

MAINE STATE LEGISLATURE

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129th MAINE LEGISLATURE

FIRST REGULAR SESSION-2019

Legislative Document

No. 1468

H.P. 1075

House of Representatives, April 2, 2019

An Act To Enact the Maine Uniform Directed Trust Act

Reported by Representative BAILEY of Saco for the Probate and Trust Law Advisory Commission pursuant to the Maine Revised Statutes, Title 18-A, section 1-803, subsection 2.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

A handwritten signature in cursive script that reads "R B. Hunt".

ROBERT B. HUNT
Clerk

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 18-B MRSA §103, sub-§17**, as enacted by PL 2003, c. 618, Pt. A, §1 and
3 affected by §2, is repealed and the following enacted in its place:

4 **17. Terms of a trust.** "Terms of a trust" means:

5 A. Except as otherwise provided in paragraph B, the manifestation of the settlor's
6 intent regarding a trust's provisions as:

7 (1) Expressed in the trust instrument; or

8 (2) Established by other evidence that would be admissible in a judicial
9 proceeding; or

10 B. The trust's provisions as established, determined or amended by:

11 (1) A trustee or other person in accordance with applicable law;

12 (2) Court order; or

13 (3) A nonjudicial settlement agreement under this Code.

14 **Sec. 2. 18-B MRSA §105, sub-§2, ¶B**, as enacted by PL 2003, c. 618, Pt. A, §1
15 and affected by §2, is amended to read:

16 ~~B. The Subject to the Maine Uniform Directed Trust Act, the~~ duty of a trustee to act
17 in good faith and in accordance with the purposes of the trust;

18 **Sec. 3. 18-B MRSA §603, sub-§1**, as amended by PL 2005, c. 184, §13, is
19 further amended to read:

20 **1. Revocable trust.** ~~While~~ To the extent a trust is revocable, rights of the
21 beneficiaries are subject to the control of, and the duties of the trustee are owed
22 exclusively to, the settlor.

23 **Sec. 4. 18-B MRSA §603, sub-§3** is enacted to read:

24 **3. Revocable trust; direction of settlor.** To the extent a trust is revocable by the
25 settlor, the trustee may follow a direction of the settlor that is contrary to the terms of the
26 trust. To the extent a trust is revocable by the settlor in conjunction with a person other
27 than the trustee or person holding an adverse interest, the trustee may follow a direction
28 of the settlor and the other person holding the power to revoke even if the direction is
29 contrary to the terms of the trust.

30 **Sec. 5. 18-B MRSA §703, sub-§3**, as enacted by PL 2003, c. 618, Pt. A, §1 and
31 affected by §2, is amended to read:

32 **3. Participation by cotrustee.** ~~A~~ Subject to the Maine Uniform Directed Trust Act,
33 a cotrustee ~~must~~ shall participate in the performance of a trustee's function unless the
34 cotrustee is unavailable to perform the function because of absence, illness,
35 disqualification or other temporary incapacity or the cotrustee has properly delegated the
36 performance of the function to another trustee.

1 **Sec. 6. 18-B MRSA §703, sub-§7**, as enacted by PL 2003, c. 618, Pt. A, §1 and
2 affected by §2, is amended to read:

3 **7. Reasonable care.** Each Subject to the Maine Uniform Directed Trust Act, each
4 trustee shall exercise reasonable care to:

- 5 A. Prevent a cotrustee from committing a serious breach of trust; and
- 6 B. Compel a cotrustee to redress a serious breach of trust.

7 **Sec. 7. 18-B MRSA §808**, as enacted by PL 2003, c. 618, Pt. A, §1 and affected
8 by §2, is repealed.

9 **Sec. 8. 18-B MRSA Pt. 2** is enacted to read:

10 **PART 2**

11 **MAINE UNIFORM DIRECTED TRUST ACT**

12 **PREFATORY NOTE**

13 *Background.* The Uniform Directed Trust Act addresses an increasingly common
14 arrangement in contemporary estate planning and asset management known as a "directed
15 trust." In a directed trust, the terms of the trust grant a person other than a trustee a power
16 over some aspect of the trust's administration. There is no consistent vocabulary to
17 describe the person other than a trustee that holds a power in a directed trust. Several
18 terms are common in practice, including "trust protector," "trust adviser," and "trust
19 director." There is much uncertainty in existing law about the fiduciary status of a
20 nontrustee that has a power over a trust and about the fiduciary duty of a trustee,
21 sometimes called an "administrative trustee" or "directed trustee," with regard to actions
22 taken or directed by the nontrustee. Existing uniform trusts and estates acts address the
23 issue inadequately. Existing nonuniform state laws are in disarray.

24 Under the Uniform Directed Trust Act, a power over a trust held by a nontrustee
25 is called a "power of direction." The holder of a power of direction is called a "trust
26 director." A trustee that is subject to a power of direction is called a "directed trustee."
27 The main contribution of the act is to address the many complications created by giving a
28 power of direction to a trust director, including the fiduciary duty of a trust director and
29 the fiduciary duty of a directed trustee.

30 *Enabling Settlor Autonomy Consistent with Fiduciary Minimums.* By validating
31 terms of a trust that grant a trust director a power of direction, the Uniform Directed Trust
32 Act promotes settlor autonomy in accordance with the principle of freedom of
33 disposition. At the same time, the act imposes a mandatory minimum of fiduciary duty on
34 both a directed trustee and a trust director in accordance with the traditional principle that
35 a trust is a fiduciary relationship. *See, e.g.,* Restatement (Third) of Trusts § 96 cmt. c
36 (2012) ("[F]or reasons of policy trust fiduciary law imposes limitations on the types and
37 degree of misconduct for which the trustee can be excused from liability.").

38 *Structure of the Act.* The heart of the Uniform Directed Trust Act appears in

1 Sections 6 through 11, which address the powers and duties of a trust director and a
2 directed trustee. Sections 6 through 8 address the kinds of powers that the terms of a trust
3 can grant to a trust director and the default and mandatory fiduciary duties of the director.
4 Section 9 addresses the fiduciary duty of a directed trustee. Sections 10 and 11 further
5 elaborate the duties of a trust director and directed trustee, prescribing specific rules for
6 information sharing and monitoring among trust directors and trustees. Section 12
7 addresses cotrusteeship, enabling a settlor to apply the fiduciary standards of conduct for
8 a directed trust under this act to a cotrusteeship. The remaining sections address a variety
9 of important technical issues in this act's relationship to existing law and in the
10 administration of a directed trust, including rules of construction for recurring matters
11 that might be overlooked in the drafting of a directed trust.

12 *Fiduciary Duty in a Directed Trust.* Under the Uniform Directed Trust Act, a
13 trust director has the same default and mandatory fiduciary duties as a trustee in a like
14 position and under similar circumstances (Section 8). In complying with a trust director's
15 exercise of a power of direction, a directed trustee is liable only for the trustee's own
16 "willful misconduct" (Section 9). The logic behind these rules is that in a directed trust
17 the trust director functions much like a trustee in an undirected trust. Accordingly, the
18 trust director should have the same duties as a trustee in the exercise or nonexercise of the
19 director's power of direction, and the fiduciary duty of the directed trustee is reduced with
20 respect to the director's power of direction.

21 In preserving some minimal fiduciary duty in a directed trustee, the drafting
22 committee was influenced by the prominent directed trust statute in Delaware, which
23 provides likewise. *See* Del. Code Ann. tit. 12, § 3313 (2017). The popularity of directed
24 trusts in Delaware establishes that a directed trust statute that preserves in a directed
25 trustee a duty to avoid "willful misconduct" is workable in practice. The drafting
26 committee therefore declined the suggestion that the Uniform Directed Trust Act should
27 eliminate the fiduciary duty of a directed trustee completely.

28 In summary, under the Uniform Directed Trust Act a beneficiary's main recourse
29 for misconduct by a trust director is an action against the director for breach of the
30 director's fiduciary duty to the beneficiary. The beneficiary also has recourse against a
31 directed trustee, but only to the extent of the trustee's own willful misconduct. Compared
32 with a non-directed trust in which a trustee holds all power over the trust, a directed trust
33 subject to this act provides for more aggregate fiduciary duties owed to a beneficiary. All
34 of the usual duties of trusteeship are preserved in the trust director, and in addition the
35 directed trustee has a duty to avoid willful misconduct.

36 **CHAPTER 21**

37 **MAINE UNIFORM DIRECTED TRUST ACT**

38 **§2101. Short title**

39 This Part may be known and cited as "the Maine Uniform Directed Trust Act."

40 **Comment**

1 (This is Section 1 of the Uniform Directed Trust Act (2017).)

2 This act governs an arrangement commonly known as a "directed trust." In a
3 directed trust, the terms of the trust grant a person other than a trustee a power over some
4 aspect of the trust's administration. Under this act, such a power is called a "power of
5 direction," the person that holds the power is called a "trust director," a trustee that is
6 subject to the power is called a "directed trustee," and the trust is a "directed trust" (see
7 Sections 2(5), (9), (3), and (2) respectively). This act applies to any arrangement that
8 exhibits the functional features of a directed trust within the meaning of this act, even if
9 the terms of the trust use other terminology, such as "trust protector," "trust advisor," or
10 "administrative trustee."

11 **§2102. Definitions**

12 As used in this Act, unless the context otherwise indicates, the following terms have
13 the following meanings.

14 **1. Act.** "Act" means the Maine Uniform Directed Trust Act.

15 **2. Breach of trust.** "Breach of trust" includes a violation by a trust director or
16 trustee of a duty imposed on that director or trustee by the terms of the trust, this Act or
17 law of this State other than this Act pertaining to trusts.

18 **3. Directed trust.** "Directed trust" means a trust for which the terms of the trust
19 grant a power of direction.

20 **4. Directed trustee.** "Directed trustee" means a trustee that is subject to a trust
21 director's power of direction.

22 **5. Person.** "Person" means an individual, estate, business or nonprofit entity, public
23 corporation, government or governmental subdivision, agency or instrumentality or other
24 legal entity.

25 **6. Power of direction.** "Power of direction" means a power over a trust granted to a
26 person by the terms of the trust to the extent the power is exercisable while the person is
27 not serving as a trustee. "Power of direction" includes a power over the investment,
28 management or distribution of trust property or other matters of trust administration.
29 "Power of direction" excludes the powers described in section 2105, subsection 2.

30 **7. Settlor.** "Settlor" has the same meaning as in section 103, subsection 14.

31 **8. State.** "State" means a state of the United States, the District of Columbia, the
32 Commonwealth of Puerto Rico, the United States Virgin Islands or any territory or
33 insular possession subject to the jurisdiction of the United States.

34 **9. Terms of a trust.** "Terms of a trust" means:

35 A. Except as otherwise provided in paragraph B, the manifestation of the settlor's
36 intent regarding a trust's provisions as:

37 (1) Expressed in the trust instrument; or

1 (2) Established by other evidence that would be admissible in a judicial
 2 proceeding; or

3 B. The trust's provisions as established, determined or amended by:

4 (1) A trustee or trust director in accordance with applicable law;

5 (2) Court order; or

6 (3) A nonjudicial settlement agreement under the Maine Uniform Trust Code.

7 **10. Trust director.** "Trust director" means a person that is granted a power of
 8 direction by the terms of a trust to the extent the power is exercisable while the person is
 9 not serving as a trustee. The person is a trust director whether or not the terms of the trust
 10 refer to the person as a trust director and whether or not the person is a beneficiary or
 11 settlor of the trust.

12 **11. Trustee.** "Trustee" includes an original, additional and successor trustee and a
 13 cotrustee.

14 **Comment**

15 (This is Section 2 of the Uniform Directed Trust Act (2017).)

16 (1) *Breach of trust.* The definition of "breach of trust" in paragraph (1) makes
 17 clear that the term includes a breach by a trust director or a trustee of a duty imposed on
 18 that director or trustee by the terms of the trust, this act, or other law pertaining to trusts.
 19 Historically, the term has been used to reference a breach of duty by a trustee, as under
 20 Uniform Trust Code § 1001(a) (2000) and Restatement (Third) of Trusts § 93 (2012). By
 21 expanding the meaning of the term to include a breach of duty by a trust director, this
 22 paragraph resolves any doubt about whether such conduct is also a "breach of trust."

23 In defining a breach of trust to include a breach of a duty imposed by this act, it is
 24 important to recognize that some of the duties imposed by this act are default rules that
 25 may be varied by the terms of the trust. The drafting committee contemplated that a trust
 26 director or a trustee would not be in breach of trust for conduct that was authorized by the
 27 terms of a trust to the extent that those terms are permissible under this act or other
 28 applicable law.

29 (2) *Directed trust.* Under paragraph (2), a "directed trust" is a trust for which the
 30 terms of the trust grant a power of direction. A "power of direction" is defined by
 31 paragraph (5).

32 (3) *Directed trustee.* The definition of "directed trustee" in paragraph (3) refers
 33 only to a trustee that is subject to direction by a trust director. A trustee that is subject to
 34 direction by a cotrustee is not for that reason a directed trustee, as paragraphs (5) and (9)
 35 exclude a person from being a trust director while that person is serving as trustee. The
 36 term "directed trustee" thus includes many but not all trustees that in practice are
 37 sometimes called "administrative trustees." Relations between multiple trustees are
 38 governed by the law of cotrusteeship as modified by Section 12.

39 (4) *Person.* The definition of "person" in paragraph (4) follows the current

1 Uniform Law Commission definition.

2 (5) *Power of direction.* The definition of "power of direction" in paragraph (5) is
3 expansive. It includes any "power over a trust" to the extent the power is exercisable at a
4 time the power holder is not serving as a trustee. A power of direction may be structured
5 as a power to direct the trustee in the exercise of the trustee's powers—for example, a
6 power to direct the trustee in the investment or management of the trust property. A
7 power of direction may also be structured as a power to act independently—for example,
8 by amending the terms of a trust or releasing a trustee from liability.

9 The definition includes a power only to the extent the power is exercisable at a
10 time the power holder is not serving as a trustee. The purpose of this limitation is to
11 exclude a person serving as trustee from the definition of a trust director, even though as
12 trustee the person will inevitably have a "power over a trust." A trust director, in other
13 words, is someone other than a trustee. The contribution of this act is to address the
14 complications created by giving a person other than a trustee—that is, a trust director—a
15 power over a trust. A power over a trust held by a trustee is governed by existing trust
16 fiduciary law.

17 The restriction in the definition to powers held by a person that is "not serving as
18 a trustee" is also designed to be consistent with the definition of "trustee" in paragraph
19 (10). Under paragraph (10), the term "trustee" includes an original, additional, and
20 successor trustee. The definition of power of direction thus clarifies that a person that
21 qualifies as a trustee under paragraph (10) by virtue of having served as an original
22 trustee in the past or having been named as a successor trustee in the future may
23 nevertheless be a "trust director" at a time when the person is not serving as a trustee. An
24 original trustee that has ceased serving as a trustee but continues to hold a power over
25 investments, for example, is a trust director under paragraph (5) even though the person
26 also qualifies as a trustee under paragraph (10).

27 The definition confirms that a power of direction may include a power over
28 "matters of trust administration" as well as a power over "investment, management, or
29 distribution of trust property." These examples are meant to illustrate the potential scope
30 of a power of direction rather than to limit it. In using the term "administration," the
31 drafting committee intended a meaning at least as broad as that found in the context of
32 determining a trust's "principal place of administration," such as under Section 3(b). The
33 drafting committee also intended the terms "investment, management, or distribution" to
34 have a meaning at least as broad as that found in Uniform Trust Code § 815(a)(2)(b)
35 (2000), which specifies a trustee's default powers. The comment to Section 6 provides
36 examples of the kinds of specific powers that the drafting committee contemplated would
37 fall within the definition of a power of direction.

38 (6) *Settlor.* The definition of "settlor" in paragraph (6) follows Uniform Trust
39 Code § 103(15) (2004).

40 (7) *State.* The definition of "state" in paragraph (7) follows the current Uniform
41 Law Commission definition.

42 (8) *Terms of a trust.* The definition of "terms of a trust" in paragraph (8) updates

1 the comparable definition in Uniform Trust Code § 103(18) (2004) to take notice of court
2 orders and nonjudicial settlement agreements, both of which are of growing practical
3 significance and are sometimes used to vary the terms of a trust from a settlor's original
4 intent. The definition also takes notice of a power in a trustee or a trust director to modify
5 the terms of a trust.

6 The expanded definition of "terms of a trust" in this paragraph is consistent with
7 the Restatement, which recognizes the possibility that the terms of a trust may later be
8 varied from the settlor's initial expression. *See* Restatement (Third) of Trusts § 76 cmt.
9 b(1) (2007) ("References ... to the terms of the trust ... also refer to trust terms as
10 reformed or modified by court decree, and as modified by the settlor or others or by
11 consent of all beneficiaries.") (internal cross-references omitted).

12 (9) *Trust director.* The definition of a "trust director" in paragraph (9) refers to a
13 person other than a serving trustee that is granted a power of direction by the terms of a
14 trust. Such a person is a trust director even if the terms of the trust or the parties call the
15 person a "trust adviser" or "trust protector" or otherwise purport to disclaim trust director
16 status. A person may be a trust director even if the person is a beneficiary or settlor of the
17 trust, though certain powers of a beneficiary and a settlor are excluded from the
18 application of this act by Section 5.

19 A serving trustee cannot be a "trust director" for the same reasons that under
20 paragraph (5) a power over a trust cannot be a "power of direction" while the person that
21 holds the power is serving as a trustee. Relations between multiple trustees are governed
22 by the law of cotrusteeship as modified by Section 12.

23 (10) *Trustee.* Following Uniform Trust Code § 103(20) (2004), paragraph (10)
24 provides that the term "trustee" includes an original, additional, and successor trustee, and
25 a cotrustee.

26 **§2103. Application; principal place of administration**

27 **1. Application.** This Act applies to a trust, whenever created, that has its principal
28 place of administration in this State, subject to the following rules:

29 A. If the trust was created before January 1, 2020, this Act applies only to a decision
30 or action occurring on or after January 1, 2020.

31 B. If the principal place of administration of the trust is changed to this State on or
32 after January 1, 2020, this Act applies only to a decision or action occurring on or
33 after the date of the change.

34 **2. Principal place of administration.** Without precluding other means to establish
35 a sufficient connection with the designated jurisdiction in a directed trust, terms of the
36 trust that designate the principal place of administration of the trust are valid and
37 controlling if:

38 A. A trustee's principal place of business is located in or a trustee is a resident of the
39 designated jurisdiction;

1 B. A trust director's principal place of business is located in or a trust director is a
2 resident of the designated jurisdiction; or

3 C. All or part of the administration occurs in the designated jurisdiction.

4 **Comment**

5 (This is Section 3 of the Uniform Directed Trust Act (2017).)

6 *Subsection (a).* Subsection (a) addresses two matters. First, because powers and
7 duties in a directed trust are matters of trust administration, see Restatement (Second) of
8 Conflict of Laws § 271 cmt. a (1971), this subsection follows the prevailing conflict of
9 laws rule by linking application of this act to the trust's principal place of administration.
10 As with other matters of administration, the parties are protected against inconsistent
11 court orders by the common law principle of "primary supervision." *See id.* § 267 cmt. e.

12 Second, this subsection applies this act to all trusts administered in an enacting
13 state regardless of whether the trust was in existence on the effective date of this act.
14 However, under subsections (a)(1) and (2), this act applies only with respect to a decision
15 or action occurring on or after the effective date or, if the trust's principal place of
16 administration was changed to the enacting state after the effective date, only with respect
17 to a decision or action occurring on or after that change. Because some of the standards of
18 conduct prescribed by this act depart from Uniform Trust Code § 808 (2000) and
19 Restatement (Third) of Trusts § 75 (2007), the drafting committee reasoned that the act
20 should apply prospectively, following the model of Uniform Prudent Investor Act § 11
21 (1994).

22 *Subsection (b).* Subsection (b), which derives from Uniform Trust Code § 108(a)
23 (2000), establishes a safe harbor for a settlor's designation of the principal place of
24 administration for a directed trust. Such a designation is valid if (1) a trustee is located in
25 the designated jurisdiction, (2) a trust director is located in the designated jurisdiction, or
26 (3) at least some of the trust administration occurs in the designated jurisdiction.
27 Subsections (b)(1) and (b)(3) reproduce without change the safe harbor prescribed by
28 Uniform Trust Code § 108(a) (2000). Subsection (b)(2) expands the safe harbor of
29 Section 108(a) to add the presence of a trust director as a sufficient connection with the
30 designated jurisdiction.

31 Other than the expansion in subsection (b)(2) of the Uniform Trust Code's safe
32 harbor for a settlor's designation of a trust's principal place of administration, the drafting
33 committee did not undertake to prescribe rules for ascertaining a trust's principal place of
34 administration. In this respect, the drafting committee followed the Uniform Trust Code
35 in "not attempt[ing] to further define principal place of administration." Uniform Trust
36 Code § 108 cmt. Accordingly, for a directed trust in an enacting state, just as for all trusts
37 in a Uniform Trust Code state, if the safe harbor of subsection (b) does not apply, the
38 question of a trust's principal place of administration will be governed by the state's then-
39 existing law on principal place of administration. *See, e.g.,* Restatement (Second) of
40 Conflict of Laws §§ 271-72, 279 (1971).

1 **§2104. Common law and principles of equity**

2 The common law and principles of equity supplement this Act, except to the extent
3 modified by this Act or law of this State other than this Act.

4 **Comment**

5 (This is Section 4 of the Uniform Directed Trust Act (2017).)

6 This section confirms that the common law and principles of equity remain
7 applicable to a directed trust except to the extent modified by this act or other law. For
8 example, other than the safe harbor under Section 3(b) for a term of a trust that designates
9 the trust's principal place of administration, the law of an enacting state by which
10 principal place of administration is determined would continue to apply to a directed
11 trust. Provisions such as this one are familiar from other uniform acts. *See, e.g.*, Uniform
12 Powers of Appointment Act § 104 (2013); Uniform Trust Code § 106 (2000). The
13 drafting committee contemplated that, by ordinary principles of statutory interpretation,
14 other statutes pertaining to trusts such as the Uniform Trust Code (2000), Uniform Trust
15 Decanting Act (2015), Uniform Principal and Income Act (1997), and Uniform Prudent
16 Investor Act (1994), would continue to apply to a directed trust except as modified by this
17 act.

18 **§2105. Exclusions**

19 **1. Power of appointment.** In this section, "power of appointment" means a power
20 that enables a person acting in a nonfiduciary capacity to designate a recipient of an
21 ownership interest in or another power of appointment over trust property.

22 **2. Exclusions.** This Act does not apply to a:

23 A. Power of appointment;

24 B. Power to appoint or remove a trustee or trust director;

25 C. Power of a settlor over a trust to the extent the settlor has a power to revoke the
26 trust;

27 D. Power of a beneficiary over a trust to the extent the exercise or nonexercise of the
28 power affects the beneficial interest of:

29 (1) The beneficiary; or

30 (2) Another beneficiary represented by the beneficiary under the Maine Uniform
31 Trust Code, sections 301 to 305 with respect to the exercise or nonexercise of the
32 power; or

33 E. Power over a trust if:

34 (1) The terms of the trust provide that the power is held in a nonfiduciary
35 capacity; and

1 (2) The power must be held in a nonfiduciary capacity to achieve the settlor's tax
2 objectives under the United States Internal Revenue Code of 1986 and
3 amendments to that Code as of December 31, 2017.

4 **3. Power of direction.** Unless the terms of a trust provide otherwise, a power
5 granted to a person to designate a recipient of an ownership interest in or power of
6 appointment over trust property that is exercisable while the person is not serving as a
7 trustee is a power of appointment and not a power of direction.

8 **Comment**

9 (This is Section 5 of the Uniform Directed Trust Act (2017).)

10 This section excludes five categories of powers that the drafting committee
11 concluded should not be covered by this act for reasons of policy, coverage by other law,
12 or both. Questions regarding a power that falls within one of these exclusions, such as the
13 duty of the holder of the power and the duty of a trustee or other person subject to the
14 power, are governed by law other than this act.

15 *(1) Power of appointment.* Subsection (b)(1) excludes a "power of appointment,"
16 which is defined by subsection (a) to mean "a power that enables a person acting in a
17 nonfiduciary capacity to designate a recipient of an ownership interest in or another
18 power of appointment over trust property." This definition of "power of appointment" is
19 based on the definition in Uniform Powers of Appointment Act § 102(13) (2013). The
20 definition is consistent with what Restatement (Third) of Property: Wills and Other
21 Donative Transfers § 17.1 cmt. g (2011), refers to as a "discretionary" power of
22 appointment, that is, one in which "the donee may exercise the power arbitrarily as long
23 as the exercise is within the scope of the power."

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

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

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

39 A power in a serving trustee to designate a recipient of an ownership interest in
40 or a power of appointment over trust property can never be a power of direction, because

1 a serving trustee can never be a trust director (see Sections 2(5) and (9)). Whether a
2 power over distribution granted to a serving trustee is held in a fiduciary capacity
3 (making it a fiduciary distributive power) or is instead a nonfiduciary power of
4 appointment is governed by law other than this act, such as under Restatement (Third) of
5 Trusts § 50 cmt. a (2003).

6 (2) *Power to appoint or remove.* Subsection (b)(2) excludes "a power to appoint
7 or remove a trustee or trust director." This exclusion addresses the compelling suggestion
8 to the drafting committee that granting a person a power to appoint or remove a trustee is
9 a common drafting practice that arose separately from the phenomenon of directed trusts.
10 Under prevailing law, the only limit on the exercise of a power to appoint or remove a
11 trustee is that it "must conform to any valid requirements or limitations imposed by the
12 trust terms." Restatement (Third) of Trusts § 37 cmt. c (2003). If the terms of the trust do
13 not impose any requirements or limitations on the power to remove, then "it is
14 unnecessary for the holder to show cause" before exercising the power. Austin Wakeman
15 Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 11.10.2
16 (5th ed. 2006).

17 (3) *Revocable trust.* Subsection (b)(3) excludes a power of a settlor over a trust to
18 the extent the settlor has a power to revoke the trust. The drafting committee intended that
19 this exception would apply only to that portion of a trust over which the settlor has a
20 power to revoke, that is, "to the extent" of the settlor's power to revoke.

21 Because the settlor of a revocable trust may at any time revoke the trust and take
22 back the trust property, under modern law, including Uniform Trust Code § 603(a)
23 (2004), the trustee's duties run to the settlor rather than to the beneficiaries. The trustee
24 must "comply with a direction of the settlor even though the direction is contrary to the
25 terms of the trust or the trustee's normal fiduciary duties." Restatement (Third) of Trusts §
26 74(1)(a)(i) (2007).

27 Without the exclusion of this subsection, the definitions contained in paragraphs
28 (3), (5), and (9) of Section 2 could have been read to transform a settlor's power over a
29 revocable trust into fiduciary powers of a trust director, thus subjecting the settlor to the
30 fiduciary duties of a trust director under Section 8 and the trustee to the modified
31 fiduciary duties of a directed trustee under Sections 9 through 11.

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

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

41 Subparagraph (A) follows from traditional law, under which "[a] power that is for
42 the sole benefit of the person holding the power is not a fiduciary power." Restatement

1 (Third) of Trusts § 75 cmt. d (2007). Thus, for example, a power in a beneficiary to
2 release a trustee from a claim by the beneficiary is excluded from this act. To the extent
3 the power affects another person, however, then it is not for the sole benefit of the person
4 holding the power. Hence, a power over a trust held by a beneficiary may be a power of
5 direction subject to this act if it affects the beneficial interest of another beneficiary. For
6 example, a power in a beneficiary to release the trustee from a claim by another
7 beneficiary is not excluded by this paragraph unless the power to bind the other
8 beneficiary arises by reason of virtual representation.

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

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

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

34 (5) *The settlor's tax objectives.* Subsection (b)(5) excludes a power if (A) the
35 terms of the trust provide that the power is held in a nonfiduciary capacity, and (B) the
36 power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under
37 federal tax law. This exclusion is responsive to multiple suggestions to the drafting
38 committee that certain powers held by a person other than a trustee must be nonfiduciary
39 to achieve the settlor's federal tax objectives.

40 For example, to ensure that a trust is a grantor trust for federal income tax
41 purposes, a common practice is to include in the trust instrument a provision that allows
42 the settlor or another person to substitute assets of the trust for assets of an equivalent
43 value, exercisable in a nonfiduciary capacity. If the power to substitute assets is
44 exercisable in a fiduciary capacity, the power will not cause the trust to be a grantor trust.

1 Without the exception of subsection (b)(5), therefore, this common drafting practice
2 might no longer ensure grantor trust status in a state that enacts this Act, and the tax status
3 of existing trusts with such a provision would be thrown into disarray.

4 In light of the evolving nature of tax planning, the frequency of amendments to
5 the tax law, and the potential for disagreement about which powers must be nonfiduciary
6 to achieve the settlor's federal tax objectives, the drafting committee reasoned that a
7 standard referring broadly to a settlor's tax objectives was preferable to a prescribed list of
8 sections of the tax code.

9 The drafting committee deliberately opted to reference tax objectives only under
10 federal law, thereby excluding tax objectives under state law. The concern was that some
11 states levy a tax on income in a trust if the trust has a fiduciary in the state. If this
12 exclusion reached state tax law, then in such a state a trust director could argue that the
13 director is not a fiduciary, because the settlor would not have wanted the trust to pay
14 income tax. The consequence would be to negate fiduciary status for virtually all trust
15 directors in those states. The purpose of this exception is to protect normal and customary
16 estate planning techniques, not to allow circumvention of the central policy choice
17 encoded in Section 8 that a trust director is generally subject to the same default and
18 mandatory fiduciary duties as a similarly situated trustee.

19 **§2106. Powers of trust director**

20 **1. Power of direction.** Subject to section 2107, the terms of a trust may grant a
21 power of direction to a trust director.

22 **2. Powers of trust director.** Unless the terms of a trust provide otherwise:

23 A. A trust director may exercise any further power appropriate to the exercise or
24 nonexercise of a power of direction granted to the director under subsection 1; and

25 B. Trust directors with joint powers shall act by majority decision.

26 **Comment**

27 (This is Section 6 of the Uniform Directed Trust Act (2017).)

28 *Validating a trust director.* Subsection (a) validates a provision for a trust
29 director in the terms of a trust. This subsection does not provide any powers to a trust
30 director by default. Nor does it specify the scope of a power of direction. The existence
31 and scope of a power of direction must instead be specified by the terms of a trust. A trust
32 director may be named by the terms of the trust, by a procedure prescribed by the terms
33 of the trust, or in accordance with Section 16(6).

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

- 37 • direct investments, including a power to:
 - 38 ○ acquire, dispose of, exchange, or retain an investment;
 - 39 ○ make or take loans;

- 1 ○ vote proxies for securities held in trust;
- 2 ○ adopt a particular valuation of trust property or determine the
- 3 frequency or methodology of valuation;
- 4 ○ adjust between principal and income or convert to a unitrust;
- 5 ○ manage a business held in the trust; or
- 6 ○ select a custodian for trust assets;
- 7 ● modify, reform, terminate, or decant a trust;
- 8 ● direct a trustee's or another director's delegation of the trustee's or other
- 9 director's powers;
- 10 ● change the principal place of administration, situs, or governing law of
- 11 the trust;
- 12 ● ascertain the happening of an event that affects the administration of the
- 13 trust;
- 14 ● determine the capacity of a trustee, settlor, director, or beneficiary of the
- 15 trust;
- 16 ● determine the compensation to be paid to a trustee or trust director;
- 17 ● prosecute, defend, or join an action, claim, or judicial proceeding relating
- 18 to the trust;
- 19 ● grant permission before a trustee or another director may exercise a
- 20 power of the trustee or other director; or
- 21 ● release a trustee or another trust director from liability for an action
- 22 proposed or previously taken by the trustee or other director.

23 This subsection does not, however, override the background law that regulates
24 the formation of a trust, such as the requirements that a trust be lawful, not contrary to
25 public policy, and possible to achieve. *See, e.g.*, Uniform Trust Code § 404 (2000);
26 Restatement (Third) of Trusts §§ 29–30 (2003).

27 *Pet and other noncharitable purpose trust enforcers.* Statutes in every state
28 validate a trust for a pet animal and certain other noncharitable purposes. Following
29 Uniform Probate Code § 2-907(c)(4) (1993) and Uniform Trust Code §§ 408(b) and
30 409(2) (2000), most of these statutes authorize enforcement of the trust by a person
31 named in the terms of the trust. In a state that enacts this act, such a person would be a
32 trust director.

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

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

40 *(1) Further appropriate powers.* Subsection (b)(1) prescribes a default rule under
41 which a trust director may exercise any "further" power that is "appropriate" to the
42 director's exercise of the director's express powers granted by the terms of the trust under
43 subsection (a). The term "appropriate" is drawn from Uniform Trust Code § 815(a)(2)(B)

1 (2000). Appropriateness should be judged in relation to the purpose for which the power
2 was granted and the function being carried out by the director. Examples of further
3 powers that might be appropriate include a power to: (1) incur reasonable costs and direct
4 indemnification for those costs; (2) make a report or accounting to a beneficiary or other
5 interested party; (3) direct a trustee to issue a certification of trust under Uniform Trust
6 Code § 1013 (2000); (4) prosecute, defend, or join an action, claim, or judicial proceeding
7 relating to a trust; or (5) employ a professional to assist or advise the director in the
8 exercise or nonexercise of the director's powers.

9 *Delegation by trust director.* In some circumstances, it may be appropriate under
10 subsection (b)(1) for a trust director to exercise a further power to delegate the director's
11 powers, much as it may sometimes be appropriate for a trustee to delegate its powers.
12 Under Section 8, a trust director is subject to the same fiduciary duty regarding delegation
13 as a trustee in a like position and under similar circumstances. In most states, therefore, a
14 trust director would be required to exercise reasonable care, skill, and caution in
15 selecting, instructing, and monitoring an agent, and a director that did so would not be
16 liable for the action of the agent. In accordance with prevailing law governing delegation
17 by a trustee, see, e.g., Uniform Trust Code § 807 (2000); Uniform Prudent Investor Act §
18 9 (1994); Restatement (Third) of Trusts § 80 (2007), the drafting committee contemplated
19 that in performing a function delegated by a trust director, the agent would owe a duty to
20 exercise reasonable care.

21 *Trust director's standing to sue.* Subsection (b)(1) addresses the situation that
22 arose in *Schwartz v. Wellin*, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr.
23 17, 2014). The court held that a trust director, which the terms of the trust referred to as a
24 "trust protector," lacked standing to bring a lawsuit under Rule 17(a)(1) of the Federal
25 Rules of Civil Procedure, because the director was neither a real party in interest nor a
26 party that could pursue a claim if not a real party in interest.

27 In some circumstances, subsection (b)(1) may produce a different outcome. Rule
28 17(a)(1) allows a party to participate in litigation even if the party is not a real party in
29 interest if the party is "authorized by statute." Subsection (b)(1) supplies the requisite
30 statutory authorization if participating in a lawsuit would be "appropriate" to a director's
31 exercise or nonexercise of a power granted by the terms of the trust under subsection (a).
32 It would normally be "appropriate," for example, for a trust director to bring an action
33 against a directed trustee if the trustee refused to comply with a director's exercise of a
34 power of direction. The requisite statutory authorization might also come from subsection
35 (a) if the terms of the trust expressly confer a power of litigation on a director.

36 (2) *Majority decision.* Subsection (b)(2) provides a default rule of majority action
37 for multiple trust directors with "joint powers," such as a three-person committee with a
38 power of direction over investment or distribution. Majority action is the prevailing
39 default for cotrustees. See Uniform Trust Code § 703(a) (2000); Restatement (Third) of
40 Trusts § 39 (2003). In the event of a deadlock among trust directors with joint powers, by
41 analogy to a deadlock among cotrustees, a court could "direct exercise of the [joint]
42 power or take other action to break the deadlock." Restatement (Third) of Trusts § 39
43 cmt. e (2003).

44 The duty and liability of a trust director is governed by Section 8, which applies

1 the fiduciary duty of trusteeship to a trust director. Thus, under Section 8(a)(1)(B), a trust
2 director that holds a power of direction jointly with a trustee or another trust director
3 would be subject to the fiduciary duty of a cotrustee.

4 **§2107. Limitations on trust director**

5 A trust director is subject to the same rules as a trustee in a like position and under
6 similar circumstances in the exercise or nonexercise of a power of direction or further
7 power under section 2106, subsection 2, paragraph A regarding:

8 **1. Medicaid payback provision.** A payback provision in the terms of a trust
9 necessary to comply with the reimbursement requirements of Medicaid law in Section
10 1917 of the federal Social Security Act, 42 United States Code, Section 1396p(d)(4)(A);
11 and

12 **2. Charitable interest.** A charitable interest in the trust, including notice regarding
13 the interest to the Attorney General.

14 **Comment**

15 (This is Section 7 of the Uniform Directed Trust Act (2017).)

16 This section applies to a trust director the same rules that apply to a trustee in two
17 specific situations in which many states have particular regulatory interests. The first, in
18 paragraph (1), concerns a payback provision necessary to comply with the reimbursement
19 requirements of Medicaid law in a trust for a beneficiary with a disability. The second, in
20 paragraph (2), concerns a charitable interest in a trust.

21 In both circumstances, this section imposes all the same rules that would apply to
22 a trustee in a like position and under similar circumstances. For example, many states
23 require a trustee to give notice to the Attorney General before taking certain actions with
24 respect to a charitable interest in a trust. Some states also disempower a trustee from
25 taking certain actions with respect to a payback provision in a trust meant to comply with
26 the reimbursement requirements of Medicaid law.

27 The drafting committee referenced "rules" rather than "duties" in order to make
28 clear that this section absorbs every provision of state law in the areas specified by
29 paragraphs (1) and (2), regardless of whether the law in these areas is classified as a duty,
30 a limit on a trustee's powers, a regulation, or otherwise. In referencing rules, rather than
31 duties, this section stands in contrast to Section 8(a) and the other sections of this act that
32 apply a trustee's duties to a trust director. Section 8(a) and these other sections absorb
33 only duties of a fiduciary nature, whereas this section absorbs all rules, whether fiduciary,
34 regulatory, or otherwise. Also unlike Section 8(a), this section applies only to two limited
35 subject areas, rather than to the whole range of a director's possible conduct.

36 **§2108. Duty and liability of trust director**

37 **1. Duties and liabilities.** Subject to subsection 2, with respect to a power of
38 direction or further power under section 2106, subsection 2, paragraph A:

1 A. A trust director has the same fiduciary duty and liability in the exercise or
2 nonexercise of the power:

3 (1) If the power is held individually, as a sole trustee in a like position and under
4 similar circumstances; or

5 (2) If the power is held jointly with a trustee or another trust director, as a
6 cotrustee in a like position and under similar circumstances; and

7 B. The terms of the trust may vary a trust director's duty or liability to the same
8 extent the terms of the trust could vary the duty or liability of a trustee in a like
9 position and under similar circumstances.

10 **2. Health care provider.** Unless the terms of a trust provide otherwise, if a trust
11 director is licensed, certified or otherwise authorized or permitted by law other than this
12 Act to provide health care in the ordinary course of the director's business or practice of a
13 profession, to the extent the director acts in that capacity, the director has no duty or
14 liability under this Act.

15 **3. Additional duties and liabilities.** The terms of a trust may impose a duty or
16 liability on a trust director in addition to the duties and liabilities under this section.

17 **Comment**

18 (This is Section 8 of the Uniform Directed Trust Act (2017).)

19 *Duty and liability of a trust director.* This section addresses the duty and liability
20 of a trust director. It should be read in conjunction with Section 10, which governs
21 information sharing among directed trustees and trust directors, and Section 11, which
22 eliminates certain duties to monitor, inform, or give advice. The drafting committee
23 contemplated that this section, along with Sections 10 and 11, would prescribe the
24 mandatory minimum fiduciary duties of a trust director, displacing any contrary
25 mandatory minimum such as under Uniform Trust Code § 105 (2005).

26 *Subsection (a).* Subsection (a) imposes the same fiduciary duties on a trust
27 director that would apply to a trustee in a like position and under similar circumstances. A
28 trust director with a power to make or direct investments, for example, has the same
29 duties that would apply to a trustee with the same power, including a duty to act
30 prudently, in the sole interest of the beneficiaries, and impartially with due regard for the
31 respective interests of the beneficiaries. *See, e.g.,* Restatement (Third) of Trusts §§ 77–79,
32 90–92 (2007). The theory behind subsection (a) is that if a trust director has a power of
33 direction, the director is the most appropriate person to bear the duty associated with the
34 exercise or nonexercise of that power. Put differently, in a directed trust, a trust director
35 functions much like a trustee in a non-directed trust, and thus should have the same duties
36 as a trustee.

37 Accordingly, subsection (a)(1) sets the default duties of a trust director by
38 absorbing the default duties that would ordinarily apply to a trustee in a like position and
39 under similar circumstances. Subsection (a)(2) sets the mandatory minimum duties of a
40 trust director by absorbing the mandatory minimum duties that the terms of a trust cannot
41 vary for a trustee in a like position and under similar circumstances. The default and

1 mandatory rules applicable to a trustee include those prescribed by the other provisions of
2 this act.

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

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

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

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

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

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

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

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

31 *Exculpation or exoneration.* A trust director is likewise subject to the same rules
32 as a trustee with regard to an exculpation or exoneration clause. Under prevailing law,
33 such as Uniform Trust Code § 1008 (2000) and Restatement (Third) of Trusts § 96
34 (2012), an exculpation or exoneration clause cannot protect a trustee against liability for
35 acting in bad faith or with reckless indifference. Under subsection (a)(2) of this section,
36 the same rules would apply to an exculpation or exoneration clause for a trust director.
37 Thus, if the terms of a trust provide that a director can never be liable to a beneficiary,
38 then the trust director would have the same liability as a trustee would have under a
39 similar exculpatory clause.

40 *Directed director.* The terms of a trust may provide that a trust director has a
41 power over a trust that requires another director to comply with the director's exercise or
42 nonexercise of the power. In other words, a director may have the power to direct another
43 director. In such a trust, subsection (a)(1) would absorb for the directed director the same
44 fiduciary duties that would apply to a directed trustee. A directed director would thus be

1 subject to the willful misconduct standard that Section 9 applies to a directed trustee.
2 Under subsection (a)(2), the terms of a trust may vary the duty of a directed director to
3 the same extent they could vary the duty of a directed trustee.

4 *Subsection (b)—health-care professionals.* Subsection (b) refers to a trust director
5 who is "licensed, certified, or otherwise authorized or permitted by law ... to provide
6 health care in the ordinary course of the director's business or practice of a profession."
7 This phrasing is based on the definition of "health-care provider" in Uniform Health-Care
8 Decisions Act § 1(8) (1993). To the extent that a trust director acts in the director's
9 business or practice of a profession to provide health care, the director is relieved from
10 duty and liability under this act unless the terms of the trust provide otherwise.

11 This subsection addresses the concern that a health-care professional might refuse
12 appointment as a trust director if such service would expose the professional to fiduciary
13 duty under this act. For example, the terms of a trust might call for a health-care
14 professional to determine the capacity or sobriety of a beneficiary or the capacity of a
15 settlor. In making such a determination, under subsection (b) the health-care professional
16 would not be subject to duty or liability under this act.

17 Although the professional would not be subject to duty or liability under this act,
18 the professional would remain subject to any rules and regulations otherwise applicable to
19 the professional, such as the rules of medical ethics. The professional would also be
20 subject to the other provisions of this act that do not create a duty or liability, such as the
21 rules of construction prescribed by Sections 6(b) and 16. Moreover, a trustee subject to a
22 direction by a health-care professional under subsection (b) of this section is still subject
23 to the duties under Section 9 to take reasonable action to comply with the professional's
24 direction and to avoid willful misconduct in doing so.

25 *Subsection (c)—no ceiling on duties.* Subsection (c) confirms that the duties
26 under this section are defaults and minimums, not ceilings. The terms of a trust may
27 impose further duties in addition to those prescribed by this section.

28 **§2109. Duty and liability of directed trustee**

29 **1. Reasonable action to comply.** Subject to subsection 2, a directed trustee shall
30 take reasonable action to comply with a trust director's exercise or nonexercise of a power
31 of direction or further power under section 2106, subsection 2, paragraph A, and the
32 trustee is not liable for the action.

33 **2. No compliance if willful misconduct.** A directed trustee may not comply with a
34 trust director's exercise or nonexercise of a power of direction or further power under
35 section 2106, subsection 2, paragraph A to the extent that by complying the trustee would
36 engage in willful misconduct.

37 **3. Release from liability not effective.** An exercise of a power of direction under
38 which a trust director may release a trustee or another trust director from liability for
39 breach of trust is not effective if:

40 **A. The breach involved the trustee's or other director's willful misconduct;**

1 the terms of the trust."). For example, an attempt by a director to exercise a power of
2 direction in a form contrary to that required by the terms of the trust, such as an oral
3 direction if the terms of the trust require a writing, is not within the trust director's power.

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

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

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

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

40 *Powers to veto or approve.* The terms of a trust may give a trust director a power
41 to veto or approve the actions of a trustee. A trustee, for example, may have the power to
42 invest trust property, subject to the power of a trust director to review and override the
43 trustee's decision. A trustee that operates under this kind of veto or approval power has
44 the normal duties of a trustee regarding the trustee's exercise of its own powers, but has

1 only the duties of a directed trustee regarding the trust director's exercise of its power to
2 veto or approve. Thus, the trustee would be subject to the normal duty of prudence in
3 deciding which investments to propose to a director, but then would be subject only to the
4 willful misconduct rule of subsection (b) in choosing whether to comply with the
5 director's veto or disapproval of the proposed investments.

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

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

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

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

27 The policy rationale for these no duty statutes is that duty should follow power. If
28 a director has the exclusive authority to exercise a power of direction, then the director
29 should be the exclusive bearer of fiduciary duty in the exercise or nonexercise of the
30 power. Placing the exclusive duty on a director does not diminish the total duty owed to a
31 beneficiary, because a settlor of a directed trust could have chosen to make the trust
32 director the sole trustee instead. Thus, on greater-includes-the-lesser reasoning, a settlor
33 who could have named a trust director to serve instead as a trustee should also be able to
34 give the trust director the duties of the trustee. Under the no duty statutes, a beneficiary's
35 only recourse for misconduct by the trust director is an action against the director for
36 breach of the director's fiduciary duty to the beneficiary.

37 In the other group of statutes, which includes Delaware, Illinois, Texas, and
38 Virginia, a directed trustee is not liable for complying with a direction of a trust director
39 unless by so doing the directed trustee would personally engage in "willful" or
40 "intentional" misconduct. The policy rationale for these statutes is that, because a trustee
41 stands at the center of a trust, the trustee must bear at least some duty even if the trustee is
42 acting under the direction of a director. Although the settlor could have made the trust
43 director the sole trustee, the settlor did not actually do so—and under traditional

1 understandings of trust law, a trustee must always be accountable to a beneficiary in some
2 way. *See, e.g.*, Restatement (Third) of Trusts § 96 cmt. c (2012) ("Notwithstanding the
3 breadth of language in a trust provision relieving a trustee from liability for breach of
4 trust, for reasons of policy trust fiduciary law imposes limitations on the types and degree
5 of misconduct for which the trustee can be excused from liability.").

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

18 After extensive deliberation and debate, the drafting committee opted to follow
19 the second group of statutes on the grounds that this model is more consistent with
20 traditional fiduciary policy. The popularity of directed trusts in Delaware, which also
21 adopts the willful misconduct standard, establishes that a directed trust regime that
22 preserves a willful misconduct safeguard is workable and that a total elimination of duty
23 in a directed trustee is unnecessary to satisfy the needs of directed trust practice.

24 The willful misconduct standard prescribed by this subsection changes the policy
25 of Uniform Trust Code § 808 (2000), which is similar in substance to Restatement
26 (Third) of Trusts § 75 (2007). Section 808(b) provides:

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

34 In deciding to adopt a different standard, the drafting committee was deeply influenced
35 by the fact that a growing number of states that had previously adopted Section 808 have
36 since abandoned or modified it to follow one of the two other models discussed above.
37 The drafting committee was also strongly influenced by the fact that a review of every
38 existing specialized state statute on directed trusts showed that no state that has legislated
39 specifically on the issue of directed trustee fiduciary duties has chosen to follow Section
40 808.

41 *Subsection (c)—release by trust director.* The terms of a trust may empower a
42 trust director to release a trustee or another trust director from liability for breach of trust.
43 If the director grants such a release, the trustee or other director is not liable to the extent

1 of the release. The terms of a trust may authorize such a release to be given at any time,
2 whether before or after the trustee or other director acts. The precise scope of a power of
3 release and the manner of its exercise depend on the terms of the trust.

4 Although a settlor has wide latitude in designing a power of direction, subsection
5 (c) prescribes three mandatory safeguards that limit a director's power to release a trustee
6 or other director from liability. First, consistent with the policy of subsection (b), a trustee
7 or other director cannot be released for a breach that involves the trustee's or the other
8 director's own willful misconduct. Second, consistent with prevailing law governing a
9 release of a trustee by a beneficiary, a release by a trust director is not enforceable if it
10 was procured by the improper conduct of the trustee or other director. Third, again
11 consistent with prevailing law governing a release of a trustee by a beneficiary, a release
12 by a trust director is not enforceable if at the time of the release the director did not know
13 the material facts relating to the breach. The drafting committee based the second and
14 third of these safeguards on Uniform Trust Code § 1009 (2001), which is similar in
15 substance to Restatement (Third) of Trusts § 97 (2012).

16 *Subsection (d)—petition for instructions.* Subsection (d) confirms that, in
17 accordance with existing law, a directed trustee that has reasonable doubt about its duty
18 under this section may petition the court for instructions. *See, e.g.,* Restatement (Third) of
19 Trusts § 71 (2007) ("A trustee or beneficiary may apply to an appropriate court for
20 instructions regarding the administration or distribution of the trust if there is reasonable
21 doubt about the powers or duties of the trusteeship or about the proper interpretation of
22 the trust provisions."). The safe harbor of this subsection is permissive rather than
23 mandatory. Though a trustee may satisfy its duties by petitioning for instructions, this
24 subsection does not require a trustee to petition.

25 *Subsection (e)—no ceiling on duties.* Subsection (e) confirms that the duties
26 prescribed by this section are defaults and minimums, not ceilings. The terms of a trust
27 may impose further duties in addition to those prescribed by this section.

28 **§2110. Duty to provide information to trust director or trustee**

29 **1. Trustee's duty to provide information.** Subject to section 2111, a trustee shall
30 provide information to a trust director to the extent the information is reasonably related
31 to both:

32 A. The powers or duties of the trustee; and

33 B. The powers or duties of the director.

34 **2. Trust director's duty to provide information.** Subject to section 2111, a trust
35 director shall provide information to a trustee or another trust director to the extent the
36 information is reasonably related to both:

37 A. The powers or duties of the director; and

38 B. The powers or duties of the trustee or other director.

1 trust director whose powers or duties were reasonably related to the amendment.

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

9 *Shelton v. Tamposi.* In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), the terms
10 of the trust left distribution in the hands of the trustee, but shifted power over investment
11 to a trust director (the "investment director"). As a result, the trustee could not liquidate
12 investments to raise the cash necessary to fund a distribution to one of the beneficiaries.
13 Under subsection (b), the trust director would have been under a duty to give the trustee
14 information about the effects of the director's investment program on the trust's cash
15 position, and the trustee would have been under a duty to give the director information
16 about the cash requirements of the trustee's distribution program. Moreover, in making
17 and implementing the investment program, under Section 8(a) the trust director would be
18 subject to the same duties as a similarly situated trustee, just as the trustee would be
19 subject to the duties of a trustee in making and implementing the distribution program.

20 *Subsections (c) and (d)*—Subsection (c) provides a safe harbor for a trustee that
21 acts in reliance on information provided by a trust director. Subsection (d) provides a
22 similar safe harbor for a trust director for information provided by a trustee or other trust
23 director. Under both subsections, the safe harbor only applies if the trustee or trust
24 director that acts in reliance on the information is not engaged in willful misconduct. For
25 example, subsection (c) protects a trustee if the trustee acts in reliance on a trust director's
26 valuation of an asset, unless by accepting the valuation the trustee would engage in
27 willful misconduct. As in Section 9, the rationale for the safe harbor and willful
28 misconduct limit is to implement the settlor's division of labor subject to a mandatory
29 fiduciary minimum.

30 *No ceiling on duties to share information.* This section imposes a mandatory
31 floor, rather than a ceiling, on a directed trustee's and a trust director's duty to share
32 information. The terms of a trust may specify more extensive duties of information
33 sharing among directed trustees and trust directors.

34 **§2111. No duty to monitor, inform or advise**

35 **1. Trustee.** Unless the terms of a trust provide otherwise:

36 A. A trustee does not have a duty to:

37 (1) Monitor a trust director; or

38 (2) Inform or give advice to a settlor, beneficiary, trustee or trust director
39 concerning an instance in which the trustee might have acted differently than the
40 director; and

1 B. By taking an action described in paragraph A, a trustee does not assume the duty
2 excluded by paragraph A.

3 **2. Trust director.** Unless the terms of a trust provide otherwise:

4 A. A trust director does not have a duty to:

5 (1) Monitor a trustee or another trust director; or

6 (2) Inform or give advice to a settlor, beneficiary, trustee or another trust director
7 concerning an instance in which the director might have acted differently than a
8 trustee or another trust director; and

9 B. By taking an action described in paragraph A, a trust director does not assume the
10 duty excluded by paragraph A.

11 **Comment**

12 (This is Section 11 of the Uniform Directed Trust Act (2017).)

13 *Following existing statutes.* Subsection (a) provides that a trustee does not have a
14 duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee,
15 or trust director concerning instances in which the trustee might have acted differently
16 than the director. Many existing state statutes are to similar effect, though the language in
17 this section is simpler and more direct. Subsection (b) applies the same rule to a trust
18 director regarding the actions of a trustee or another trust director.

19 The existing statutes on which this section is based were meant to reverse the
20 result in *Rollins v. Branch Banking & Trust Company of Virginia*, 56 Va. Cir. 147
21 (2002), in which the court considered the liability of a trustee that was subject to direction
22 in investment. The court declined to hold the trustee liable for the investment director's
23 failure to direct diversification of the trust's investments, but the court nevertheless held
24 the trustee liable for failing to advise the beneficiaries about the risks of the investment
25 director's actions.

26 *Survival of trustee's and trust director's general duty of disclosure.* Although this
27 section confirms that a directed trustee has no duty to monitor a trust director or inform or
28 give advice to others concerning instances in which the trustee might have acted
29 differently than the director, this section does not relieve a trustee of its ordinary duties to
30 disclose, report, or account under otherwise applicable law such as under Uniform Trust
31 Code § 813 (2004) or Restatement (Third) of Trusts § 82 (2007). The same is true for a
32 trust director, on whom Section 8(a) imposes the fiduciary duties of a trustee.

33 For example, if a trust director has a power to direct investments, this section
34 would relieve a directed trustee of any duty to advise a beneficiary about the risks of the
35 director's decision to concentrate the investment portfolio. The trustee would remain
36 under a duty, however, to make periodic reports or accountings to the beneficiary and to
37 answer reasonable inquiries by the beneficiary about the administration of the trust to the
38 extent required by otherwise applicable law. The trustee would also remain under the
39 duty imposed by Section 10 to provide a trust director with information reasonably
40 related to its powers and duties.

1 *No assumption of duty.* In addition to waiving a directed trustee's duty to monitor,
2 inform, or give advice as under subsection (a)(1), many state statutes go further and also
3 provide that if a trustee for some reason chooses to monitor, inform, or give advice, these
4 activities will be deemed to be "administrative actions." *See, e.g.,* Del. Code Ann. tit. 12,
5 § 3313(e) (2017). The purpose of these provisions is to ensure that if a directed trustee
6 chooses for some reason to monitor, inform, or give advice, the trustee does not assume a
7 continuing obligation to do so or concede a prior duty to have done so. This section
8 dispenses with the opacity of an administrative classification and achieves the intended
9 result more directly. Subsection (a)(2) provides that if a trustee monitors, informs, or
10 gives advice about the actions of a trust director, the trustee does not thereby assume a
11 duty to do so. Subsection (b)(2) applies the same rule for a trust director.

12 **§2112. Application to cotrustee**

13 The terms of a trust may relieve a cotrustee from duty and liability with respect to
14 another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same
15 extent that in a directed trust a directed trustee is relieved from duty and liability with
16 respect to a trust director's power of direction under sections 2109 to 2111.

17 **Comment**

18 (This is Section 12 of the Uniform Directed Trust Act (2017).)

19 *Traditional law.* Under traditional law, each cotrustee "has a duty to use
20 reasonable care to prevent a cotrustee from committing a breach of trust and, if a breach
21 of trust occurs, to obtain redress." Restatement (Third) of Trusts § 81(2) (2007). This rule
22 applies even if the settlor limits the role or function of one of the cotrustees. "Even in
23 matters for which a trustee is relieved of responsibility, ... if the trustee knows that a co-
24 trustee is committing or attempting to commit a breach of trust, the trustee has a duty to
25 take reasonable steps to prevent the fiduciary misconduct." *Id.* cmt. b. Moreover, "even in
26 the absence of any duty to intervene or grounds for suspicion, a trustee is entitled to
27 request and receive reasonable information regarding an aspect of trust administration in
28 which the trustee is not required to participate." *Id.* These rules for cotrusteeship contrast
29 with the less demanding fiduciary standards for a directed trusteeship under Sections 9,
30 10, and 11 of this act.

31 *Settlor autonomy.* This section allows a settlor to choose either fiduciary regime
32 for a cotrusteeship—the traditional rules of cotrusteeship or the more permissive rules of
33 a directed trusteeship. There seems little reason to prohibit a settlor from applying the
34 fiduciary rules of this act to a cotrusteeship given that the settlor could choose the more
35 permissive rules of a directed trusteeship by labeling one of the cotrustees as a trust
36 director and another as a directed trustee. The rationale for permitting the terms of a trust
37 to reduce the duty of a cotrustee that is subject to direction by another trustee is the same
38 as the rationale for permitting the terms of a trust to reduce the duty of a directed trustee.
39 In both instances, a trustee must act according to directions from another person and
40 therefore the other person, not the trustee, should bear the full fiduciary responsibility for
41 the action.

42 Accordingly, if the terms of a trust so provide, a cotrustee may have only the duty

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

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

16 For example, a familiar drafting strategy is to name cotrustees but also to provide
17 that in the event of disagreement about a particular matter the decision of a specified
18 trustee controls and the other cotrustee has no liability in that event. Under traditional
19 law, notwithstanding this provision, the other cotrustee would be liable if it did not take
20 reasonable steps to prevent a breach by the controlling cotrustee. Under this section, on a
21 prospective basis the other cotrustee would be liable only for its own willful misconduct
22 akin to a directed trustee.

23 *Cotrustees as directed trustees and trust directors.* The terms of a trust can place
24 a cotrustee in a position of either giving direction, like a trust director, or taking direction,
25 like a directed trustee. This section only applies to a cotrustee that takes direction. This
26 section does not address the duties of a cotrustee that is not directed. Nor does this section
27 address the duties of a cotrustee that gives direction. Under Section 8, the background law
28 of an enacting state that applies to a directing cotrustee also applies to a similarly situated
29 trustee. The drafting committee intended that the language "with respect to another
30 cotrustee's exercise or nonexercise of a power of the other cotrustee" would refer only to
31 a power of another cotrustee and not a power held jointly with the directed cotrustee,
32 because a cotrustee cannot be thought of as taking direction from another cotrustee if the
33 two cotrustees exercise a power jointly.

34 *No third-party effects.* Although this section changes the degree to which the
35 terms of a trust may reduce a cotrustee's duty and liability, it does not alter the rules that
36 affect the rights of third parties who contract with or otherwise interact with a cotrustee.
37 The principal difference between cotrusteeship and directed trusteeship is that in a
38 cotrusteeship every cotrustee has title to the trust property, whereas in a directed
39 trusteeship, title to trust property belongs only to the trustee, and not to the trust director.
40 The placement of title can have important consequences for dealings with third parties
41 and for tax, property, and other bodies of law outside of trust law. This section does not
42 change the rights of third parties who deal with a cotrustee in the cotrustee's capacity as
43 such.

1 **2113. Limitation of action against trust director**

2 **1. Action for breach of trust.** An action against a trust director for breach of trust
3 must be commenced within the same limitation period as in the Maine Uniform Trust
4 Code, section 1005 for an action for breach of trust against a trustee in a like position and
5 under similar circumstances.

6 **2. Report or accounting.** A report or accounting has the same effect on the
7 limitation period for an action against a trust director for breach of trust that the report or
8 accounting would have under the Maine Uniform Trust Code, section 1005 in an action
9 for breach of trust against a trustee in a like position and under similar circumstances.

10 **Comment**

11 (This is Section 13 of the Uniform Directed Trust Act (2017).)

12 This section absorbs for a trust director the law of an enacting state governing
13 limitations on an action against a trustee. A limitation applies to a trust director as it
14 would to a trustee in a like position and under similar circumstances. Whether the law is
15 default or mandatory as applied to a trust director, for example, is determined by whether
16 it is default or mandatory as applied to a trustee.

17 Subsection (a) extends to a trust director the same limits on liability that a trustee
18 enjoys under the law of an enacting state by way of a statutory limitations period, such as
19 under Uniform Trust Code § 1005(c) (2000). The limitations period absorbed by
20 subsection (a) applies to all claims against a trust director for breach of trust, whether by
21 a beneficiary, a trustee, another trust director, or some other party.

22 Subsection (b) extends to a trust director the same limitation period that a trustee
23 enjoys under the law of an enacting state arising from the making of a report or
24 accounting, such as under Uniform Trust Code § 1005(a)–(b) (2000). The rule of
25 subsection (b) applies regardless of whether the report or accounting was made by the
26 trust director. A trust director may therefore be protected by a report or accounting made
27 by a trustee or another trust director even though the director did not make the report or
28 accounting, so long as the report or accounting fairly discloses the relevant facts of the
29 director's conduct.

30 Laches, which strictly speaking is an equitable defense rather than a limitations
31 period, would apply to an action against a trust director under Section 14.

32 **§2114. Defenses in action against trust director**

33 In an action against a trust director for breach of trust, the director may assert the
34 same defenses a trustee in a like position and under similar circumstances could assert in
35 an action for breach of trust against the trustee.

36 **Comment**

37 (This is Section 14 of the Uniform Directed Trust Act (2017).)

1 *Absorption.* This section makes available to a trust director the same defenses
2 that are available to a trustee in a like position and under similar circumstances in an
3 action for breach of trust. A trust director can assert any defense that would be available
4 to a trustee in a comparable action for breach of trust under existing state law, including:

- 5 • laches or estoppel (see Restatement (Third) of Trusts § 98 (2012));
- 6 • consent, release, or ratification by a beneficiary (see Uniform Trust Code § 1009
7 (2001); Restatement (Third) of Trusts § 97(b)–(c) (2012));
- 8 • reasonable reliance on the terms of a trust (see Uniform Trust Code § 1006
9 (2000); Uniform Prudent Investor Act § 1(b) (1994)); and
- 10 • reasonable care in ascertaining the happening of an event affecting administration
11 or distribution (see Uniform Trust Code § 1007 (2000); Restatement (Third) of
12 Trusts § 76 cmt. f (2007)).

13 *Exculpation or exoneration.* The comments to Section 8 address the effect of an
14 exculpation or exoneration clause on the duty and liability of a trust director.

15 *Attorney's fees and indemnification.* Attorney's fees and indemnification for a
16 trust director are governed by Section 6(b)(1), which establishes a default rule that allows
17 a trust director to exercise "any further power appropriate to the exercise or nonexercise
18 of a power of direction granted to the director." By default, therefore, a trust director has
19 a power to incur attorney's fees and other expenses and to direct indemnification for them
20 if doing so would be "appropriate" to the exercise of the director's express powers.

21 **§2115. Jurisdiction over trust director**

22 **1. Personal jurisdiction.** By accepting appointment as a trust director of a trust
23 subject to this Act, the director submits to personal jurisdiction of the courts of this State
24 regarding any matter related to a power or duty of the director.

25 **2. Other methods not excluded.** This section does not preclude other methods of
26 obtaining jurisdiction over a trust director.

27 **Comment**

28 (This is Section 15 of the Uniform Directed Trust Act (2017).)

29 Under subsection (a), by accepting appointment as a trust director of a trust
30 subject to this act, the director submits to personal jurisdiction of the courts of this state
31 with respect to "any matter related to a power or duty of the director." This subsection
32 does not apply to a person that has not accepted appointment as a trust director (the
33 question of whether a person has accepted appointment is governed by Section 16(1)).
34 The drafting committee contemplated that a purported director could contest acceptance,
35 and therefore jurisdiction, in the normal course of a judicial proceeding in which the
36 matter arose, as under Fed. R. Civ. P. § 12(b)(2).

37 Jurisdiction over a person that has accepted appointment as trust director is

1 mandatory. The terms of a trust or an agreement among the trust director and other parties
2 cannot negate personal jurisdiction over a trust director under this section. However, this
3 section does not preclude a court from declining to exercise jurisdiction under the
4 doctrine of forum non conveniens.

5 Subsection (b) confirms that subsection (a) does not prescribe the exclusive
6 method of obtaining jurisdiction over a trust director.

7 **§2116. Office of trust director**

8 Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to
9 a trust director regarding the following matters:

10 **1. Acceptance.** Acceptance under the Maine Uniform Trust Code, section 701;

11 **2. Bond to secure performance.** Giving of bond to secure performance under the
12 Maine Uniform Trust Code, section 702;

13 **3. Reasonable compensation.** Reasonable compensation under the Maine Uniform
14 Trust Code, section 708;

15 **4. Resignation.** Resignation under the Maine Uniform Trust Code, section 705;

16 **5. Removal.** Removal under the Maine Uniform Trust Code, section 706; and

17 **6. Successor.** Vacancy and appointment of successor under the Maine Uniform
18 Trust Code, section 704.

19 **Comment**

20 (This is Section 16 of the Uniform Directed Trust Act (2017).)

21 This section applies the law of trusteeship to a trust directorship with regard to
22 seven subjects. Whether the law is default or mandatory as applied to a trust director
23 depends on whether it is default or mandatory as applied to a trustee.

24 *Paragraph (1)—acceptance.* This paragraph absorbs an enacting state's law
25 governing acceptance of a trusteeship, such as under Uniform Trust Code § 701(a)–(b)
26 (2000) or Restatement (Third) of Trusts § 35 (2003), for application to acceptance of a
27 trust directorship. However, whereas a trustee is expected to participate actively in the
28 administration of the trust, and is therefore usually capable of signaling acceptance by
29 conduct, some trust directors, such as a director with a power to determine the settlor's
30 competence, may not take any action for long stretches of time, if ever. This delay in
31 action may complicate acceptance by conduct.

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

1 property.

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

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

16 Moreover, the reasonable compensation of a directed trustee is likely to be less
17 than that for a trustee that is not directed. An apt analogy is to a trustee that hires others to
18 "render services expected or normally to be performed by the trustee." Restatement
19 (Third) of Trusts § 38 cmt. c(1) (2003); *see also* Uniform Prudent Investor Act § 9 cmt.
20 (1994) ("If, for example, the trustee's regular compensation schedule presupposes that the
21 trustee will conduct the investment management function, it should ordinarily follow that
22 the trustee will lower its fee when delegating the investment function to an outside
23 manager.").

24 *Paragraph (4)—resignation.* This paragraph absorbs an enacting state's law
25 governing resignation by a trustee, such as under Uniform Trust Code § 705 (2001) and
26 Restatement (Third) of Trusts § 36 (2003), for application to resignation by a trust
27 director.

28 *Paragraph (5)—removal.* This subsection absorbs an enacting state's law
29 governing removal of a trustee, such as under Uniform Trust Code § 706 (2000) and
30 Restatement (Third) of Trusts § 37 cmt. e (2003), for application to removal of a trust
31 director.

32 *Paragraph (6)—vacancy.* This section absorbs an enacting state's law applicable
33 to a vacancy in a trusteeship for application to a vacancy in a trust directorship. For
34 example, under Uniform Trust Code § 704 (2004), "a vacancy in a trusteeship need not be
35 filled" if "one or more cotrustees remain in office." So too, if three of five trust directors
36 with a joint power to determine the settlor's capacity remain in office, the court "need
37 not" fill the vacancies, though the vacancies should be filled if doing so would be more
38 consistent with the settlor's plan. Likewise, if the sole trust director with power over
39 investment of the trust property ceases to serve, in most circumstances the vacancy
40 should be filled, and this is true even if other directors with unrelated powers remain
41 in office. An apt analogy is to a trust with several cotrustees, each of whom has controlling
42 authority over different aspects of the trust's administration. If any of those trustees ceases
43 to serve, in many circumstances a court should appoint a successor even though other

1 cotrustees remain in office.

2 *Costs and indemnification.* The power of a trust director to incur reasonable costs
3 and to direct indemnification for expenses would in most cases be covered by Section
4 6(b)(1).

5 **§2117. Uniformity of application and construction**

6 In applying and construing this uniform act, consideration must be given to the need
7 to promote uniformity of the law with respect to its subject matter among states that enact
8 it.

9 **§2118. Relation to Electronic Signatures in Global and National Commerce Act**

10 This Act modifies, limits and supersedes the federal Electronic Signatures in Global
11 and National Commerce Act, 15 United States Code, Section 7001 et seq., but does not
12 modify, limit or supersede Section 101(c) of that Act, 15 United States Code, Section
13 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b)
14 of that Act, 15 United States Code, Section 7003(b).

15 **§2119. Effective date**

16 This Act takes effect January 1, 2020.

17 **SUMMARY**

18 This bill enacts the Maine Uniform Directed Trust Act as approved by the Uniform
19 Law Commissioners in 2017. It includes confirming amendments to the Uniform Trust
20 Code, adopted in this State as the Maine Revised Statutes, Title 18-B, Part 1, the Maine
21 Uniform Trust Code.