

## PROPOSED ADDITIONS TO CONFORMING CHANGES FOR UDTA

*For Committee Consideration on 8/16/18*

### **1. Section 2 of UDTA – add definition as follows:**

(11) *Willful and Wanton Misconduct*. The definition of “willful and wanton misconduct” means the intentional wrongdoing and not the mere negligence, gross negligence or recklessness.

(12) *Wrongdoing*. The definition of “wrongdoing” means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.<sup>1</sup>

### **2. C.R.S. 15-10-504(2) – revise to include the underlined language:**

(2) Surcharge.

(a) If a court, after a hearing, determines that a breach of fiduciary duty has occurred or an exercise of power by a fiduciary has been improper, after applying the potentially differing standards of care applicable to each fiduciary in a proceeding, the court may surcharge the fiduciary for any damage or loss to the estate, beneficiaries, or interested persons. Such damages may include compensatory damages, interest, and attorney fees and costs. When allocating any such damages among fiduciaries, the court shall consider the potentially differing standards of care applicable to the fiduciaries in the proceeding.

(b) In awarding attorney fees and costs pursuant to this section, a court may consider the provisions of part 6 of this article and shall consider the potentially differing standards of care applicable to the fiduciaries in the proceeding.

### **3. C.R.S. 15-10-504(4) - revise to include the underlined language:**

(4) Sanctions. If a court determines that a breach of fiduciary duty has occurred or an exercise of power by a fiduciary has been improper, the court, after a hearing, may order such other sanctions as the court deems appropriate, but the court shall take into account the potentially differing standards of care applicable to each fiduciary in the proceeding.

### **4. C.R.S. 15-10-504 – add the following as a new subsection (5):**

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<sup>1</sup> The Delaware Statute provides: When a trustee acts in accordance with the directions of a trust direction adviser, the trustee will only be liable for its “willful misconduct”. If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction then except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act. 12 Del. C. § 3313(b). The term willful misconduct means intentional wrongdoing and not mere negligence, gross negligence or recklessness. 12 Del. C. § 3301(g) and 12 Del. C. § 3301(h)(4). The term wrongdoing means malicious conduct or conduct designed to defraud or seek an unconscionable advantage. 12 Del. C. § 3301(g).

(5) If remedies are sought against a directed trustee for complying with the direction of a trust director under the Colorado Uniform Directed Trust Act, or comparable arrangement created under the terms of a trust, the court shall take into account the different standards of care applicable to each fiduciary in the proceeding when apportioning damages, fees, costs or fault amongst the fiduciaries.

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

UDTA Section	Prefatory Note
Section Title	NA
Statutory Language	NA
Current Colorado Law	There is no prefatory note to the current Colorado directed trust act.
Colorado Subcommittee Comment	The prefatory note provides a useful overview of the act.
Colorado Subcommittee Recommendation	If the comments to the Uniform Directed Trust Act are to be published in Colorado revised statutes, the Prefatory Note should be included.

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

UDTA Section	Section 1
Section Title	Short Title
Statutory Language	This [act] may be cited as the Uniform Directed Trust Act.
Uniform Law Commission Comment	This act governs an arrangement commonly known as a “directed trust.” In a directed trust, the terms of the trust grant a person other than a trustee a power over some aspect of the trust’s administration. Under this act, such a power is called a “power of direction,” the person that holds the power is called a “trust director,” a trustee that is subject to the power is called a “directed trustee,” and the trust is a “directed trust” (see Sections 2(5), (9), (3), and (2) respectively). This act applies to any arrangement that exhibits the functional features of a directed trust within the meaning of this act, even if the terms of the trust use other terminology, such as “trust protector,” “trust advisor,” or “administrative trustee.”
Current Colorado Law	The current Colorado Directed Trustees Act is at C.R.S. § 15-16-801 et seq., but there is no section assigning a formal title to the

	act.
Colorado Subcommittee Comment	The Colorado enactment should call the act the “Colorado Uniform Directed Trust Act.”
Colorado Subcommittee Recommendation	Colorado should adopt this section with the addition of the word “Colorado” before “Uniform Directed Trust Act.”

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

UDTA Section	Section 2  Paragraph (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 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.
Uniform Law Commission Comment	<p>Breach of trust. The definition of “breach of trust” in paragraph (1) makes clear that the term includes a breach by a trust director or a trustee of a duty imposed on that director or trustee by the terms of the trust, this act, or other law pertaining to trusts. 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 (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.”</p> <p>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 applicable law.</p>

<p>Current Colorado Law</p>	<p>The <i>Third Restatement</i> defines “Breach of Trust” as follows:</p> <p style="text-align: center;">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.</p> <p style="text-align: center;"><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 P2d 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>
<p>Colorado Subcommittee Comment</p>	

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

UDTA Section	Section 2  Paragraph (2)
Section Title	Definitions – Directed Trust
Statutory Language	“Directed trust” means a trust for which the terms of the trust grant a power of direction.
Uniform Law Commission Comment	Directed trust. Under paragraph (2), a “directed trust” is a trust for which the terms of the trust grant a power of direction. A “power of direction” is defined by paragraph (5).
Current Colorado Law	
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	Adopt the Uniform language.

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

UDTA Section	Section 2  Paragraph (3)
Section Title	Definitions – Directed Trustee
Statutory Language	“Directed trustee” means a trustee that is subject to a trust director’s power of direction.

<p>Uniform Law Commission Comment</p>	<p>Directed trustee. The definition of “directed trustee” in paragraph (3) refers only to a trustee that is subject to direction by a trust director. A trustee that is subject to direction by a cotrustee is not for that reason a directed trustee, as paragraphs (5) and (9) exclude a person from being a trust director while that person is serving as trustee. The term “directed trustee” thus includes many but not all trustees that in practice are sometimes called “administrative trustees.” Relations between multiple trustees are governed by the law of cotrusteeship as modified by Section 12.</p>
<p>Current Colorado Law</p>	<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</p>

	<p>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"> <li>• “Directed trustee” means a trustee that is subject to <u>any</u> trust director’s <u>defined</u> power of direction.</li> <li>• “Directed trustee” means a trustee that is subject to a trust director’s power of direction <u>to the extent of the power.</u></li> </ul>
Colorado Subcommittee Recommendation	Adopt the Uniform language.

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

UDTA Section	Section 2  Paragraph (4)
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 (4) 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,</p>



	<p>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>“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>“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	Adopt the Uniform language.

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

UDTA Section	Section 2  Paragraph (5)
Section Title	Definitions – Power of Direction
Statutory Language	<p>“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 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).</p>
Uniform Law Commission Comment	<p>Power of direction. The definition of “power of direction” in paragraph (5) is expansive. It includes any “power over a trust” to the extent the power is exercisable at a time the power holder is not serving as a trustee. 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 of direction 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.</p> <p>The definition includes a power only to the extent the power is exercisable at a time the power holder is not serving as a trustee. The purpose of this limitation is to exclude a person serving as trustee from the definition of a trust director, even though as trustee the person will inevitably have a “power over a trust.” A trust director, in other words, is someone other than a trustee. The contribution of this act is to address the complications created by giving a person other than a trustee—that is, a trust director—a power over a trust. A power over a trust held by a trustee is governed by existing trust fiduciary law.</p> <p>The restriction in the definition to powers held by a person that is “not serving as a trustee” is also designed to be consistent with the definition of “trustee” in paragraph (10). Under paragraph (10), the term “trustee” includes an original, additional, and successor trustee. The definition of power of direction thus clarifies that a person that qualifies as a trustee under paragraph (10) by virtue of having served as an original trustee in the past or</p>

	<p>having been named as a successor trustee in the future may nevertheless be a “trust director” at a time when the person is not serving as a trustee. An original trustee that has ceased serving as a trustee but continues to hold a power over investments, for example, is a trust director under paragraph (5) even though the person also qualifies as a trustee under paragraph (10).</p> <p>The definition confirms that a power of direction may include a power over “matters of trust administration” as well as a power over “investment, management, or distribution of trust property.” These examples are meant to illustrate the potential scope of a power of direction rather than to limit it. In using the term “administration,” the drafting committee intended a meaning at least as broad as that found 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 that found in Uniform Trust Code § 815(a)(2)(b) (2000), which specifies a trustee’s default powers. The comment to Section 6 provides examples of the kinds of specific powers that the drafting committee contemplated would fall within the definition of a power of direction.</p>
Current Colorado Law	<p>“Power of Direction” is not expressly defined.</p> <p>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> <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</p>

	<p>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"> <li>(i) consent of all beneficiaries that have capacity and are fully informed;</li> <li>(ii) a cotrustee if allowed by the terms of trust; and</li> <li>(iii) a trust director that is specifically authorized power to do this.</li> </ul>
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	Adopt the Uniform language.

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

UDTA Section	Section 2  Paragraph (6)
Section Title	Definitions – Settlor
Statutory Language	“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.
Uniform Law Commission Comment	Settlor. The definition of “settlor” in paragraph (6) follows Uniform Trust Code § 103(15) (2004).
Current Colorado Law	The most recent codification of a definition of “settlor” is in the Colorado Trust Decanting Act at § 15-16-902 (25). This definition is virtually identical.
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	Adopt the Uniform language.

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

UDTA Section	Section 2  Paragraph (7)
Section Title	Definitions – 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 (7) tracks the current Uniform Law Commission definition.
Current Colorado Law	Colorado statutes define state:  <i>Colorado Probate:</i>  § 15-10-201 (49):  “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.  <i>Colorado Uniform Trust Decanting Act:</i>  § 15-16-902 (27):  “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.
Colorado Subcommittee Comment	
Colorado Subcommittee	Adopt the Uniform language.

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

UDTA Section	Section 2  Paragraph (8)
Section Title	Definitions – Terms of Trust
Statutory Language	<p>“Terms of a trust” means:</p> <p>(A) except as otherwise provided in subparagraph (B), the manifestation of the 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 established, determined, or amended by:</p> <p style="padding-left: 40px;">(i) a trustee or trust director in accordance with applicable law; [or]</p> <p style="padding-left: 40px;">(ii) court order[; or]</p> <p style="padding-left: 40px;">(iii) a 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 (8) 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 are sometimes used to vary the terms of a trust from a settlor’s original intent. The definition also takes notice of a power in a trustee or a trust director to modify the terms of a trust.</p> <p>The expanded definition of “terms of a trust” in this paragraph is consistent with the Restatement, which recognizes the possibility</p>

	<p>that the terms of a trust may later be varied from the settlor’s initial expression. <i>See</i> Restatement (Third) of Trusts § 76 cmt. b(1) (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).</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>§ 15-5-103 (21)</p> <p>“Terms of a trust” means the manifestation of the settlor’s intent regarding a trust’s provisions, as expressed in the trust instrument, or as may be established by other evidence in a judicial proceeding, or in a nonjudicial settlement</p>



	<p>agreement pursuant to Section 15-11-111 or by alternative dispute resolution pursuant to Section 15-5-113.</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> <p>The <i>Colorado Uniform Trust Code</i> has been adopted, and its counter-part definition of “terms of trust” includes alternative dispute resolution as an additional means of establishing terms of trust. Accordingly, a subparagraph (B)(iv) should be added regarding ADR as a means of establishing terms of trust.</p> <p>Further, the definition of “Terms of a trust” was modified in the <i>CUTC</i>. Rather than uniform “established by other evidence that would be admissible in a judicial proceeding”, the <i>CUTC</i></p>

	definition includes “as may be established by other evidence <u>in</u> a judicial proceeding.” The definition should follow <i>CUTC</i> .
Colorado Subcommittee Recommendation	<p>Section 2 (6) should be rewritten to provide:</p> <p>“Terms of a trust” means:</p> <p>(A) except as otherwise provided in subparagraph (B), the manifestation of the settlor’s intent regarding a trust’s provisions as:</p> <p>(i) expressed in the trust instrument; or</p> <p>(ii) as may be established by other evidence in a judicial proceeding; or</p> <p>(B) the trust’s provisions as established, determined, or amended by:</p> <p>(i) a trustee or trust director in accordance with applicable law;</p> <p>(ii) court order;</p> <p>(iii) a nonjudicial settlement agreement; or</p> <p>(iv) by alternative dispute resolution.</p>

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

UDTA Section	Section 2 Paragraph (9)
Section Title	Definitions – Trust Director
Statutory Language	“Trust director” means a person that is granted a power of direction by the terms of a trust to the extent the power is

	<p>exercisable while the person is not 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.</p>
<p>Uniform Law Commission Comment</p>	<p>Trust director. The definition of a “trust director” in paragraph (9) refers to a person other than a serving trustee that is granted a power of direction by the terms of a trust. Such a person is a trust director even if the terms of the trust or the parties call the person a “trust adviser” or “trust protector” or otherwise purport to disclaim trust director status. A person may 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 from the application of this act by Section 5.</p> <p>A serving trustee cannot be a “trust director” for the same reasons that under paragraph (5) a power over a trust cannot be a “power of direction” while the person that holds the power is serving as a trustee. Relations between multiple trustees are governed by the law of cotrusteeship as modified by Section 12.</p>
<p>Current Colorado Law</p>	<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> <ul style="list-style-type: none"> <li>(I) Acting in a fiduciary capacity;</li> <li>and</li> <li>(II) Vested under a governing instrument with fiduciary powers to direct a trustee’s actual or proposed investment decisions or non-investment decisions.</li> </ul> <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</p>

	<p>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 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	Adopt the Uniform language.

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

UDTA Section	Section 2
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	Paragraph (10)
Section Title	Definitions – Trustee
Statutory Language	“Trustee” includes an original, additional, and successor trustee, and a cotrustee.
Uniform Law Commission Comment	Trustee. Following Uniform Trust Code § 103(20) (2004), paragraph (10) provides that the term “trustee” includes an original, additional, and successor trustee, and a cotrustee.
Current Colorado Law	The definition of trustee in the Colorado Uniform Trust Code at § 15-5-103(23) is identical.
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	Adopt the Uniform language.

**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 [the effective date of this [act]], this [act] applies only to a decision or action occurring on or after [the effective date of this [act]].</p> <p>(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 occurring on or after the date of the change.</p> <p>(b) Without precluding other means to establish a sufficient connection with the designated jurisdiction in a directed trust, terms of the trust which designate the principal place of</p>

	<p>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>
<p>Uniform Law Commission Comment</p>	<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 (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.” <i>See id.</i> § 267 cmt. e.</p> <p>Second, this subsection applies this act to all trusts administered in an enacting state regardless of whether the trust was in existence on the effective date of this act. However, under subsections (a)(1) and (2), this act applies only with respect to a decision or action occurring on or 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 a decision or action occurring on or after that change. Because some of the standards of conduct prescribed by this act depart from Uniform Trust Code § 808 (2000) and Restatement (Third) of Trusts § 75 (2007), the drafting committee reasoned that the act should apply prospectively, following the model of Uniform Prudent Investor Act § 11 (1994).</p> <p><i>Subsection (b).</i> Subsection (b), which derives from Uniform Trust Code § 108(a) (2000), establishes a safe harbor for a settlor’s designation of the principal place of administration for a directed trust. 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</p>

	<p>prescribed by Uniform Trust Code § 108(a) (2000). Subsection (b)(2) expands the safe harbor of Section 108(a) to add the presence of a trust director as a sufficient connection with the designated jurisdiction.</p> <p>Other than the expansion in subsection (b)(2) of the Uniform Trust Code’s safe harbor for a settlor’s designation of a trust’s principal place of administration, the drafting committee did not undertake to prescribe rules for ascertaining a trust’s principal place of administration. In this respect, the drafting committee followed the Uniform Trust Code in “not attempt[ing] to further define principal place of administration.” Uniform Trust Code § 108 cmt. Accordingly, for a directed trust in an enacting state, just as for all trusts in a Uniform Trust Code state, if the safe harbor of subsection (b) does not apply, the question of a trust’s principal place of administration will be governed by the state’s then-existing law on principal place of administration. <i>See, e.g.</i>, Restatement (Second) of Conflict of Laws §§ 271-72, 279 (1971).</p>
<p>Current Colorado Law</p>	<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 style="padding-left: 80px;">(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 style="padding-left: 80px;">(I) Administration, including administration of a trust whose governing law for purposes of administration has been changed to</p>

	<p>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>
<p>Colorado Subcommittee Comment</p>	<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>Colorado Subcommittee Recommendation</p>	<p>Section 3 should be rewritten to provide:</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> <p>(1) If the trust was created before [the effective date of this [act]], this [act] applies only to a decision or action occurring on or after [the effective date of this [act]].</p> <p>(2) If the principal place of administration of the trust is changed</p>



	<p>to this state on or after [the effective date of this [act]], this [act] applies only to a decision or action occurring on or after the date of the change.</p> <p>(b) Without precluding other means to establish a sufficient connection with the designated jurisdiction in a directed trust, terms of the trust which designate 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;</p> <p>(3) all or part of the administration occurs in the designated jurisdiction.; or</p> <p>(4) the trust is duly registered with a court in the designated jurisdiction.</p>
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**Colorado T&E Section Statutory Revisions Committee Subcommittee on the Uniform Directed Trust Act**

UDTA Section	Section 4
Section Title	Common Law and Principles of Equity
Statutory Language	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].
Uniform Law Commission	This section confirms that the common law and principles of

<p>Comment</p>	<p>equity remain applicable to a directed trust except to the extent modified by this act or other law. 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. <i>See, e.g.</i>, Uniform Powers of Appointment Act § 104 (2013); Uniform Trust Code § 106 (2000). The drafting committee contemplated that, by ordinary principles of statutory interpretation, other statutes pertaining to trusts such as the Uniform Trust Code (2000), Uniform Trust Decanting Act (2015), Uniform Principal and Income Act (1997), and Uniform Prudent Investor Act (1994), would continue to apply to a directed trust except as modified by this act.</p>
<p>Current Colorado Law</p>	<p><i>Colorado Probate Code:</i></p> <p>§ 15-10-103:</p> <p style="padding-left: 40px;">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:</p> <p style="padding-left: 40px;">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 style="padding-left: 40px;">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><i>Colorado Uniform Trust Act</i></p> <p>§ 15-5-106</p> <p>Unless displaced by the particular provisions of this code, the common law of trusts and principles of law and equity, and other statutes of this state, supplement its provisions.</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</p>

	<p>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 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.</p>
Colorado Subcommittee Recommendation	Adopt the Uniform language.

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

UDTA Section	Section 5
Section Title	Exclusions
Statutory Language	<p>(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.</p> <p>(b) This [act] does not apply to a:</p> <p style="padding-left: 40px;">(1) power of appointment;</p> <p style="padding-left: 40px;">(2) power to appoint or remove a trustee or trust director;</p> <p style="padding-left: 40px;">(3) power of a settlor over a trust to the extent the settlor has a power to revoke the trust;</p> <p style="padding-left: 40px;">(4) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:</p>

	<p>(A) the beneficiary; or</p> <p>(B) another beneficiary represented by the beneficiary [under Uniform Trust Code Sections 301 through 305] with respect to the exercise or nonexercise of the power;</p> <p>or</p> <p>(5) power over a trust if:</p> <p>(A) the terms of the trust provide that the power is held in a nonfiduciary capacity; and</p> <p>(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][, as amended].</p> <p>(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 which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.</p> <p><i>Legislative Note: A state that has not enacted Uniform Trust Code (Last Revised or Amended in 2010) Sections 301 through 305 should replace the bracketed language in subsection (b)(4)(B) with a cross reference to the state’s statute governing virtual representation or should omit the bracketed language if the state does not have such a statute.</i></p> <p><i>A state that does not permit the phrase “as amended” when incorporating federal statutes or permit reference to “regulations issued thereunder” should delete the bracketed language in subsection (b)(5)(B).</i></p>
<p>Uniform Law Commission Comment</p>	<p>This section excludes five categories of powers that the drafting committee concluded should not be covered by this act for reasons of policy, coverage by other law, or both. Questions regarding a power that falls within one of these exclusions, such as the duty of the holder of the power and the duty of a trustee or other person subject to the power, are governed by law other than this act.</p>

*(1) Power of appointment.* Subsection (b)(1) excludes a “power of appointment,” which is defined by subsection (a) to mean “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.” This definition of “power of appointment” is based on the definition in Uniform Powers of Appointment Act § 102(13) (2013). The definition is consistent with what Restatement (Third) of Property: Wills and Other Donative Transfers § 17.1 cmt. g (2011), refers to as a “discretionary” power of appointment, that is, one in which “the donee may exercise the power arbitrarily as long as the exercise is within the scope of the power.”

Accordingly, if the terms of a trust purport to grant a person not serving as trustee a nonfiduciary power to direct distributions of trust property, under this act that power will be construed as a power of appointment governed by law other than this act, such as the Uniform Powers of Appointment Act (2013) and Restatement (Third) of Property: Wills and Other Donative Transfers §§ 17.1–23.1 (2011).

The exclusion prescribed by subsection (b)(1) applies only to a nonfiduciary power of appointment. It does not apply to a fiduciary power of distribution. Thus, if the terms of a trust grant a person a fiduciary power to direct a distribution of trust property, and the power is exercisable while the person is not serving as trustee, then the power is a power of direction subject to this act.

To resolve doubt about whether a power over distribution is a power of appointment or a power of direction, subsection (c) prescribes a rule of construction under which a power over distribution is a power of appointment, and so is not held in a fiduciary capacity, unless the terms of the trust provide that the power is held in a fiduciary capacity.

A power in a serving trustee to designate a recipient of an ownership interest in or a power of appointment over trust property can never be a power of direction, because a serving trustee can never be a trust director (see Sections 2(5) and (9)). Whether a power over distribution granted to a serving trustee is held in a fiduciary capacity (making it a fiduciary distributive power) or is instead a nonfiduciary power of appointment is

governed by law other than this act, such as under Restatement (Third) of Trusts § 50 cmt. a (2003).

(2) *Power to appoint or remove.* Subsection (b)(2) excludes “a power to appoint or remove a trustee or trust director.” This exclusion addresses the compelling suggestion to the drafting committee that granting a person a power to appoint or remove a trustee is a common drafting practice that arose separately from the phenomenon of directed trusts. Under prevailing law, the only limit on the exercise of a power to appoint or remove a trustee is that it “must conform to any valid requirements or limitations imposed by the trust terms.” Restatement (Third) of Trusts § 37 cmt. c (2003). If the terms of the trust do not impose any requirements or limitations on the power to remove, then “it is unnecessary for the holder to show cause” before exercising the power. Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott and Ascher on Trusts* § 11.10.2 (5th ed. 2006).

(3) *Revocable trust.* Subsection (b)(3) excludes a power of a settlor over a trust to the extent the settlor has a power to revoke the trust. The drafting committee intended that this exception would apply only to that portion of a trust over which the settlor has a power to revoke, that is, “to the extent” of the settlor’s power to revoke.

Because the settlor of a revocable trust may at any time revoke the trust and take back the trust property, under modern law, including Uniform Trust Code § 603(a) (2004), the trustee’s duties run to the settlor rather than to the beneficiaries. The trustee must “comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the trustee’s normal fiduciary duties.” Restatement (Third) of Trusts § 74(1)(a)(i) (2007).

Without the exclusion of this subsection, the definitions contained in paragraphs (3), (5), and (9) of Section 2 could have been read to transform a settlor’s power over a revocable trust into fiduciary powers of a trust director, thus subjecting the settlor to the fiduciary duties of a trust director under Section 8 and the trustee to the modified fiduciary duties of a directed trustee under Sections 9 through 11.

To the extent that a conservator or agent of the settlor may exercise the settlor’s power to revoke, as under Uniform Trust Code § 602(e)–(f) (2001), subsection (b)(3) of this section would apply to the conservator or agent. A nonfiduciary power in a person other than the settlor to withdraw the trust property is a power of appointment that would fall within subsection (b)(1).

*(4) Power of a beneficiary.* Paragraph (4) excludes a power of a beneficiary to the extent that the exercise or nonexercise of the power affects (A) the beneficial interest of the beneficiary, or (B) the beneficial interest of another beneficiary who is represented by the beneficiary under virtual representation law.

Subparagraph (A) follows from traditional law, under which “[a] power that is for the sole benefit of the person holding the power is not a fiduciary power.” Restatement (Third) of Trusts § 75 cmt. d (2007). Thus, for example, a power in a beneficiary to release a trustee from a claim by the beneficiary is excluded from this act. To the extent the power affects another person, however, then it is not for the sole benefit of the person holding the power. Hence, a power over a trust held by a beneficiary may be a power of direction subject to this act if it affects the beneficial interest of another beneficiary. For example, a power in a beneficiary to release the trustee from a claim by another beneficiary is not excluded by this paragraph unless the power to bind the other beneficiary arises by reason of virtual representation.

The same rules apply if the beneficiary’s power is jointly held. Thus, for example, if the terms of a trust provide that a trustee may be released from liability by a majority of the beneficiaries, and a majority of the beneficiaries grants such a release, then those beneficiaries would be acting as trust directors to the extent the release bound other beneficiaries by reason of the power other than by virtual representation. This act would therefore reverse the result in *Vena v. Vena*, 899 N.E.2d 522 (Ill. App. 2008), in which the court refused to enforce a provision for release of a trustee by a majority of the beneficiaries on the grounds that the minority beneficiaries did not have recourse against the majority for an abusive release. Under this act, the minority beneficiaries would have recourse against the majority for breach of their fiduciary duty as trust directors.



The carve-out for virtual representation in subparagraph (B) reflects the drafting committee’s intent not to impose the fiduciary rules of this act on top of the law of virtual representation, which contains its own limits and safeguards. Without the exclusion of this subsection, the definitions contained in paragraphs (5) and (9) of Section 2 could have been read to transform a beneficiary who represented another beneficiary by virtual representation into a trust director.

By way of illustration, under Uniform Trust Code § 304 (2000), a beneficiary who suffers from an incapacitating case of Alzheimer’s disease may sometimes be represented by another beneficiary in litigation against a trustee for breach of trust. In such a case, paragraph (4) of this section prevents the beneficiary who represents the beneficiary with Alzheimer’s from being a trust director. Instead, the safeguards provided by the law of virtual representation will apply. Under § 304, for example, the representative beneficiary and the beneficiary with Alzheimer’s disease must have “a substantially identical interest with respect to the particular question or dispute,” and have “no conflict of interest” with each other.

*(5) The settlor’s tax objectives.* Subsection (b)(5) excludes a power 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 federal tax law. This exclusion is responsive to multiple suggestions to the drafting committee that certain powers held by a person other than a trustee must be nonfiduciary to achieve the settlor’s federal tax objectives.

For example, to ensure that a trust is a grantor trust for federal income tax purposes, a common practice is to include in the trust instrument a provision that allows the settlor or another person to substitute assets of the trust for assets of an equivalent value, exercisable in a nonfiduciary capacity. If the power to substitute assets is exercisable in a fiduciary capacity, the power will not cause the trust to be a grantor trust. Without the exception of subsection (b)(5), therefore, this common drafting practice might no longer ensure grantor trust status in a state that enacts this Act, and the tax status of existing trusts with such a provision

	<p>would be thrown into disarray.</p> <p>In light of the evolving nature of tax planning, the frequency of amendments to the tax law, and the potential for disagreement about which powers must be nonfiduciary to achieve the settlor’s federal tax objectives, the drafting committee reasoned that a standard referring broadly to a settlor’s tax objectives was preferable to a prescribed list of sections of the tax code.</p> <p>The drafting committee deliberately opted to reference tax objectives only under federal law, thereby excluding tax objectives under state law. The concern was that some states levy a tax on income in a trust if the trust has a fiduciary in the state. If this exclusion reached state tax law, then in such a state a trust director could argue that the director is not a fiduciary, because the settlor would not have wanted the trust to pay income tax. The consequence would be to negate fiduciary status for virtually all trust directors in those states. The purpose of this exception is to protect normal and customary estate planning techniques, not to allow circumvention of the central policy choice encoded in Section 8 that a trust director is generally subject to the same default and mandatory fiduciary duties as a similarly situated trustee.</p>
<p>Current Colorado Law</p>	<p>Under the current Colorado Directed Trustees Act, the powers of a trust advisor are established by the governing instrument, C.R.S. § 15-16-803(2), and may include directing the trustee as to investment decisions and non-investment decisions, including the exercise of discretion to make distributions. C.R.S. § 15-16-803(3). A trust advisor must act in a fiduciary capacity, C.R.S. §§ 15-16-801(8) and 15-16-802, but the act also provides that “A person who holds a nonfiduciary power over a trust, including a power of appointment as defined in section 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 a governing instrument.” Current law thus expressly excludes a power of appointment from the scope of the Directed Trustees Act, and suggests that other powers over a trust may be held in a nonfiduciary capacity but without clear elucidation of what those other powers might be.</p> <p>The current Colorado Directed Trustees Act does not</p>

	<p>address whether and to what extent it applies to a “pet trust.”</p> <p>Uniform Trust Code § 408 authorizes pet trusts and provides that the terms of the trust may appoint a person who can enforce the trust and, if no person is so appointed, the court may appoint someone who may enforce the trust. Under this UTC provision, a person having an interest in the welfare of the animal may ask the court to appoint someone to enforce the trust, but is not directly given the power to enforce the trust. The comment to Uniform Directed Trust Act § 6 says that a person appointed to enforce a pet trust as provided under UTC § 408 is a trust director under the Uniform Directed Trust Act.</p> <p>The recently enacted Colorado Uniform Trust Code carries forward our current pet trust statute, rather than adopting UTC § 408. CRS § 15-5-408 and 15-5-409.5. Under the Colorado pet trust statute, the trust may be enforced by the person having custody of the animal and by a remainder beneficiary, as well as by a person designated in the trust instrument or a person appointed by the court. It was suggested to the Colorado Uniform Directed Trust Act subcommittee that the person having custody of the animal and the remainder beneficiaries ought not to be considered trust directors, because that would make them fiduciaries, which, it is suggested, most people would not intend.</p>
<p>Colorado Subcommittee Comment</p>	<p>The Uniform Directed Trust Act would improve upon current Colorado law by providing more specificity as to powers that are excluded from the act. Current Colorado law does not expressly except from the scope of the Directed Trustees Act (1) powers to appointment or remove trustees or trust directors, (2) powers of a settlor over a revocable trust, (3) powers of a beneficiary that affect only that beneficiary or another beneficiary who is represented by that beneficiary, (4) the “swap power” that is commonly used to make a trust a grantor trust for income tax purposes and which must be held in a nonfiduciary capacity in order to achieve the intended tax result, or (5) powers to enforce a pet trust.</p>
<p>Colorado Subcommittee Recommendation</p>	<p>Colorado should adopt this provision but should (1) insert in the brackets in section (b)(4)(B) cross-references to C.R.S. §§ 15-5-301 through 15-5-305; (2) include the bracketed language in section (b)(5)(B) referring to amendments to the Internal Revenue</p>

Code and regulations issued under it; and (3) add an additional exclusion as section (5)(b)(6) to except out a power to enforce a pet trust that is held either by the custodian of the animal or by a remainder beneficiary, unless the terms of the trust expressly make the power subject to the directed trust act. Thus, Colorado should adopt section 5 to read as follows:

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 the beneficial interest of:

(A) the beneficiary; or

(B) another beneficiary represented by the beneficiary under C.R.S. §§ 15-5-301 through 15-5-305 with respect to the exercise or nonexercise of the power;

(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, as amended; or

(6) A POWER UNDER C.R.S. §15-5-409.5(1)(d)

	<p>TO ENFORCE THE INTENDED USE OF THE PRINCIPAL AND INCOME OF A TRUST AUTHORIZED BY C.R.S. § 15-5-408 FOR THE CARE OF DESIGNATED DOMESTIC OR PET ANIMALS AND THE ANIMALS' OFFSPRING IN GESTATION, IF THE POWER IS HELD BY A PERSON HAVING CUSTODY OF AN ANIMAL FOR WHICH CARE IS PROVIDED BY THE TRUST OR BY A REMAINDER BENEFICIARY OF THE TRUST, UNLESS THE TERMS OF THE TRUST SPECIFICALLY PROVIDE THAT THE POWER HELD BY THE CUSTODIAN OR REMAINDER BENEFICIARY IS SUBJECT TO THIS ACT.</p> <p style="text-align: center;">(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 which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.</p>
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**Colorado T&E Section Statutory Revisions Committee Subcommittee on the  
Uniform Directed Trust Act**

UDTA Section	Section 6
Section Title	Powers of Trust Director.
Statutory Language	<p style="text-align: center;">(a) Subject to Section 7, the terms of a trust may grant a power of direction to a trust director.</p> <p style="text-align: center;">(b) Unless the terms of a trust provide otherwise:</p> <p style="text-align: center;">(1) a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director under subsection (a); and</p> <p style="text-align: center;">(2) trust directors with joint powers must act by majority decision.</p>
Uniform Law Commission Comment	<p style="text-align: center;"><i>Validating a trust director.</i> Subsection (a) validates a provision for a trust director in the terms of a trust. This subsection does not provide any powers to a trust director by default. Nor does it specify the scope of a power of direction. The existence and scope of a power of direction must instead be specified by the</p>

terms of a trust. A trust director may be named by the terms of the trust, by a procedure prescribed by the terms of the trust, or in accordance with Section 16(6).

*Breadth of subsection (a).* Without limiting the definition of a “power of direction” in Section 2(5), the drafting committee specifically contemplated that subsection (a) would validate terms of a trust that grant a power to a trust director to:

- direct investments, including a power to:
  - acquire, dispose of, exchange, or retain an investment;
  - make or take loans;
  - vote proxies for securities held in trust;
  - adopt a particular valuation of trust property or determine the frequency or methodology of valuation;
  - adjust between principal and income or convert to a unitrust;
  - manage a business held in the trust; or
  - select a custodian for trust assets;
- modify, reform, terminate, or decant a trust;
- direct a trustee’s or another director’s delegation of the trustee’s or other director’s powers;
- change the principal place of administration, situs, or governing law of the trust;
- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;
- prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;
- grant permission before a trustee or another director may exercise a power of the trustee or other director; or
- release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.

This subsection does not, however, override the background law that regulates the formation of a trust, such as the requirements that a trust be lawful, not contrary to public policy, and possible to achieve. *See, e.g.*, Uniform Trust Code § 404

(2000); Restatement (Third) of Trusts §§ 29–30 (2003).

*Pet and other noncharitable purpose trust enforcers.*

Statutes in every state validate a trust for a pet animal and certain other noncharitable purposes. Following Uniform Probate Code § 2-907(c)(4) (1993) and Uniform Trust Code §§ 408(b) and 409(2) (2000), most of these statutes authorize enforcement of the trust by a person named in the terms of the trust. In a state that enacts this act, such a person would be a trust director.

*Exclusions.* Like the other provisions of this act, this section does not apply to matters that are excluded by Section 5. Thus, because Sections 5(b)(1)-(2) exclude a “power of appointment,” and a “power to appoint or remove a trustee or trust director,” subsection 6(a) does not authorize the granting of such powers. Instead, such a power is governed by law other than this act.

*Subsection (b).* Subsection (b) prescribes two rules of construction that apply unless the terms of a trust provide otherwise.

*(1) Further appropriate powers.* Subsection (b)(1) prescribes a default rule under which a trust director may exercise any “further” power that is “appropriate” to the director’s exercise of the director’s express powers granted by the terms of the trust under subsection (a). The term “appropriate” is drawn from Uniform Trust Code § 815(a)(2)(B) (2000). Appropriateness should be judged in relation to the purpose for which the power was granted and the function being carried out by the director. Examples of further powers that might be appropriate include a power to: (1) incur reasonable costs and direct indemnification for those costs; (2) make a report or accounting to a beneficiary or other interested party; (3) direct a trustee to issue a certification of trust under Uniform Trust Code § 1013 (2000); (4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or (5) employ a professional to assist or advise the director in the exercise or nonexercise of the director’s powers.

*Delegation by trust director.* In some circumstances, it may be appropriate under subsection (b)(1) for a trust director to exercise a further power to delegate the director’s powers, much as

it may sometimes be appropriate for a trustee to delegate its powers. Under Section 8, a trust director is subject to the same fiduciary duty regarding delegation as a trustee in a like position and under similar circumstances. In most states, therefore, a trust director would be required to exercise reasonable care, skill, and caution in selecting, instructing, and monitoring an agent, and a director that did so would not be liable for the action of the agent. In accordance with prevailing law governing delegation by a trustee, see, e.g., Uniform Trust Code § 807 (2000); Uniform Prudent Investor Act § 9 (1994); Restatement (Third) of Trusts § 80 (2007), the drafting committee contemplated that in performing a function delegated by a trust director, the agent would owe a duty to exercise reasonable care.

*Trust director's standing to sue.* Subsection (b)(1) addresses the situation that arose in *Schwartz v. Wellin*, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014). The court held that a trust director, which the terms of the trust referred to as a “trust protector,” lacked standing to bring a lawsuit under Rule 17(a)(1) of the Federal Rules of Civil Procedure, because the director was neither a real party in interest nor a party that could pursue a claim if not a real party in interest.

In some circumstances, subsection (b)(1) may produce a different outcome. Rule 17(a)(1) allows a party to participate in litigation even if the party is not a real party in interest if the party is “authorized by statute.” Subsection (b)(1) supplies the requisite statutory authorization if participating in a lawsuit would be “appropriate” to a director’s exercise or nonexercise of a power granted by the terms of the trust under subsection (a). It would normally be “appropriate,” for example, for a trust director to bring an action against a directed trustee if the trustee refused to comply with a director’s exercise of a power of direction. The requisite statutory authorization might also come from subsection (a) if the terms of the trust expressly confer a power of litigation on a director.

*(2) Majority decision.* Subsection (b)(2) provides a default rule of majority action for multiple trust directors with “joint powers,” such as a three-person committee with a power of direction over investment or distribution. Majority action is the



	<p>prevailing default for cotrustees. See Uniform Trust Code § 703(a) (2000); Restatement (Third) of Trusts § 39 (2003). In the event of a deadlock among trust directors with joint powers, by analogy to a deadlock among cotrustees, a court could “direct exercise of the [joint] power or take other action to break the deadlock.” Restatement (Third) of Trusts § 39 cmt. e (2003).</p> <p>The duty and liability of a trust director is governed by Section 8, which applies the fiduciary duty of trusteeship to a trust director. Thus, under Section 8(a)(1)(B), a trust director that holds a power of direction jointly with a trustee or another trust director would be subject to the fiduciary duty of a cotrustee.</p>
Current Colorado Law	<p>The current Colorado Directed Trustees Act provides that the powers and duties of a trust advisor are established by the governing instrument. C.R.S. § 15-16-803(2). The current statute does not expressly address the exercise of further powers appropriate to the exercise of powers expressly granted by the governing instrument.</p>
Colorado Subcommittee Comment	<p>The Uniform Directed Trust Act, like the current Colorado Directed Trustees Act, is an enabling statute. That is, it does not specify any default powers that are held by a trust director, leaving it up to the drafter of the governing instrument to specify the powers of the director. The uniform law is an improvement on the current Colorado law in that it expressly also authorizes a trust director to exercise further powers that are appropriate to the exercise or nonexercise of the expressly granted powers. As explained in the comment, the “further appropriate powers” language would authorize a director, for example, to incur reasonable costs, provide reports to the beneficiaries, direct the trustee to issue a certification of trust under C.R.S. § 15-5-1013, to prosecute or defend actions relating to the director’s powers, and to employ professionals to advise or assist the director in carrying out its powers.</p>
Colorado Subcommittee Recommendation	<p>Colorado should adopt this section as is.</p>

**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></p> <p><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>This section applies to a trust director the same rules that apply to a trustee in two specific situations in which many states have particular regulatory interests. The first, in paragraph (1), concerns a payback provision necessary to comply with the reimbursement requirements of Medicaid law in a trust for a beneficiary with a disability. The second, in paragraph (2), concerns a charitable interest in a trust.</p> <p>In both circumstances, this section imposes all the same rules that would apply to a trustee in a like position and under similar circumstances. For example, many states require a trustee to give notice to the Attorney General before taking certain actions with respect to a charitable interest in a trust. Some states also disempower a trustee from taking certain actions with respect to a payback provision in a trust meant to comply with the reimbursement requirements of Medicaid law.</p> <p>The drafting committee referenced “rules” rather than “duties” in</p>

	<p>order to make clear that this section absorbs every provision of state law in the areas specified by paragraphs (1) and (2), regardless of whether the law in these areas is classified as a duty, a limit on a trustee’s powers, a regulation, or otherwise. In referencing rules, rather than duties, this section stands in contrast to Section 8(a) and the other sections of this act that apply a trustee’s duties to a trust director. Section 8(a) and these other sections absorb only duties of a fiduciary nature, whereas this section absorbs all rules, whether fiduciary, regulatory, or otherwise. Also unlike Section 8(a), this section applies only to two limited subject areas, rather than to the whole range of a director’s possible conduct.</p>
<p>Current Colorado Law</p>	<p>Colorado’s Directed Trustee statute does not impose any statutory limitations on the powers of a trust director, except those that would be considered a breach of the trust director’s duties.</p> <p>Colorado’s attorney general “has all powers conferred by statute, and by common law in accordance with section 2-4-211, C.R.S., regarding all trusts established for charitable, educational, religious, or benevolent purposes.” CRS 24-31-101. Notice to the attorney general related a charitable trust is specifically required where a charity is named in a will and the charity’s address cannot be located.</p> <p>Rule 17 of the Colorado Probate Code provides: “In a decedent’s estate, whenever it appears that *** the address of any heir or devisee is unknown, *** the personal representative shall promptly notify the attorney general. Thereafter, the attorney general shall be given the same information and notice required to be given to persons qualified to receive a devise or distributive share***”</p> <p>Under the Colorado Uniform Trust Decanting Act at CRS 15-16-914 the attorney general has the rights of a qualified beneficiary and may represent and bind the charitable interest. At least with regard to decanting a trust with a charitable interest, such as a charitable remainder trust, the attorney general, as a qualified beneficiary, is entitled to notice of the potential decanting, the right to petition the decanting, the right to consent to change in the compensation of an authorized fiduciary, consent to a change in the identity of who may remove or replace the authorized fiduciary or to block the change of the jurisdiction of a trust. CRS 15-16-</p>

	<p>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	Adopt the Uniform language.

**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</p>

	<p>or a further power under Section 6(b)(1):</p> <p>(1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:</p> <p>(A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or</p> <p>(B) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and</p> <p>(2) the terms of the trust may vary the director’s duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.</p> <p>(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this [act] to provide health care in the ordinary course of the director’s business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this [act].</p> <p>(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.</p>
<p>Uniform Law Commission Comment</p>	<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.</p>

Subsection (a)(2) sets the mandatory minimum duties of a trust director by absorbing the mandatory minimum duties that the terms of a trust cannot vary for a trustee in a like position and under similar circumstances. The default and mandatory rules applicable to a trustee include those prescribed by the other provisions of this act.

In making a trust director a fiduciary, subsection (a) follows the great majority of the existing state directed trust statutes.

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

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

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

*The trust director's duty of disclosure.* Under subsection (a), a trust director is subject to the same duties of disclosure as a trustee in a like position and under similar circumstances. For example, if a trust director intended to direct a nonroutine transaction, to change “investment strategies,” or to take “significant actions involving hard-to-value assets or special sensitivity to beneficiaries,” the director would be under a duty of affirmative advance disclosure just like a trustee. Restatement (Third) of Trusts § 82 cmt. d (2007). A trust director’s disclosure duties are limited, however, by Section 11, which eliminates certain duties to monitor, inform, or give advice.

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

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

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

*Springing powers without a duty to monitor.* The drafting committee contemplated that a settlor could construct a trust director's power to be springing such that the director would not be under a continuous obligation to monitor the administration of the trust. For example, a settlor could grant a trust director a power to direct a distribution, but only if the director was requested to do so by a beneficiary. A director holding such a power would not be under a duty to act unless requested to do so by a beneficiary. Moreover, because under subsection (a)(2) a settlor can vary the fiduciary duties of a trust director to the same extent that the settlor could vary the fiduciary duties of a trustee, under Uniform Trust Code § 105(b)(2) (2004) the settlor could waive all of the director's otherwise applicable duties other than the duty "to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." A director with a power to direct a distribution upon a beneficiary's request, for example, would be subject to this mandatory duty when it responds to a beneficiary's request.

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

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

*Directed director.* The terms of a trust may provide that a trust director has a power over a trust that requires another director to comply with the director's exercise or nonexercise of the power. In other words, a director may have the power to direct another



	<p>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.</p> <p><i>Subsection (b)—health-care professionals.</i> 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.</p> <p>This subsection, which applies unless the terms of the trust provide otherwise, addresses the concern that a health-care professional might refuse appointment as a trust director if such service would expose the provider to fiduciary duty under this act. For example, the terms of a trust might call for a health-care professional to determine the capacity or sobriety of a beneficiary or the capacity of a settlor. In making such a determination, under subsection (b) the health-care professional would not be subject to duty or liability under this act.</p> <p>Although the professional would not be subject to duty or liability under this act, the professional would remain subject to any rules and regulations otherwise applicable to the professional, such as the rules of construction prescribed by Sections 6(b) and 16. Moreover, a trustee subject to a direction by a health-care professional under subsection (b) of this section is still subject to the duties under Section 9 to take reasonable action to comply with the professional’s direction and to avoid willful misconduct in doing so.</p> <p><i>Subsection (c)—no ceiling on duties.</i> Subsection (c) confirms that the duties under this section are defaults and minimums, not ceilings. The terms of a trust may impose further duties in addition to those prescribed by this section.</p>
Current Colorado Law	<b>§ 15-16-803. Trust advisor and excluded trustee</b>

**Universal Citation:** CO Rev Stat § 15-16-803 (2016)

(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.

(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.

(3) The powers and duties of a trust advisor may include, but are not limited to:

(a) The exercise of a specific power or the performance of a specific duty or function that would normally be performed by a trustee;

(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 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.
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	Adopt the Uniform language.

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

UDTA SECTION	Section 9
Section Title	Duty and Liability of Directed Trustee
Statutory Language	<p>SECTION 9. DUTY AND LIABILITY OF DIRECTED TRUSTEE.</p> <p>(a) Subject to subsection (b), a directed trustee shall take reasonable action to comply with a trust director’s exercise or nonexercise of a power of direction or further power under Section 6(b)(1) and the trustee is not liable for the action.</p> <p>(b) A directed trustee must not comply with a trust director’s exercise or nonexercise of a power of direction or further power under Section 6(b)(1) to the extent that by complying the trustee would engage in willful misconduct.</p> <p>(c) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:</p> <p>(1) the breach involved the trustee’s or other director’s willful misconduct;</p> <p>(2) the release was induced by improper conduct of the trustee or other director in procuring the release; or</p> <p>(3) at the time of the release, the director did not know the material facts relating to the breach.</p> <p>(d) A directed trustee that has reasonable doubt about its duty under this section may petition the [court] for instructions.</p> <p>(e) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.</p> <p><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 “subject to [insert cite to Uniform Directed Trust Act Sections 9, 11, and 12.]” to the beginning of Section (b)(2) of Section 105. Section 105(b)(2) prescribes the</p>

	<p><i>mandatory minimum fiduciary duty of a trustee, which is superseded with respect to a directed trustee by the willful misconduct mandatory minimum of this section.</i></p> <p><i>The term “court” in subsection (d) should be revised as needed to refer to the appropriate court having jurisdiction over trust matters.</i></p>
<p>Uniform Law Commission Comment</p>	<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; nonliability other than under 5 subsection (b).</i> Subject to subsection (b), subsection (a) requires a directed trustee to take reasonable action to comply with a trust director’s exercise or nonexercise of the director’s power of direction or further power under Section power 6(b)(1) and provides that the trustee is not liable for so acting.</p> <p>The duty of a trustee in subsection (a) to take reasonable action is context dependent. A power of direction under which a trust director may give a trustee an express direction, for example, will require the trustee to comply by following the direction. A power that requires a trustee to obtain permission from a trust director before acting imposes a duty on the trustee to obtain the required permission. A power that allows a director to amend the trust imposes a duty on the trustee to take reasonable action to facilitate the amendment and then comply with its terms. The duty prescribed by subsection (a), in other words, is to take reasonable action to comply with whatever the terms of the trust require of a trustee in connection with a trust director’s exercise or nonexercise of the director’s power of direction or further power under Section 6(b)(1).</p> <p>A trustee’s duty to take reasonable action is limited by the scope of the trust director’s power of direction. A directed trustee should not comply with a direction that is outside of the director’s power of direction and beyond the director’s further powers under Section 6(b)(1). To do so would violate the</p>

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.

Subsection (a) requires a trustee to act reasonably as it carries out the acts necessary to comply with a trust director's exercise or nonexercise of the director's powers. If a trust director with a power to direct investments directs the trustee to purchase a particular security, for example, the trustee must take care to ensure the security is purchased within a reasonable time and at reasonable cost and must refrain from self-dealing and conflicts of interest in doing so.

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

*Powers jointly held with a trust director.* A trustee may hold a power of direction jointly with a trust director. For example, the terms of a trust may confer a power to determine the capacity of a beneficiary upon a committee of people, and the committee may include both the trustee and the beneficiary's son, who is a trust director. When a trustee holds a power jointly with a trust director, the trustee continues to have the normal duties of a trustee regarding its own exercise or nonexercise of the joint power. Subsection (a), in other words, does not relieve the trustee from the trustee's normal duties as to powers that belong

directly to the trustee, including powers held jointly with a trust director. In deciding how to vote as a member of the committee to determine a beneficiary's capacity, the trustee would be subject to the same duties as if it held its power jointly with another trustee instead of with another trust director.

A trustee's participation in joint decision-making with a trust director, however, must be distinguished from the trustee's execution of those joint decisions. Although the trustee is subject to the normal fiduciary duties of trusteeship in making a decision jointly with a trust director, the trustee is subject to the reduced duty of subsections (a) and (b) in executing the decision.

Returning to the example in the prior paragraph of a committee including a trustee with power to determine a beneficiary's capacity, the trustee has its normal fiduciary duties in deciding how to cast its vote about whether the beneficiary lacks capacity. But the trustee has only the duties prescribed by subsections (a) and (b) when the trustee takes action to comply with the decision of the committee.

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

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

The willful misconduct standard in subsection (b) is to be

	<p>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” or other such language are not enforceable under subsection (b). Instead, such provisions would provide for the willful misconduct standard of subsection (b).</p>
<p>Current Colorado Law</p>	<p><b>See Foiles v. Foiles (In re Estate of Foiles) Court of Appeals No. 12 CA 2436 for ratification of co-fiduciary’s actions</b></p> <p><b>§ 15-16-805. No duty to review actions of trust advisor</b>  <b>Universal Citation:</b> 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><b>§ 15-16-806. Duty to communicate - no duty to warn</b>  <b>Universal Citation:</b> 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</p>



	<p>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><b>§ 15-16-807. Excluded trustee not liable for action of trust advisor</b></p> <p><b>Universal Citation:</b> 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	Adopt the Uniform language.

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

UDTA Section	Section 10
Section Title	Duty to Provide Information to Trust Director or Trustee

<p>Statutory Language</p>	<p>(a) Subject to Section 11, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:</p> <ul style="list-style-type: none"> <li>(1) the powers or duties of the trustee; and</li> <li>(2) the powers or duties of the director.</li> </ul> <p>(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:</p> <ul style="list-style-type: none"> <li>(1) the powers or duties of the director; and</li> <li>(2) the powers or duties of the trustee or other director.</li> </ul> <p>(c) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.</p> <p>(d) A trust director that acts in reliance on information provided by a trustee of another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.</p>
<p>Uniform Law Commission Comment</p>	<p><i>Subsections (a) and (b)- Duty to provide Information.</i> This section imposes duties on trustees and trust directors to provide information to each other. Subsection (a) imposes this duty on a directed trustee, and subsection (b) imposes this duty on a trust director. The drafting committee contemplated that the duties created by this section would provide trustees and trust directors with sufficient information to fulfill their obligations under trust law as well as other law, including banking, securities, and tax law.</p> <p><i>Disclosure to beneficiaries.</i> This section governs disclosure of information to trustees and trust directors. The duty of a trust director to disclose information to a beneficiary is governed by Section 8 (fiduciary duties of a trust director), subject to Section 11. The duty of a trustee to disclose information to a beneficiary is governed by the background law of an enacting state under Section 4 (Common Law and Principles of Equity) as modified by Section 11, which limits a directed trustee’s duty to inform a beneficiary about the actions of a trust director.</p> <p><i>Reasonableness.</i> This section relies heavily on the concept of reasonableness. Information must be disclosed only if it is reasonably related both to the powers or duties of the person making the disclosure and to the powers or duties of the person</p>

receiving the disclosure. The information must be reasonably related to the powers or duties of the person making the disclosure, because otherwise that person cannot be expected to possess the information. The information must also be reasonably related to the powers or duties of the person receiving the disclosure, because otherwise that person would not need the information. Examples of matters that might require disclosure under this section include asset valuations, modifications to the terms of a trust, changes to investment policy or strategy, distributions, changes in accounting procedure or valuations, and removal or appointment of trustees and trust directors.

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

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

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

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

	<p>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 not duty to monitor the conduct of the trust advisor or to provide advice to or consult with the trust advisor.</p> <p>(3) A trust advisor has a duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration, to the extent that such information relates to a duty or function being performed by the trust advisor. This duty is governed by section 15-16-303 [Duty to inform and account to beneficiaries].</p> <p>(4) A trust advisor has no duty to communicate with or warn any beneficiary or third party concerning any action or actions taken by any other trust advisor or trustee.</p>
<p>Colorado Subcommittee Comment</p>	<p>. The Colorado Subcommittee believes that Section 10 as drafted does not necessarily require the trustee to provide a copy of the terms of the trust to the trust director. Therefore, the Colorado Subcommittee recommends adopting Section 10 but adding the following subsection (e) “A trustee shall provide a copy of the terms of the trust to a trust director.”</p>
<p>Colorado Subcommittee Recommendation</p>	<p>(a) Subject to Section 11, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:</p> <ul style="list-style-type: none"> <li>(3) the powers or duties of the trustee; and</li> <li>(4) the powers or duties of the director.</li> </ul> <p>(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:</p> <ul style="list-style-type: none"> <li>(3) the powers or duties of the director; and</li> <li>(4) the powers or duties of the trustee or other director.</li> </ul> <p>(c) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent</p>

	<p>the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.</p> <p>(d) A trust director that acts in reliance on information provided by a trustee of another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.</p> <p>(e) A trustee shall provide a copy of the terms of the trust to a trust director.</p>
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**Colorado T&E Section Statutory Revisions Committee Subcommittee on the  
Uniform Directed Trust Act**

UDTA Section	Section 11
Section Title	No Duty to Monitor, Inform, or Advise
Statutory Language	<p>(a) Unless the terms of a trust provide otherwise:</p> <p style="padding-left: 40px;">(1) a trustee does not have a duty to:</p> <p style="padding-left: 80px;">(A) monitor a trust director; or</p> <p style="padding-left: 80px;">(B) inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and</p> <p style="padding-left: 40px;">(2) by taking an action described in paragraph (1), a trustee does not assume a duty excluded by paragraph (1).</p> <p>(b) Unless the terms of a trust provide otherwise:</p> <p style="padding-left: 40px;">(1) a trust director does not have a duty to:</p> <p style="padding-left: 80px;">(A) monitor a trustee or another trust director; or</p> <p style="padding-left: 80px;">(B) inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director; and</p> <p style="padding-left: 40px;">(2) by taking an action described in paragraph (1), a trust director does not assume the duty excluded by paragraph</p>

	(1).
Uniform Law Commission Comment	<p><i>Following existing statutes.</i> Subsection (a) provides that a trustee does not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning instances in which the trustee might have acted differently than the director. Many existing state statutes are to similar effect, though the language in this section is simpler and more direct. Subsection (b) applies the same rule to a trust director regarding the actions of a trustee or another trust director.</p> <p>The existing statutes on which this section is based were meant to reverse the result in <i>Rollins v. Branch Banking &amp; Trust Company of Virginia</i>, 56 Va. Cir. 147 (2002), in which the court considered the liability of a trustee that was subject to direction in investment. The court declined to hold the trustee liable for the investment director's failure to direct diversification of the trust's investments, but the court nevertheless held the trustee liable for failing to advise the beneficiaries about the risks of the investment director's actions.</p> <p><i>Survival of trustee's and trust director's general duty of disclosure.</i> Although this section confirms that a directed trustee has no duty to monitor a trust director or inform or give advice to others concerning instances in which the trustee might have acted differently than the director this section does not relieve a trustee of its ordinary duties to disclose, report, or account under otherwise applicable law such as under the Uniform Trust Code § 813 (2004) [Duty to Inform and Report] or Restatement (Third) of Trusts § 82 (2007) [Duty to Furnish Information to Beneficiaries]. The same is true for a trust director, on whom Section 8(a) imposes the fiduciary duties of a trustee.</p> <p>For example, if a trust director has a power to direct investments, this section would relieve a directed trustee of any duty to advise a beneficiary about the risks of the director's decision to concentrate the investment portfolio. The trustee would remain under a duty, however, to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust to the extent required by other applicable law. The trustee would also remain under the duty imposed by Section 10 [Duty to Provide Information to Trust</p>

	<p>Director or Trustee] to provide a trust director with information reasonably related to its powers and duties.</p> <p><i>No assumption of duty.</i> In addition to waiving a directed trustee’s duty to monitor, inform, or give advice as under subsection (a)(1), many state statutes go further and also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these activities will be deemed to be “administrative actions.” <i>See, e.g.,</i> Del. Code Ann. Tit. 12, § 3313(e) (2017). The purpose of these provisions is to ensure that if a directed trustee chooses for some reason to monitor, inform, or give advice, the trustee does not assume a continuing obligation to do so or concede a prior duty to have done so. This section dispenses with the opacity of an administrative classification and achieves the intended result more directly. Subsection (a)(2) provides that if a trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not thereby assume a duty to do so. Subsection (b)(2) applies the same rule for a trust director.</p>
Current Colorado Law	<p><b>15-16-303 Duty to Inform and account to beneficiaries.</b></p> <p>(1) The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration.</p> <p>(3) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of trustee.</p> <p><b>15-16-806 (1)</b> A trustee has a duty to keep a trust advisor reasonably informed about the administration of a trust with respect to any specific duty or function being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trust advisor to perform the duty or function. <u><i>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.</i></u></p> <p><b>15-16-806(2)</b> 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</p>



perform their duties or functions. *A trustee requesting or receiving any such information from a trust advisor has no duty to monitor the conduct of the trust advisor or to provide advice to or consult with the trust advisor.*

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

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

***Beyer v. First Nat'l Bank, 843 P.2d 53, 61 (Colo. App. 1992):***

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

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

“Only the beneficiaries of the trust, the cotrustees of a trust or a successor trustee have standing to sue for breach of trust by a trustee. “No one other than a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust.” 3 Scott,

	<p>Trusts (4th Ed.) § 200, p. 209. HN7 The law "permits one trustee to bring an action against his cotrustees to compel the latter to perform their duties or enjoin them from committing a breach of trust or to compel them to redress a breach of trust . . . That principle . . . has as its basis the fiduciary duty owed to the beneficiaries by each trustee . . ." <i>See also, Richards v. Midkiff</i> 48 Haw. 32 (1964); <i>Thatcher Estate</i>, 1971 Pa. Dist. &amp; Cnty. Dec. LEXIS 30, 59 Pa. D. &amp; C.2d 277.</p>
<p>Colorado Subcommittee Comment</p>	<p>Adopt Section 11 of the UDTA as drafted but add a new Paragraph (c), which will read as follows:</p> <p style="padding-left: 40px;">(c) Unless the terms of a trust provide otherwise, Colo. Rev. Stat. § 15-5-1012 (Protection of person dealing with trustee) shall not be applicable to a trust director.</p>
<p>Colorado Subcommittee Recommendation</p>	<p>(a) Unless the terms of a trust provide otherwise:</p> <p style="padding-left: 40px;">(1) a trustee does not have a duty to:</p> <p style="padding-left: 80px;">(A) monitor a trust director; or</p> <p style="padding-left: 80px;">(B) inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and</p> <p style="padding-left: 40px;">(2) by taking an action described in paragraph (1), a trustee does not assume a duty excluded by paragraph (1).</p> <p>(b) Unless the terms of a trust provide otherwise:</p> <p style="padding-left: 40px;">(1) a trust director does not have a duty to:</p> <p style="padding-left: 80px;">(A) monitor a trustee or another trust director; or</p> <p style="padding-left: 80px;">(B) inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director; and</p> <p style="padding-left: 40px;">(2) by taking an action described in paragraph (1), a trust director does not assume the duty excluded by paragraph</p>

	<p>(1).</p> <p>(c) Unless the terms of a trust provide otherwise, C.R.S. § 15-5-1012 shall not be applicable to a trust director.</p>
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**Colorado T&E Section Statutory Revisions Committee Subcommittee on the  
Uniform Directed Trust Act**

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

cotrusteeship or the more permissive rules of a directed trusteeship. There seems little reason to prohibit a settlor from applying the fiduciary rules of this act to a cotrusteeship given that the settlor could choose the more permissive rules of a directed trusteeship by labeling one of the cotrustees as a trust director and another as a directed trustee. The rationale for permitting the terms of a trust to reduce the duty of a cotrustee that is subject to direction by another trustee is the same as the rationale for permitting the terms of a trust to reduce the duty of a directed trustee. In both instances, a trustee must act according to directions from another person and therefore the other person, not the trustee, should bear the full fiduciary responsibility for the action.

Accordingly, if the terms of a trust so provide, a cotrustee may have only the duty required by the reasonable action and willful misconduct standards specified in Section 9, and be subject to the narrower rules governing information sharing and monitoring specified in Sections 10 and 11, with respect to another cotrustee's exercise or nonexercise of a power of that other cotrustee. If the terms of a trust indicate that a directed cotrustee is to have no duty or is not a fiduciary, then the effect will be to reduce the cotrustee's duties to those prescribed by Sections 9 through 11, just as would be the effect of similar language for a directed trustee.

*Mechanics of choosing directed trustee duties.* Under this section the default rule is that, if a settlor names cotrustees, the traditional law of cotrusteeship applies. The fiduciary duties of directed trusteeship will only apply to a cotrustee if the terms of the trust manifest such an intent. Whether this section applies to a given trust is thus a question of construction. This section does not impose a requirement of express reference to this section or to this act. Moreover, under Section 3(a), this section applies to a trust created before the effective date of this act, but only as to a decision or action on or after that date.

For example, a familiar drafting strategy is to name cotrustees but also to provide that in the event of disagreement about a particular matter the decision of a specified trustee controls and the other cotrustee has no liability in that event. Under traditional law, notwithstanding this provision, the other cotrustee would be liable

	<p>if it did not take reasonable steps to prevent a breach by the controlling cotrustee. Under this section, on a prospective basis the other cotrustee would be liable only for its own willful misconduct akin to a directed trustee.</p> <p><i>Cotrustees as directed trustees and trust directors.</i> The terms of a trust can place a cotrustee in a position of either giving direction, like a trust director, or taking direction, like a directed trustee. This section only applies to a cotrustee that takes direction. This section does not address the duties of a cotrustee that is not directed. Nor does this section address the duties of a cotrustee that gives direction. Under Section 8, the background law of an enacting state that applies to a directing cotrustee also applies to a similarly situated trustee. The drafting committee intended that the language “with respect to another cotrustee’s exercise or nonexercise of a power of the other cotrustee” would refer only to a power of another cotrustee and not a power held jointly with the directed cotrustee, because a cotrustee cannot be thought of as taking direction from another cotrustee if the two cotrustees exercise a power jointly.</p> <p><i>No third-party effects.</i> Although this section changes the degree to which the terms of a trust may reduce a cotrustee’s duty and liability, it does not alter the rules that affect the rights of third parties who contract with or otherwise interact with a cotrustee. The principal difference between cotrusteeship and directed trusteeship is that in a cotrusteeship every cotrustee has title to the trust property, whereas in a directed trusteeship, title to trust property belongs only to the trustee, and not to the trust director. The placement of title can have important consequences for dealings with third parties and for tax, property, and other bodies of law outside of trust law. This section does not change the rights of third parties who deal with a cotrustee in the cotrustee’s capacity as such.</p>
Current Colorado Law	<p>Section 12 allows treatment of a co-trustee as a directed trustee or a trust director; however to be treated as such an “opt-in” by the governing instrument must be made, similar to Colorado’s requirement that directed trust treatment also be affirmatively stated.</p> <p>Colorado case law suggests that a co-trustee’s liability may be</p>

limited by the terms of the trust. *Poertner v. Razor* (Cert. Denied 9/25/1972). However, as this case was not selected for official publication, it cannot be relied upon.

Where there is more than one trustee, unless one is in a passive position as to the asset involved, legally incompetent or unless otherwise provided by terms of the trust, it is the **duty** of each to participate in the administration of the trust and one trustee should not be allowed to sit idly by while the cotrustee acts upon a matter and then takes advantage of that action at a later time.

**C.R.S. 15-16-803. Trust advisor and excluded trustee.**

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.

**C.R.S. 15-16-801(8)** requires the government instrument to affirmatively state trust advisor treatment:

(a) “Trust advisor” means a person who is:

(I) Acting in a fiduciary capacity; and

(II) Vested under a governing instrument with fiduciary powers to direct a trustee’s actual or proposed investment decisions or non-investment decisions.

(2) “Excluded trustee” means any trustee that, under the terms of the governing instrument, is precluded from exercising certain powers, which powers may be exercised only by a trust advisor designated by the governing instrument.

**C. R. S. 15-16-803. Trust advisor and excluded trustee. \* \* \***

(2) The powers and duties of a trust advisor, and the extent of such powers and duties, are established by the governing instrument, and the nonexercise of such powers and duties is binding on all other persons.

**C. R. S. 15-16-805. No duty to review actions of trust advisor.**

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

	<p><b>C. R. S. 15-16-806 Duty to communicate - no duty to warn.* *</b></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>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	Adopt the Uniform language.

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

UDTA Section	Section 13 Subsections (a) and (b)
Section Title	Limitations of Action Against Trust Director
Statutory Language	<p>(a) An action against a trust director for breach of trust must be commenced within the same limitations period as an action against a trustee for a similar breach of trust [as prescribed by the Uniform Trust Code Section 1005].</p> <p>(b) A report or accounting has the same effect on the limitations period for an action against the director that the report or accounting would have if the director were a trustee [as prescribed by the Uniform Trust Code Section 1005].</p> <p><i>Legislative Note: A state that has adopted Uniform Trust Code Section 1005 (2000) should update the bracketed language to refer to that enactment. A state that has adopted a statute other than Uniform Trust Code Section 1005 to govern limitation of an action against a trustee should replace the bracketed language with a cross reference to that statute. A state that has not adopted a statutory limitation should delete the bracketed language.</i></p>
Uniform Law Commission	This section absorbs an enacting state's law governing limitations



<p>Comment</p>	<p>on an action against a trustee for application to an action against a trust director. The default and mandatory character of such law as applied to a trustee governs whether the law is default as applied to a trust director.</p> <p>Subsection (a) extends to a trust director the same limits on liability that a trustee enjoys under the law of an enacting state by way of a statutory limitations period, or mandatory such as under Uniform Trust Code § 1005(c) (2000). The limitations period absorbed by subsection (a) applies to all claims against a trust director for breach of trust, whether by a beneficiary, a trustee, another trust director, or some other party.</p> <p>Subsection (b) extends to a trust director the same limits on liability that a trustee enjoys under the law of an enacting state arising from the making of a report or accounting such as under Uniform Trust Code § 1005(a)--(b) (2000), except that the rule of subsection (b) applies regardless of whether the report or accounting was made by the trust director. A trust director may therefore be protected by a report or accounting made by a trustee or another trust director even though the director did not make the report or accounting, so long as the report or accounting fairly discloses the relevant facts of director's conduct.</p> <p>Laches, which strictly speaking is an equitable defense rather than a statute of limitations period, is applicable to an action against a trust director by Section 14.</p>
<p>UTC 1005(a)(b) 2000</p> <p>CUTC § 15-5-1005</p>	<p>Limitations of Actions Against Trustee</p> <p>(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date that the beneficiary or a representative of person who may represent and bind a beneficiary, as provided in Part 3 of this Article, was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.</p> <p>(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.</p> <p>(c) If subsection (a) does not apply, a judicial proceeding by a</p>

	<p>beneficiary against a trustee for breach must be commenced within 3 years after the first to occur of:</p> <ul style="list-style-type: none"> <li>(1) The removal, resignation, or death of trustee;</li> <li>(2) The termination of the beneficiary’s interest in the trust; or</li> <li>(3) The termination of the trust.</li> </ul> <p>(d) For purposes of subsection(a) of this Section, a beneficiary is deemed to have been sent a report if:</p> <ul style="list-style-type: none"> <li>(1) In the case of a beneficiary having capacity, it is sent to the beneficiary; or</li> <li>(2) In the case of a beneficiary who under Part 3 of this Article may be represented and bound by another person, it is sent to the other person.</li> </ul> <p>(e) This section does not preclude an action to recover for fraud or misrepresentation related to the report.</p>
<p>UTC Uniform Law Commission Comments</p>	<p>The one-year and five-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 1009. Claims may also be barred by principals such as estoppel and laches arising in equity under the common law of trusts. <i>See</i> Section 106.</p> <p>The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in Article 3. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. <i>See</i> Section 603(a) (rights of settlor of revocable trust).</p> <p>This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to Section 1009. For the provisions relating to the duty to report to beneficiaries, see Section 813.</p> <p>Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 813(d).</p>

	<p>Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the five-year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.</p> <p>If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.</p> <p>This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.</p>
Restatement (Third) of Trusts § 98	<p>§ 98. Laches and Statutes of Limitations</p> <p>A beneficiary may not maintain a suit against a trustee for breach of trust if the beneficiary is barred from doing so by the doctrine of laches or by a statutory period of limitation.</p>
Colorado Case Law	<p>The Colorado Court of Appeals has consistently held that where the beneficiaries of a trust, after full disclosure, consented to the actions of the trustee, they cannot later bring a claim for surcharge. <i>Beyer v. First National Bank</i>, 843 P.2d 53 (Colo. App. 1992). Section 13-80-101, C.R.S., provides: (1) The following civil actions, regardless of the theory upon which suit is brought or against whom suit is brought shall be commenced within three years after the cause of actions accrues, and not thereafter: (f) all actions for breach of trust or breach of fiduciary duty. Section 15-10-106, C.R.S., provides that any action for fraud must be</p>

	<p>commenced within 5 years from the date after the discovery of the fraud.</p>
<p>C.R.S. § 15-16-307</p>	<p>C.R.S. § 15-16-307. Limitations on proceedings against trustees after final account. Unless previously barred by adjudication, consent, or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within six months after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure, an action for breach of trust against a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his or her examination must be brought within the time period prescribed in Section 13-80-101, C.R.S. A beneficiary is deemed to have received a final account or statement, if being an adult, it is received by him or her personally or if, being a minor or an individual with a disability, it is received by his or her representative as described in Section 15-10-403.</p>
<p>Colorado Directed Trustees C.R.S. § 15-16-807</p>	<p>C.R.S. § 15-16-807. Excluded trustee is not liable for action of trust advisor (1) If an excluded trustee is required to follow the direction of a trust advisor and the excluded trustee acts in accordance with such direction, the excluded trustee is not liable for any cause resulting from the act of complying therewith, except in cases of willful misconduct on part of the excluded trustee so directed.</p> <p>(2) An excluded trustee has no liability for any action of a trust advisor.</p>
<p>CUTDA - Decanting C.R.S. § 15-16-917</p>	<p>C.R.S. § 15-16-917. Relief from liability and indemnification. (1) Except as otherwise provided in this section, a second-trust instrument may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.</p> <p>(2) A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or other person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power</p>

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

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

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

UDTA Section	Section 14
Section Title	Defenses in Action Against Trust Director
Statutory Language	In an action against a trust director for breach of trust, the director may assert the same defenses a trustee could assert in an action against the trustee for similar breach of trust.
Uniform Law Commission Comment	<p><i>Absorption.</i> This section applies to an action for breach of trust against a trust director the law of an enacting state governing defenses available to a trustee in a comparable action. A trust director can assert any defense that would be available to a trustee in a comparable action for breach of trust under existing state law, including:</p> <ul style="list-style-type: none"> <li>- Laches or estoppel (see Restatement (Third) of Trusts §</li> </ul>

	<p>98 (Am Law. Inst. 2012));</p> <ul style="list-style-type: none"> <li>- Beneficiary consent, release or ratification (see Uniform Trust Code § 1009 (2001); Restatement (Third) of Trusts § 97(b)-(c) (Am. Law Inst. 2012));</li> <li>- Reasonable reliance on the terms of a trust (see Uniform Trust Code § 1006 (2000); Uniform Prudent Investor Act § 1(b) (1994)); and</li> <li>- Reasonable care in ascertaining the happening of an event affecting administration or distribution (see Uniform Trust Code § 1007 (2000); Restatement (Third) of Trusts § 76 cmt.f (Am. Law Inst. 2007)).</li> </ul> <p><i>Exculpation or exoneration.</i> The comments to Section 8 address the effect of an exculpation or exoneration clause on the duty and liability of a trust director.</p> <p><i>Attorney’s fees and indemnification.</i> Attorney’s fees and indemnification for a trust director are governed by Section 6(c)(1), which establishes a default rule that allows a trust director to exercise “any further power appropriate to the exercise of the director’s power of direction.” By default, therefore, a trust director has a power to incur attorney’s fees and other expenses and to direct indemnification for them if “appropriate” to the exercise of the director’s express powers.</p>
<p>CUTC § 15-5-1009</p> <p>UTC § 1009</p>	<p>Beneficiary’s Consent, Release, or Ratification</p> <p>(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction continuing the breach, unless:</p> <ol style="list-style-type: none"> <li>(1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or</li> <li>(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.</li> </ol>
<p>UTC Uniform Law Commissioner Comments</p>	<p>This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. <i>See</i> Restatement (Second) of Trusts § 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. <i>See</i> Restatement (Second) of</p>

	<p>Trusts § 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary’s rights and of the material facts relating to the breach. See Restatement (Second) of Trusts § 216 cmt. k (1959). If the beneficiary’s approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. See Restatement (Second) of Trusts §§ 170(2), 216(3) and cmt. n (1959).</p> <p>An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. <i>See</i> Section 603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Article 3.</p>
<p>Restatement (Third) of Trusts § 97</p>	<p>§ 97. Effect of Beneficiary Consent, Ratification, or Release</p> <p>A beneficiary who consented to or ratified, or released the trustee from liability for, an act or omission that constitutes a breach of trust cannot hold the trustee liable for that breach, provided:</p> <ul style="list-style-type: none"> <li>(a) The beneficiary, at the time of consenting to or ratifying the breach or granting the release, had the capacity to do so or was bound in doing so by the act of or representation by another; and</li> <li>(b) The beneficiary (or the beneficiary’s representative), at the time of the consent, ratification or release, was aware of the beneficiary’s rights and of all material facts and implications that the trustee knew or should have known relating to the matter; and</li> <li>(c) The consent, ratification, or release was not induced by improper conduct of the trustee.</li> </ul>
<p>Restatement (Third) of Trusts § 98</p>	<p>§ 98. Laches and Statutes of Limitations</p> <p>A beneficiary may not maintain a suit against a trustee for breach of trust if the beneficiary is barred from doing so by the doctrine of laches or by a statutory period of limitation.</p> <p>Laches, strictly speaking is an equitable defense rather than a limitations period, an applicable action against trust directors by Section 14.</p>
<p>UTC 1006</p>	<p>Reliance on Trust Instrument</p> <p>A trustee who acts in reasonable reliance on the terms of the</p>



CUTC §15-5-1006	trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.
Uniform Law Commissioners Comments	This section provides that the trustee may rely on the apparent plain meaning of the written trust instrument to govern his fiduciary responsibilities concerning the administration of the trust. Section 103 (17) (Definition of “Terms of a Trust”) means “the manifestation of the settlor’s intent regarding a trust provision as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.” The terms of the trust as defined under the Code as well as under the Doctrine of Reformation reflect the principle that a trust should be administered and distributed according to the settlor’s intent. Further, the trustee should be permitted to reasonably rely on the terms of the trust with respect to the administration of the trust. This section protects the trustee who relies on a written trust instrument, but only to the extent that breach of trust resulted from such reliance. This section is similar to Section 2(b) of the Uniform Prudent Investor Act which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.
UTC 1007	<p>Event Affecting Administration or Distribution</p> <p>If the happening of an event, including marriage, divorce performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee’s lack of knowledge.</p>
Uniform Law Commissioner Comments	This section, which is based on Washington Revised Code § 11.98.100, is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this section, imposed absolute liability against a trustee for misdelivery regardless of the trustee’s level of care. See Restatement (Second) of Trusts §226 (1959). The events listed in this section are not exclusive. A trustee who has

	<p>exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.</p>
<p>Current Colorado Law</p>	<p>Colorado Prudent Investment Rule C.R.S. § 15-1.1-101 generally provides that a trustee is not liable to a beneficiary to the extent that the trustee acted reasonably and with reasonable reliance under the provisions of the trust. In <i>Estate of McCart</i>, 847 P.2d 184 (Colo. App. 1992), the Court of Appeals held that the trustee abused his discretion in denying discretionary distributions to spouse/beneficiary that had remarried. The Court also held that, as a general rule, the trustee is entitled to defend litigation as an expense of the trust if the litigation is not the fault of the trustee.</p> <p>The ULC comment notes that a “power of direction” under the act may include a power to act independently in releasing a trustee from liability. This would be an expansion of the holding in <i>In re: Estate of Foiles</i>, 338 P.3d 1098 (Colo. App. 2014):</p> <p style="padding-left: 40px;">“... in the absence of a trust provision allowing ratification by a <u>co-trustee</u> of otherwise invalid actions, <u>only the consent of all beneficiaries</u>, who have proper capacity and who are fully informed of the facts can ratify an action taken in violation a trust agreement, and that ratification by a <u>co-trustee</u> is insufficient. Id. 1104.”</p> <p>In other words, if this Act is adopted by Colorado, ratification of a trustee’s action that would otherwise be a breach of trust would be permitted by:</p> <ul style="list-style-type: none"> <li>(i) Consent of all beneficiaries that have capacity and are fully informed;</li> <li>(ii) A co-trustee if allowed by the terms of trust; and</li> <li>(iii) A trust director that is specifically authorized power to do this.</li> </ul>
<p>Colorado Directed Trustees C.R.S. § 15-16-807</p>	<p>C.R.S. § 15-16-807. Excluded trustee is not liable for action of trust advisor (1) If an excluded trustee is required to follow the direction of a trust advisor and the excluded trustee acts in accordance with such direction, the excluded trustee is not liable for any cause of action resulting from the act of complying therewith, except in cases of willful misconduct on the part of</p>

	<p>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	Adopt the Uniform language.

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

UDTA Section	Section 15
Section Title	Jurisdiction Over Trust Director
Statutory Language	<p>(a) By accepting appointment as a trust director of a trust subject to this [act], the director submits to personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the director.</p> <p>(b) This section does not preclude other methods of obtaining jurisdiction over a trust director.</p>
Uniform Law Commission Comment	<p>Under subsection (a), by accepting appointment as a trust director of a trust subject to this act, the director submits to personal jurisdiction of the courts of this state with respect to “any matter related to a power or duty of the director.” This subsection does not apply to a person that has not accepted appointment as a trust director (the question of whether a person has accepted appointment is governed by Section 16(1)). The drafting committee contemplated that a purported director could contest acceptance, and therefore jurisdiction, in the normal course of a judicial proceeding in which the matter arose, as under Fed. R. Civ. P. § 12(b)(2).</p> <p>Jurisdiction over a person that has accepted appointment as trust director is mandatory. The terms of a trust or an agreement among the trust director and other parties cannot negate personal jurisdiction over a trust director under this section. However, this section does not preclude a court from declining to exercise jurisdiction under the doctrine of forum non conveniens.</p> <p>Subsection (b) confirms that subsection (a) does not prescribe the exclusive method of obtaining jurisdiction over a trust director.</p>
Current Colorado Law C.R.S. § 15-16-809	<p>Trust advisor subject to district court jurisdiction</p> <p>By accepting appointment to serve as a trust advisor of a trust having its principal place of administration in the state of Colorado, the trust advisor is subject to the jurisdiction of the courts of the state of Colorado even if other related agreements</p>

	provide otherwise, and the trust adviser may be made a party to any action or proceeding if issues relate to a decision or action of the trust adviser.
Current Colorado Law  C.R.S. § 15-16-203	Trust proceedings – dismissal of matters relating to foreign trusts  The court will not, over the objection of a party, entertain proceedings under section 15-16-201 involving a trust registered or having its principal place of administration in another state, except when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration, or when the interests of justice otherwise would seriously be impaired. The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the court may grant a continuance or enter any other appropriate order.
Current Colorado Law  <i>Luebke v. Luebke</i> , 143 P.3d 1008 (Colo. App 2006)	Unlike the common law doctrine of forum non conveniens, this section creates the presumption that courts in Colorado should dismiss actions against foreign trusts. To overcome the presumption, the nonmoving party must show that the interests of justice would be strongly impaired by referring the case to the state where the trust is registered.  Probate court did not abuse its discretion when it concluded that referring the case to the state of the trust’s administration and the beneficiary’s constitutional right of access to Colorado courts was not violated because his claims were not based on a substantive right or cause of action created by the Colorado legislature.
Colorado Subcommittee Comment	Adopt Section 15 of the UDTA as drafted.
Colorado Subcommittee Recommendation	(a) By accepting appointment as a trust director of a trust subject to this [act], the director submits to personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the director.  (b) This section does not preclude other methods of obtaining jurisdiction over a trust director.

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

UDTA Section	Section 16
Section Title	Office of Trust Director
Statutory Language	<p>Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director regarding the following matters:</p> <p>(1) acceptance [under Uniform Trust Code Section 701];</p> <p>(2) giving of bond to secure performance [under Uniform Trust Code Section 702];</p> <p>(3) reasonable compensation [under Uniform Trust Code Section 708];</p> <p>(4) resignation [under Uniform Trust Code Section 705];</p> <p>(5) removal [under Uniform Trust Code Section 706]; and</p> <p>(6) vacancy and appointment of successor [under Uniform Trust Code Section 704].</p> <p><i><b>Legislative Note:</b> A state that has enacted the Uniform Trust Code (Last Revised or Amended in 2010) 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.</i></p>
Uniform Law Commission Comment	This section applies the law of trusteeship to a trust directorship with regard to seven subjects. Whether the law is default or mandatory as applied to a trust director depends on whether it is default or mandatory as applied to a trustee.

*Paragraph (1)—acceptance.* This paragraph absorbs an enacting state’s law governing acceptance of a trusteeship, such as under Uniform Trust Code § 701(a)–(b) (2000) or Restatement (Third) of Trusts § 35 (2003), for application to acceptance of a trust directorship. However, whereas a trustee is expected to participate actively in the administration of the trust, and is therefore usually capable of signaling acceptance by conduct, some trust directors, such as a director with a power to determine the settlor’s competence, may not take any action for long stretches of time, if ever. This delay in action may complicate acceptance by conduct.

*Paragraph (2)—bond.* This paragraph absorbs an enacting state’s law governing bond to secure performance by a trustee, such as under Uniform Trust Code § 702(a)–(b) (2000) and Restatement (Third) of Trusts § 34(3) (2003), for application to bond by a trust director. The drafting committee assumed that bond would seldom be required for a trust director, as in the usual case the director would not have custody of the trust property.

*Paragraph (3)—reasonable compensation.* This paragraph absorbs an enacting state’s law governing reasonable compensation of a trustee, such as under Uniform Trust Code § 708 (2000) and Restatement (Third) of Trusts § 38 cmt. i (2003), for application to compensation of a trust director. The drafting committee contemplated that, just as in total “the reasonable fees for multiple trustees may be higher than for a single trustee,” Restatement (Third) of Trusts § 38 cmt. i (2003), so too the total reasonable fees for a trust with a directed trustee and a trust director may be higher than for a single trustee.

Reasonable compensation for a trust director will vary based on the nature of the director’s powers, and in some circumstances may well be zero. A state that provides a statutory commission for a trustee should therefore refrain from using the commission for a trust director and should instead use a rule of reasonable compensation. Statutory trustee commissions will often overcompensate a trust director, especially a director that does not participate actively on an ongoing basis in the administration of the trust. The problem will be especially serious in a trust with multiple such directors.

Moreover, the reasonable compensation of a directed trustee is likely to be less than that for a trustee that is not directed. An apt analogy is to a trustee that hires others to “render services expected

	<p>or normally to be performed by the trustee.” Restatement (Third) of Trusts § 38 cmt. c(1) (2003); <i>see also</i> Uniform Prudent Investor Act § 9 cmt. (1994) (“If, for example, the trustee’s regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.”).</p> <p><i>Paragraph (4)—resignation.</i> This paragraph absorbs an enacting state’s law governing resignation by a trustee, such as under Uniform Trust Code § 705 (2001) and Restatement (Third) of Trusts § 36 (2003), for application to resignation by a trust director.</p> <p><i>Paragraph (5)—removal.</i> This subsection absorbs an enacting state’s law governing removal of a trustee, such as under Uniform Trust Code § 706 (2000) and Restatement (Third) of Trusts § 37 cmt. e (2003), for application to removal of a trust director.</p> <p><i>Paragraph (6)—vacancy.</i> This section absorbs an enacting state’s law applicable to a vacancy in a trusteeship for application to a vacancy in a trust directorship. For example, under Uniform Trust Code § 704 (2004), “a vacancy in a trusteeship need not be filled” if “one or more cotrustees remain in office.” So too, if three of five trust directors with a joint power to determine the settlor’s capacity remain in office, the court “need not” fill the vacancies, though the vacancies should be filled if doing so would be more consistent with the settlor’s plan. Likewise, if the sole trust director with power over investment of the trust property ceases to serve, in most circumstances the vacancy should be filled, and this is true even if other directors with unrelated powers remain in office. An apt analogy is to a trust with several cotrustees, each of whom has controlling authority over different aspects of the trust’s administration. If any of those trustees ceases to serve, in many circumstances a court should appoint a successor even though other cotrustees remain in office.</p> <p><i>Costs and indemnification.</i> The power of a trust director to incur reasonable costs and to direct indemnification for expenses would in most cases be covered by Section 6(b)(1).</p>
Restatement (Third) of Trusts § 35 (2003)	<p>Acceptance or Renunciation of Trusteeship</p> <p>(1) A designated trustee may accept the trusteeship either by words or by conduct.</p>



	(2) A designated trustee who has not accepted the trusteeship may decline it.
Current Colorado Law C.R.S. § 15-16-304	<p>Duty to provide bond</p> <p>A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other interested person the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the court of registration or other appropriate court in amounts and with sureties and liabilities as provided in sections 15-12-604 and 15-12-606 relating to bonds of personal representatives.</p>
Current Colorado Law C.R.S. § 15-10-602	<p>Recovery of reasonable compensation and costs</p> <p>(1) A fiduciary and his or her lawyer are entitled to reasonable compensation for services rendered on behalf of an estate.</p> <p>(5) Except as limited or otherwise restricted by a court order, compensation and costs that may be recovered pursuant to this section may be paid directly or reimbursed without a court order. After a fiduciary receives notice of proceedings for his, her, or its removal, the fiduciary shall not pay compensation or attorney fees and costs from the estate without an order of the court. A court shall order a person who receives excessive compensation or payment for inappropriate costs to make appropriate refunds.</p>
Current Colorado Law C.R.S. 15-1.1-107	<p>Investment Costs</p> <p>In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.</p>
Restatement (Third) of Trusts § 36 (2003)	<p>Resignation of Trustee</p> <p>A trustee who has accepted the trust can properly resign:</p>

	<p>(a) in accordance with the terms of the trust;</p> <p>(b) with the consent of all beneficiaries; or</p> <p>(c) upon terms approved by a proper court.</p>
<p>Restatement (Third) of Trusts § 37 (2003)</p>	<p>Removal of Trustee</p> <p>A trustee may be removed</p> <p>(a) in accordance with the terms of the trust; or</p> <p>(b) for cause by a proper court.</p> <p>Cmt [e] e. Grounds for removal. The following are illustrative, but not exhaustive, of possible grounds for a court to remove a trustee: lack of capacity to administer the trust (see § 32); unfitness, whether due to insolvency, diminution of physical vigor or mental acuity, substance abuse, want of skill, or the inability to understand fiduciary standards and duties; acquisition of a conflicting interest (cf. Comment f(1)); refusal or inability to give bond, if bond is required (see § 34, Comment a); repeated or flagrant failure or delay in providing proper information or accountings to beneficiaries (see §§ 82 and 83); the commission of a crime, particularly one involving dishonesty; gross or continued inadequacies in matters of investment (see §§ 90-92); changes in the place of trust administration, location of beneficiaries, or other developments causing serious geographic inconvenience to the beneficiaries or to the administration of the trust; unwarranted preference to the interests of one or more beneficiaries; a pattern of indifference toward some or all of the beneficiaries; or unreasonable or corrupt failure to cooperate with a co-trustee.</p> <p>Not every breach of trust warrants removal of the trustee (cf. Comment g), but serious or repeated misconduct, even unconnected with the trust itself, may justify removal.</p>
<p>Colorado Subcommittee Comment</p>	<p>Adopt Section 16 of the UDTA as drafted with the following additions:</p> <ul style="list-style-type: none"> <li>• Include cross references to CUTC</li> <li>• Add cross reference to CUTC § 15-5-1004; to Compensation and Cost Recovery (C.R.S. § 15-10-601)</li> </ul>

	<p>and Fiduciary Tool Box (C.R.S. § 15-10-501(3) in Paragraph (3).</p> <ul style="list-style-type: none"> <li>• Add a new Paragraph 7, giving a trust director the right to petition the court for instructions pursuant to C.R.S. § 15-5-201(3)</li> </ul>
Colorado Subcommittee Recommendation	<p>Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director regarding the following matters:</p> <p>(1) acceptance [under C.R.S. § 15-5-701];</p> <p>(2) giving of bond to secure performance [under C.R.S. § 15-5-702];</p> <p>(3) reasonable compensation [under C.R.S. §§ 15-5-1004; 15-10-601; and 15-10-501(3)];</p> <p>(4) resignation [ under C.R.S. § 15-5-705];</p> <p>(5) removal [under C.R.S. § 15-5-706];</p> <p>(6) vacancy and appointment of successor [under C.R.S. § 15-5-704]; and</p> <p>(7) the right to petition the court for instructions [under C.R.S. § 15-5-201(3)].</p>

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

UDTA Section	Section 17
Section Title	Uniformity of Application and Construction.
Statutory Language	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.
Uniform Law Commission Comment	None

Current Colorado Law	NA
Colorado Subcommittee Comment	This is a standard provision for uniform laws.
Colorado Subcommittee Recommendation	Colorado should adopt this provision as is.

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

UDTA Section	Section 18
Section Title	Relation To Electronic Signatures In Global And National Commerce Act.
Statutory Language	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).
Uniform Law Commission Comment	None
Current Colorado Law	No provision.
Colorado Subcommittee Comment	This is a standard provision in uniform laws.
Colorado Subcommittee Recommendation	Colorado should enact this provision as is.

**SECTION 19  
UNIFORM DIRECTED TRUST ACT - CONFORMING CHANGES**

Plain text = current statutory language; SMALL CAPS = ADDITION; ~~Strikethrough~~ = deletion of current statutory language

Changes to the Colorado Probate Code

§ 15-10-201(27) – "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, TRUST DIRECTORS, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person, which may be affected by the proceeding. It also includes persons having priority for an appointment as a personal representative and other fiduciaries representing the interested person. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

§ 15-10-501(3) – Application. The provisions of this part 5 shall apply to any fiduciary over whom a court has obtained jurisdiction, including but not limited to a personal representative, special administrator, guardian, conservator, special conservator, trustee, TRUST DIRECTOR, agent under a power of attorney, and custodian, including a custodian of assets or accounts created under the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.

§ 15-10-601(2)(a) – A personal representative, guardian, conservator, TRUST DIRECTOR, or trustee;

#### Changes to the Colorado Uniform Trust Code

§ 15-5-105(2)(b) – SUBJECT TO SECTIONS §§ 15-16-809, 15-16-810, AND 15-16-811, the terms of a trust prevail over any provision of this code except:

§ 15-5-201(3)(a) – The appointment or removal of a trustee OR TRUST DIRECTOR;

§ 15-5-201(3)(b) – Review of a trustee's fees OR TRUST DIRECTOR'S FEES and review and settling of interim or final accountings;

§ 15-5-203 – The district court or, in the city and county of Denver, the probate court, has exclusive jurisdiction of proceedings in this state brought by a trustee, TRUST DIRECTOR, or beneficiary concerning the administration of a trust.

§ 15-5-204(2)(b) – ~~Either~~ ANY OF THE FOLLOWING: (I) A county in which a beneficiary resides; ~~or~~ (II) a county in which the trust property, or some portion of the trust property, is located.; (III) A COUNTY IN WHICH A TRUST DIRECTOR RESIDES OR HAS A PRINCIPAL PLACE OF BUSINESS.

§ 15-5-417 – After notice to the qualified beneficiaries AND TRUST DIRECTORS, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.

§ 15-5-603 – ~~Unless the terms of the trust expressly provide otherwise, while a trust is revocable, the rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.~~

(1) TO THE EXTENT A TRUST IS REVOCABLE BY A SETTLOR, A TRUSTEE MAY FOLLOW A DIRECTION OF THE SETTLOR THAT IS CONTRARY TO THE TERMS OF THE TRUST. TO THE EXTENT A TRUST IS REVOCABLE BY A SETTLOR IN CONJUNCTION WITH A PERSON OTHER THAN A TRUSTEE OR PERSON

HOLDING AN ADVERSE INTEREST, THE TRUSTEE MAY FOLLOW A DIRECTION FROM THE SETTLOR AND THE OTHER PERSON HOLDING THE POWER TO REVOKE EVEN IF THE DIRECTION IS CONTRARY TO THE TERMS OF THE TRUST.

(2) TO THE EXTENT A TRUST IS REVOCABLE, RIGHTS OF THE BENEFICIARIES ARE SUBJECT TO THE CONTROL OF, AND THE DUTIES OF THE TRUSTEE ARE OWED EXCLUSIVELY TO, THE SETTLOR.

(3) DURING THE PERIOD THE POWER MAY BE EXERCISED, THE HOLDER OF A POWER OF WITHDRAWAL HAS THE RIGHTS OF A SETTLOR OF A REVOCABLE TRUST UNDER THIS SECTION TO THE EXTENT OF THE PROPERTY SUBJECT TO THE POWER.

§ 15-5-703(3) – SUBJECT TO § 15-16-812, ~~A~~a cotrustee shall participate in the performance of a trustee’s function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

§ 15-5-703(7) - SUBJECT TO § 15-16-812, ~~E~~each trustee shall exercise reasonable care to:

Changes to Directed Trustees Act

§§ 15-16-801, et seq. – repeal and replace with new Directed Trust Act

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

UDTA Section	Section 20
Section Title	Effective Date.
Statutory Language	This [act] takes effect . . . .
Uniform Law Commission Comment	None
Current Colorado Law	The current Colorado Directed Trustees Act, C.R.S. § 15-16-801 et seq., was effective August 6, 2014. It includes no specific effective date provision.
Colorado Subcommittee Comment	<p>The standard effective date approach in Colorado is set out below under Colorado Subcommittee Recommendation.</p> <p>Note that under UDTA § 3, the act will apply to any trust, “whenever created,” that has its principal place of business in Colorado, but if the trust was created before the effective date, the act will apply only to decisions or actions taken on or after the effective date, and if the principal place of administration is</p>

	<p>changed to Colorado on or after the effective date, then the act will apply only to decisions and actions taken on or after the date of the change.</p>
<p>Colorado Subcommittee Recommendation</p>	<p>Colorado should enact section 20 to read as follows:</p> <p>“Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August __, 2019, if adjournment sine die is on May __, 2019); except that, if a referendum petition is filed pursuant to section 1(3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2019 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.”</p>

## **Summary of the Proposed Colorado Uniform Directed Trust Act**

**Prefatory Note.** Provides an overview of the Act.

**Section 1. Short Title.** In Colorado, the short title of the act will be the “Colorado Uniform Directed Trust Act.

**Section 2. Definitions.** The definitions generally track existing Colorado law and the CUTC, particularly “terms of trust,” effective 1-1-19.

**Section 3. Application; Principal Place of Administration.** This section follows prevailing conflict of laws rules by linking application of the Act to a trust’s principal place of administration. Further, this section establishes a safe harbor for a settlor’s designation of principal place of administration for a directed trust. The designated jurisdiction is valid if: (i) a trustee is located there; (ii) a trust director is located there; or (iii) at least some of the trust administration occurs there.

**Section 4. Common Law and Principals of Equity.** The common law and principals of equity supplement the Act except to the extent modified by the Act.

**Section 5. Exclusions.** The act does not apply to a power of appointment, a power to appoint or remove a trustee or trust director, a settlor’s power over a revocable trust, a power held by a beneficiary to the extent it affects the interest of that beneficiary or another beneficiary represented by that beneficiary, a “swap power” under IRC § 675(4)(C) used to make a trust a grantor trust for income tax purposes, or, unless the terms of the trust specifically provide otherwise, a power to enforce a pet trust held by a person having custody of the animal or by a remainder beneficiary of the a trust.

**Section 6. Powers of Director.** The act is an enabling statute, meaning that a trust may designate a trust director, and the director has the powers set out in the terms of the trust.

**Section 7. Limitations on Powers of Trust Director.** To the extent Colorado has rules imposed on a trustee of a charitable trust or a trust with a payback provision necessary to comply with the reimbursement requirements of Medicaid law, a trust director is subject to the same rules as a trustee in like position.

**Section 8. Duty and Liability of Trust Director.** This Section places a fiduciary duty and liability upon the trust director for the exercise or non-exercise of a power and permits the trust terms to vary the duty or liability. The section further carves out an exception to a fiduciary duty or liability for a medical professional acting as a trust director who is making decisions in the scope of that director’s medical profession or practice.

**Section 9. Duty and Liability of Directed Trustee.** This Section generally places no fiduciary duty or liability on a directed trustee for complying with a trust director order unless compliance



would amount to willful misconduct. The section further clarifies when a trust director may not release a trustee or other trust director from liability for breach of trust.

**Section 10. Duty to Provide Information to Trust Director or Trustee.** This Section imposes duties on trustees and trust directors to provide information to each other to the extent the information is reasonably related to both the powers or duties of the information provider and the powers or duties of the information receiver. The information receiver is exculpated, except in cases of willful misconduct, for any action or failure to act that results from reliance on the information received.

**Section 11. No Duty to Monitor, Inform, or Advise.** This Section relieves a trustee and trust director from the duty to monitor the actions of the other or to inform or give advice to a settlor, beneficiary, another trustee, or another trust director concerning instances in which the trustee or trust protector might have acted differently.

**Section 12. Application to Cotrustee.** A settlor of a trust may limit a co-trustee's liability to the same extent that a settlor of a trust may limit a directed trustee's liability.

**Section 13. Limitations of Action Against Trust Director.** An action against a trust director for breach of trust is subject to the same statute of limitations as an action for breach of trust against a trustee.

**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 could assert in an action against the trustee for similar breach of trust.

**Section 15. Jurisdiction Over Trust Protector.** A trust director is subject to personal jurisdiction of the Colorado courts regarding any matter related to a power or duty of the trust director.

**Section 16. Office of Trust Director.** This Section applies the law of trusteeship to a trust directorship with regard to: (1) acceptance of the office of trust director; (2) giving bond to secure performance; (3) reasonable compensation; (4) resignation; (5) removal; and (6) vacancy and appointment of a successor trust director.

**Section 17. Uniformity of Application and Construction; and Section 18. Relation to Electronic Signatures in Global and National Commerce Act.** These are standard provisions in uniform laws.

**Section 19. Conforming Changes.** The conforming changes are necessary to reflect the changes suggested by the Uniform Law Commissioners and to address the recent enactments of the Colorado Uniform Trust Code and the Uniform Trust Decanting Act.

**Section 20. Effective Date.** The act will be effective 90 days after the end of the 2019 legislative session, which should be in early August, 2019.