

Proposed Comments for DN 20-3 – Non-Trustee Power Holders

[Staff Note: This document sets out comments proposed by the Estate Planning & Fiduciary Law Section of the North Carolina Bar Association, in light of the amendments made by Part II of S.L. 2021-85. All changes to the proposed comments since the General Statutes Commission's June 3, 2022, meeting have been redlined and marked with arrows.

For context, the statutory text and any existing comments are set out before each proposed comment. Each grouping of statutory text and comments is separated by a line of asterisks. Staff has also included some very minor changes to existing comments. If approved, these proposed comments would first appear in the 2023 edition of the General Statutes.]

§ 36C-1-103. Definitions.

The following definitions apply in this Chapter:

- (1) Action. – When applicable to an act of a trustee, includes a failure to act.
- (2) Ascertainable standard. – A standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.
- (3) Beneficiary. – A person who:
 - a. Has a present or future beneficial interest in a trust, vested or contingent, including the owner of an interest by assignment or transfer, but excluding a permissible appointee of a power of appointment; or
 - b. In a capacity other than that of trustee, holds a power of appointment over trust property.
- (4) Charitable trust. – A trust, including a split-interest trust as described in section 4947 of the Internal Revenue Code, created for a charitable purpose described in G.S. 36C-4-405(a).
- (5) Environmental law. – A federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.
- (6) General guardian. – As defined in G.S. 35A-1202(7).
- (7) Guardian of the estate. – As defined in G.S. 35A-1202(9).
- (8) Guardian of the person. – As defined in G.S. 35A-1202(10).
- (9) Interests of the beneficiaries. – The beneficial interests provided in the terms of the trust.
- (10) Internal Revenue Code. – The Internal Revenue Code of 1986, as amended from time to time. Each reference to a provision of the Internal Revenue Code shall include any successor to that provision.
- (11) Jurisdiction. – When applicable to a geographic area, includes a state or country.
- (12) Person. – An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.
- (13) Power of withdrawal. – A presently exercisable general power of appointment other than a power:
 - a. Exercisable by a trustee and limited by an ascertainable standard; or
 - b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

- (13a) Principal place of administration. – The trustee's usual place of business where the records pertaining to the trust are kept or the trustee's residence if the trustee has no usual place of business. In the case of cotrustees, the principal place of administration is one of the following:
 - a. The usual place of business of the corporate trustee if there is a corporate cotrustee.
 - b. The usual place of business or residence of any of the cotrustees if there is no corporate cotrustee.
- (14) Property. – Anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
- (15) Qualified beneficiary. – A living beneficiary to whom, on the date the beneficiary's qualification is determined, any of the following apply:
 - a. Is a distributee or permissible distributee of trust income or principal.
 - b. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in sub-subdivision a. of this subdivision terminated on that date without causing the trust to terminate.
 - c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
- (16) Revocable. – When applicable to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.
- (17) Settlor. – Except as otherwise provided in G.S. 36C-8B-25, a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.
- (18) Spendthrift provision. – A term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.
- (19) State. – A state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.
- (20) Terms of a trust. – The manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as established, determined, or amended by any of the following:
 - a. A judicial proceeding.
 - b. A nonjudicial settlement agreement.
 - c. A nonjudicial modification with the consent of the settlor and all beneficiaries under G.S. 36C-4-411(a) or other law.
 - d. A trustee or other person in accordance with law, including a power holder under Article 8A of this Chapter or a trustee under Article 8B of this Chapter.
- (21) Trust instrument. – An instrument that contains the terms of a trust.
- (22) Trustee. – Includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court. The term does not

include trustees in mortgages and deeds of trusts. (2001-413, s. 1; 2005-192, s. 2; 2007-106, s. 2; 2009-222, s. 1; 2017-121, s. 2.1; 2021-85, s. 2(a).)

Existing Comments:

OFFICIAL COMMENT

A definition of "action" (paragraph (1)) is included for drafting convenience, to avoid having to clarify in the numerous places in the Uniform Trust Code where reference is made to an "action" by the trustee that the term includes a failure to act.

The definition of "ascertainable standard" (paragraph (2)) was added to the Code by a 2004 amendment. The term was previously used only in and defined in Section 814. Other 2004 amendments add the term to Sections 103(11) and 504, necessitating the need to move the definition in Section 814 to the list of defined terms in Section 103 and thereby make it applicable throughout the Code.

"Beneficiary" (paragraph (3)) refers only to a beneficiary of a trust as defined in the Uniform Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. Pursuant to Section 402(b), a trust is valid only if a beneficiary can be ascertained now or in the future. The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. *See* Restatement (Third) of Trusts Section 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 126 cmt. c (1959).

While the holder of a power of appointment is not considered a trust beneficiary under the common law of trusts, holders of powers are classified as beneficiaries under the Uniform Trust Code. Holders of powers are included on the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries. A power of appointment as used in state trust law and this Code is as defined in state property law and not federal tax law although there is considerable overlap between the two definitions.

A power of appointment is authority to designate the recipients of beneficial interests in property. *See* Restatement (Second) of Property: Donative Transfers Section 11.1 (1986). A power is either general or nongeneral and either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate. *See* Restatement (Second) of Property: Donative Transfers Section 11.4 (1986). All other powers are nongeneral. A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power of appointment is not presently exercisable if exercisable only by the power holder's will or if its exercise is not effective for a specified period

of time or until occurrence of some event. See Restatement (Second) of Property: Donative Transfers Section 11.5 (1986). Powers of appointment may be held in either a fiduciary or nonfiduciary capacity. The definition of "beneficiary" excludes powers held by a trustee but not powers held by others in a fiduciary capacity.

While all categories of powers of appointment are included within the definition of "beneficiary," the Uniform Trust Code elsewhere makes distinctions among types of powers. Under Section 302, the holder of a testamentary general power of appointment may represent and bind persons whose interests are subject to the power. A "power of withdrawal" (paragraph (11)) is defined as a presently exercisable general power of appointment other than a power exercisable by a trustee and limited by an ascertainable standard, or a power which is exercisable by another person only upon consent of the trustee or a person holding an adverse interest. The exception for a power exercisable by a trustee that is limited by an ascertainable standard was added in 2004. For a discussion of this amendment, see the comment on the 2004 Amendment to Section 504, which made a related change.

The definition of "beneficiary" includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (see Section 405(a)), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Code. However, pursuant to Section 110(b), also granted rights of a qualified beneficiary under the Code are charitable organizations expressly designated to receive distributions under the terms of a charitable trust but only if ~~there their~~ beneficial interests are sufficient to satisfy the definition of a qualified beneficiary for a noncharitable trust.

[Staff Note: We contacted Uniform Law Commission staff about some minor errors in the preceding sentence. The Joint Editorial Board for Uniform Trust and Estate Acts approved these changes to the Official Comment.]

The Uniform Trust Code leaves certain issues concerning beneficiaries to the common law. Any person with capacity to take and hold legal title to intended trust property has capacity to be a beneficiary. See Restatement (Third) of Trusts Section 43 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 116-119 (1959). Except as limited by public policy, the extent of a beneficiary's interest is determined solely by the settlor's intent. See Restatement (Third) of Trusts Section 49 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 127-128 (1959). While most beneficial interests terminate upon a beneficiary's death, the interest of a beneficiary may devolve by will or intestate succession the same as a corresponding legal interest. See Restatement (Third) of Trusts Section 55(1) (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 140, 142 (1959).

Under the Uniform Trust Code, when a trust has both charitable and noncharitable beneficiaries only the charitable portion qualifies as a "charitable trust" (paragraph (4)). The great majority of the Code's provisions apply to both charitable and noncharitable trusts without distinction. The distinctions between the two types of trusts are found in the requirements relating to trust creation and modification. Pursuant to Sections 405 and 413, a charitable trust must have a charitable purpose and charitable trusts may be modified or terminated under the doctrine of cy

pres. Also, Section 411 allows a noncharitable trust to in certain instances be terminated by its beneficiaries while charitable trusts do not have beneficiaries in the usual sense. To the extent of these distinctions, a split-interest trust is subject to two sets of provisions, one applicable to the charitable interests, the other the noncharitable.

For discussion of the definition of "conservator" (paragraph (5)), see the definition of "guardian" (paragraph (7)).

To encourage trustees to accept and administer trusts containing real property, the Uniform Trust Code contains several provisions designed to limit exposure to possible liability for violation of "environmental law" (paragraph (6)). Section 701(c)(2) authorizes a nominated 15 trustee to investigate trust property to determine potential liability for violation of environmental law or other law without accepting the trusteeship. Section 816(13) grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Section 1010(b) immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.

Under the Uniform Trust Code, a "guardian" (paragraph (7)) makes decisions with respect to personal care; a "conservator" (paragraph (5)) manages property. The terminology used is that employed in Article V of the Uniform Probate Code, and in its free-standing Uniform Guardianship and Protective Proceedings Act. Enacting jurisdictions not using these terms in the defined sense should substitute their own terminology. For this reason, both terms have been placed in brackets. The definition of "guardian" accommodates those jurisdictions which allow appointment of a guardian by a parent or spouse in addition to appointment by a court. Enacting jurisdictions which allow appointment of a guardian solely by a court should delete the bracketed language "a parent, or a spouse."

The phrase "interests of the beneficiaries" (paragraph (8)) is used with some frequency in the Uniform Trust Code. The definition clarifies that the interests are as provided in the terms of the trust and not as determined by the beneficiaries. Absent authority to do so in the terms of the trust, Section 108 prohibits a trustee from changing a trust's principal place of administration if the transfer would violate the trustee's duty to administer the trust at a place appropriate to the interests of the beneficiaries. Section 706(b) conditions certain of the grounds for removing a trustee on the court's finding that removal of the trustee will best serve the interests of the beneficiaries. Section 801 requires the trustee to administer the trust in the interests of the beneficiaries, and Section 802 makes clear that a trustee may not place its own interests above those of the beneficiaries. Section 808(d) requires the holder of a power to direct who is subject to a fiduciary obligation to act with regard to the interests of the beneficiaries. Section 1002(b) may impose greater liability on a cotrustee who commits a breach of trust with reckless indifference to the interests of the beneficiaries. Section 1008 invalidates an exculpatory term to the extent it relieves a trustee of liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.

"Jurisdiction" (paragraph (9)), when used with reference to a geographic area, includes a state or country but is not necessarily so limited. Its precise scope will depend on the context in which it is used. "Jurisdiction" is used in Sections 107 and 403 to refer to the place whose law will

govern the trust. The term is used in Section 108 to refer to the trust's principal place of administration. The term is used in Section 816 to refer to the place where the trustee may appoint an ancillary trustee and to the place in whose courts the trustee can bring and defend legal proceedings.

The definition of "property" (paragraph (12)) is intended to be as expansive as possible and to encompass anything that may be the subject of ownership. Included are choses in action, claims, and interests created by beneficiary designations under policies of insurance, financial 16 instruments, and deferred compensation and other retirement arrangements, whether revocable or irrevocable. Any such property interest is sufficient to support creation of a trust. See Section 401 comment.

Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the Uniform Trust Code uses the concept of "qualified beneficiary" (paragraph (13)) to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used in Section 705 to define the class to whom notice must be given of a trustee resignation. The term is used in Section 813 to define the class to be kept informed of the trust's administration. Section 417 requires that notice be given to the qualified beneficiaries before a trust may be combined or divided. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee as provided in Section 704. Prior to transferring a trust's principal place of administration, Section 108(d) requires that the trustee give at least 60 days notice to the qualified beneficiaries.

The qualified beneficiaries consist of the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen. These are the beneficiaries who would become eligible to receive distributions were the event triggering the termination of a beneficiary's interest or of the trust itself to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation and virtual representation principles of Article 3 may be employed, including the possible appointment by the court of a representative to represent the beneficiary's interest.

The qualified beneficiaries who take upon termination of the beneficiary's interest or of the trust can include takers in default of the exercise of a power of appointment. The term can also include the persons entitled to receive the trust property pursuant to the exercise of a power of appointment. Because the exercise of a testamentary power of appointment is not effective until the testator's death and probate of the will, the qualified beneficiaries do not include appointees under the will of a living person. Nor would the term include the objects of an unexercised inter vivos power.

Charitable trusts and trusts for a valid noncharitable purpose do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. Section 110 expands the definition of qualified beneficiaries to encompass this wider group. Section 110(b) grants the rights of qualified beneficiaries to charitable

organizations expressly designated under the terms of a charitable trust and whose beneficial interests are sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust. Section 110(c) also grants the rights of qualified beneficiaries to a person appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose. Section 110(d) is an optional provision granting the rights of a qualified beneficiary with respect to a charitable trust to the attorney general of the enacting jurisdiction.

The definition of "revocable" (paragraph (14)) clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor's control. The fact that the settlor becomes incapacitated does not convert a revocable trust into an irrevocable trust. The trust remains revocable until the settlor's death or the power of revocation is released. The consequences of classifying a trust as revocable are many. The Uniform Trust Code contains provisions relating to liability of a revocable trust for payment of the settlor's debts (Section 505), the standard of capacity for creating a revocable trust (Section 601), the procedure for revocation (Section 602), the subjecting of the beneficiaries' rights to the settlor's control (Section 603), the period for contesting a revocable trust (Section 604), the power of the settlor of a revocable trust to direct the actions of a trustee (Section 808(a)), notice to the qualified beneficiaries upon the settlor's death (Section 813(b)), and the liability of a trustee of a revocable trust for the obligations of a partnership of which the trustee is a general partner (Section 1011(d)).

Because under Section 603(b) the holder of a power of withdrawal has the rights of a settlor of a revocable trust, the definition of "power of withdrawal" (paragraph (11)), and "revocable" (paragraph (14)) are similar. Both exclude individuals who can exercise their power only with the consent of the trustee or person having an adverse interest although the definition of "power of withdrawal" excludes powers subject to an ascertainable standard, a limitation which is not present in the definition of ~~"revocable"~~ revocable.

[Staff Note: The Official Comment on the Uniform Law Commission's website correctly includes a period after "revocable"; we plan to ask LexisNexis to add this period.]

The definition of "settlor" (paragraph (15)) refers to the person who creates, or contributes property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section 401. Determining the identity of the "settlor" is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the "settlor" by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. ~~See~~ See Section 602(b).

[Staff Note: The Official Comment on the Uniform Law Commission's website italicizes "See" in the preceding sentence. Therefore, we plan to ask LexisNexis to italicize it.]

In the case of a revocable trust employed as a will substitute, gifts to the trust's creator are sometimes made by placing the gifted property directly into the trust. To recognize that such a donor is not intended to be treated as a settlor, the definition of "settlor" excludes a contributor to a trust that is revocable by another person or over which another person has a power of withdrawal. Thus, a parent who contributes to a child's revocable trust would not be treated as one of the trust's settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of the child's proportionate contribution. Pursuant to Section 603(b), the child's power of withdrawal over the trust would also result in the child being treated as the settlor with respect to the portion of the trust attributable to the parent's contribution.

Ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. *See* Sections 505(a)(1), (3) (creditor claims against settlor of revocable trust), 602 (revocation or modification of revocable trust), and 604 (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. *See* Section 505(a)(2) (creditors of settlor can reach maximum amount trustee can distribute to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the trust except for the right under Section 411 to terminate the trust with the beneficiaries' consent, the Uniform Trust Code also authorizes the settlor of an irrevocable trust to petition for removal of the trustee and to enforce or modify a charitable trust. *See* Sections 405(c) (standing to enforce charitable trust), 413 (doctrine of cy pres), and 706 (removal of trustee).

"Spendthrift provision" (paragraph (16)) means a term of a trust which restrains the transfer of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action of a beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. A spendthrift provision is valid under the Uniform Trust Code only if it restrains both voluntary and involuntary transfer. For a discussion of this requirement and the effect of a spendthrift provision in general, see Section 502. The insertion of a spendthrift provision in the terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust by agreement of the beneficiaries under Section 411, although the Code does not presume this result.

"Terms of a trust" (paragraph (18)) is a defined term used frequently in the Uniform Trust Code. While the wording of a written trust instrument is almost always the most important determinant of a trust's terms, the definition is not so limited. Oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning. *See* Restatement (Third) of Trusts Section 4 cmt. a (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 4 cmt. a (1959). If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. *See* Restatement (Third) of Trusts Section 4 cmt. f (Tentative Draft No. 1, approved 1996).

A manifestation of a settlor's intention does not constitute evidence of a trust's terms if it would be inadmissible in a judicial proceeding in which the trust's terms are in question. *See* Restatement (Third) of Trusts Section 4 cmt. b (Tentative Draft No. 1, approved 1996);

Restatement (Second) of Trusts Section 4 cmt. b (1959). *See also* Restatement (Third) Property: 19 Donative Transfers Sections 10.2, 11.1-11.3 (Tentative Draft No. 1, approved 1995). For example, in many states a trust of real property is unenforceable unless evidenced by a writing, although Section 407 of this Code does not so require, leaving this issue to be covered by separate statute if the enacting jurisdiction so elects. Evidence otherwise relevant to determining the terms of a trust may also be excluded under other principles of law, such as the parol evidence rule.

"Trust instrument" (paragraph (19)) is a subset of the definition of "terms of a trust" (paragraph (18)), referring to only such terms as are found in an instrument executed by the settlor. Section 403 provides that a trust is validly created if created in compliance with the law of the place where the trust instrument was executed. Pursuant to Section 604(a)(2), the contest period for a revocable trust can be shortened by providing the potential contestant with a copy of the trust instrument plus other information. Section 813(b)(1) requires that the trustee upon request furnish a beneficiary with a copy of the trust instrument. To allow a trustee to administer a trust with some dispatch without concern about liability if the terms of a trust instrument are contradicted by evidence outside of the instrument, Section 1006 protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on those terms. Section 1013 allows a trustee to substitute a certification of trust in lieu of providing a third person with a copy of the trust instrument. Section 1106(a)(4) provides that unless there is a clear indication of a contrary intent, rules of construction and presumptions provided in the Uniform Trust Code apply to trust instruments executed before the effective date of the Code.

The definition of "trustee" (paragraph (20)) includes not only the original trustee but also an additional and successor trustee as well as a cotrustee. Because the definition of trustee includes trustees of all types, any trustee, whether original or succeeding, single or cotrustee, has the powers of a trustee and is subject to the duties imposed on trustees under the Uniform Trust Code. Any natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust. *See* Restatement (Third) of Trusts Section 32 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 89 (1959). State banking statutes normally impose additional requirements before a corporation can act as trustee.

2004 Amendment. Section 103(2) adds a definition of "ascertainable standard." The term was formerly used only in Section 814. Other 2004 amendments add the term to Sections 103(11) and 504. The amendment moves into this section the definition previously found in Section 814, thereby making it apply generally throughout the Code. Adding this definition required the renumbering of all subsequent definitions in the Section and corrections to crossreferences to this Section throughout the Code and comments.

Section 103(11), the definition of "power of withdrawal," is amended to exclude a possible inference that the term includes a discretionary power in a trustee to make distributions for the trustee's own benefit which is limited by an ascertainable standard. For an explanation of the reason for this amendment, see the comment to the 2004 amendment to Section 504, which 20 addresses a related issue.

Clarifying language is added to Section 103(13), the definition of "qualified beneficiary," to make clear that the second category in the definition refers to termination of an interest that is not associated with termination of the trust.

NORTH CAROLINA COMMENT

The definitions provided in this section of the Uniform Trust Code were modified in the following respects:

(i) In paragraph (3) the words "including the owner of an interest by assignment or transferor" was added to the end of subparagraph a. to conform the definition of "beneficiary" to that contained in former G.S. 36A-22.1(1)(i).

(ii) In paragraph (4) the definition of a "charitable trust" was modified to substitute for the words "or portion of a trust" the words "including a split-interest trust as described in ~~Section~~ section 4947 of the Internal Revenue Code". ~~Code~~.] As revised a charitable trust is intended to include only wholly charitable trusts and split-interest trusts, such as charitable remainder trusts and charitable lead trusts.

(iii) The provisions of the Uniform Trust Code defining "conservator" and "guardian" were omitted. In their place paragraph (6) defining "general guardian," paragraph (7) defining "guardian of the estate," and paragraph (8) defining "guardian of the person" were added to the section and given the same definitions that they have in Chapter 35A of the General Statutes. In the North Carolina context, references in the Official Comments to "conservator" should be read to apply to a general guardian or guardian of the estate, and references to "guardian" should be read to apply to a guardian of the person.

(iv) Paragraph (10) adds the definition of "Internal Revenue Code" to this section.

(v) In paragraph (20) the definition of "terms of a trust" was modified in order to exclude from the definition such manifestation of the settlor's intent as may be established "by other evidence that would be admissible" in a judicial proceeding. As revised the phrase "terms of a trust" includes only actual provisions of the trust agreement and any provisions established in a judicial proceeding. Although the drafters agreed with the statement in the Official Comment that "[o]ral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is being administered ... all may have a bearing in determining the trust's meaning", the drafters concluded that such indications of the trust's meaning should not result in changes or additions to the terms of the trust until the court so ruled in a judicial proceeding.

(vi) In paragraph (21) the words "and any modifications permitted by court order" were added to the definition of "trust instrument" in order to clarify that any language added to or deleted from the trust instrument, or otherwise modified pursuant to court order, becomes part of the trust instrument.

(vii) In paragraph (22) the definition of "trustee" was modified to clarify that cotrustees are included whether or not appointed or confirmed by a court and to bring forward the language of former G.S. 36A-22.1(6) regarding the exclusion of trustees in mortgages and deeds of trust.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended to add paragraph (13a) defining "principal place of ~~administration~~—administration." That definition was brought forward from former G.S. 36C-2-204(3) relating to venue to make it applicable to other references to "principal place of administration" in Chapter 36C.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2009)

Effective October 1, 2009, subdivision (3) of this section is amended to clarify that a beneficiary as defined in that subdivision does not include a permissible appointee under a power of appointment. A permissible appointee has a mere expectancy with no vested rights. The interest of such an appointee, unlike a taker in default of an exercise of the power of appointment, requires affirmative action by the holder of the power.

Proposed Comment:

SUPPLEMENTAL NORTH CAROLINA COMMENT (2023)

Effective July 8, 2021, the definitions provided in this section of the Uniform Trust Code were further modified as follows:

(i) In subdivision (20) the definition of “terms of a trust” is modified to take into account the changes in the settlor’s original intent by a nonjudicial ~~settlement~~, settlement agreement, a nonjudicial modification with the consent of the settlor and the ~~beneficiaries and beneficiaries~~, or a trustee or other person in accordance with law, including a power holder under Article 8A or trustee under Article 8B of this Chapter.

(ii) In subdivision (21) the definition of “trust instrument” is modified to provide that it is an instrument that contains the terms of a trust as defined in subdivision (20) of this section.

§ 36C-1-105. Default and mandatory rules.

(a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties and powers of a trustee and a power holder under Article 8A of this Chapter, relations among trustees and those power holders, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this Chapter except:

(1) The requirements for creating a trust.

- (2) The duty of a trustee or a power holder under Article 8A of this Chapter to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except as follows:
 - a. This duty is subject to G.S. 36C-8A-4 with respect to the trustee.
 - b. This duty does not apply to the extent the power holder is acting in a nonfiduciary capacity as provided in G.S. 36C-8A-3.
 - (3) The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.
 - (4) The power of the court to modify or terminate a trust under G.S. 36C-4-410 through G.S. 36C-4-416.
 - (5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 of this Chapter.
 - (6) The effect of an exculpatory term under G.S. 36C-10-1008, except to the extent the power holder is acting in a nonfiduciary capacity as provided in G.S. 36C-8A-3.
 - (7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary.
 - (8) Periods of limitation for commencing a judicial proceeding.
 - (9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice.
 - (10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.
 - (11) The requirement that the exercise of the powers described in G.S. 36C-6-602.1(a) shall not alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.
 - (12) The power of a trustee to renounce an interest in or power over property under G.S. 36C-8-816(32).
- (c) Repealed by Session Laws 2021-85, s. 2(b), effective July 8, 2021, and applicable to trusts created before, on, or after that date. (2005-192, s. 2; 2007-106, s. 3; 2009-48, s. 15; 2015-205, s. 7; 2021-85, s. 2(b).)

Existing Comments:

OFFICIAL COMMENT

Subsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust.

Subsection (b) lists the items not subject to override in the terms of the trust. Because subsection (b) refers specifically to other sections of the Code, enacting jurisdictions modifying these other sections may also need to modify subsection (b).

Subsection (b)(1) confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see Sections 401-409. Subsection (b)(12) makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. *See* Sections 604 (period of limitations for contesting validity of revocable trust), and 1005 (period of limitation on action for breach of trust). Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. Subsection (b)(2) provides that the terms may not eliminate a trustee's duty to act in good faith and in accordance with the purposes of the trust and the interests of the beneficiaries. For this duty, see Sections 801 and 814(a). Subsection (b)(3) provides that the terms may not eliminate the requirement that a trust and its terms must be for the benefit of the beneficiaries. Subsection (b)(3) also provides that the terms may not eliminate the requirement that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve. Subsections (b)(2)-(3) are echoed in Sections 404 (trust and its terms must be for benefit of beneficiaries; trust must have a purpose that is lawful, not contrary to public policy, and possible to achieve), 801 (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 802(a) (trustee must administer trust solely in interests of the beneficiaries), 814 (trustee must exercise discretionary power in good faith and in accordance with its terms and purposes and the interests of the beneficiaries), and 1008 (exculpatory term unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries).

The terms of a trust may not deny a court authority to take such action as necessary in the interests of justice, including requiring that a trustee furnish bond. Subsection (b)(6), (13). Additionally, should the jurisdiction adopting this Code enact the optional provisions on ~~subject-matter~~ subject-matter jurisdiction and venue, subsection (b)(14) similarly provides that such provisions cannot be altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections 410 through 416 is not subject to variation in the terms of the trust. Subsection (b)(4). However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated by the settlor.

[Staff Note: The Official Comment on the Uniform Law Commission's website correctly hyphenates "subject-matter" in the paragraph above. Therefore, we plan to ask LexisNexis to make this correction.]

Section 813 imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements. Subsections (b)(8) and (b)(9), which were placed in brackets and made optional provisions by a 2004 amendment, specify limits on the settlor's ability to waive these information requirements. With respect to beneficiaries age 25 or older, a settlor may dispense with all of the requirements of Section 813 except for the duties to inform the beneficiaries of the existence of the trust, of the identity of the trustee, and to provide a beneficiary upon request with such reports as the trustee may have prepared. Among the specific requirements that a settlor may waive include the duty to provide a beneficiary upon request with a copy of the

trust instrument (Section 813(b)(1)), and the requirement that the trustee provide annual reports to the qualified beneficiaries (Section 813(c)). The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trust's administration.

Responding to the desire of some settlors that younger beneficiaries not know of the trust's bounty until they have reached an age of maturity and self-sufficiency, subsection (b)(8) allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust. However, pursuant to subsection (b)(9), if the younger beneficiary learns of the trust and requests information, the trustee must respond. More generally, subsection (b)(9) prohibits a settlor from overriding the right provided to a beneficiary in Section 813(a) to request from the trustee of an irrevocable trust copies of trustee reports and other information reasonably related to the trust's administration.

During the drafting of the Uniform Trust Code, the drafting committee discussed and rejected a proposal that the ability of the settlor to waive required notice be based on the nature of the beneficiaries' interest and not on the beneficiaries' age. Advocates of this alternative approach concluded that a settlor should be able to waive required notices to the remainder beneficiaries, regardless of their age. Enacting jurisdictions preferring this alternative should substitute the language "adult and current or permissible distributees of trust income or principal" for the reference to "qualified beneficiaries" in subsection (b)(8). They should also delete the reference to beneficiaries "who have attained the age of 25 years."

Waiver by a settlor of the trustee's duty to keep the beneficiaries informed of the trust's administration does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions.

Neither subsection (b)(8) nor (b)(9) apply to revocable trusts. The settlor of a revocable trust may waive all reporting to the beneficiaries, even in the event the settlor loses capacity. If the settlor is silent about the subject, reporting to the beneficiaries will be required upon the settlor's loss of capacity. *See* Section 603.

In conformity with traditional doctrine, the Uniform Trust Code limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in Section 1008. Subsection (b)(10) of this section provides a cross-reference. Similarly, subsection (b)(7) provides a cross-reference to Section 708(b), which limits the binding effect of a provision specifying the trustee's compensation.

Finally, subsection (b)(11) clarifies that a settlor is not free to limit the rights of third persons, such as purchasers of trust property. Subsection (b)(5) clarifies that a settlor may not restrict the rights of a beneficiary's creditors except to the extent a spendthrift restriction is allowed as provided in Article 5.

2001 Amendment. By amendment in 2001, subsections (b) (3), (8) and (9) were revised. The language in subsection (b)(3) "that the trust have a purpose that is lawful, not contrary to

public policy, and possible to achieve" is new. This addition clarifies that the settlor may not waive this common law requirement, which is codified in the Code at Section 404.

Subsections (b)(8) and (9) formerly provided:

(8) the duty to notify the qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, and of their right to request trustee's reports and other information reasonably related to the administration of the trust;

(9) the duty to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.

The amendment clarifies that the information requirements not subject to waiver are requirements specified in Section 813 of the Code.

2003 Amendment. By amendment in 2003, subsection (b)(8) was revised. Under the previous provision, as amended in 2001, the presence of two "excepts" in the same sentence, the first in the introductory language to subsection (b) and the second at the beginning of subsection (b)(8), has caused considerable confusion. The revision eliminates the second "except" in (b)(8) without changing the meaning of the provision.

2004 Amendment. Sections 105(b)(8) and 105(b)(9) address the extent to which a settlor may waive trustee notices and other disclosures to beneficiaries that would otherwise be required under the Code. These subsections have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code. A majority of the enacting jurisdictions have modified these provisions but not in a consistent way. This lack of agreement and resulting variety of approaches is expected to continue as additional states enact the Code.

Placing these sections in brackets signals that uniformity is not expected. States may 26 elect to enact these provisions without change, delete these provisions, or enact them with modifications. In Section 105(b)(9), an internal bracket has been added to make clear that an enacting jurisdiction may limit to the qualified beneficiaries the obligation to respond to a beneficiary's request for information.

The placing of these provisions in brackets does not mean that the Drafting Committee recommends that an enacting jurisdiction delete Sections 105(b)(8) and 105(b)(9). The Committee continues to believe that Sections 105(b)(8) and (b)(9), enacted as is, represent the best balance of competing policy considerations. Rather, the provisions were placed in brackets out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there is little chance that the states will enact Sections 105(b)(8) and (b)(9) with any uniformity.

→ The policy debate is succinctly stated in Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys*, Prob. & Prop., ~~Mar.-pri~~ Mar./April 2003, at 18, 20:

[Staff Note: The Official Comment on the Uniform Law Commission's website does not set out the typographical error in the preceding sentence. Therefore, we plan to ask LexisNexis to make this correction.]

The beneficiaries' rights to information and reports are among the most important provisions in the UTC. They also are among the provisions that have attracted the most attention. The UTC provisions reflect a compromise position between opposing viewpoints.

Objections raised to beneficiaries' rights to information include the wishes of some settlors who believe that knowledge of trust benefits would not be good for younger beneficiaries, encouraging them to take up a life of ease rather than work and be productive citizens. Sometimes trustees themselves desire secrecy and freedom from interference by beneficiaries.

The policy arguments on the other side are: that the essence of the trust relationship is accounting to the beneficiaries; that it is wise administration to account and inform beneficiaries, to avoid the greater danger of the beneficiary learning of a breach or possible breach long after the event; and that there are practical difficulties with secrecy (for example, the trustee must tell a child that he or she is not eligible for financial aid at college because the trust will pay, and must determine whether to accumulate income at high income tax rates or pay it out for inclusion in the beneficiary's own return). Furthermore, there is the practical advantage of a one-year statute of limitations when the beneficiary is informed of the trust transactions and advised of the bar if no claim is made within the year. UTC 1005. In the absence of notice, the trustee is exposed to liability until five years after the trustee ceases to serve, the interests of beneficiaries end, or the trust terminates. UTC 1005(c).

2005 Amendment. Subsection (b)(2) is revised to make the language consistent with the corresponding duties in Sections 801 and 814(a), which require that a trustee act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Previously, subsection (b)(2) provided that the settlor could not waive the duty of a trustee to act in good faith and in accordance with the purposes of the trust. The amendment adds that the settlor also cannot waive the obligation to act in accordance with the terms of the trust and the interests of the beneficiaries.

[Staff Note: We contacted Uniform Law Commission staff about a minor error in the preceding sentence. The Joint Editorial Board for Uniform Trust and Estate Acts approved this change to the Official Comment.]

The purpose of the amendment is to make the language consistent, not to change the substance of the section. Absent some other restriction, a settlor is always free to specify the trust's terms to which the trustee must comply. Also, "interests of the beneficiaries" is a defined term in Section 103(8) meaning the beneficial interests as provided in the terms of the trust, which the settlor is also free to specify.

NORTH CAROLINA COMMENT

The drafters substantially modified subsection (b) of the Uniform Trust Code by omitting the following four paragraphs of the fourteen listed in subsection (b) which describes matters known as "mandatory rules" that a settlor may not override in the terms of the trust:

(i) Paragraph (6) regarding the power of the court to require, dispense with, or modify or terminate a bond. The drafters omitted this paragraph to be consistent with the provision in G.S. 36C-7-702(a), which brings forward the provision in former G.S. 36A-31(b), that in no event shall the court require a bond where the terms of the trust direct otherwise. A beneficiary who has complaints about a trustee's administration of the trust could bring an action to remove the trustee rather than to seek to have the trustee provide bond.

(ii) Paragraph (7) regarding the power of the court to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high. This paragraph was omitted to be consistent with the omission in G.S. 36C-7-708(b) of the provisions in Section 708(b) of the Uniform Trust Code authorizing the court to adjust trustee compensation set by the terms of the trust. The drafters concluded that the settlor should have the right to compensate a trustee in whatever amount the settlor chooses regardless of whether a court would find such compensation to be unreasonably high or low.

(iii) Paragraph (8) regarding the trustee's duty under Section 813(b)(2) and (3) of the Uniform Trust Code to notify qualified beneficiaries who have reached age 25 of the existence of the trust and other matters, and paragraph (9) regarding the trustee's duty under Section 813(a) of the Uniform Trust Code to respond to the request of a qualified beneficiary for reports and other information. The drafters substantially modified Section 813(a) and (b) of the Uniform Trust Code, but the modified provisions still impose a duty on the trustee to give the beneficiary specified information upon request, a duty that can be discharged for matters disclosed in a report given to the beneficiary. See G.S. 36C-8-813(a) and (b) and the North Carolina Comments to that section. Whether and to what extent the settlor by the terms of the trust could prevent a beneficiary from receiving trust information was one of the more debatable issues of the Uniform Trust Code. The drafters concluded that in North Carolina the settlor should have the right to override any duty to furnish information imposed by G.S. 36C-8-813(a) and (b). Accordingly, the drafters decided not to impose a mandatory rule with respect to these provisions. This is consistent with the statement in *Taylor v. NationsBank*, 125 N.C. App. 515, 521, 481 S.E.2d 358, 362 (1997) where the court said that "trust beneficiaries are entitled to view the trust instrument from which their interest is derived" so long as that right is not waived by the settlor through "an explicit provision in the trust to the ~~contrary~~". contrary[.]"

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (b) is amended to add paragraph (11) providing that the terms of the trust may not override the rule in G.S. 36C-6-602.1(a) that the powers described in that subsection authorizing an agent under a power of attorney to exercise the settlor's powers

with respect to a revocable trust cannot be exercised to alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2009)

Effective October 1, 2009, with respect to renunciations executed on or after that date, subsection (b) of this section is amended by adding paragraph (12).

SUPPLEMENTAL NORTH CAROLINA COMMENT (2015)

Effective October 1, 2015, subsection (a) and subdivision (b)(2) are amended to apply to a power holder under Article 8A the mandatory rule of subdivision (b)(2) applicable to a trustee to act in good faith in accordance with the terms and purposes of the trust and the interest of the beneficiaries. In addition, subsection (a) is amended to apply to a power holder the mandatory rule of subdivision (b)(6) regarding the limitations on the enforceability of the exculpatory provisions of a trust under G.S. 36C-10-1008.

Also effective October 1, 2015, subsection (c) is added to provide that the mandatory requirement of subdivision (b)(2) that the power holder must act in good faith and rule of subdivision (b)(6) regarding the limitations on the exculpatory terms of a trust under G.S. 36C-10-1008 shall not apply to a power holder with respect to powers conferred upon the power holder in a nonfiduciary capacity. Unlike a trustee, under G.S. 36C-8A-3(a) and the terms of the trust the power holder may act in a nonfiduciary capacity as to certain powers conferred upon the powerholder.

As noted in the North Carolina Comment to Article 8A, the drafters caution against the terms of the trust providing that the powerholder is a nonfiduciary as to a power that does not fall within the exceptions provided by G.S. 36C-8A-3(a). In other cases, a powerholder's status as a fiduciary may be essential to the administration of a trust because this assures that the beneficiaries will have recourse against the powerholder for misuse of the power.

Proposed Comment:

SUPPLEMENTAL NORTH CAROLINA (2023)

Effective July 8, ~~2021~~ 2021, subdivision (b)(2) is amended as follows:

(i) Sub-subdivision (b)(2)a. is added ~~providing to provide~~ that the mandatory fiduciary ~~duties~~ duty imposed by subdivision (b)(2) on a trustee or a power holder is subject to G.S. 36C-8A-4 with respect to the trustee. The substance of this amendment was recommended in the Legislative Note to Section 9 of the Uniform Directed Trust Act.

(ii) Sub-subdivision (b)(2)b. is added to bring forward from former subsection (c) of this section the provision that the mandatory duty imposed by subdivision (b)(2) on a power holder does not apply to the extent the power holder is acting in a nonfiduciary capacity as provided in G.S. 36C-8A-3.

Also effective July 8, 2021-2021, in subdivision ~~(b)(6)~~ (b)(6), language is added to bring forward from former subsection (c) of this section the provision that the mandatory effect of an exculpatory term under G.S. 36C-10-1008 does not apply to the extent the power holder is acting in a nonfiduciary capacity as provided in G.S. 36C-8A-3.

Article 8A.

Powers, Duties, and Liability of a Power Holder Other Than a Trustee; Duty and Liability of a Trustee With Respect to Power Holder's Actions.

[Staff Note: Currently, Article 8A of Chapter 36C has a general comment for the entire article but does not have specific comments for the sections.]

Existing Comment:

NORTH CAROLINA GENERAL COMMENT

Article 8A, effective June 11, 2012, adds to this Chapter comprehensive provisions governing the powers, ~~duties~~ duties, and liabilities of a person, other than a trustee or settlor, who is granted one or more powers with respect to a trust and the duty and liability of a trustee subject to such a power holder's actions. Article 8A replaces, with substantial revisions and additions, the limited Uniform Trust Code provisions of former G.S. 36C-8-808(b), ~~(c)~~ (c), and (d) which were repealed effective June 11, 2012.

The definition of "power holder" in G.S. 36C-8A-1 as the person who under the terms of a trust has the power to take certain actions with respect to the trust is intended to include both a "trust advisor" and a "trust protector" which are terms that have been commonly used to describe power holders. Although no specific reference was made to trust advisors and trust protectors in former G.S. 36C-8-808(b), (c) and (d), the Official Comment stated that subsections (b), ~~(c)~~ (c), and (d) "ratified" their use.

As guidance to practitioners, G.S. 36C-8A-2 provides a nonexclusive range of specific powers that may be granted to a power holder. These powers were based to a large extent on the powers enumerated in other state statutes and in articles by commentators. The only specific power authorized in former G.S. 36C-8-808(b), ~~(c)~~ (c), and (d) was the power in subsection (c) to direct the modification and termination of trusts.

G.S. 36C-8A-2(a) lists several powers typically conferred upon "trust advisors" who are given powers in trust instruments to direct or consent to certain functions for which a trustee ordinarily would be responsible such as the purchase, ~~retention~~ retention, and sale of investments. G.S. 36C-8A-2(b) lists other broader powers which typically are conferred upon "trust protectors." The terms "trust advisor" and "trust protector" have been used interchangeably, however, and G.S. 36C-8A-2 does not use either term. The settlor may describe the power holder as a "trust advisor" or "trust protector" or use another term entirely and may assign to any power holder, whatever the power holder is called, any power the settlor chooses.

The provisions of G.S. 36C-8A-3 governing the duty and liability of a power holder are similar to the Uniform Trust Code provisions of former G.S. 36C-8-808(d) in providing that a power holder is a fiduciary who, as such, is required to act in good faith and in accordance with the purposes and terms of the trust and the interest of the beneficiaries, the same standard applicable to a trustee under G.S. 36C-8-801. However, G.S. 36C-8A-3 makes the following significant changes from G.S. 36C-8-808(d):

(i) Unlike former G. S. 36C-8-808(d), G.S. 36C-8A-3 does not provide that the power holder is "presumptively" a fiduciary. The drafters thought that this qualification was too vague and preferred to provide that the power holder is a fiduciary, subject to specific exceptions provided in the statute.

(ii) Former G.S. 36C-8-808(d) provided that a beneficiary who holds a power to direct is not a fiduciary. The drafters considered this exception as being too broad and provided in G.S. 36C-8A-3(a)(2) and (3) exceptions for a power holder who is a beneficiary only if the power constitutes a power of appointment or if the power affects the interest of the power holder only and no other beneficiary. G.S. 36C-8A-3(a)(1) also provides an exception for a power to remove and appoint a trustee or power holder.

(iii) Finally, G.S. 36C-8A-3 provides that the following provisions of the Uniform Trust Code are applicable to a power holder as a fiduciary: G.S. 36C-8-814 regarding discretionary powers and tax savings, G.S. 36C-10-1001 through -1012 regarding the liability of trustees and rights of third parties dealing with trustees, and Article 9 of this Chapter regarding the uniform prudent investor rule.

Because Article 8A, like the provisions of former G.S. 36C-8-808(b), (c) and (d), is a default statute, the terms of a trust may alter its provisions. The settlor could even provide that the power holder is not a fiduciary, even though the power granted to the power holder does not fall within the exceptions provided in G.S. 36C-8A-3(a)(1)-(3). Although Article 8A has default status, the drafters recognized that a waiver by the settlor of fiduciary obligations of the power holder in exercising a power should be made with caution because the beneficiary would have no recourse if the power holder misused the power.

G.S. 36C-8A-4 governs the duty and liability of a trustee who is subject to a power holder's actions, but differs substantially from the Uniform Trust Code provisions of former G.S. 36C-8-808(b) in the following ways:

(i) G.S. 36C-8A-4(a) provides that the directed trustee must act in accordance with the direction "unless compliance with the direction constitutes intentional misconduct on the part of the trustee." In contrast, the Uniform Trust Code provisions of former G.S. 36C-8-808(b) provided that the directed trustee must act in accordance with the direction, "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 fiduciary duty that the person holding the power owes to the beneficiaries of the trust."

The drafters agreed with commentators who criticized the Uniform Trust Code provisions on the ground that the trustee, to be protected, is required to exercise a considerable amount of due diligence, including the duty to determine the fiduciary duty the power holder owes to the beneficiary and whether the directions may result in a serious breach of that duty. This criticism is based on the rationale that the power to direct is more effective when the trustee is not required to second guess the power holder's direction to avoid the threat of liability. Accordingly, the drafters preferred the more protective provision of G.S. 36C-8A-4(a) that the trustee is only liable for intentional misconduct. This provision is somewhat similar to the Delaware statute, 12 Del. C. 3313(b), providing that the trustee is only liable for "willful misconduct."

(ii) G.S. 36C-8A-4(b) addresses the liability of a trustee when the power holder has the power to consent to the trustee's actions, as distinguished from a power to direct such actions. It provides that the trustee is not liable for loss resulting from the trustee's failure to take any action requiring consent if the power holder does not provide consent within a reasonable time after the trustee has made a timely request for the consent. Although G.S. 36C-8-808 did not include provisions dealing with the liability of a trustee subject to a power to consent, contrary to the rule in G.S. 36C-8A-4(b) the Official Comment to G.S. 36C-8-808 stated that a trustee subject to a veto power is responsible to take appropriate action if the power holder's refusal to consent would result in a serious breach of trust.

(iii) G.S. 36C-8A-4(c) provides that the fiduciary is not liable for the exercise or non exercise of a power other than a power to direct or consent to actions of the trustee. This would include a power described in G.S. 36C-8A-2(b) in which no action is required of the trustee, such as the exercise of power to amend or terminate the trust. Former G.S. 36C-8-808(b), (c), and (d) made no such provision with respect to the liability of the trustee subject to any such power.

(iv) Finally, G.S. 36C-8A-4(d) provides that a directed trustee is not required to monitor the actions of or consult with the power holder or give notice to any beneficiary of action taken or not taken. The objective of this provision is to negate the decision in *Rollins v. Branch Banking & Trust Co. of Virginia*, 56 Va. Cir. 147, 2001, 101 WL 34037931 (Va. Cir. Ct. April, 2001), which involved a Virginia statute providing that a trustee was not liable for investment decisions made by another person. The court held that although under the statute the trustee was not liable for loss caused by retention of stock as directed by the beneficiaries, the statute did not excuse the trustee from failing to warn the beneficiaries of a breach of trust. G.S. 36C-8-808 did not include a provision like the one in G.S. 36C-8A-4(d).

To make the law governing power holders and directed trustees more comprehensive, G.S. 36C-8A-5 through 36C-8A-11 add administrative provisions governing power holders which former G.S. 36C-8-808(b), (c) and (d) did not address. These provisions, which are similar to those governing trustees in this Chapter, cover the compensation and reimbursement of expenses of the power holder, the jurisdiction over the power holder, acceptance of the appointment as power holder, the trustee's exercise of powers in the absence of a power holder because of illness or other cause, decisions by multiple power holders, and the resignation and removal of the power holder.

*Proposed Comment:***SUPPLEMENTAL NORTH CAROLINA COMMENT (2023)**

The provisions of Article 8A were reviewed by the drafters in light of the subsequently approved Uniform Directed Trust Act. The drafters considered two options. First, the Uniform Directed Trust Act could be adopted with modifications to retain provisions in the current Article 8A that the drafters thought appropriate. Secondly, the drafters could retain Article 8A but incorporate or follow the provisions in the Uniform Directed Trust Act that were preferred in place of those in the current Article 8A. The drafters chose the second option.

The North Carolina Comments to specific sections of Article 8A describe the amendments made in following or incorporating the provisions of the Uniform Directed Trust Act. These amendments became effective July 8, 2021. As an aid to the practitioner, the North Carolina Comments on the specific sections contain excerpts from the Uniform Directed Trust Act's Official Comments on the provisions that were followed or incorporated. References in the Official Comments to the term "trust director" should be understood to refer to the term "power holder" used in this Article 8A.

The North Carolina Comment above should be read keeping in mind the amendments to Article 8A which are briefly summarized as follows:

- (i) ~~G.S. 36C 8A 1(a) adds three exclusions from the definition of "power holder":~~
 - (1) ~~The donee of a power of appointment.~~
 - (2) ~~A person who has authority to consent to the exercise of a power of appointment.~~
 - (3) ~~A beneficiary with a power over a trust to the extent described in G.S. 36C 8A 1(a)(1)e.~~
- (ii) ~~G.S. 36C 8A 2(c) is added providing that a power holder may exercise further powers appropriate to the exercise or nonexercise of powers granted by the terms of the trust instrument.~~
- (iii) ~~G.S. 36C 8A 3(a) is modified providing that the same fiduciary duties and liabilities are imposed on a power holder that would apply to a trustee in a like position and under similar circumstances.~~
- (iv) ~~G.S. 36C 8A 3(e) is added and G.S. 36C 8A 4(d) is modified providing that the power holder and trustee do not have a duty to monitor each other or give advice to or inform others.~~
- (v) ~~G.S. 36C 8A 3(d) and G.S. 36C 8A 4(e) are added providing that the power holder and trustee have a duty to provide information to each other.~~
- (vi) ~~G.S. 36C 8A 3(f) clarifies that the terms of the trust may provide that the power holder is a nonfiduciary and that the power to appoint and remove a trustee is deemed to be a nonfiduciary power unless the instrument provides otherwise.~~

~~(vii) G.S. 36C-8A-4.1 and G.S. 36C-8A-4.2 are added providing that the statute of limitations and defenses in action against a trustee apply to a power holder that are applicable to a trustee in a like position and under similar circumstances.~~

~~(viii) G.S. 36C-8A-8 and G.S. 36C-8A-12 are modified to add provisions governing the vacancy in the office of the power holder and giving bond to secure performance of the power holder.~~

§ 36C-8A-1. "Power holder" defined.

(a) For purposes of this Article:

(1) The term "power holder" means a person described in subdivision (2) of this subsection that under the terms of a trust has the power to take certain actions with respect to a trust and that is not any of the following:

- a. A trustee.
- b. A settlor with a power to direct or consent pursuant to G.S. 36C-8-808.
- c. A person in which a donor creates a power of appointment.
- d. A person that has authority to consent to the exercise of a power of appointment.
- e. A beneficiary with a power over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary or another beneficiary represented by a beneficiary under G.S. 36C-3-301 through G.S. 36C-3-305 with respect to the exercise or nonexercise of the power.

(2) A power holder may be any of the following:

- a. One or more individuals.
- b. One or more other persons each of which is qualified to exercise trust powers in this State.
- c. Any combination of the persons described in sub-subdivisions a. and b. of this subdivision.

(b) A person is a power holder whether or not the terms of a trust refer to the person as a power holder and, except as otherwise provided in sub-subdivisions (a)(1)b. and e. of this section, whether or not the person is a beneficiary or settlor of the trust. (2012-18, s. 3.4; 2021-85, s. 2(c).)

Proposed Comment:

NORTH CAROLINA COMMENT (2023)

Subdivision (a)(1) is amended to add that a power holder is a person as described in subdivision (a)(2) who is not:

→ (1) ~~In sub-subdivision (a)(1)e. a~~ A person in which a donor creates a power of appointment.

→ (2) ~~In sub-subdivision (a)(1)d. a~~ A person ~~who~~ that has authority to consent to the exercise of a power of appointment.

→ (3) ~~In sub-subdivision (a)(1)e. a~~ A beneficiary with the power over a trust to the extent provided in that sub-subdivision.

→ The provisions of sub-subdivision (a)(1)c. follow generally the provisions of subdivision (a)(1) of Section 5 of the Uniform Directed Trust Act providing that the Act does not apply to a power of appointment. The provisions of sub-subdivision (a)(1)e. follow generally the provisions of subdivision (b)(4) of Section 5 of the Uniform Directed Trust Act providing that the Act does not apply to a power of a beneficiary of the trust to the extent prescribed in subdivision (b)(4) of Section 5. Although the Uniform Directed Trust Act excludes these from the Act itself, the drafters intended a similar result by excluding them from the definition of a power holder in Article 8A. ~~The Official Comments of the Uniform Directed Trust Act on these exclusions are set out below.~~

Sub-subdivision (a)(1)d. of this section was added based on the recommendation of a commentator on the Uniform Directed Trust Act.

Subdivision (a)(2) is added to clarify that the power holder may be any one or more of individuals or other persons each of which is qualified to exercise trust powers in this State or a combination of these persons. Under G.S. 36C-1-103(12) a “person” includes a legal entity.

Subsection (b) was added to clarify that a person is a power holder whether or not the terms of the trust refer to the person as a power holder and, except as otherwise provided in sub-subdivisions (a)(1)b. and e. of this section, whether or not the person is a settlor or beneficiary of the trust.

→ The Official Comment of the Uniform Directed Trust Act on the exclusion of a power of appointment over a trust is as follows: (Note that in ~~G.S. 31D-1-101(14)~~ G.S. 31D-1-102 the definition of a power of appointment ~~of in~~ in the North Carolina Uniform Powers of Appointment Act is the same as that mirrors the definition in subsection (a) of Section 5 of the Uniform Directed Trust Act.)

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

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

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

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

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The Official Comment of the Uniform Directed Trust Act on the exclusion of a power of a beneficiary is as follows:

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

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

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

release. Under this act, the minority beneficiaries would have recourse against the majority for breach of their fiduciary duty as trust directors.

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

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

§ 36C-8A-2. Powers of a power holder.

(a) The terms of a trust may confer upon a power holder a power to direct or consent to a duty that would normally be required of a trustee, including, but not limited to, a power to direct or consent to the following:

- (1) Investments, including any action relating to investment of all or any one or more of the trust assets that a trustee may take under this Chapter.
- (2) Discretionary distributions of trust assets, including distributions to one or more beneficiaries, distribution of one of more trust assets, and termination of the trust by distribution of all of the trust assets.
- (3) Any other matter regarding trust administration, including the transfer of the principal place of administration of the trust.

(b) The terms of a trust may also confer upon a power holder any other power, including, but not limited to, the power to do the following:

- (1) Modify or amend the trust to do any of the following:
 - a. Achieve favorable tax status under applicable law.
 - b. Take advantage of laws governing restraints on alienation or other State laws restricting the terms of the trust, distribution of trust property, or the administration of the trust.
- (2) Remove and appoint trustees and power holders.
- (3) Increase or decrease the interests of any beneficiary.
- (4) Grant a power of appointment to one or more beneficiaries of the trust or modify the terms of or terminate a power of appointment granted to a beneficiary by the governing instrument, except that a grant or modification of a power of appointment shall not grant a beneficial interest to any of the following:

- a. Any individual or class of individuals not specifically provided for in the trust instrument.
 - b. The person having the power to grant, modify, or terminate the power of appointment.
 - c. The estate and creditors of the person having the power to grant, modify, or terminate the power of appointment.
- (5) Change the governing law of the trust.
- (c) A power holder may exercise any further power appropriate to the exercise or nonexercise of a power granted to the power holder under subsections (a) and (b) of this section.
- (d) The powers granted to a power holder under this section are subject to the same provisions of G.S. 36C-8-814 regarding discretionary powers and tax savings that are applicable to a trustee in a like position and under similar circumstances. (2012-18, s. 3.4; 2021-85, s. 2(c).)

Proposed Comment:

NORTH CAROLINA COMMENT (2023)

Subsection (c) is added to incorporate in substance and make applicable to a power holder the provisions of subdivision (b)(1) of Section 6 of the Uniform Directed Trust Act authorizing a trust director to exercise further powers appropriate to the exercise or nonexercise of a power of direction granted to the trust director. The drafters considered this default provision to be a desirable addition to make more comprehensive the powers granted in subsections (a) and (b) by the terms of the trust.

Subsection (d) is added to bring forward in substance the provisions of former G.S. 36C-8A-3(c)(1) that the powers granted to a power holder are subject to the same provisions regarding discretionary powers and tax savings that are applicable to a trustee in a like position and under similar circumstances.

The Official Comment of the Uniform Directed Trust Act on further powers appropriate to the exercise or nonexercise of a power of direction granted to a trust director is in part as follows:

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

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

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

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

§ 36C-8A-3. Duty and liability of power holder.

(a) Except as otherwise provided in subsection (f) of this section, a power holder is a fiduciary with respect to the exercise or nonexercise of a power and has the same duty and liability as the following:

- (1) If the power is not held jointly with the trustee or another power holder, as a sole trustee in a like position and under similar circumstances.
- (2) If the power is held jointly with the trustee or another power holder, as a cotrustee in a like position and under similar circumstances.

(b) Repealed by Session Laws 2021-85, s. 2(c), effective July 8, 2021, and applicable to trusts created before, on, or after that date.

(c) The provisions regarding the same duty and liability of a power holder as a trustee in a like position and under similar circumstances include all of the following:

- (1) The provisions of Article 8 of this Chapter regarding the duties of a trustee.
- (2) The provisions of G.S. 36C-10-1001 through G.S. 36C-10-1012 regarding liability of trustees and rights of third persons dealing with trustees.
- (3) The provisions of Article 9 of this Chapter regarding the uniform prudent investor rule.
- (4) The provisions of G.S. 36C-7-703 regarding cotrustees.

(d) Subject to subsection (e) of this section, a power holder shall provide information to a trustee or another power holder to the extent the information is reasonably related both to the powers and duties of a power holder and the powers and duties of the trustee or the other power holder. A trustee or other power holder that acts in reliance on information provided by the power holder is not liable for breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee or the other power holder engages in intentional misconduct.

(e) A power holder does not have a duty to monitor a trustee or another power holder or inform or give advice to a settlor, beneficiary, trustee, or another power holder concerning an instance in which the power holder might have acted differently than a trustee or another power holder. By taking the action described in this subsection, the power holder does not assume the duty excluded under this subsection.

(f) The terms of a trust may provide that a power holder is a nonfiduciary with respect to the exercise or nonexercise of a power, including the power to achieve the settlor's tax objectives under the Internal Revenue Code. Unless the terms of a trust provide otherwise, the power to remove and appoint a trustee or power holder shall be deemed to be held in a nonfiduciary capacity. (2012-18, s. 3.4; 2021-85, s. 2(c).)

Proposed Comment:

NORTH CAROLINA COMMENT (2023)

Subsection (a) is amended to incorporate, in substance and, except as provided in subsection (e) of this section, make applicable to a power holder the provisions of subsection (a) of Section 8 of the Uniform Directed Trust Act imposing the same fiduciary duty and liability on a trust director that would apply to a trustee in a like position and under similar circumstances. This provision replaces the former provision in subsection (a) regarding the fiduciary duties of the power holder. The drafters concluded that the incorporated provisions were a simpler and more comprehensive description of the fiduciary duty and liability of a power holder than the provision in former subsection (a). ~~The Official Comment on the duty and liability of a trust director is set out below.~~

The provisions of subsection (b) providing that the power holder is liable for losses or for any loss that results from the breach of fiduciary duty is deleted as being absorbed within the provisions regarding the liability of a power holder under subsection (a).

Subsection (c) is amended to refer to the provisions regarding the same duty and liability of a power holder as a trustee in a like position under similar circumstances in listing specific statutory provisions that this duty and liability include. Subdivision (c)(4) was added to include the provisions of G.S. 36C-7-703 regarding cotrustees.

Subsection (d) is added to incorporate in substance and make applicable to a power holder the provisions of subsections ~~(b)-(b), (c),~~ and (d) of Section 10 of the Uniform Directed Trust Act regarding the duty of a trust director to provide information to the trustee. In the second sentence the words “intentional misconduct” were substituted for the words “lawful misconduct” appearing in the provision of the Uniform Directed Trust Act. The duty of a trust director to provide information to a trustee has not previously been addressed in Article 8A. This duty is added for the reasons stated in the Official Comment of the Uniform Directed Trust Act to provide the trustee with sufficient information to fulfill the trustee’s obligation under the trust law as well as other law. ~~The Official Comment on the duty of a trust director to provide information is set out below.~~

Subsection (e) is added to incorporate in substance and make applicable to a power holder the provisions of subsection (b) of Section 11 of the Uniform Directed Trust Act that a trust director does not have a duty to monitor a trustee or give advice to others concerning the instances in which the trust director might have acted differently than a trustee. This rule has not been previously addressed in Article 8A although the same rule ~~applied~~ applies to a trustee under G.S. 36C-8A-4(d). ~~The Official Comment of the Uniform Directed Trust Act on the duty of a trust director to monitor or give advice is set out below.~~

Subsection (f) is added to clarify that the terms of the trust may provide that the power holder is a nonfiduciary with respect to the exercise or nonexercise of the powers, but unless the terms of the trust provide otherwise, the power to remove and appoint a trustee or power holder ~~shall~~ is deemed to be held in a nonfiduciary capacity. The provision that the power to remove and appoint a trustee or power holder is deemed to be held in a nonfiduciary capacity is consistent with former subsection (a) of this section providing that the power holder is not a fiduciary with respect to the power to remove and appoint a trustee or power holder.

The Official Comment of the Uniform Directed Trust Act on the duty and liability of the trust director is in part as follows:

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

Subsection (a). Subsection (a) imposes the same fiduciary duties on a trust director that would apply to a trustee in a like position and under similar circumstances. A trust director with a power to make or direct investments, for example, has the same duties that would apply to a trustee with the same power, including a duty to act prudently, in the sole interest of the beneficiaries, and impartially with due regard for the respective interests of the beneficiaries. *See, e.g.,* Restatement (Third) of Trusts §§ 77–79, 90–92 (2007). The theory behind subsection (a) is that if a trust director has a power of direction, the director is the most appropriate person to bear the duty associated with the exercise or nonexercise

of that power. Put differently, in a directed trust, a trust director functions much like a trustee in a non-directed trust, and thus should have the same duties as a trustee.

Accordingly, subsection (a)(1) sets the default duties of a trust director by absorbing the default duties that would ordinarily apply to a trustee in a like position and under similar circumstances. Subsection (a)(2) sets the mandatory minimum duties of a trust director by absorbing the mandatory minimum duties that the terms of a trust cannot vary for a trustee in a like position and under similar circumstances. The default and mandatory rules applicable to a trustee include those prescribed by the other provisions of this act.

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

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

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

The trust director’s duty of disclosure. Under subsection (a), a trust director is subject to the same duties of disclosure as a trustee in a like position and under similar circumstances. For example, if a trust director intends to direct a nonroutine

transaction, to change “investment. . . strategies,” or to take “significant actions. . . involving hard-to-value assets or special sensitivity to beneficiaries,” the director is under a duty of affirmative advance disclosure, just like a trustee. Restatement (Third) of Trusts § 82 cmt. d (2007). A trust director’s disclosure duties are limited, however, by Section 11, which eliminates certain duties to monitor, inform, or give advice.

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

Subject to Section 11, a trust director that holds a power of direction jointly with a trustee or another trust director, by contrast, has the duties of a cotrustee regarding the actions of that trustee or other trust director that are within the scope of the jointly held power. Thus, a trust director that jointly exercises a power to direct investments with other trust directors has the same fiduciary duties as a cotrustee regarding its own actions and the actions of the other directors with respect to the power.

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The Official Comment of the Uniform Directed Trust Act on the duty of a trust director to provide information to the trustee is as follows:

Subsections (a) and (b)—Duty to provide information. This section imposes duties on trustees and trust directors to provide information to each other. Subsection (a) imposes this duty on a directed trustee, and subsection (b) imposes this duty on a trust director. The drafting committee contemplated that the duties created by this section would provide trustees and trust directors with sufficient information to fulfill their obligations under trust law as well as other law, including banking, securities, and tax law.

Disclosure to beneficiaries. This section governs disclosure of information to trustees and trust directors. The duty of a trust director to disclose information to a beneficiary is governed by Section 8, which prescribes the fiduciary duties of a trust director, subject to Section 11. The duty of a trustee to disclose information to a beneficiary is governed by the background law of an enacting state under Section 4 as modified by Section 11, which limits a directed trustee’s duty to inform a beneficiary about the actions of a trust director.

Reasonableness. This section relies heavily on the concept of reasonableness. Information must be disclosed only if it is reasonably related both to the powers or duties of the person making the disclosure and to the powers or

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

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

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

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

Subsections (c) and (d)—Subsection (c) provides a safe harbor for a trustee that acts in reliance on information provided by a trust director. Subsection (d) provides a similar safe harbor for a trust director for information provided by a trustee or other trust director. Under both subsections, the safe harbor only applies if the trustee or trust director that acts in reliance on the information is not engaged

in willful misconduct. For example, subsection (c) protects a trustee if the trustee acts in reliance on a trust director's valuation of an asset, unless by accepting the valuation the trustee would engage in willful misconduct. As in Section 9, the rationale for the safe harbor and willful misconduct limit is to implement the settlor's division of labor subject to a mandatory fiduciary minimum.

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

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→ The Official Comment of the Uniform Directed Trust Act on the duty of a trust director to monitor, ~~inform~~ inform, or advise is as follows:

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

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

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

For example, if a trust director has a power to direct investments, this section would relieve a directed trustee of any duty to advise a beneficiary about the risks of the director's decision to concentrate the investment portfolio. The trustee would remain under a duty, however, to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust to the extent required by otherwise applicable

law. The trustee would also remain under the duty imposed by Section 10 provide a trust director with information reasonably related to its powers and duties.

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

§ 36C-8A-4. Duty and liability of trustee.

(a) If the terms of a trust confer upon a power holder the power to direct certain actions of the trustee, the trustee shall act in accordance with the direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction, unless compliance with the direction constitutes intentional misconduct on the part of the trustee.

(b) If the terms of a trust confer upon the power holder the power to consent to certain actions of the trustee, and the power holder does not provide consent within a reasonable time after the trustee has made a timely request for the power holder's consent, the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the trustee's failure to take any action that required the power holder's consent.

(c) If the terms of a trust confer upon a power holder a power other than the power to direct or to consent to the actions of the trustee described in G.S. 36C-8A-2(a), the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the exercise or nonexercise of the power.

(d) A trustee does not have a duty to monitor a power holder or inform or give advice to a settlor, beneficiary, trustee, or power holder concerning an instance in which the trustee might have acted differently from a power holder. By taking an action described in this subsection, a trustee does not assume a duty excluded by this subsection.

(e) Subject to subsection (d) of this section, a trustee shall provide information to a power holder to the extent the information is reasonably related both to the powers and duties of the trustee and the powers and duties of the power holder. A power holder that acts in reliance on information provided by a trustee is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the power holder engages in intentional misconduct. (2012-18, s. 3.4; 2021-85, s. 2(c).)

Proposed Comment:

NORTH CAROLINA COMMENT (2023)

Subsection (d) is amended to incorporate in substance the provisions of subsection (a) of Section 11 of the Uniform Directed Trust Act that a trustee does not have a duty to monitor a trust director or give advice to others concerning instances in which the trustee might have acted differently than the trust director. The substitution of this provision is in place of former subsection (a); the drafters agreed with the Official Comments that the language of the provision of subsection (a) of Section 11 of the Uniform Directed Trust Act was simpler and more direct. A similar rule applicable to a power holder was added in G.S. 36C-8A-3(e).

→ The Official Comment on the duty of a trustee to ~~monitor or give advice~~ monitor, inform, or advise is set out in the North Carolina Comment to G.S. 36-8A-3.

→ Subsection (e) is added to incorporate the provisions of subsections (a) and ~~(e)-(d)~~ of Section 10 of the Uniform Directed Trust Act regarding the duty of a trustee to provide information to a trust director. This duty, which is new to Article 8A, is added for the reason stated in the Official Comment of the Uniform Directed Trust Act to provide a trust director with sufficient information to fulfill the trust director's obligation under trust law as well as other law.

→ The Official Comment on the duty of a trustee to provide information is set out in the North Carolina Comment to G.S. 36-8A-3.

§ 36C-8A-4.1. Limitations of actions against power holder for breach of trust.

In an action against a power holder for breach of trust, the same limitations of actions apply to the power holder that apply under G.S. 36C-10-1005 to an action for breach of trust against a trustee in a like position and under similar circumstances. (2021-85, s. 2(c).)

Proposed Comment:

NORTH CAROLINA COMMENT (2023)

This section is added to incorporate in substance and make applicable to a power holder the provisions of subsection (a) of Section 13 of the Uniform Directed Trust Act applying the statute of limitations applicable to a trust director as it would to a trustee in like position and under similar circumstances. These provisions, not previously addressed in Article 8A, are consistent with the general rule in G.S. 36-8A-3(a) making applicable to a power holder the duty and liability that is applicable to a trustee in a like position and under similar circumstances.

→ The Official Comment of the Uniform Directed Trust Act on the limitations of an action against a trust director is in part as follows:

This section absorbs for a trust director the law of an enacting state governing limitations on an action against a trustee. A limitation applies to a trust director as it would to a trustee in a like position and under similar circumstances.

Whether the law is default or mandatory as applied to a trust director, for example, is determined by whether it is default or mandatory as applied to a trustee.

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

§ 36C-8A-4.2. Defenses in action against power holder.

In an action against a power holder for breach of trust, the power holder may assert the same defenses that a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee, including the following:

- (1) Reasonable reliance on the terms of a trust pursuant to G.S. 36C-9-901(b) and G.S. 36C-10-1006.
- (2) Reasonable care in ascertaining the happening of an event affecting the administration or distribution of a trust pursuant to G.S. 36C-10-1007.
- (3) Beneficiary's consent, release, or ratification pursuant to G.S. 36C-10-1009. (2021-85, s. 2(c).)

Proposed Comment:

NORTH CAROLINA COMMENT (2023)

This section is added to incorporate in substance and make applicable to a power holder the provisions of Section 14 of the Uniform Directed Trust Act providing for defenses in actions against a trust director that are available to a trustee in a like position and under similar circumstances. The addition of this provision, which is new to Article 8A, is consistent with the general rule in G.S. 36C-8A-3(a) making applicable to a power holder the duty and liability that applies to a trustee in a like position and under similar circumstances.

→ The Official Comment of the Uniform Directed Trust Act on the defenses in an action against a trust director is in part as follows:

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

- laches or estoppel (see Restatement (Third) of Trusts § 98 (2012));
- consent, release, or ratification by a beneficiary (see Uniform Trust Code § 1009 (2001); Restatement (Third) of Trusts § 97(b) – (c) (2012));
- reasonable reliance on the terms of a trust (see Uniform Trust Code § 1006 (2000); Uniform Prudent Investor Act § 1(b) (1994)); and

- reasonable care in ascertaining the happening of an event affecting administration or distribution (see Uniform Trust Code § 1007 (2000); Restatement (Third) of Trusts § 76 cmt. f (2007)).

§ 36C-8A-8. Vacancy in the office of the power holder.

(a) If a vacancy occurs in the office of the power holder because the power holder fails or ceases to act for any reason, all of the following apply:

- (1) If one or more power holders remain in office, a vacancy in the office of the power holder need not be filled.
- (2) If the terms of the trust provide for a successor to the power holder, the person designated by the terms of the trust or appointed under the terms of the trust shall act as the successor power holder.
- (3) During the time when a vacancy occurs, the trustee shall be vested with any fiduciary power or duty conferred upon the power holder by the terms of the trust that are described in G.S. 36C-8A-2(a).
- (4) The court may appoint a power holder whenever the court considers the appointment necessary for the administration of the trust.

(b) A successor power holder shall succeed to all the powers and is subject to the duties and liabilities that were imposed upon the original power holder, unless a contrary intent appears from the governing instrument. (2012-18, s. 3.4; 2021-85, s. 2(c).)

Proposed Comment:

NORTH CAROLINA COMMENT (2023)

This section makes additional rules regarding the vacancy in the office of a trustee under G.S. 36C-7-704 applicable to a power holder. Specifically:

- ➡ (1) Subdivision (a)(1) ~~tracks~~ follows the provisions of ~~G.S. 36C-7-704(b);~~ G.S. 36C-7-704(b).
- ➡ (2) Subdivision (a)(2) follows the provisions of ~~G.S. 36C-7-704(e)(1);~~ G.S. 36C-7-704(c)(1).
- ➡ (3) Subdivision (a)(4) follows the provisions of ~~G.S. 36C-7-704(e); and~~ G.S. 36C-7-704(e).
- (4) Subsection (b) follows the provisions of G.S. 36C-7-704(f).

➡ Making additional rules ~~applicable to~~ regarding the vacancy in the office of the trustee
 ➡ applicable to a power holder is consistent with the objective, as reflected in other sections of ~~this~~ Article 8A, to make administrative provisions regarding the office of a trustee under the North Carolina Uniform Trust Code applicable to a power holder.

§ 36C-8A-12. Power holder's bond.

(a) A bond shall be required for the performance of the power holder's duty only if the terms of a trust require the power holder to provide a bond.

(b) If no bond is required, the provisions of G.S. 36C-7-702(a)(3) and (4) applicable to a trustee apply to the power holder, but in no event shall a bond be required of a power holder if the terms of a trust require otherwise.

(c) If a bond is required, the provisions of G.S. 36C-7-702(b) and (c) applicable to a trustee apply to the power holder. (2021-85, s. 2(c).)

Proposed Comment:

NORTH CAROLINA COMMENT (2023)

→ This section is added to make certain provisions of G.S. 36C-7-702 regarding the giving of bond to secure the performance of the trustee applicable to a power holder ~~except that in subsection (a) a bond is required~~ holder. Subsection (a), however, requires a bond only if the terms of the trust require a power holder to provide a bond, whereas in G.S. 36C-7-702(a) a bond of a trustee is not required if the governing instrument directs otherwise.

Making the provisions regarding the giving of a bond applicable to a power holder is new to Article 8A. The addition of the provisions is consistent with the objective, as reflected in other sections of Article 8A, to make administrative provisions regarding the office of a trustee under the North Carolina Uniform Trust Code applicable to a power holder.

[Staff Note: G.S. 36C-7-702 provides:

§ 36C-7-702. Trustee's bond.

(a) *A trustee shall provide bond to secure the performance of the trustee's duties if:*

- (1) The trust instrument was executed before January 1, 2006, unless the terms of the trust instrument provide otherwise;*
- (2) The trust instrument was executed on or after January 1, 2006, but only if the terms of the trust instrument require the trustee to provide bond;*
- (3) A beneficiary requests the trustee to provide bond, and the court finds the request to be reasonable; or*
- (4) The court finds that it is necessary for the trustee to provide bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.*

However, in no event shall bond be required of a trustee if the governing instrument directs otherwise.

(b) If bond is required, it shall be in a sum of double the value of the personal property to come into the trustee's hands if bond is executed by a personal surety, and in an amount not less than one and one-fourth times the value of all personal property of the trust estate if the bond is secured by a suretyship bond executed by a corporate surety company authorized by the Commissioner of Insurance to do business in this State, provided that the court, when the value of the personal property exceeds one hundred thousand dollars (\$100,000), may accept bond in an amount equal to the value of the personal property plus ten percent (10%) of that value, conditioned upon the faithful performance of the trustee's duties and for the payment to the persons

entitled to receive property that may come into the trustee's hands. All bonds executed under this Article shall be filed with the clerk of superior court.

(c) On petition of the trustee or a qualified beneficiary, the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties.

(d) As provided in G.S. 53-159 and G.S. 53-366(a)(10), banks and trust companies licensed to do trust business in this State need not give bond, even if required by the terms of the trust. (1911, c. 39, s. 7; C.S., s. 4031; 1951, c. 264; 1965, c. 1177, s. 1; 1977, c. 502, s. 2; 2001-413, s. 1; 2003-261, s. 5; 2005-192, s. 2.)"