



# TRUSTS & ESTATES

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## If You Can't Beat 'Em, Join 'Em

UDTA and directed trust statutes come of age

Over the last decade, trust law has evolved so the role of trustee can better reflect the open architecture that modern families desire. It's now commonplace for trust settlors to design so-called "directed trusts," and existing trusts are frequently transferred to new jurisdictions to be modified through the use of techniques such as decanting, non-judicial settlement agreements, consent modifications, court orders and trust mergers so they can become directed trusts.<sup>1</sup> Known as the "directed trust model," these trusts permit duties traditionally held by a trustee to be held instead by an advisor. A directed trust is a trust whose governing instrument includes provisions that allow for a separate fiduciary (or possibly a non-fiduciary) called an "advisor" to direct the trustee to exercise a variety of ministerial and discretionary responsibilities, such as investment decisions pertaining to all or a portion of the assets, distributions, tax reporting, transfer of trust situs, amendments to the trust instrument and how and when beneficiaries receive notice and information. The trustee exercises that trust power and authority only when directed by the advisor, thus bifurcating responsibility and action so the settlor can use different specialized advisors to administer the trust. Advisors and trustees can be removed and replaced without changing the other fiduciaries, enabling à la carte administration. As an added bonus, directed trusts often result in lower fiduciary fees because the directed trustee who's

been relieved of the responsibility and liability for making investment decisions will charge accordingly.

### State Directed Trust Statutes

Demand for this type of trust has become so significant that there are currently only six states<sup>2</sup> without some form of directed trust statute, and one of those (Connecticut) has a bill currently pending before its legislature which, if passed, would reduce that number to five. The 44 states plus the District of Columbia that have enacted directed trust statutes offer varying levels of effectiveness at carrying out the bifurcation of responsibilities and liability between trustee and advisor. There are 16 states (including the District of Columbia) with directed trust statutes that are based on Section 808 of the Uniform Trust Code (UTC) (some with variations). There's one state (Iowa) with a directed trust statute based on the *Restatement (Second) of Trusts (Restatement Second)* Section 185. The remaining states have adopted much stronger statutes. While states offering strong statutes have enabled settlors to implement their goals, statutes based on the UTC and *Restatement Second* have generally failed to implement the directed trust model. Trust planners in those states will often use another trust jurisdiction to implement the directed trust model. In late 2017, the Uniform Law Commission finalized the Uniform Directed Trust Act (UDTA),<sup>3</sup> which was intensively vetted by practitioners, trust industry professionals and scholars to produce a state-of-the-art directed trust model incorporating the best practices from around the country. The UDTA was enacted as a reaction to the ineffectiveness of UTC Section 808 to serve as a viable directed trust model.<sup>4</sup> To date, the UDTA has been enacted by two states, New Mexico (effective Jan. 1, 2019)<sup>5</sup> and Georgia (effective July 1, 2018)<sup>6</sup> and has been introduced in Michigan and Connecticut.

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A list of all directed trust statutes can be found in “Overview of Directed Trust Statutes.”

### Two Approaches

Only Iowa follows the approach set forth in the *Restatement Second* (although Virginia follows the *Restatement Second* approach as a default unless the stronger provisions of the statute are expressly incorporated).<sup>7</sup> *Restatement Second* Section 185 provides:

If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.

If a statute follows the *Restatement Second* approach, the trustee shouldn't follow a direction if the advisor is violating its fiduciary duty. Thus, whenever the trustee receives direction, it must second-guess the advisor's decision and make a subjective evaluation of the decision. Consequently, the trustee continues to possess the fiduciary responsibility and liability for deciding whether to follow the direction. This doesn't effectively bifurcate the responsibilities.

Sixteen jurisdictions (including the District of Columbia) have adopted the UTC approach to directed trusts, with some variations. UTC Section 808 provides:

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

The UTC approach is similar to the *Restatement Second* approach, except it requires the trustee to refuse

to follow direction if it constitutes a serious breach of a fiduciary duty. Thus, the trustee continues to possess the fiduciary responsibility and liability for deciding whether to follow the direction because the trustee must ascertain whether a serious breach of duty exists. This also doesn't effectively bifurcate the responsibilities because all responsibility isn't shifted to the advisor, and like the *Restatement Second* approach, the trustee effectively becomes a guarantor of the advisor's decisions.

### Strong-Form Statutes

There are 28 states with stronger forms of directed trust statutes. Some statutes only offer a directed trust model

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for certain types of functions such as investments and distributions, and among those, some actually lay out the specific investment or distribution decisions covered by the statute. For example, the directed trust models in New Jersey,<sup>8</sup> Oklahoma<sup>9</sup> and Utah<sup>10</sup> only allow for investment advisors. Other statutes provide more of an open architecture approach, permitting the trust instrument to provide that the trustee can be directed with respect to almost any set of responsibilities. In those jurisdictions, a settlor could name an advisor or trust protector that directs the trustee with regard to matters like how and when to provide notice and information to beneficiaries, tax reporting, change of situs and governing law, amendments to the trust instrument or virtually any other matter (depending on the flexibility



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of the statute). There are many different approaches to the directed trust model, and settlors should be attuned to which jurisdiction's laws will produce the desired (best) result. Generally, strong-form statutes limit the trustee's liability when acting at direction to willful misconduct or no liability at all and clarify that there's no duty to monitor the advisor's decisions or warn the beneficiaries. Most strong-form statutes also include other gap fillers to help implement the directed trust model.

1. **No liability or willful misconduct.** All strong-form directed trust statutes have a limited standard of liability applicable to the directed trustee to accomplish

In response to the decision in Virginia's *Rollins* case, many states have included language in their directed trust statutes that clarifies that a directed trustee has no duty to monitor the actions of the advisor or to advise or warn the beneficiaries when an advisor's actions are contrary to how the trustee would act.

bifurcation. There are some strong-form statutes that provide for a willful misconduct standard of liability and others that provide that the directed trustee shall have no liability at all when acting at the direction of the direction advisor. A few states, such as Arizona, Missouri, Virginia and Utah, provide a slightly looser standard of liability that includes unintentional conduct such as gross negligence or reckless indifference, and this could pose issues for effective bifurcation.<sup>11</sup> To truly bifurcate the function that's subject to direc-

tion, the trustee must not have any liability for acting at the direction of an advisor or should only be liable for willful misconduct, not gross negligence or some lesser standard for liability. Limited liability is the crux of a workable directed trustee statute because it enables the trustee to simply perform an executory function and refrain from forming a subjective view about the advisability of the advisor's decisions to protect itself from liability. If the trustee is liable for gross negligence or simple negligence in connection with carrying out the advisor's directions, then the trustee will be saddled with the obligation to independently monitor and second-guess the decisions of the advisor because of the threat of liability. In those states that set an outer limit of willful misconduct as the standard of liability applicable to a directed trustee, it's helpful for the jurisdiction to define "willful misconduct" to provide clarity and avoid uncertainty.<sup>12</sup> Without a clear definition, questions may linger about what exactly constitutes willful misconduct in a particular situation.

2. **No trustee duty to warn or monitor.** In response to the decision in Virginia's *Rollins* case,<sup>13</sup> many states have included language in their directed trust statutes that clarifies that a directed trustee has no duty to monitor the actions of the advisor or to advise or warn the beneficiaries when an advisor's actions are contrary to how the trustee would act. In *Rollins*, a trustee was found not liable for following the direction of the beneficiary in a trust that provided that, "Investment decisions as to the retention, sale, or purchase of any asset of the Trust Fund shall likewise be decided by such living children or beneficiaries, as the case may be." However, the trustee was found liable for failing to attempt to prevent a breach of trust by failing to warn the beneficiaries about the decline in value of the stock, stating that the trustee can't "rid himself of 'this duty to warn.'" As a result of *Rollins*, strong-form statutes made it clear that the same result wouldn't occur in those states by stating that the directed trustee has no duty to warn or monitor beneficiaries.<sup>14</sup> Some, but not all, directed trust statutes also contain a presumption that any actions taken by the directed trustee to review documents or transactions are presumed to be administrative actions taken solely to allow the fiduciary to perform the duties assigned to the directed trustee.<sup>15</sup> This



is done to avoid an argument that by undertaking a substantive review of the action being directed, a court could consider the directed trustee to have waived the directed trustee protections or to have set an expectation between the advisor and beneficiary, which would expose the directed trustee to potential liability.

**3. Duty to keep other fiduciaries informed and provide information.** Information-sharing is essential to the administration of a bifurcated trust. Ensuring that all fiduciaries are aware of transactions occurring within the trust not only makes for smoother administration but also ensures that each fiduciary is able to perform its portion of that administration effectively. This is particularly important with regard to the administrative trustee responsible for ensuring that the trust records are complete, that account statements and tax returns are prepared accurately and that inquiries from beneficiaries, regulators and others are responded to promptly and accurately. Some states have adopted statutes that impose an affirmative legal obligation among co-fiduciaries to share information. In others, the duty exists on the request by a co-fiduciary for information. The difference between the two approaches can be significant. The affirmative duty can create fiduciary risk if interested parties can claim that more information should have been provided but wasn't. When the duty to provide information only exists when requested, the requesting party may not even know why or when to request information, but it alleviates co-fiduciaries from the affirmative obligation to provide the information and could avoid arguments arising from affirmative duties to share information.

**4. Overcoming other "coordination gaps."** Some of the best directed trust statutes include many other bells and whistles that address practical issues that can arise from "coordination gaps"<sup>16</sup> associated with splitting functions among different fiduciaries. To the extent these requirements aren't supplied by mandatory or default state law provisions, they must be supplied by the trust's governing instrument. For example, many statutes address the issue of court jurisdiction over the advisor and fill in the gap of who has responsibility for investment decisions in the event there's a vacancy in the position. Some even provide certain parties with the power to replace the

direction advisor if there's a vacancy. They may also address things like the applicable statute of limitations and applying a trustee's set of fiduciary duties to the direction advisor by default.

Strong-form statutes can be categorized as either "off-the-rack statutes" or "enabling statutes."<sup>17</sup> Off-the-rack statutes generally provide a detailed statutory rubric that outlines the specific role and responsibilities of the advisor. They usually only permit an investment advisor and/or distribution advisor or require adherence to statutory language to fall within the protections of the statute. Off-the-rack statutes sometimes limit the scope

The UDTA adopts the enabling statute model in which directed trustees can be directed as to any matter.

of specific investment or distribution powers that are subject to the direction of an advisor. Enabling statutes generally provide a more open architecture design and rely on the terms of the governing instrument to outline the entire directed trust structure. The governing instrument will need to outline the powers exercised (or not exercised) at direction and gap-filler provisions that address vacancies in the advisor role, compensation, removal and appointment, indemnification, court jurisdiction, how and in what form directions may be delivered to the trustee, whether the advisor acts in a fiduciary capacity and other matters. These statutes don't limit the scope of permissible directed activities to simply investments or distributions like an off-the-rack statute and provide freedom of contract that enables the settlor to structure the directed trust to tailor the scope and responsibilities of the advisor to meet specific objectives. The enabling statutes offer settlors the utmost flexibility and freedom to permit an advisor to direct any kind of ministerial or discretionary function, such as handling tax matters, providing notice and information to beneficiaries, investing in special holdings, overseeing



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real estate matters, changing of situs or governing law or making administrative amendments to the trust instrument. However, all of this flexibility and reliance on the trust instrument can be a double-edged sword because it makes good drafting imperative, and poor drafting can produce unintended gaps and risks.

One example of a so-called enabling strong-form statute is Delaware's statute.<sup>18</sup> Section 3313(a) of Title 12 of the Delaware Code provides that an advisor may direct, consent or disapprove investment decisions, distribution decisions or any other decision of the fiduciary. The linchpin to Delaware's entire directed trust

The UDTA places a duty on both the trust director and the directed trustee to share information with one another to help bridge the coordination gap between trustee and advisor.

statute is Subsection 3313(b), which simply states that if the governing instrument provides that a fiduciary is to follow the direction of an advisor or isn't to take specified actions except at the direction of an advisor, and the fiduciary acts in accordance with such a direction, then except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act. That statutory limitation of liability when the trustee executes an advisor's directions pursuant to the trust instrument is really all that's needed for a directed trust. The remaining provisions of the statute are gap-fillers and/or rely on the terms of the governing instrument.

The Illinois directed trust statute<sup>19</sup> is an example of an off-the-rack statute. It lays out very specific guidelines for the directed trust relationship and the types of matters that can be directed and includes the concepts of: "excluded fiduciary,"<sup>20</sup> "distribution trust advisor," "investment trust advisor" and "trust protector." An

Illinois excluded fiduciary isn't liable except in cases of willful misconduct and has no duty to monitor, review, inquire, investigate, recommend, evaluate or warn with regard to the actions of the directing party.<sup>21</sup> As an off-the-rack statute, the Illinois statute may make it unclear whether a directed trustee may rely on the statute's protections if it receives a direction outside the generic descriptive list provided as a definition of authority of the "investment trust advisor." An investment trust advisor has the power to "direct the trustee with respect to the retention, purchase, transfer, assignment, sale, or encumbrance of trust property and the investment and reinvestment of principal and income of the trust"; and "direct the trustee with respect to all management, control and voting powers related directly or indirectly to trust assets, including but not limited to voting proxies for securities held in trust."<sup>22</sup> It also seems to conflate which party (advisor or trustee) possesses the power and authority to take actions on behalf of the trust. However, in a directed trust model, the trustee continues to possess the trust power and authority, and the trustee exercises those powers only on direction.

The New Jersey directed trust statute<sup>23</sup> only allows for an investment advisor. It provides that the directed trustee is liable for willful misconduct or gross negligence when following directions, which undermines some of the statutory protection and opens the door for liability. The New Jersey statute suffers from the worst infirmity of off-the-rack statutes, severely limiting its utility, because it only allows an investment advisor to direct a trustee with respect to a generic list of "investment decisions" defined as "the retention, purchase, sale, exchange, tender or other transaction affecting the ownership thereof or rights therein and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser." Thus, any investment power that doesn't clearly involve those things, such as borrowing by the trust, loans, granting powers of attorney or encumbering assets, wouldn't fall under the directed trust model.

Another example of a statute that resembles an off-the-rack statute, but seems to allow for the trust instrument to override the default provisions, is found in South Dakota. South Dakota doesn't permit advisors to direct the trustee with respect to functions other than investments or distributions.<sup>24</sup> South Dakota defines the



specific powers of direction possessed by an investment trust advisor or distribution trust advisor unless the trust instrument provides otherwise (apparently the trust instrument can expand on or override the default scope of direction power).<sup>25</sup>

### UDTA

The UDTA adopts the enabling statute model in which directed trustees can be directed as to any matter. It was designed to avoid the limitations and uncertainty of off-the-rack statutes, the inadequacies of the UTC model and the lack of uniformity among the states. The powers and duties that can be subject to a power of direction can be defined in the governing instrument to include anything, including a power over the investment, management or distribution of trust property or other matters of trust administration.<sup>26</sup>

The term “directed trust” is defined as a trust for which the terms of the trust grant a power of direction (thus relying on the drafting).<sup>27</sup> A “power of direction” means a power over a trust granted to a person (the trust director) by the terms of the trust to the extent that the power is exercisable while the person isn’t serving as a trustee.<sup>28</sup> A “directed trustee” is defined as a trustee that’s subject to a trust director’s power of direction.<sup>29</sup>

Unlike off-the-rack statutes, the comments to the UDTA explain that the definition of “power of direction” is intended to be expansive. The comments to UDTA Section 6 describe the breadth of the trust director’s powers to direct, which, without limiting the definition of a “power of direction,” may include granting a power to a trust director to:

- direct investments, including a power to:
  - acquire, dispose of, exchange or retain any investment;
  - make or take loans;
  - vote proxies for securities held in trust;
  - adopt a particular valuation of trust property or determine the frequency or methodology of valuation;
  - adjust between principal and income or convert to a unitrust;
  - manage a business held in the trust; or
  - select a custodian for trust assets;
- modify, reform, terminate or decant a trust;
- direct a trustee’s or another director’s delegation of

- the trustee’s or other director’s powers;
- change the principal place of administration, situs or governing law of the trust;
- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;
- prosecute, defend or join an action, claim or judicial proceeding relating to the trust;
- grant permission before a trustee or another director may exercise a power of the trustee or other director; or
- release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.

When drafting, it’s important to be clear about the advisor’s authority and avoid language that’s too broad.

Section 9 sets forth the limited standard of liability that affords the directed trustee’s statutory protection that’s the cornerstone of any effective directed trust statute. It provides that a directed trustee shall not be liable for taking reasonable action to comply with a trust director’s exercise or non-exercise of a power of direction, provided, however, that a directed trustee must not comply with a trust director’s exercise or non-exercise of a power of direction to the extent that, by complying, the trustee would engage in willful misconduct.<sup>30</sup> There’s no definition of “willful misconduct” in the UDTA or the UTC. Application of that standard will be left to the states and their varying definitions (of lack of definitions) found mostly in the common law. The decision to use the willful misconduct standard for a directed trustee under the UDTA was influenced by Delaware’s prominent directed trust statute due to the popularity



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of directed trusts in Delaware.<sup>31</sup> The drafting committee declined to eliminate completely the fiduciary duty of a directed trustee, even though that's the approach taken by many states described herein as having strong-form statutes. The general rationale is that even though a trustee acts only at direction, the trustee is still acting as a fiduciary, and the willful misconduct standard recognizes there's at least a base level of responsibility for a fiduciary.<sup>32</sup> The comments to UDTA Section 9 make an important clarification that a directed trustee has a duty to take reasonable action to execute a direction. While perhaps implicit in fiduciary law that a directed trustee should follow the directions reasonably, in terms of timing and approach, this isn't explicit in other strong-form statutes and is an important clarification made in the UDTA.

The UDTA addresses the default fiduciary duty and liability of a trust director providing seamless conformity between the directed trust structure and traditional fiduciary law applicable to trusts.<sup>33</sup> It imposes the same fiduciary duties and liability on a trust director that would apply to a trustee in a like position and under similar circumstances, unless such duties and liability are varied by the terms of the trust.<sup>34</sup> The terms of a trust may not, however, reduce a trust director's duties or liability below the mandatory minimums that would be applicable to a trustee in a like position under similar circumstances.

The UDTA places a duty on both the trust director and the directed trustee to share information with one another to help bridge the coordination gap between trustee and advisor.<sup>35</sup> There's an affirmative duty to provide information if it pertains to a matter reasonably related to the powers and duties of both the trustee and the advisor. Thus, there could arguably be a breach of fiduciary duty by the directed trustee if it possesses information that could have been used by the trust director to make a better investment decision. This can be contrasted to other statutes, like Delaware's, which impose a duty to inform co-fiduciaries only on request.<sup>36</sup>

The UDTA provides "[u]nless the terms of the trust provide otherwise, (1) a trustee does not have a duty to: (A) monitor a trust director; or (B) inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and (2) by taking an action described in paragraph (1), a trustee does not assume the duty excluded by paragraph (1)."<sup>37</sup> Notably,

however, the comments provide that this section doesn't relieve a trustee of its ordinary duties to disclose, report or account under otherwise applicable law, meaning that the directed trustee remains under a duty to make periodic accountings and to answer reasonable inquiries about the administration of the trust to the extent required by otherwise applicable law. Also, the UDTA doesn't include a provision like Delaware and other strong-form statutes stating that any actions taken by the directed trustee to review documents or transactions are presumed to be merely administrative actions taken solely to allow the fiduciary to perform the duties assigned to the directed trustee.<sup>38</sup>

Although a power of direction is expressly defined to mean a power held by a person when not serving as a trustee, the terms of a trust may relieve a co-trustee from duty and liability for another co-trustee's exercise or non-exercise of a power to the same extent that in a directed trust, a directed trustee is relieved from duty and liability with respect to a trust director's power of direction.<sup>39</sup> This section allows a settlor to accomplish the same objectives by selecting a traditional co-trustee relationship or a modern directed trustee relationship.

The UDTA contains many other gap-filler provisions that fully round out the directed trust model. For example, by accepting an appointment to serve as trust director, the trust director submits to the personal jurisdiction of the courts of that particular state with respect to any matter related to a power or duty of the director.<sup>40</sup> The same statute of limitations that would apply to a trustee for breach of trust applies to a claim for breach of trust against a trust director.<sup>41</sup> Similarly, a report or accounting that would trigger or otherwise limit a limitations period with respect to a trustee has the same effect on a claim against a trust director. Consequently, the existing law of the jurisdiction in which the UDTA is enacted will ultimately dictate the limitations period applicable to the trust director. A trust director may assert any other defense in an action for breach of trust that a trustee may assert under similar circumstances.<sup>42</sup> Accordingly, defenses including laches or estoppel, consent release or ratification, reasonable reliance and reasonable care may be available to the trust director under the UDTA.

### Closing Drafting Tips

When drafting, it's important to be clear about the



advisor’s authority and avoid language that’s too broad, such as providing that the advisor “shall have the power to direct the trustee” without actually stating that the trustee shall act “solely” or “exclusively” on the written direction of the advisor. A provision in the trust instrument that merely provides that the advisor “may direct the trustee,” “shall have the power to direct the trustee” or “the trustee may act upon the direction of the trustee,” without expressly providing that the trustee shall only act on direction, arguably sets up a simultaneous duty for the trustee to take directions and to act in its own discretion when a direction hasn’t been received.

It’s also important to include language that indicates that directions will be in writing so that there’s a clear record of each direction. When including this language, drafters should be certain to address the ancillary questions of what will constitute a writing. Typically, this language will specifically include a pdf, an email and a fax. It’s also prudent to include a catchall provision that can address changes in technology, such as “or as agreed upon in writing with the trustee.”

Clarifying the specific powers exercisable only at direction is essential in states with enabling statutes because the entire directed trust model is based on the drafting of the trust instrument. It’s also important in states with off-the-rack statutes because relying on a short list of descriptive phrases to try and cover every trustee power covered by direction will lead to ambiguities and uncertainty as to fiduciary risk and responsibility. Often, drafters take the approach that all of the investment power and authority is to be held by the advisor, and the trustee shall have no trust power and authority over investments. This isn’t how a directed trust is structured. The trustee holds all power and authority to act, and the direction advisor directs the trustee to exercise those powers. Put another way, the advisor should be the only one able to make the decision; however, the trustee is still the owner of the trust assets and thus should be the only one with authority to act. 

## Endnotes

- For further discussion of directed trusts, see Todd A. Flubacher, “Directed Trusts: Panacea or Plague?” *Trusts & Estates* (February 2015); Todd A. Flubacher and David A. Diamond, “The Trustee’s Role in Directed Trusts,” *Trusts & Estates* (December 2010); Richard W. Nanno, “Good Directions Needed When Using Directed Trusts,” *Estate Planning Journal* (December 2015); Mary Clarke and Diana S.C. Zeydel, “Directed Trusts: The Statutory Approaches to Authority and Liability,” *Estate Planning Journal* (September 2008).
- States without directed trust statutes are California, Connecticut, Hawaii, Louisiana, New

- York and Rhode Island.
- See Uniform Directed Trust Act (UDTA) (Uniform Law Commission 2017).
- See John D. Morley and Robert H. Sitkoff, “Making Directed Trusts Work: The Uniform Directed Trust Act,” 44 *ACTEC L.J.* (Fall 2018).
- N.M. Stat. Ann. Section 46-14-1 et seq. (2018).
- Ga. Code Ann. Section 53-12-500 et seq.
- Iowa Code Ann. Section 633A.4207(2); Va. Code Ann. Section 64.2-770(B).
- N.J.S.A. 3B:31-62.
- Okla. Stat. Tit. 60 Section 175.19.
- Utah Code Ann. Section 75-7-906.
- See Ariz. Rev. Stat. Ann. Section 14-10808(B); Mo. Stat. Ann. Section 456.8-808(8); Utah Code Ann. Section 75-7-906(4); and Va. Code Ann. Section 64.2-770(E).
- For example, 12 Del. C. Section 3301(g) defines the term “willful misconduct” as “intentional wrongdoing, not mere negligence, gross negligence or recklessness” and “wrongdoing” means “malicious conduct or conduct designed to defraud or seek an unconscionable advantage.”
- Rollins v. Branch Banking & Trust Company of Virginia*, 2001 Va.Cir.Lexis 146 (Va. Cir. Ct. 2001).
- See 12 Del. C. Section 3313(e) (stating a directed trustee shall have “...no duty to monitor the conduct of the adviser, provide advice to the adviser or consult with the adviser, or communicate or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary’s own discretion in a manner different from the manner directed by the adviser”). See also UDTA Section 11.
- See 12 Del. C. Section 3313(e).
- The term “coordination gap” was cleverly coined by the authors of an article, John P.C. Duncan and Anita Sarafa, “Achieve the Promise—Limit the Risks—of Multi-Participant Trusts,” 36 *ACTEC L.J.* 769 (Spring 2011).
- Supra* note 4.
- 12 Del. C. Section 3313.
- 760 Ill. Comp. Stat. 5/16.3.
- Several of the off-the-rack statutes use the term “excluded trustee,” although the trustee isn’t technically excluded, but rather directed to exercise its trust power and authority.
- 760 Ill. Comp. Stat. 5/16.3(f).
- 760 Ill. Comp. Stat. 5/16.3(a)(5).
- N.J.S.A. 3B:31-62.
- SDCL Section 55-1B-1 et seq.
- SDCL Section 55-1B-10-11.
- UDTA Sections 2(5), 6.
- Ibid.*, Section 2(2).
- Ibid.*, Section 2(5).
- Ibid.*, Section 2(3).
- Ibid.*, Section 9.
- See Comments to UDTA Section 9.
- Ibid.*
- UDTA Section 8.
- Ibid.*, Section 8(a).
- Ibid.*, Section 10.
- See 12 Del. C. Section 3317.
- UDTA Section 11.
- See 12 Del. C. Section 3313(e).
- UDTA Section 12.
- Ibid.*, Section 15.
- Ibid.*, UDTA Section 13.
- Ibid.*, UDTA Section 14.



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### Overview of Directed Trust Statutes

*Specific provisions vary*

#### Jurisdictions That Have Adopted the Uniform Trust Code Section 808 Form of Directed Trust Statute

Jurisdiction	Citation
Alabama	Ala. Code §19-3B-808(b)
Arkansas	Ark. Code Ann. §28-73-808(b)
District of Columbia	D.C. Code Ann. §19-1308.08(b)
Kansas	Kan. Stat. Ann. §58a-808(b)
Maine	Me. Rev. Stat. Ann. tit. 18-B, §808(2)
Maryland	MD Code, Estates and Trusts, §14.5-808
Massachusetts	Mass. Gen. L. Ch. 203E, §808(b)
Michigan	Mich. Comp. Laws §700.7809(4)
Mississippi	Miss Code Ann. §91-8-808
Montana	MCA 72-38-808
Nebraska	Neb. Rev. Stat. §30-3873(b)
Oregon	Or. Rev. Stat. §130.685(2)
Pennsylvania	20 Pa. Cons. Stat. §7778(b)
South Carolina	S.C. Code Ann. §62-7-808(b)
Vermont	Vt. Stat. Ann. tit. 14A, §808(b)
West Virginia	W. Va. Code §44D-8-808(b)

#### States That Have Adopted Strong-Form of Directed Trust Statute

State	Citation	Scope	Off-the-Rack or Enabling	Liability
Alaska	Alaska Stat. 13.32.072(c)	Any power	Enabling	No liability
Arizona	Ariz. Rev. Stat. Ann. §14-10808(B)	Investment decisions only	Enabling	Bad faith/reckless indifference
Colorado	Col. Rev. Stat. §§16-801 to 808	Investment decisions or non-investment decisions	Enabling	Willful misconduct
Delaware	Del Code Ann. Tit. 12, §3313	Investment, distribution or any other decisions	Enabling	Willful misconduct
Florida	Fla. Stat. §736.0703(9)	Where directing person is co-trustee	Enabling	Willful misconduct of directing trustee of which directed trustee has knowledge
Georgia	Ga. Code Ann. §53-12-500 et seq.	Any power—adopted UDTA	Enabling	Willful misconduct
Idaho	Idaho Code §15-7-501(2),(5)	Investment decisions or discretionary distributions	Enabling	No liability

*(Continued)*



(Continued)

**States That Have Adopted Strong-Form of Directed Trust Statute**

State	Citation	Scope	Off-the-Rack or Enabling	Liability
Illinois	760 ILCS 5/16.3(f)(1)	Investment trust advisor, distribution trust advisor	Off-the-rack	Willful misconduct
Indiana	Ind. Code Ann. §30-4-3-9(a)	Any power in the administration of trust	Enabling	No liability
Kentucky	Ky. Rev. Stat. Ann. §286.3-275	Applies to corporate trustees, investment decisions; authorized directions only	Off-the-rack	No liability
Minnesota	M.S.A. §501C.0808	Investment trust advisor, distribution trust advisor	Off-the-rack	Willful misconduct
Missouri	Mo. Stat. Ann. §456.8-808(8)	Investment, distribution or any other decisions	Enabling	Bad faith/reckless indifference
Nevada	Nev. Rev. Stat. §163.5549	Investment trust advisor, distribution trust advisor	Enabling	No liability
New Hampshire	N.H. Rev. Stat. Ann. §564-B:8-808(b)	Investment, distribution or any other decisions	Enabling	No liability
New Jersey	N.J.S.A. 3B:31-62	Investment decisions	Off-the-rack	Willful misconduct and gross negligence
New Mexico (effective 1/1/19)	N.M. Stat. Ann. §46-14-1 et seq. (2018)	Any power—adopted UDTA	Enabling	Willful misconduct
North Carolina	N.C. Gen. Stat. §§36C-7-703(g), 32-72(d)(2)(a), 36C-8A-4(a)	Investment, distribution or any other decisions	Enabling	Intentional misconduct
North Dakota	N.D. Cent. Code §§59-16.2-01-08	Investment trust advisor, distribution advisor	Off-the-rack	Willful misconduct
Ohio	Ohio Rev. Code Ann. §§5808.08(B), 5815.25(B)	Investment, distribution or any other decisions	Off-the-rack	No liability
Oklahoma	Okla. Stat. Ann. Tit. 60, §175.19	Investment decisions only	Enabling	Except to the extent negligent in carrying out execution of directed investment or other directed action
South Dakota	S.D. Codified Laws Ann. §§55-1B-2(f), 55-1B-5	Investment trust advisor, distribution trust advisor	Off-the-rack	No liability
Tennessee	Tenn. Code Ann. §§35-15-808(b), (e), 35-3-122	Advisory or investment committee or any other person	Off-the-rack	No liability
Texas	Tex. Prop. Code Ann. §114.0031	Investment, distribution or any other decisions	Enabling	Willful misconduct
Utah	Utah Code Ann. §75-7-906(4)	Investment decisions only	Off-the-rack	Willful misconduct/gross negligence
Virginia	Va. Code Ann. §64.2-770(E)	Where statute expressly incorporated into trust by reference	Enabling	Willful misconduct/gross negligence
Washington	RCW 11.98A.010 through 900	Investment, distribution or any other decisions	Enabling	No liability for relying on direction
Wisconsin	W.S.A. 701.0808	Investment, distribution or any other decisions	Off-the-rack	Willful misconduct
Wyoming	Wyo. Stat. §§4-10-712 through 4-10-718	Investment, distribution decisions or any other matter	Enabling	No liability

— Todd A. Flubacher