108(a) (2000), establishes a safe harbor for a settlor’s designation of a trust’s principal place of administration. Such a designation is valid if (1) a trustee is located in the designated jurisdiction, (2) a trust director is located in the designated jurisdiction, or (3) at least some of the trust administration occurs in the designated jurisdiction. Subsections (b)(1) and (b)(3) reproduce without change the safe harbor prescribed by Uniform Trust Code § 108(a) (2000). Subsection (b)(2) expands the safe harbor of Section 108(a) to include the location of a trust director, in addition to the location of a trustee, as a sufficient connection with the designated jurisdiction. Other than this expansion in subsection (b)(2), the drafting committee followed the Uniform Trust Code in “not attempt[ing] to further define principal place of administration.” Uniform Trust Code § 108 cmt.</p>
Current Colorado Law	<p>This section is similar to the counterpart in the <i>Colorado Uniform Trust Decanting Act</i>. Section 15-16-905 provides:</p> <p style="padding-left: 40px;">Application – governing law.</p> <p style="padding-left: 40px;">(1) This part 9 applies to a trust created before, on, or after August 10, 2016, which:</p> <p style="padding-left: 80px;">(a) Has its principal place of administration in this state, including a trust whose principal place of administration has been changed to this state: or</p>

	<p>(b) Provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for the purpose of:</p> <p>(I) Administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this state;</p> <p>(II) Construction of terms of the trust; or</p> <p>(III) Determining the meaning or effect of terms of the trust.</p> <p>This section and the <i>UTDA</i> counterpart attempt to resolve conflict of law issues. Applications of both Acts are tied to a place of trust administration. In doing this, both Acts follow the safe harbor provisions of <i>UTC</i> Section 108 (a).</p> <p>The Act applies to a trust that has its principal place of administration in Colorado or if the terms of the trust designate Colorado as the principal place of administration provided the criteria of Sub-Section (b) (1), (2), or (3) are applicable.</p> <p>Similarly, the Colorado <i>UTDA</i> applies if the trust is actually administered in Colorado (15-16-905 (1) (a)) or the trust instrument provides that it is governed by the law of Colorado. (15-16-905 (1)(b)).</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	<p>The Colorado Committee recommends that, in addition to the three “safe harbor” criteria for designation of a trust’s principal place of administration, in subsection (b), Colorado add a 4<sup>th</sup> criteria based on registration of the trust.</p> <p>Accordingly, Section 3 would provide as follows:</p> <p>(a) This [act] applies to a trust, whenever created, that has its principal place of administration in this state, subject to the following rules:</p>

(1) If the trust was created before or on [the effective date of this [act]], this [act] applies only to decisions or actions occurring after that date.

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

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

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

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

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

**(4) the trust is duly registered with a court in the designated jurisdiction.**

**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 17 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: 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.</i>  <i>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.</i></p>
Uniform Law Commission Comment	<p>The capacious language of Section 6 permits a broad array of powers to be given to a trust director with the exercise or nonexercise of such a power subject to the director’s fiduciary duty and liability under Section 8. This section goes further. It imposes on the exercise or nonexercise of two types of powers by a trust director whatever other rules would apply to the exercise or nonexercise of such a power by a trustee in a like position and under similar circumstances. Paragraph (1) does so with respect to a payback provision in a trust for a beneficiary with a disability necessary for compliance with the reimbursement requirements of Medicaid law. Paragraph (2) does so with respect to a charitable interest in the trust (including specifically rules requiring notice to the Attorney General or other public official with supervisory power over charities). In consequence of this provision, a settlor cannot avoid state law that limits the power of a trustee in a supplemental needs trust or charitable trust by granting the power to a trust director.</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</p>

	<p>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 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	



## MEMORANDUM

**To:** Subcommittee on the Uniform Directed Trust Act  
Trust and Estate Section Statutory Revisions Committee, Colorado Bar Association

**From:** Lisa Willcox

**Re:** Source Material for Citations in Uniform Directed Trust Act Comments

**Date:** August 10, 2017

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### I. Restatement 3rd

#### 1. Sec. 82 cmt. D (2007)

*d. Subsection (1), Clause (c): disclosure of significant information.* The rule of Subsection (1)(c) does not impose a regular or routine requirement of reporting or accounting. It does, however, impose an affirmative requirement that, if and as circumstances warrant over the course of administration, the trustee inform fairly representative beneficiaries of important developments and information that appear reasonably necessary for the beneficiaries to be aware of in order to protect their interests. Because of inevitable differences in trusts and in their terms, objectives, asset holdings, investment or management activities, and other circumstances, it is not realistic to attempt to state precisely or universally what information will be “significant” for these purposes. Accordingly, the trustee’s duty under Subsection (1)(c) is to exercise reasonable judgment in determining what matters have such significance. Nevertheless, some generalizations may offer guidance.

For various reasons of prudence, loyalty, or impartiality, or simply as a general matter of proper disclosure, but subject to considerations of practicality as well as sensitivity of negotiations, a trustee’s duty to provide information to beneficiaries may apply when there are (inter alia): significant changes in trustee circumstances, including changes in the identities, number, or roles of trustees or in methods of determining trustee compensation; decisions regarding delegation of important fiduciary responsibilities or significant changes in arrangements for delegation; important adjustments being considered in investment or other management strategies; significant actions under consideration involving hard-to-value assets or special sensitivity to beneficiaries (such as liquidating or selling shares of a closely held business or a sale or long-term lease of a major real-estate holding); plans being made for distribution on termination or partial termination (or perhaps subdivision) of the trust; and other transactions or developments of which beneficiaries should be made aware and thereby allowed an opportunity to offer suggestions, comments, or information, or to request reports or accountings under § 83. In addition, a trustee should advise discretionary distributees of information the trustee may need (or desire) regarding the beneficiaries’ circumstances, needs, resources, concerns, or wishes, as may be relevant to fiduciary judgments with respect to discretionary distributions, along with disclosure by the trustee of the bases upon which discretion will be exercised. (Cf. § 87 and § 50, Comment *e(1)*; also see § 79.)

These types of disclosures do not afford beneficiaries a right to veto trustee action, although disclosure may eventually afford the trustee a defense based on laches or a statute of limitations (§ 98).

Disclosure is fundamental to sound administration of the trust, and to both the trustee’s performance and the beneficiaries’ monitoring of associated fiduciary obligations. Therefore, the trustee’s duty to provide the type of information described in this Comment is subject to modification only by clear language in the terms of the trust and within limits described in Comment *a(2)*. That trusts and their administration are to be for the benefit of the beneficiaries, see § 27, Comment *b*, and Reporter’s Note thereto. See also §§ 77-79 (on duties of prudence, loyalty, and impartiality), § 87 (on abuse of discretion), § 89 (duties on termination), and more generally § 86.



## 2. Sec. 50 cmt. C (2003)

*c. Effect of extended discretion.* Although the discretionary character of a power of distribution does not ordinarily authorize the trustee to act beyond the bounds of reasonable judgment (Comment *b*), a settlor may manifest an intention to grant the trustee greater than ordinary latitude in exercising discretionary judgment. How does such an intention affect the duty of the trustee and the role of the court?

It is contrary to sound policy, and a contradiction in terms, to permit the settlor to relieve a “trustee” of all accountability. (Cf. § 87, and also § 76.) Once it is determined that the authority over trust distributions is held in the role of trustee (contrast nonfiduciary powers mentioned in Comment *a*), words such as “absolute” or “unlimited” or “sole and uncontrolled” are not interpreted literally. Even under the broadest grant of fiduciary discretion, a trustee must act honestly and in a state of mind contemplated by the settlor. Thus, the court will not permit the trustee to act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power. Except as the power is for the trustee’s personal benefit, the court will also prevent the trustee from *failing* to act, either arbitrarily or from a misunderstanding of the trustee’s duty or authority.

Within these limits, it is a matter of interpretation to ascertain the *degree* to which the settlor’s use of language of extended (e.g., “absolute”) discretion manifests an intention to relieve the trustee of normal judicial supervision and control in the exercise of a discretionary power over trust distributions.

### Illustrations:

3. Following S’s death his previously revocable trust has been administered for nearly a decade by T Bank, which is directed to pay income to S’s widow, W, and also empowered to pay her “such additional amounts from the principal of the trust as the Trustee, in its sole and uncontrolled discretion, believes appropriate for W’s comfortable support and care,” with the remainder upon W’s death to pass to S’s then living issue. In response to requests by W, T Bank has begun to pay substantially increased amounts to her to enable her to accumulate funds from which she may aid C (her child by a prior marriage) in his plans to obtain control and expand the activities of X Co., of which C has been an officer and shareholder for a number of years. S’s children petition the court to instruct T Bank that principal distributions for that purpose are improper and that it must recover amounts previously paid to W for that purpose. Nothing in relevant circumstances or in other terms of the trust indicates a broader purpose for the invasion power than the support-related (see Comment *d*) language quoted above. The court will issue the order requested by the remainder beneficiaries. Despite S’s grant of extensive discretion, and without a finding of bad faith, T’s judgment was not exercised in an appropriate state of mind, that is, for a purpose falling within the quoted standard.

4. S’s testamentary trust grants T, as trustee, the “absolute and uncontrolled discretion to pay or apply such amounts of income or principal or both to or for the support and benefit of my wife W and any one or more of my descendants, as T may consider desirable and in their best interests.” On W’s death, the trust estate will be distributed to S’s then living issue, if any, and otherwise to others. After a meeting with W (who does not expect to need funds from the trust), her tax accountant, and D (S’s only child), T made a large distribution to D to enable her to acquire a home and to advance her career and investment objectives, and has begun to implement a plan of modest distributions to D’s two children (ages 14 and 15) to develop funding for their career and personal objectives. Assuming no showing of bad faith or of settlor intention contrary to the quoted trust provisions, T has not abused the extended discretion it has in pursuing the broad standard (see generally Comment *d*) set out in S’s will. (On a trustee’s duties to provide information to beneficiaries and to act with impartiality, see Comment *b*.)

Extended discretion serves to discourage challenges by remainder beneficiaries to the generosity of trustees, as in Illustration 4. On the other hand, it may also make it difficult for a discretionary beneficiary to obtain judicial intervention when a trustee's judgments are highly conservative with regard to matters that fall within the settlor's authorized purposes. The overall tenor of the terms of a power may, however, in the context of the trust's more general purposes, lead to an interpretation granting the trustee ordinary discretion with respect to the benefits to which the discretionary beneficiary is minimally entitled (e.g., reasonable support), with the extended discretion applicable to the trustee's allowance of more. This "one-sided" liberalization of the discretionary authority, where a court finds the settlor's language was intended to assure generosity in favor of a life beneficiary, would thus tend to encumber the efforts of remainder beneficiaries who seek to challenge what might otherwise be excessively generous decisions by a trustee.

### 3. Sec. 96 cmt. C (2012)

*c. Effect limited by public policy.* 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. Hence, an exculpatory clause cannot excuse a trustee for a breach of trust committed in bad faith. Nor can the trustee be excused for a breach committed with indifference to the interests of the beneficiaries or to the terms and purposes of the trust—that is, committed without reasonable effort to understand and conform to applicable fiduciary duties. In some situations, courts have, not inappropriately, sought to distinguish between simple and gross negligence, while authorities in analogous contexts have emphasized fiduciaries' sustained inattention to their duty of care. It is not possible to state with precision and uniform applicability the permissible limits of exculpatory relief, especially recognizing that it is appropriate in this regard to take account of what may be reasonable to expect of a particular trustee. See Reporter's Note.

Reporter's Note: Comments *b* and *c*:

Both the limits on the effectiveness of exculpatory clauses and, to a lesser degree, their strict construction are based on a public-policy rationale, beginning with the definition and essence of a trust as a "fiduciary relationship" and the principle that "a private trust, its terms, and its administration must be for the benefit of its beneficiaries" (§ 27(2), and see Uniform Trust Code § 404). Also compare § 29, Comment *i*, on policy bases for limiting deadhand control over the rights of beneficial owners. And see comment to Uniform Trust Code § 108, beginning: "Even if the terms of the trust attempt to completely exculpate a trustee ..., the trustee must always comply with a certain minimum standard." There is nothing new in these policy-based principles. See Restatement Second, Trusts § 222, Comment *b* (concluding: "Such provisions as these [described in § 222(2)] are invalid on the ground that it would be contrary to public policy to give effect to them"); and R. Whitman, "Exoneration Clauses in Wills and Trust Instruments," 4 Hofstra Prop. L.J. 123 (1992). See also the observations in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada* 927 (3d ed. 2005) ("[T]otal exoneration of [a trustee] ... must be contrary to public policy. Not only is a trustee a fiduciary, a person whose essential character cannot be taken away, even by the creator of the trust, but the essence of a trust is a beneficiary's right of recourse against the trustee for improper administration, and if the beneficiary is altogether denied that recourse it is highly questionable whether the settlor has created a trust at all"), and in Bogert & Bogert, *supra*, § 673 (that a settlor "who attempts to create a trust without any accountability in the trustee is contradicting himself. A trust necessarily grants rights to the beneficiary that are enforceable in equity.... [I]f the settlor really intended to create a trust, it would seem that accountability ... must inevitably follow"), and cf. *id.*, § 542 (pp. 208-209) ("Such immunities have a tendency to encourage embezzlement and undesirable slackness"). See particularly extensive, more comprehensive discussions of rationale in

such matters in two leading articles, J. Langbein, “Mandatory Rules in the Law of Trusts,” 98 Northwestern Univ. L. Rev. 1105 (2004) (especially at 1122-1123 and, specifically on exculpation, 1123-1125), and D. Hayton, “The Irreducible Core Content of Trusteeship,” Trends in Contemporary Trust Law 47 (Oakley ed., 1996). Cf. Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 164 (1946) (“The present instance would be a humiliating example of the helplessness into which courts could be cast if a provision, placed in a trust instrument due to a settlor’s mistaken confidence in a trustee, could relieve the latter of a duty to account. Such a provision would be virtually a license to the trustee to convert the trust fund to his own use and thereby terminate the trust. When we mention mistaken confidence, we had in mind the words of the ... instrument: ‘I think David Honeyman would be an ideal trustee.’ It is this mistaken impression ... which the defendant now seeks to employ as an impenetrable shield.”); and other primary and secondary authorities discussed in the extensive Reporter’s Notes to Comments *a*, *a*(2), and *e* of § 82. Compare the highly restrictive policy in ERISA § 410(a), 29 U.S.C. § 1110(a) (that, with limited exceptions, exculpatory provisions are “void as against public policy”).

On exculpatory clauses and the adaptability of their application to professional and nonprofessional trustees, see M. Leslie, “Common Law, Common Sense: Fiduciary Standards and Trustee Identity,” 27 Cardozo L. Rev. 2713 (2006), concluding (at 2752): “Courts intuitively understand ... [and] take account of the particular difficulties that non-professional trustees face,” and arguing that “classic fiduciary rules” (evolved over time “to compensate for information asymmetry and market imperfections”) should not be weakened by statute in order to accommodate nonprofessional trustees, because courts already offer them “adequate protection” without such legislation. K. Boxx, “Distinguishing Trustees and Protecting Beneficiaries: A Response to Professor Leslie,” 27 Cardozo L. Rev. 2753 (2006), although taking issue on other matters (mainly on loyalty cases), agrees (at 2759) that settlor expectations “in selecting a professional trustee are very different than ... in selecting a family member.” Also see M. Leslie, “Trusting Trustees: Fiduciary Duties and the Limits of Default Rules,” 94 Georgetown L.J. 67, 106-107 (2005) (“Although ... [most] courts routinely announce that exculpatory clauses are enforceable, in reality courts tend to shield the trustee from liability only in four situations: ... (2) the trustee is a non-professional or uncompensated; (3) the [provision relates to a] ... direction that the trustee retain specific, relatively risky investments ...”). Cf. Bartlett v. Barclays Bank Trust Co., [1980] Ch. 515, [1980] 1 All E.R. 139 (despite courts’ statutory authority to excuse a trustee from surcharge liability, reliance on certain information in question was not “reasonable” for the professional trustee involved); and *In re Quinlan’s Estate*, 441 Pa. 266, 273 A.2d 340 (1971) (declining to remove a nonprofessional executor for improper delegation).

Some statutes (such as UTC § 1008) do not preclude an exculpatory clause from excusing profits made by the trustee from a breach of trust, but absent such a provision, the rule of Subsection (1)(b) continues the rule of Restatement Second, Trusts § 222(2) (codified in some statutes) and the view of numerous cases, such as *New England Trust Co. v. Paine*, 317 Mass. 542, 59 N.E.2d 263 (1945) (that even a valid exculpatory clause cannot excuse liability for “any profit which the trustee has derived from a breach of trust”), 158 A.L.R. 262, and *Renz v. Beeman*, 589 F.2d 735 (2d Cir. 1978) (that unless trust provision explicitly authorizes self-dealing, trustee not protected by exculpatory clause).

4. **Sec. 71 (2007)**- *See attached*
5. **Sec. 75 (2007)**- *See attached*
6. **Sec. 76 (2007)**- *See attached*
7. **Sec. 77-79, 90-92 (2007)**- *See attached*
8. **Sec. 97 (2012)**- *See attached*

## II. Uniform Trust Code

### 1. Sec 814(a) (2004)

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as “absolute”, “sole”, or “uncontrolled”, the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

### 2. Sec 1008 (2000)

(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:  
(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

Editors' Notes

#### COMMENT

Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Subsection (a) is consistent with the standards expressed in Sections 105 and 814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.

Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanan v. Ballard*, 678 N.E.2d 133 (Mass. 1997). Subsection (b) responds to the danger that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. To overcome the presumption of abuse in subsection (b), the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. See Restatement (Second) of Trusts Section 222 cmt. d (1959).

The requirements of subsection (b) are satisfied if the settlor was represented by independent counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor.

### 3. Sec 105(b)(2) (amended 2005)

(a) Except as otherwise provided in the terms of the trust, this [Code] governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this [Code] except:

(2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

### 4. Sec 808 (2000)

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) 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.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

Editors' Notes

#### COMMENT

Subsection (a) is an application of Section 603(a), which provides that a revocable trust is subject to the settlor's exclusive control as long as the settlor has capacity. Because of the settlor's degree of control, subsection (a) of this section authorizes a trustee to rely on a direction from the settlor even if it is contrary to the terms of the trust. The direction of the settlor might be regarded as an amendment of the trust. Subsection (a) has limited application upon a settlor's incapacity. An agent, conservator, or guardian has authority to give the trustee instructions contrary to the terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's powers with respect to revocation, amendment, or distribution as provided in Section 602(e).

Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts Section 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts Section 64(2) (Tentative Draft No. 3, approved 2001). "Advisers" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c)

ratifies the recent trend to grant third persons such broader powers.

A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party's approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a serious breach of trust. *See* Restatement (Second) of Trusts Section 185 cmt. g (1959); Section 703(g) (duties of cotrustees).

Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. *See* ERISA Section 404(c) (29 U.S.C. Section 1104(c)). But for the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of others. In that event and as provided in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. *See* Section 701.

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

The provisions of this section may be altered in the terms of the trust. *See* Section 105. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. *See* I.R.C. Section 675(4)

## 5. Sec 1009 (2001)

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 constituting the breach, unless:

- (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.

Credits

As amended in 2001.  
Editors' Notes

## COMMENT

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. *See* Restatement (Second) of Trusts Section 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. *See* Restatement (Second) of Trusts Section 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. *See* Restatement (Second) of Trusts Section 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. *See* Restatement (Second) of Trusts Sections 170(2), 216(3) & cmt. n (1959).

An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. *See* 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.

2001 Amendment. By a 2001 amendment, the limitation of this section to beneficiaries "having capacity" was deleted. This limitation was included by mistake. As indicated in the second paragraph of the comment, the drafting committee did not intend to prohibit the use of the representation provisions of Article 3, several of which address representation of and the giving of a binding consent on behalf of an incapacitated beneficiary.

### III. Miscellaneous References

#### 1. Uniform Health-Care Decisions Act Sec 1(8) (1993)

(8) "Health-care provider" means an individual licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business or practice of a profession.

#### 2. ALLARD V. PACIFIC NATIONAL BANK, 663 P.2d 104,110 (Wash. 1983)- *See attached*

# UNIFORM DIRECTED TRUST ACT\*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

at its

ANNUAL CONFERENCE  
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SIXTH YEAR  
SAN DIEGO, CALIFORNIA  
JULY 14 - JULY 20, 2017

*WITHOUT PREFATORY NOTE OR COMMENTS*

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

July 19, 2017

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## **UNIFORM DIRECTED TRUST ACT**

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

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

(1) “Breach of trust” includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this [act], or law of this state other than this [act] pertaining to trusts.

(2) “Directed trust” means a trust for which the terms of the trust grant a power of direction.

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

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

(5) “Power of direction” means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not then serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in Section 5(b).

(6) “Settlor” means a person, including a testator, that creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke or withdraw that portion.

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

United States.

(8) “Terms of a trust” means:

(A) except as otherwise provided in subparagraph (B), the manifestation of the settlor’s intent regarding a trust’s provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust’s provisions as established, determined, or amended by:

(i) a trustee or trust director in accord with applicable law; [or]

(ii) court order[; or

(iii) nonjudicial settlement agreement under [Uniform Trust Code Section 111]].

(9) “Trust director” means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not then serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.

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

*Legislative Note:* A state that has enacted Uniform Trust Code Section 103(18) (2004), defining “terms of a trust,” or Uniform Trust Decanting Act Section 2(28) (2015), defining “terms of the trust,” should update those definitions to conform to paragraph (8). A state that has enacted Uniform Trust Code Section 103(15) and (20) could replace paragraphs (6) and (10) of this section with cross-references to those provisions of the Uniform Trust Code. A state that has not enacted Uniform Trust Code Section 111 (2000) should replace the bracketed language of paragraph (8)(B)(iii) with a cross reference to the state’s law governing nonjudicial settlement or should omit paragraph (8)(B)(iii) if the state does not have such a law.

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

(a) This [act] applies to a trust, whenever created, that has its principal place of

administration in this state, subject to the following rules:

(1) If the trust was created before [the effective date of this [act]], this [act] applies only to a decision or action on or after that date.

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

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

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

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

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

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

**SECTION 4. LAW AND PRINCIPLES OF EQUITY.** The common law and principles of equity supplement this [act], except to the extent modified by this [act] or law of this state other than this [act].

**SECTION 5. EXCLUSIONS.**

(a) In this section, "power of appointment" means a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property.

(b) This [act] does not apply to a:

(1) power of appointment;

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

(3) power of a settlor over a trust to the extent the settlor has a power to revoke the trust;

(4) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects:

(A) the beneficial interest of the beneficiary; or

(B) the beneficial interest of another beneficiary represented by the beneficiary under [Uniform Trust Code Sections 301 through 305] with respect to the exercise or nonexercise of the power; or

(5) power over a trust if:

(A) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

(B) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the United States Internal Revenue Code of 1986[, as amended][, and regulations issued thereunder].

(c) Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property that is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.

**Legislative Note:** *A state that has not enacted Uniform Trust Code Sections 301 through 305 (2000) should replace the bracketed language in subsection (b)(4)(B) with a cross reference to the state's law governing virtual representation.*

*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 subsection (b)(5).*

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

(a) Subject to Section 7, the terms of a trust may grant a power of direction to a trust director.

(b) A power of direction includes only those powers granted by the terms of the trust.

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

(1) a trust director may exercise any further power appropriate to the exercise or nonexercise of the director’s power of direction; and

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

**SECTION 7. LIMITATIONS ON POWERS OF TRUST DIRECTOR.** 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 or further power under Section 6(c)(1) regarding:

(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

(2) a charitable interest in the trust, including notice regarding the interest to [the Attorney General].

**Legislative Note:** *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.*

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

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

(1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:

(A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or

(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

(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.

(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] .

(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].

**SECTION 9. DUTY AND LIABILITY OF DIRECTED TRUSTEE.**

(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(c)(1) and the trustee is not liable for the action.

(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(c)(1) to the extent that by complying the trustee would engage in willful misconduct.

(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:

(1) the breach involved the trustee's or other director's willful misconduct;

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

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

(d) A directed trustee that has reasonable doubt about its duty under this section may petition the [court] for instructions.

(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 [act].

**Legislative Note:** A state that has enacted the Uniform Trust Code should move Section 808(a) into Section 603, delete Section 808(b)-(d), and add to the end of Section 105(b)(2) the following text: "except as otherwise provided in Uniform Directed Trust Act Sections 9, 11, and 12." The term "court" in subsection (d) should be revised as needed to refer to the appropriate court having jurisdiction over trust matters.

**SECTION 10. DUTY TO PROVIDE INFORMATION TO TRUST DIRECTOR OR TRUSTEE.**

(a) Subject to Section 11, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:

(1) the powers or duties of the trustee; and

(2) the powers or duties of the director.

(b) Subject to Section 11, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

(1) the powers or duties of the director; and

(2) the powers or duties of the trustee or other director.

(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.

(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.

**SECTION 11. NO DUTY TO MONITOR, INFORM, OR ADVISE.**

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

(1) a trustee does not have a duty to:

(A) monitor a trust director; or

(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

(2) by taking an action described in paragraph (1), a trustee does not assume the duty excluded by paragraph (1).

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

(1) a trust director does not have a duty to:

(A) monitor a trustee or another trust director; or

(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

(2) by taking an action described in paragraph (1), a trust director does not assume



the duty excluded by paragraph (1).

**SECTION 12. APPLICATION TO COTRUSTEE.** 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.

*Legislative Note:* A state that has enacted Uniform Trust Code Section 703(c) or (g) (2000) should revise those sections to make them subject to this section. In the alternative, the state could insert this section as subsection (i) in Uniform Trust Code Section 703 and make subsections (c) and (g) subject to that new subsection (i).

**SECTION 13. LIMITATION OF ACTION AGAINST TRUST DIRECTOR.**

(a) An action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee in a like position and under similar circumstances[ as under Uniform Trust Code Section 1005].

(b) A report or accounting has the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have in an action for breach of trust against a trustee in a like position and under similar circumstances[ under Uniform Trust Code Section 1005].

*Legislative Note:* A state that has enacted Uniform Trust Code Section 1005 (2000) should update the bracketed language to refer to that enactment. A state that has enacted 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 enacted a statutory limitation should delete the bracketed language.

**SECTION 14. DEFENSES IN ACTION AGAINST TRUST DIRECTOR.** In an action against a trust director for breach of trust, the director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

**SECTION 15. JURISDICTION OVER TRUST DIRECTOR.**

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

(b) This section does not preclude use of another method to obtain jurisdiction over a trust director.

**SECTION 16. OFFICE OF TRUST DIRECTOR.** Unless the terms of a trust provide otherwise, the rules applicable to a trusteeship apply to a trust directorship regarding the following matters:

- (1) acceptance[ under Uniform Trust Code Section 701];
- (2) giving of bond to secure performance[ under Uniform Trust Code Section 702];
- (3) reasonable compensation[ under Uniform Trust Code Section 708];
- (4) resignation[ under Uniform Trust Code Section 705];
- (5) removal[ under Uniform Trust Code Section 706]; and
- (6) vacancy and appointment of successor[ under Uniform Trust Code Section 704].

**Legislative Note:** A state that has enacted the Uniform Trust Code provisions cited in this section should update the bracketed language to refer to the appropriate provisions of that enactment. A state that has enacted relevant statutory provisions other than the provisions of the Uniform Trust Code cited in this section should replace the bracketed language with cross references to those provisions, except that a state that allows statutory commissions rather than reasonable compensation for a trustee is advised for the reasons given in the comments below to apply a rule of reasonable compensation to a trust director. A state that has not enacted relevant statutory provisions should delete the bracketed language.

**SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

**SECTION 19. REPEALS; CONFORMING AMENDMENTS.**

(a) . . . .

(b) . . . .

(c) . . . .

**SECTION 20. EFFECTIVE DATE.** This [act] takes effect . . . .

**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 [act].</p> <p><b>Legislative Note:</b> 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 to the beginning of Section 105(b)(2) the following 20 text: subject to Uniform Directed Trust Act Sections 9, 11, and 12.” The term “court” in subsection (d) should be revised as needed to refer to the appropriate court having jurisdiction over trust matters.</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 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;</i></p>

*nonliability other than under 5 subsection (b)*. 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.

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 to act from a trust director imposes a duty on the trustee to obtain such permission before acting. 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).

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. *See, e.g.*, 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 of direction.

Subsection (a) requires a trustee to act reasonably as it carries out the acts necessary to comply with and execute 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 cost and must refrain from self-dealing and conflicts of interest in doing so.

The duty under subsection (a) to act reasonably in complying with a

trust director's exercise or nonexercise of a power of direction or further power 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 in the prior paragraph 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. Responsibility for the substance of a direction rests principally with a trust director under Section 8.

*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,

	<p>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.</p> <p><i>Subsection (b)—willful misconduct.</i> 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.”</p> <p>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.</p> <p>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” are not enforceable under subsection (b). Instead, such provisions would provide for the willful misconduct standard of subsection (b).</p>
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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 replaced a directed trustee with a trust director should also be able to replace a directed trustee’s duty and liability with the duty and liability of a trust director. Under these statutes, a beneficiary’s only recourse for misconduct by the trust director is an action

against the director for breach of the director's fiduciary duty to the beneficiary.

In the other group 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, which includes the prominent Delaware act, on the grounds that this model does more to protect a beneficiary and is more consistent with traditional fiduciary policy. The popularity of directed trusts in Delaware establishes that a directed trust regime that preserves a "willful misconduct" safeguard is workable and that a total elimination of duty in a directed trustee is unnecessary 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 change this standard, the drafting committee was deeply influenced by the fact that a growing number of states that had previously adopted Section 808 have since abandoned it or modified it to follow one of the two other models discussed above. The drafting committee was also strongly influenced by the fact that a review of every existing specialized state statute on directed trusts showed that no state that has legislated specifically on the issue of directed trustee fiduciary



duties has chosen to follow Section 808.

*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. 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).

*Subsection (d)—petition for instructions.* Subsection (d) provides that a directed trustee that has reasonable doubt about its duty under this section may petition the court for instructions. This section thus confirms that, in accordance with existing law, a trustee with reasonable doubt about its duties under this section may petition the court for instructions. See, e.g., Restatement (Third) of Trusts § 71 (2007), which provides ( "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.

*Subsection (e)—no ceiling on duties.* 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.

#### **§ 15-16-805. No duty to review actions of trust advisor**

**Universal Citation:** CO Rev Stat § 15-16-805 (2016)

An excluded trustee has no duty to review or monitor the actions of a trust advisor.

**§ 15-16-806. Duty to communicate - no duty to warn**

**Universal Citation:** CO Rev Stat § 15-16-806 (2016)

(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.

(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.

(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.

(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.

**§ 15-16-807. Excluded trustee not liable for action of trust advisor**

**Universal Citation:** CO Rev Stat § 15-16-807 (2016)

(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.

(2) An excluded trustee has no liability for any action of a trust advisor.

Current Colorado Law
Colorado Subcommittee Comment
Colorado Subcommittee Recommendation

**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 [act].</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 a settlor</p>

cannot waive for a trustee in a like position and under similar circumstances. 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).

*Joint and sole 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. A trust director that holds a power of direction jointly with a trustee or another trust director, however, 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..

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 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.

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

	<p>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 medical ethics. The professional would also be subject to the other provisions of this act that do not create a duty or liability, such as the rules regarding the office of a trust director prescribed by Section 16. Moreover, a trustee subject to a direction by a health-care professional under subsection (b) is still subject to the duties to act reasonably and avoid willful misconduct in complying with the trust director’s exercise of its powers under Section 9.</p> <p><i>Subsection (c)—no ceiling on duties.</i> Subsection (c) confirms that the duties prescribed 44 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>
<p>Current Colorado Law</p>	<p><b>§ 15-16-803. Trust advisor and excluded trustee</b>  <b>Universal Citation:</b> <a href="#">CO Rev Stat § 15-16-803 (2016)</a></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 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</p>

discretion to make distributions to beneficiaries.

(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.

**§ 15-16-805. No duty to review actions of trust advisor**

**Universal Citation:** [CO Rev Stat § 15-16-805 \(2016\)](#)

An excluded trustee has no duty to review or monitor the actions of a trust advisor.

**§ 15-16-806. Duty to communicate - no duty to warn**

**Universal Citation:** [CO Rev Stat § 15-16-806 \(2016\)](#)

(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.

(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.

(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.

(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.

**§ 15-16-807. Excluded trustee not liable for action of trust advisor**

**Universal Citation:** [CO Rev Stat § 15-16-807 \(2016\)](#)



	<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	