CHAPTER 59-16.2
DIRECTED TRUSTEES

59-16.2-01. Consistency with power of attorney provisions.

The provisions of this chapter relating to power of attorney are subject to other provisions of law.

59-16.2-02. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Directing party" means an investment trust advisor, distribution trust advisor, or trust protector as provided in this chapter.
2. "Distribution trust advisor" means one or more persons given authority by the governing instrument to direct, consent to, veto, or otherwise exercise all or a portion of the distribution powers and discretion of the trust, including authority to make discretionary distributions of income or principal.
3. "Excluded fiduciary" means a fiduciary that by the governing instrument is directed to act in accordance with the exercise of specified powers by a directing party, in which case the specified powers must be deemed granted not to the fiduciary but to the directing party and the fiduciary must be deemed excluded from exercising the specified powers.
    a. If a governing instrument provides a fiduciary as to one or more specified matters is to act, omit action, or make decisions only with the consent of a directing party, the fiduciary is an excluded fiduciary with respect to those matters.
    b. A person may be an excluded fiduciary even if the person participated in:
        (1) The exercise of a power described in section 59-09-11 relating to nonjudicial settlement agreements;
        (2) A power described in chapter 59-16.1 relating to decanting;
        (3) A permitted trustee amendment; or
        (4) A similar power that invokes the provisions of this chapter with respect to any new or existing trust.
4. "Fiduciary" means any person expressly given one or more fiduciary duties by the governing instrument, including a trustee.
5. "Governing instrument" means the instrument stating the terms of a trust, including a court order, or nonjudicial settlement agreement establishing, construing, or modifying the terms of the trust in accordance with section 59-09-11, chapter 59-16.1, or other applicable law.
6. "Investment trust advisor" means one or more persons given authority by the governing instrument to direct, consent to, or veto the exercise of all or a portion of the investment powers of the trust.
7. "Power" means authority to take or withhold an action or decision, including an expressly specified power, the implied power necessary to exercise a specified power, and authority inherent in a general grant of discretion.
8. "Trust protector" means one or more persons given one or more of the powers specified in section 59-16.2-05, whether or not designated with the title of trust protector by the governing instrument.

59-16.2-03. Designation and powers of investment trust advisor.

1. An investment trust advisor may be designated in the governing instrument of a trust. The powers of an investment trust advisor may be exercised or not exercised in the sole and absolute discretion of the investment trust advisor, and are binding on all other persons, including each beneficiary, each fiduciary, each excluded fiduciary, and any other party having an interest in the trust.
2. The governing instrument may use the title "investment trust advisor" or a similar name or description demonstrating the intent to provide for the office and function of an investment trust advisor.

3. Unless the terms of the governing instrument provide otherwise, the investment trust advisor has the authority to:
    a. Direct the trustee with respect to the retention, purchase, transfer, assignment, sale, or encumbrance of trust property and the investment and reinvestment of principal and income of the trust;
    b. Direct the trustee with respect to all management, control, and voting powers related directly or indirectly to trust assets, including voting proxies for securities held in trust;
    c. Select and determine reasonable compensation of one or more advisors, managers, consultants, or counselors, including the trustee, and to delegate to them any of the powers of the investment trust advisor in accordance with section 59-16-07; and
    d. Determine the frequency and methodology for valuing an asset for which there is no readily available market value.

59-16.2-04. Designation and powers of distribution trust advisor.

1. A distribution trust advisor may be designated in the governing instrument of a trust. The powers of a distribution trust advisor may be exercised or not exercised in the sole and absolute discretion of the distribution trust advisor, and are binding on all other persons, including each beneficiary, each fiduciary, each excluded fiduciary, and any other person having an interest in the trust.
2. The governing instrument may use the title "distribution trust advisor" or a similar name or description demonstrating the intent to provide for the office and function of a distribution trust advisor.
3. Unless the terms of the governing instrument provide otherwise, the distribution trust advisor may direct the trustee with regard to all decisions relating directly or indirectly to discretionary distributions to or for one or more beneficiaries.

59-16.2-05. Designation and powers of trust protector.

1. A trust protector may be designated in the governing instrument of a trust.
2. The powers of a trust protector may be exercised or not exercised in the sole and absolute discretion of the trust protector, and are binding on all other persons, including a beneficiary, an investment trust advisor, a distribution trust advisor, a fiduciary, an excluded fiduciary, and any other person having an interest in the trust.
3. The governing instrument may use the title "trust protector" or a similar name or description demonstrating the intent to provide for the office and function of a trust protector.
4. The powers granted to a trust protector by the governing instrument may include authority to do one or more of the following:
    a. Modify or amend the governing instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, federal laws, state laws, or the rulings and regulations under those laws;
    b. Increase, decrease, or modify the interests of a beneficiary or beneficiaries of the trust;
    c. Modify the terms of a power of appointment granted by the trust provided, the modification or amendment does not grant a beneficial interest to any individual, class of individuals, or other parties not specifically provided for under the trust instrument;
    d. Remove, or appoint, a trustee, investment trust advisor, distribution trust advisor, another directing party, investment committee member, or distribution committee member, including designation of a plan of succession for future holders of that office;
    e. Terminate the trust, including determination of how the trustee is to distribute the trust property to be consistent with the purposes of the trust;
    f. Change the situs of the trust, the governing law of the trust, or both;

g. Appoint one or more successor trust protectors, including designation of a plan of succession for future trust protectors;
h. Interpret terms of the trust instrument at the request of the trustee;
i. Advise the trustee on matters concerning a beneficiary;
j. Amend or modify the governing instrument to take advantage of laws governing:
(1) Restraints on alienation;
(2) Distribution of trust property; or
(3) Improvement of the administration of the trust;
k. Veto or direct trust distributions; or
l. Provide direction regarding notification of qualified beneficiaries.

5. If a charity is a qualified beneficiary of the trust, a trust protector shall give notice to the attorney general at least sixty days before taking any action authorized under subdivisions b through f of subsection 4. The attorney general may waive this notice requirement.

59-16.2-06. Duty and liability of directing party.

1. A directing party is a fiduciary of the trust subject to the same duties and standards applicable to a trustee of a trust as provided by applicable law unless the governing instrument provides otherwise. However, the governing instrument may not relieve or exonerate a directing party from the duty to act or withhold acting as the directing party in good faith reasonably believes is in the best interests of the trust.
2. Each directing party must keep the excluded fiduciary and any other directing party reasonably informed regarding the administration of the trust with respect to any specific duty or function being performed by the directing party to the extent the duty or function would normally be performed by the excluded fiduciary or to the extent providing the information to the excluded fiduciary or other directing party is reasonably necessary for the excluded fiduciary or other directing party to perform its duties. The directing party shall provide the information reasonably requested by the excluded fiduciary or other directing party.
3. Neither the performance nor the failure to perform of a directing party's duty to inform as provided in this section affects the limitation on the liability of the excluded fiduciary as provided in this section.
4. The directing party may be made a party to an action or proceeding if issues relate to a decision or action of the directing party, even if investment advisory agreements or other related agreement provide otherwise.

59-16.2-07. Duty and liability of excluded fiduciary.

1. The excluded fiduciary shall act in accordance with the governing instrument and comply with the directing party's exercise of the powers granted to the directing party by the governing instrument.
2. Unless otherwise provided in the governing instrument, an excluded fiduciary has no duty to monitor, review, inquire, investigate, recommend, evaluate, or warn with respect to a directing party's exercise of or failure to exercise any power granted to the directing party by the governing instrument, including, any power related to the acquisition, disposition, retention, management, or valuation of any asset or investment.
3. Except as otherwise provided in this chapter or the governing instrument, an excluded fiduciary is not liable, either individually or as a fiduciary, for an action, inaction, consent, or failure to consent by a directing party, including:
a. If a governing instrument provides an excluded fiduciary is to follow the direction of a directing party and the excluded fiduciary acts in accordance with this direction, except in cases of willful misconduct on the part of the excluded fiduciary in complying with the direction of the directing party, the excluded fiduciary is not liable for any loss resulting directly or indirectly from following the direction, including compliance regarding the valuation of assets for which there is no readily available market value.

b. If a governing instrument provides an excluded fiduciary is to act or omit to act only with the consent of a directing party, except in cases of willful misconduct on the part of the excluded fiduciary, the excluded fiduciary is not liable for any loss resulting directly or indirectly from an act taken or omitted as a result of the directing party's failure to provide consent after having been requested to do so by the excluded fiduciary.
c. If a governing instrument so provides, or if for any reason, an excluded fiduciary is required to assume the role or responsibilities of a directing party, or if the excluded fiduciary appoints a directing party or successor to a directing party, except in cases of willful misconduct on the part of the excluded fiduciary, the excluded fiduciary is not liable for any loss resulting directly or indirectly from its actions in carrying out the roles and responsibilities of the directing party.

4. An excluded fiduciary does not have an obligation to review or evaluate a direction from a distribution trust advisor nor to perform investment or suitability reviews, inquiries, or investigations, nor to make recommendations or evaluations with respect to investments to the extent the directing party, custodial account owner, or authorized designee of a custodial account owner had authority to direct the acquisition, disposition, or retention of the investment. If the excluded fiduciary offers communication to the directing party or an investment person selected by the investment trust advisor, the action may not be deemed to constitute an undertaking by the excluded fiduciary to monitor or otherwise participate in actions within the scope of the advisor's authority or to constitute a duty to do so.
5. An excluded fiduciary does not have a duty to communicate with, warn, or apprise a beneficiary or third party concerning instances in which the excluded fiduciary would or may have exercised the excluded fiduciary's own discretion in a manner different from the manner directed by the directing party.
6. Absent a contrary provision in the governing instrument, the actions of the excluded fiduciary, including any communications with the directing party or others, or carrying out, recording, or reporting actions taken at the directing party's direction pertaining to matters within the scope of authority of the directing party, must be deemed to be administrative actions taken by the excluded fiduciary solely to allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary under the governing instrument. These administrative actions may not be deemed to constitute an undertaking by the excluded fiduciary to monitor, participate, or otherwise take a fiduciary responsibility for actions within the scope of authority of the directing party.
7. An excluded fiduciary may obtain and act upon an opinion of counsel on a matter relevant to this section.

59-16.2-08. Application.

This chapter applies to:

1. Existing and future trusts that appoint or provide for a directing party including a party granted power or authority effectively comparable in substance to that of a directing party as provided in this chapter; or
2. An existing or future trusts that:
   a. Are modified in accordance with applicable law or the terms of the governing instrument to appoint or provide for a directing party; or
   b. Are modified to appoint or provide for a directing party, including a party granted power or authority effectively comparable in substance to that of a directing party, in accordance with a court order, or a nonjudicial settlement agreement whether the order or agreement specifies this chapter governs the responsibilities, actions, and liabilities of persons designated as a directing party or excluded fiduciary.