

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

UDTA Section	Section 2 Sub-section (1)
Section Title	Definitions – Breach of Trust
Statutory Language	“Breach of trust” includes a violation by a trust director or trustee of a duty imposed by the terms of the trust, this [act], or other law or principles of equity of this state pertaining to trusts.
Uniform Law Commission Comment	Breach of trust. The definition of “breach of trust” in paragraph (1) clarifies that the term “includes” a breach by a trust director of a duty imposed by the terms of a trust, this act, or other law. Historically, the term has been used to reference a breach of duty by a trustee, as under Uniform Trust Code § 1001(a) (2000) and Restatement (Third) of Trusts § 93 (Am. Law Inst. 2012). By expanding the meaning of the term to include a breach of duty by a trust director, this paragraph resolves any doubt about whether such conduct is also a “breach of trust.” In defining a breach of trust to include a breach of a duty imposed by this act, it is important to recognize that some of the duties imposed by this act are default rules that may be varied by the terms of the trust. The drafting committee contemplated that a trust director or a trustee would not be in breach of trust for conduct that was authorized by the terms of a trust to the extent that those terms are permissible under this act or other law.
Current Colorado Law	<p>The <i>Third Restatement</i> defines “Breach of Trust” as follows:</p> <p style="padding-left: 40px;">A breach of trust is a failure by the trustee to comply with any duty that trustee owes, as trustee, to the beneficiaries, or to further the charitable purposes, of the trust. <i>Restatement (Third) of Trusts</i> § 93</p> <p>The ALI comments explain that “a <u>breach of trust</u> occurs if the trustee, intentionally or negligently, fails to do what the <u>fiduciary duties</u> of the particular trusteeship require or does what those <u>duties</u> forbid, or if the trustee fails in performing a permissible act to conform to the applicable fiduciary standards.”</p>

	<p><i>Restatement (Third) of Trusts</i> § 93 cmt. b. [underscoring added]</p> <p>The <u>breach of trust</u> exception to American Rule on award of attorney fees applies to actions that involve protection of the trust estate from <u>breach of duty</u> by the trustee. <i>Heller v. First National Bank of Denver</i>, 657 P.2d 992, 999-1000 (Colo. App. 1982).</p> <p>The Supreme Court has recognized the <u>breach of trust</u> exception where a custodian mismanages funds by investing them in penny stocks and incurring substantial losses thereby <u>breaching fiduciary duty</u>. <i>Buder v. Sartore</i>, 774 P.2d 1383, 1390-91 (Colo. 1989).</p> <p><u>Breach of trust</u> occurs when a trustee lists trust funds as the trustee's own assets, and pledges those assets as security for a personal loan. <i>Mancuso v. United Bank of Pueblo</i>, 818 P.2d 732, 740 (Colo. 1991).</p> <p>A <u>breach of trust</u> occurs when a trustee sells trust property, without first determining its value, for an inadequate consideration. <i>Whatley v. Wood</i>, 404 P.2d 537, 541 (Colo. 1965).</p>
Colorado Subcommittee Comment	<p>The statutory language seems to be more a statement of substantive law than a definition.</p> <p>At the risk of deviating from uniformity, should the definition of "Breach of Trust" be the black letter of <i>Restatement (Third) of Trusts</i> § 93?</p> <p>Should the statutory language now in Section 2 (1) be used to create a substantive rule within the Act?</p>
Colorado Subcommittee Recommendation	<p>Section 2 (1) should be re-written to provide:</p> <p>"Breach of Trust" means a failure by a trustee or trust director to comply with any duty the trustee or trust director owes, as trustee or trust director, to the beneficiaries, or to further the charitable purposes, of the trust.</p>

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

UDTA Section	Section 2 Sub-section (2)
Section Title	Definitions – Directed Trustee
Statutory Language	“Directed trustee” means a trustee that is subject to a trust director’s power of direction.
Uniform Law Commission Comment	Directed trustee. The definition of “directed trustee” in paragraph (2) includes only a trustee that is subject to a trust director’s power of direction. A trustee that is subject to direction by a cotrustee is not for that reason a directed trustee, as paragraph (7) excludes a trustee from the definition of a “trust director.” Because a trustee cannot be a trust director, a trustee that is subject to direction by a cotrustee is not on that basis a directed trustee under paragraph (2). Section 12 addresses the relationship between this act and cotrusteeship.
Current Colorado Law	<p>Colorado law does not define “directed trustee.”</p> <p>However, Section 15-16-801 et. seq. is the Colorado “directed trustee” statute. While this statute does not expressly define “directed trustee” it does by implication in defining “excluded trustee” as follows:</p> <p style="padding-left: 40px;">“Excluded trustee” means any trustee that, under the terms of the governing instrument is precluded from exercising certain powers, which powers may be exercised only by a trust advisor designated by the governing instrument. C.R.S. §15-16-801 (2)</p> <p>If a governing instrument appoints a “trust advisor” that is vested with fiduciary powers to direct a trustee’s actual or proposed investment decisions or non-investment decisions, then the trustee is an “excluded trustee” that is required to follow the directions of the trust advisor and “is not liable for any cause of action resulting from the act of complying therewith...” § 15-16-807 C.R.S.</p> <p>Moreover, an “excluded trustee” has no duty to review or monitor the actions of a trust advisor. § 15-16-805 C.R.S.</p>

<p>Colorado Subcommittee Comment</p>	<p>The issue raised in committee is this:</p> <p>Suppose a trust director has authority to direct sale of stock in “X” company. Is the trustee a directed trustee with respect to all other powers? Or, is the trustee a directed trustee only to the extent of the trust director’s authority to sell company “X” stock? Is the issue resolved by other black letter provisions? If not, does this matter? If it does matter, then should the definition be revised to clarify? The committee conceived of two alternatives, to wit:</p> <ul style="list-style-type: none"> • “Directed trustee” means a trustee that is subject to <u>any</u> trust director’s <u>defined</u> power of direction. • “Directed trustee” means a trustee that is subject to a trust director’s power of direction <u>to the extent of the power</u>.
<p>Colorado Subcommittee Recommendation</p>	

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

UDTA Section	Section 2 Sub-section (3)
Section Title	Definitions – Person
Statutory Language	“Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.
Uniform Law Commission Comment	Person. The definition of “person” in paragraph (3) tracks the current Uniform Law Commission definition
Current Colorado Law	<p><i>Colorado Probate Code:</i></p> <p>§ 15-10-201 (38):</p> <p style="padding-left: 40px;">“Person” means an individual or an organization. [“Organization” is defined at § 201(35)].</p> <p><i>Uniform Power of Attorney Act:</i></p> <p>§ 15-14-702 (6):</p> <p style="padding-left: 40px;">“Person” means and individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.</p> <p><i>Uniform Powers of Appointment Act:</i></p> <p>§ 15-2.5-102 (12):</p> <p style="padding-left: 40px;">“Person” means an individual; estate; trust; business or non-profit entity; public corporation; government or governmental subdivision, agency or instrumentality; or legal entity.</p>

	<p><i>Colorado Uniform Trust Decanting Act:</i></p> <p>§ 15-16-902 (16):</p> <p style="padding-left: 40px;">“Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.</p> <p>The definition of “person” under the Act is identical to the <i>UTDA</i> of “person.” This is not surprising because the <i>UTDA</i> was promulgated just before drafting of the Act was commenced.</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

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

UDTA Section	Section 2 Sub-section (4)
Section Title	Definitions – Power of Direction
Statutory Language	“Power of direction” means a power over a trust granted by the terms of the trust to a trust director. The term includes a power over the administration of the trust or the investment, management, or distribution of the trust property.
Uniform Law Commission Comment	Power of direction. The definition of “power of direction” in paragraph (4) is expansive. It includes any “power over a trust” held by a trust director. A power of direction may be structured as a power to direct the trustee in the exercise of the trustee’s powers, for example, a power to direct the trustee in the investment or management of the trust property. A power over a trust may also be structured as a power to act independently, for example, by amending the terms of a trust or releasing a trustee from liability. The definition clarifies that a power of direction may include a power over “administration” as well as a power over “investment, management, or distribution of the trust property.” These examples are meant to illustrate the potential scope of a power of direction; they do not limit it. In using the term “administration,” the drafting committee intended a meaning at least as broad as in the context of determining a trust’s “principal place of administration,” such as under Section 3(b). The drafting committee also intended the terms “investment, management, or distribution” to have a meaning at least as broad as in Uniform Trust Code § 815(a)(2)(b) (2000), which specifies a trustee’s powers. The comment to Section 6 provides further examples of the kinds of specific powers that the drafting committee contemplated would fall within the definition of a power of direction.
Current Colorado Law	“Power of Direction” is not expressly defined. However, the Colorado <i>Directed Trustees</i> statute provides that a “trust advisor” is a person that is acting in a fiduciary capacity and is vested under a governing instrument with fiduciary <u>power to direct</u> a trustee’s actual or proposed investment decisions or non-investment decisions. C.R.S. 15-16-801-(8)(a)(II).

	<p>The ULC comment notes that a “power of direction” under the act may include a power to act independently in releasing a trustee from liability. This would be an expansion of the holding in <i>In re: Estate of Foiles</i>, 338 P.3d 1098 (Colo. App. Div. 3 2014):</p> <p style="padding-left: 40px;">... in the absence of a trust provision allowing ratification by a <u>cotrustee</u> of otherwise invalid actions, <u>only the consent of all beneficiaries</u>, who have proper capacity and who are fully informed of the facts can ratify an action taken in violation a trust agreement, and that ratification by a <u>cotrustee</u> is insufficient. Id. 1104.</p> <p>In other words, if this Act is adopted by Colorado, ratification of a trustee’s action that would otherwise be a breach of trust would be permitted by:</p> <ul style="list-style-type: none"> (i) consent of all beneficiaries that have capacity and are fully informed; (ii) a cotrustee if allowed by the terms of trust; and (iii) a trust director that is specifically authorized power to do this.
Colorado Subcommittee Comment	<p>The definition is approved but the current consensus is that the holding in <i>Foiles</i> should be incorporated into other black letter, perhaps Section 7 (Limitations On Powers of Trust Director.)</p> <p>I.e. Codifying a rule that a trust director may not waive, consent or ratify a breach of trust unless the power to do so is expressly granted in the trust instrument (Note: In this context, “trust instrument”, not the “terms of the trust” .)</p>
Colorado Subcommittee Recommendation	

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
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UDTA Section	Section 2 Sub-section (5)
Section Title	Definition – State
Statutory Language	“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.
Uniform Law Commission Comment	State. The definition of state in paragraph (5) tracks the current Uniform Law Commission definition.
Current Colorado Law	<p>Colorado statutes define state:</p> <p><i>Colorado Probate:</i></p> <p>§ 15-10-201 (49):</p> <p style="padding-left: 40px;">“State” means any state of the United States, the District of Columbia, the commonwealth of Puerto Rico, any territory or insular possession subject to the jurisdiction of the United States.</p> <p><i>Colorado Uniform Trust Decanting Act:</i></p> <p>§ 15-16-902 (27):</p> <p style="padding-left: 40px;">“State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
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UDTA Section	Section 2 Sub-section (6)
Section Title	Definition – Terms of Trust
Statutory Language	<p>“Terms of a trust” means:</p> <p>(A) the manifestation of a settlor’s intent regarding a trust’s provisions as:</p> <p style="padding-left: 40px;">(i) expressed in the trust instrument; or</p> <p style="padding-left: 40px;">(ii) established by other evidence that would be admissible in a judicial proceeding; or</p> <p>(B) the trust’s provisions as determined or amended by:</p> <p style="padding-left: 40px;">(i) a trustee or trust director in accord with applicable law; [or]</p> <p style="padding-left: 40px;">(ii) court order[; or</p> <p style="padding-left: 40px;">(iii) nonjudicial settlement agreement under [Uniform Trust Code Section 111].</p>
Uniform Law Commission Comment	<p>Terms of a trust. The definition of “terms of a trust” in paragraph (6) updates the comparable definition in Uniform Trust Code § 103(18) (2004) to take notice of court orders and nonjudicial settlement agreements, both of which are of growing practical significance, and which may sometimes be employed to vary the terms of a trust from a settlor’s original intent. In so doing, paragraph (6) is consistent with the Restatement, which likewise recognizes the possibility that the terms of a trust may later be varied from the settlor’s initial expression. See Restatement (Third) of Trusts § 76 cmt. b(1) (Am. Law Inst. 2007) (“References ... to the terms of the trust ... also refer to trust terms as reformed or modified by court decree, and as modified by the settlor or others or by consent of all beneficiaries.”) (internal cross-references omitted). The definition of “terms of a trust” is also consistent with Uniform Trust Decanting Act § 2(28) (2015), which similarly defines the term to include manifestations of a settlor’s intent “as may be established by court order or nonjudicial settlement agreement.”</p>

<p>Current Colorado Law</p>	<p><i>Colorado Uniform Trust Decanting Act:</i></p> <p>§ 15-16-902 (28):</p> <p>“Terms of trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding, or as may be established by court order or nonjudicial settlement agreement.</p> <p><i>Colorado Uniform Powers of Appointment Act:</i></p> <p>§ 15-2.5-102 (19):</p> <p>“Terms of the instrument” means the manifestation of the intent of the maker of the instrument regarding the instrument’s provisions as expressed in the instrument or as may be established by other evidence that would be admissible in a legal proceeding.</p>
<p>Colorado Subcommittee Comment</p>	<p>The current definition of “Terms of trust” in Colorado includes trust provisions determined by court order or nonjudicial settlement agreement. Accordingly, the bracketed language in Sub-section (b)(ii) of the definition regarding court order should be included in the Colorado Act.</p> <p>The definition of “Terms of Trust” also includes provisions as determined by nonjudicial settlement agreements. The nonjudicial settlement rule is codified in the <i>Uniform Trust Code</i>. Colorado has yet to enact the <i>UTC</i>.</p> <p>However, Colorado has enacted the <i>Uniform Trust Decanting Act</i> and its definition of “Terms of trust” includes as terms of trust provisions under nonjudicial settlement agreements.</p> <p>The <i>Colorado Probate Code</i> recognizes “private agreements among successors in the context of wills and intestate succession. C.R.S. 15-12-912.</p>

	<p>Presumably, the provisions of a testamentary trust may be determined by private agreement.</p> <p>Further, provisions of a trust may have indeed been determined by nonjudicial settlement in other states and then imported to Colorado.</p> <p>This being the case, Sub-section (b)(iii) would have application in Colorado and should be included.</p>
Colorado Subcommittee Recommendation	

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

UDTA Section	Section 2 Sub-section (7)
Section Title	Definition – Trust Director
Statutory Language	“Trust director” means a person other than a trustee that is granted a power of direction by the terms of a trust whether or not the terms of the trust refer to the person as a trust director, and, subject to Section 5, whether or not the person is a beneficiary or a settlor of the trust.
Uniform Law Commission Comment	Trust director. The definition of a “trust director” in paragraph (7) includes any person other than a trustee who is granted a power of direction by the terms of a trust. A person other than a trustee that is granted a power over a trust by the terms of the trust is a trust director even if the terms of the trust or the parties call the person an “adviser” or “protector” or otherwise purport to disclaim trust director status. A person may also be a trust director even if the person is a beneficiary or settlor of the trust, though certain powers of a beneficiary and a settlor are excluded by Section 5. The definition of “trust director” does not include a trustee. Relations between multiple trustees are governed by the law of cotrusteeship, subject to Section 12, which enables a settlor by the terms of a trust to relieve a cotrustee from liability in a manner similar to a directed trustee under certain circumstances.
Current Colorado Law	<p>Colorado law does not define “Trust Director.”</p> <p>Colorado law does define “Trust advisor” as follows:</p> <p>§ 15-16-801 (a) “Trust advisor” means a person who is:</p> <p style="padding-left: 40px;">(I) Acting in a fiduciary capacity;</p> <p style="padding-left: 40px;">and</p> <p style="padding-left: 40px;">(II) Vested under a governing instrument with fiduciary powers to direct a trustee’s actual or proposed investment decisions or non-investment decisions.</p>

	<p>(b) A person who holds a non-fiduciary power over a trust, including a power of appointment as defined in § 15-2-102, is not subject to the provisions of this part 8, regardless of whether he or she is described as a “trust advisor” within the governing instrument.</p> <p>Accordingly, it is reasonable to include conclude that a “trust director” under the Uniform Act is “trust advisor” under the current Colorado statute.</p> <p>§ 15-16-923 (1)(b) <i>Colorado Uniform Trust Decanting Act</i> defines “protector” as follows:</p> <p>“Protector” means a person listed under § 15-11-901 (3)(d) with authority to enforce the trust on behalf of the animal.</p> <p>§ 15-11-901 (3)(d) provides:</p> <p>The intended use of the principal or the income can be enforced by an individual designated for that purpose in the trust instrument, by the person having custody of an animal for which care is provided by the trust instrument, by a remainder beneficiary, or, if none, by an individual appointed by a court upon application to it by an individual.</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

**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 Subcommittee recommends that this section be rewritten so that, similar to the counterpart provision in the Uniform Trust Decanting Act, in addition to applying to a trust that has its principal place in administration in this state, the Act will also apply to a trust that, pursuant its trust instrument, is governed by the law of this state.</p> <p>Thus, Section 3 would provide as follows:</p>

Section 3

Application: Principal Place of Administration

(a) Subject to subsection b, ¶this [act] applies to a trust, whenever created, that has its principal place of administration in this state or provides by its trust instrument that it is governed by the law of this state for purposes of administration, or whose governing law for purposes of administration has been changed to the law of this state. subject to the following rules:

(b) Application of this act to a trust is subject to the following rules:

(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; and

(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)~~ (c) 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.

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
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UDTA Section	Section 4
Section Title	Law and Principles of Equity
Statutory Language	The law and principles of equity of this state supplement this [act], except to the extent modified by this [act] or law of this state other than this [act].
Uniform Law Commission Comment	This section confirms that the law and principles of equity of an enacting state remain applicable to a directed trust except to the extent modified by this act. For example, other than the safe harbor under Section 3(b) for a term of a trust that designates the trust’s principal place of administration, the law of an enacting state by which principal place of administration is determined would continue to apply to a directed trust. Provisions such as this one are familiar from other uniform acts. See, e.g., Uniform Powers of Appointment Act § 104 (2013); Uniform Trust Code § 106 (2000). This section departs from other uniform acts, however, by referencing the “law,” rather than the “common law.” Given that so much trust law has been codified by statutes such as the Uniform Trust Code (2000), Uniform Trust Decanting Act (2015), Uniform Principal and Income Act (1997), and Uniform Prudent Investor Act (1994), the drafting committee intended the word “law” in this section to reference both common law and statutory law.
Current Colorado Law	<p><i>Colorado Probate Code:</i></p> <p>§ 15-10-103: Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions.</p> <p><i>Uniform Powers of Appointment Act:</i></p> <p>§ 15-2.5-104: Unless displaced by the particular provisions of this article, the principles of law and equity supplement its provisions.</p>

	<p><i>Uniform Disclaimer of Property Interests Act</i></p> <p>§ 15-11-1204</p> <p>Unless displaced by a provision of this part 12, the principles of law and equity supplement this part 12.</p> <p><i>Uniform Power of Attorney Act</i></p> <p>§ 15-14-721</p> <p>Unless displaced by a provision of this part 7, the principles of law and equity supplement this part 7.</p>
<p>Colorado Subcommittee Comment</p>	<p>The significance of this section is explained in the <i>Uniform Trust Code</i>. Section 106 of the <i>UTC</i> provides:</p> <p>The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.</p> <p>The Uniform Comment explains:</p> <p>The Uniform Trust Code codifies those portions of the law of expressed trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources such as the Restatement of Trusts, Restatement (Third) of property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in the</p>

	exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.
Colorado Subcommittee Recommendation	

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

UDTA Section	Section 7
Section Title	Limitations on Powers of Trust Director
Statutory Language	<p>A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction regarding:</p> <p>(1) a payback provision in the terms of the trust necessary for compliance with the reimbursement requirements of Medicaid law in Section 1917 of the Social Security Act, 42 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	

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(c)(1):</p> <p>(1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:</p> <p>(A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or</p> <p>(B) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and</p> <p>(2) 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 such a 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 what kind of fiduciary or which fiduciary duties apply. Subsection (a) provides greater clarity by specifically absorbing the fiduciary duty and liability of a trustee.

Absorption of existing trust fiduciary law. Subsection (a) operates by absorbing existing state law rather than 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.

Absorption and 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. Trust 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. Thus, 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. Restatement (Third) of Trusts § 82 cmt. d

(2007); *see also Allard v. Pacific Nat'l Bank*, 663 P.2d 104, 110 (Wash. 1983) (“The trustee must inform beneficiaries, however, of all material facts in connection with a nonroutine transaction which significantly affects the trust estate and the interests of the beneficiaries prior to the transaction taking place.”).

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. Thus, a trust director that holds a power of direction individually does not have the duties of a cotrustee regarding other trust directors or trustees. A trust director that individually holds a power to amend the trust, for example, does not have the duty 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 duty 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 duty and liability regarding the investment actions of itself and the other trust directors as a cotrustee.

Although a trust director that holds a power of direction jointly with a trustee or other trust director generally has the duty 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 holds a power to direct investments with another trust director jointly, for example, and the other director also holds a power to amend the trust individually, the first director has the duty 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 has no duty or is not a fiduciary or can never be liable to a beneficiary, then the trust director would have the same duty and 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

	<p>provide health care, the director is relieved from duty or 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 determine the capacity or sobriety of a beneficiary or the capacity of the 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 15. Moreover, a trustee subject to a direction by a healthcare professional under subsection (b) is still subject to the duties to act reasonably and avoid willful misconduct in complying with a 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>§ 15-16-803. Trust advisor and excluded trustee Universal Citation: CO Rev Stat § 15-16-803 (2016)</p> <p>(1) A trust advisor with power over investment decisions is subject to the "Uniform Prudent Investor Act", article 1.1 of this title. A trust advisor who has special skills or expertise or who is named a trust advisor in reliance upon his or her representation that he or she has special skills or expertise has a duty to use those special skills or expertise.</p> <p>(2) The powers and duties of a trust advisor, and the extent of such powers and duties, are established by the governing instrument, and the exercise or nonexercise of such powers and duties is binding on all other persons.</p> <p>(3) The powers and duties of a trust advisor may include, but are 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>

(b) The direction of a trustee's actions regarding all investment decisions or one or more specific investment decisions; or

(c) The direction of a trustee's actions relating to one or more specific non-investment decisions, including the exercise of discretion to make distributions to beneficiaries.

(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

	<p>any other trust advisor or trustee.</p> <p>§ 15-16-807. Excluded trustee not liable for action of trust advisor</p> <p>Universal Citation: CO Rev Stat § 15-16-807 (2016)</p> <p>(1) If an excluded trustee is required to follow the direction of a trust advisor and the excluded trustee acts in accordance with such direction, the excluded trustee is not liable for any cause of action resulting from the act of complying therewith, except in cases of willful misconduct on the part of the excluded trustee so directed.</p> <p>(2) An excluded trustee has no liability for any action of a trust advisor.</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

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

UDTA SECTION	Section 9
Section Title	Duty and Liability of Directed Trustee
Statutory Language	<p>SECTION 9. DUTY AND LIABILITY OF DIRECTED TRUSTEE.</p> <p>(a) Subject to subsection (b), a directed trustee shall take reasonable action to comply with the exercise or nonexercise of a power of direction or further power of a trust director under Section 6(c)(1) and is not liable for the action.</p> <p>(b) A directed trustee must not comply with the exercise or nonexercise of a power of direction or further power of a trust director under Section 6(c)(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>Legislative Note: 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 end of Section 105(b)(2) the following 20 text: “except as otherwise provided in Uniform Directed Trust Act Sections 9, 11, and 12.” The 21 term “court” in subsection (d) should be revised as needed to refer to the appropriate court 22 having jurisdiction over trust matters. 23</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 (governing information sharing among directed trustees and trust directors) and Section 11 (eliminating 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 power of direction or a further power of a trust director under Section 6(c)(1) and provides that the trustee is not liable for so acting.

A power of direction may impose a variety of obligations on a directed trustee. For example, a power of direction may require a trustee to follow the express directions of a trust director, such as if the power allows the director to direct the trustee in the investment management of trust property. A power of direction may also require a trustee to request permission from a director before acting, to refrain from acting if the director so directs, or to act independently in the absence of a contrary direction. For example, a power of direction might provide that a trustee may not sell certain property without the approval of the trust director. A power of direction may also allow a director to modify the trust or to impose particular administrative procedures. The duty “to comply with a power of direction” imposed by subsection (a) requires a trustee to comply with all such powers of direction, subject to subsection (b).

Compliance may require different actions depending on the exact nature of a particular power of director. A power that a director exercises by express direction, for example, will require a 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 not just a duty to follow express directions but 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.

The duty to comply with a power of direction is limited by the scope of the power. 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(c)(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 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.

Subject to subsection (b), subsection (a) requires that a directed trustee take "reasonable action" to comply with a power of direction or a trust director's further powers under Section 6(c)(1). Subsection (a) thus requires a trustee to act reasonably as it carries out the acts necessary to comply with and execute a director's exercise of its 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 the terms of a power of direction does not, however, impose a duty to ensure that the substance of a direction is reasonable. To the contrary, subject to subsection (b), a trustee that takes reasonable action to comply with a power of direction or a further power of a trust director under Section 6(c)(1) 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. Liability for the substance of a direction instead rests 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, the latter of whom 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. Thus, the drafting committee contemplated that 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 such a 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. The trustee must comply with the decision of the committee (even if the trustee disagrees) and must act reasonably in carrying out that decision, but the trustee is not liable for the substance of the decision, except to the extent of the trustee's own breach in the trustee's vote as a member of the committee.

Subsection (b)—willful misconduct. Subsection (b) provides an exception to the duty of compliance prescribed by subsection (a). Under subsection (b), a trustee must not comply with a power of direction or a further power of a trust director under Section 6(c)(1) to the extent that by complying the trustee would engage in "willful misconduct." The drafting committee settled upon the "willful misconduct" standard after a review of the existing directed trust statutes.

Roughly speaking, the existing directed trust 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. A related policy rationale is that placing the liability on a director does not diminish the total liability available 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, Colorado, North Carolina, 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 and liability 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 terms of the power of direction 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.

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

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

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

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 enable such a release to be given

at any time, whether before or after the trustee or other director acts. Under Section 6(b), which provides that a trust director has only those powers granted by the terms of a trust, 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 this act generally permits a settlor to design a power of direction as it wishes, 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. The requirement that a trustee's doubt be "reasonable" follows from 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 merely defaults and minimums, not ceilings. The terms of a trust may impose further duties in addition to those prescribed by this section.

<p>Current Colorado Law</p>	<p>§ 15-16-805. No duty to review actions of trust advisor Universal Citation: CO Rev Stat § 15-16-805 (2016)</p> <p>An excluded trustee has no duty to review or monitor the actions of a trust advisor.</p> <p>§ 15-16-806. Duty to communicate - no duty to warn Universal Citation: CO Rev Stat § 15-16-806 (2016)</p> <p>(1) A trustee has a duty to keep a trust advisor reasonably informed about the administration of the trust with respect to any specific duty or function being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trust advisor to perform the duty or function. A trust advisor requesting or receiving any such information from a trustee has no duty to monitor the conduct of the trustee or to provide advice to or consult with the trustee.</p> <p>(2) A trust advisor has a duty to keep the trustee and any other trust advisors reasonably informed about the administration of the trust with respect to all duties or functions being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trustee and any other trust advisors to perform their duties or functions. A trustee requesting or receiving any such information from a trust advisor has no duty to monitor the conduct of the trust advisor or to provide advice to or consult with the trust advisor.</p> <p>(3) A trust advisor has a duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration, to the extent that such information relates to a duty or function being performed by the trust advisor. This duty is governed by section 15-16-303.</p> <p>(4) A trust advisor has no duty to communicate with or warn any beneficiary or third party concerning any action or actions taken by any other trust advisor or trustee.</p> <p>§ 15-16-807. Excluded trustee not liable for action of trust advisor Universal Citation: CO Rev Stat § 15-16-807 (2016)</p> <p>(1) If an excluded trustee is required to follow the direction of a trust advisor and the excluded trustee acts in accordance with such direction, the excluded trustee is not liable for any cause of action resulting from the act of complying therewith, except in cases of</p>
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	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.
Colorado Subcommittee Comment	
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