

Article 7.Part 8. Duties and Powers of Trustee	Article 7.Part 8.
<p><b>GENERAL COMMENT</b></p> <p>This article states the fundamental duties of a trustee and lists the trustee’s powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This article was drafted where possible to conform with the 1994 Uniform Prudent Investor Act, which has been enacted in approximately two thirds of the States. The Uniform Prudent Investor Act prescribes a trustee’s responsibilities with respect to the management and investment of trust property. The Uniform Trust Code also addresses a trustee’s duties with respect to distribution to beneficiaries.</p> <p>Because of the widespread adoption of the Uniform Prudent Investor Act, it was decided not to disassemble and fully integrate the Prudent Investor Act into the Uniform Trust Code. Instead, States enacting the Uniform Trust Code are encouraged to recodify their version of the Prudent Investor Act by reenacting it as Article 9 of this Code rather than leaving it elsewhere in their statutes. Where the Uniform Trust Code and Uniform Prudent Investor Act overlap, States should enact the provisions of this article and not enact the duplicative provisions of the Prudent Investor Act. Sections of this article which overlap with the Prudent Investor Act are Sections 802 (duty of loyalty) , 803 (impartiality), 805 (costs of administration), 806 (trustee’s skills), and 807 (delegation). For more complete instructions on how to enact the Uniform Prudent Investor Act as part of this Code, see the General Comment to Article 9.</p> <p>All of the provisions of this article may be overridden in the terms of the trust except for certain aspects of the trustee’s duty to keep the beneficiaries informed of administration (see Section 105(b)(8)-(9)), and the trustee’s fundamental obligation to act in good faith, in accordance with the purposes of the trust, and</p>	<p><b>GENERAL COMMENT</b></p> <p>This article states the fundamental duties of a trustee and lists the trustee’s powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This Part was drafted where possible to conform with the South Carolina Uniform Prudent Investor Act. The South Carolina Prudent Investor Act prescribes a trustee’s responsibilities with respect to the management and investment of trust property. The SCTC also addresses a trustee’s duties with respect to distribution to beneficiaries.</p> <p>Because of the widespread adoption of the Uniform Prudent Investor Act, it was decided not to disassemble and fully integrate the Prudent Investor Act into the Uniform Trust Code. Instead, states enacting the Uniform Trust Code were encouraged to recodify their version of the Prudent Investor Act by reenacting it as Part 9 of this Code rather than leaving it elsewhere in their statutes. Where the Uniform Trust Code and Uniform Prudent Investor Act overlap, states were advised to enact the provisions of this Part and not enact the duplicative provisions of the Prudent Investor Act. Sections of this article which overlap with the Prudent Investor Act are Sections 62-7-802 (duty of loyalty), 62-7-803 (impartiality), 62-7-805 (costs of administration), 62-7-806 (trustee’s skills), and 62-7-807 (delegation). For more complete instructions on how states were advised to enact the Uniform Prudent Investor Act as part of this Code, see the General Comment to Article 9. South Carolina followed the advice of the Uniform Code drafters by including the South Carolina Prudent Investor Act as Sections 62-7-901 through 62-7-932 of the SCTC.</p> <p>All of the provisions of this Part may be overridden in the terms of the trust except for certain aspects of the trustee’s duty to act in good faith, in accordance with the purposes of</p>

for the benefit of the beneficiaries (see Section 105(b)(2)-(3)).

**SECTION 62-7-801. Duty to administer trust.**

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article.

**COMMENT**

This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith. Only if the terms of a trust are silent or for some reason invalid on a particular issue does this Code govern the trustee's duties. This section also confirms that a trustee does not have a duty to act until the trustee has accepted the trusteeship. For the procedure for accepting a trusteeship, see Section 701.

In administering the trust, the trustee must not only comply with this section but also with the other duties specified in this article, particularly the obligation not to place the interests of others above those of the beneficiaries (Section 802), the duty to act with prudence (Section 804), and the duty to keep the qualified beneficiaries reasonably informed about the administration of the trust (Section 813).

While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust can on occasion conflict. If such a conflict occurs because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under Section 412 to modify or terminate the trust. Pursuant to Section 404, the trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, illegal or contrary to public policy.

For background on the trustee's duty to

the trust, and for the benefit of the beneficiaries (*see* Section 62-7-105(b)(2)-(3)).

**SECTION 62-7-801.**

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**REPORTER'S COMMENT**

This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith.

This section describes a trustee's broad and general duty of good faith and establishes that a nominated or proposed trustee owes no duty to the beneficiary unless and until the trusteeship is accepted. See former South Carolina Probate Code Section 62-7-301 (a trustee has a general duty to administer the trust expeditiously for the benefit of the beneficiaries) and Section 62-7-305 (a trustee is under a continuing duty to administer the trust according to the objectives of the trustor); *Sarlin v. Sarlin*, 312 S.C. 27, 430 S.E.2d 530 (S.C. Ct. App. 1993) (a trustee's discretion must be exercised in good faith, consistent with the primary purpose(s) of the trust).

There was no prior South Carolina case law regarding the principle that there is no duty owed to beneficiaries without acceptance of the trust by the proposed trustee; however, there is general common law to that effect.

Restatement, Second, Trusts Section 169.

administer the trust, see Restatement (Second) of Trusts Sections 164-169 (1959).

**SOUTH CAROLINA COMMENT**

This section describes a trustee's broad and general duty of good faith and establishes that a nominated or proposed trustee owes no duty to the beneficiary unless and until the trusteeship is accepted. See former South Carolina Probate Code Section 62-7-301 (a trustee has a general duty to administer the trust expeditiously for the benefit of the beneficiaries) and Section 62-7-305 (a trustee is under a continuing duty to administer the trust according to the objectives of the trustor); *Sarlin v. Sarlin*, 312 S.C. 27, 430 S.E.2d 530 (S.C. Ct. App. 1993) (a trustee's discretion must be exercised in good faith, consistent with the primary purpose(s) of the trust).

There was no prior South Carolina case law regarding the principle that there is no duty owed to beneficiaries without acceptance of the trust by the proposed trustee; however, there is general common law to that effect. Restatement, Second, Trusts Section 169.

**SECTION 62-7-802. Duty of loyalty.**

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 62-7-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

- (1) the transaction was authorized by the terms of the trust;
- (2) the transaction was approved by the court;
- (3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 62-7-1005;

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<p>(4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 62-7-1009; or</p> <p>(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.</p> <p>(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:</p> <ol style="list-style-type: none"> <li>(1) the trustee's spouse;</li> <li>(2) the trustee's descendants, siblings, parents, or their spouses;</li> <li>(3) an agent or attorney of the trustee;</li> <li>(4) a corporation or other person or enterprise in which the trustee has such a substantial interest that it might affect the trustee's best judgment; and</li> <li>(5) a corporation or other person or enterprise which has such a substantial interest in the trustee that it might affect the trustee's best judgment.</li> </ol> <p>(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.</p> <p>(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.</p> <p>(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the</p>	<p>Section 62-7-1005;</p> <p>(4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 62-7-1009; or</p> <p>(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.</p> <p>(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:</p> <ol style="list-style-type: none"> <li>(1) the trustee's spouse;</li> <li>(2) the trustee's descendants, siblings, parents, or their spouses;</li> <li>(3) an agent or attorney of the trustee;</li> <li>(4) a corporation or other person or enterprise in which the trustee has such a substantial interest that it might affect the trustee's best judgment; and</li> <li>(5) a corporation or other person or enterprise which has such a substantial interest in the trustee that it might affect the trustee's best judgment.</li> </ol> <p>(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.</p> <p>(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.</p> <p>(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict</p>
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prudent investor rule of Part 9. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 62-7-813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) payment of reasonable compensation to the trustee;

(3) a transaction between a trust and another trust, decedent's estate, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial-service institution operated by the trustee; or

(5) an advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

#### COMMENT

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts Section 170(1) (1959). A

between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Part 9. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 62-7-813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

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#### REPORTER'S COMMENT

This section addresses the duty of loyalty, perhaps the most fundamental duty of the

trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take other forms. For a discussion of the different types of violations, see George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 170-170.24 (4th ed. 1987). The "interests of the beneficiaries" to which the trustee must be loyal are the beneficial interests as provided in the terms of the trust. See Section 103(7). The duty of loyalty applies to both charitable and noncharitable trusts, even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust's charitable purposes. See Restatement (Second) of Trusts Section 379 cmt. a (1959). Duty of loyalty issues often arise in connection with the settlor's designation of the trustee. For example, it is not uncommon that the trustee will also be a beneficiary. Or the settlor will name a friend or family member who is an officer of a company in which the settlor owns stock. In such cases, settlors should be advised to consider addressing in the terms of the trust how such conflicts are to be handled. Section 105 authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes the override is implied. The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit. Subsection (b) states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the

trustee.

Section 62-7-802(a) sets forth the Trustee's particular duty of loyalty owed to beneficiaries. See former South Carolina Probate Code Section 62-7-301, which states that a trustee has a general duty to administer the trust "for the benefit of the beneficiaries . . . ." South Carolina case law provided similarly. See *McNeil v. Morrow*, 30 S.C. Eq. (9 Rich.Cas.) 172 (S.C. 1832); *Cartee v. Lesley*, 290 S.C. 333, 350 S.E.2d 388 (S.C. 1986); *Yates v. Yates*, 292 S.C. 49, 354 S.E.2d 800 (S.C. Ct. App. 1987).

Section 62-7-802(b) states the general rule governing trust property transactions affected by the trustee's conflict of interest. Such a transaction is voidable by a beneficiary unless one of the stated exceptions is shown to apply. Regarding the general power of a beneficiary to void a conflict of interest transaction, see former SCPC Section 62-7-706, which implied such a power. In the analogous situation of a personal representative's conflict of interest transaction, SCPC Section 62-3-713 provides that any transaction affected by "a substantial conflict of interest" is voidable unless (1) the decedent's will or contract expressly authorized the transaction, or (2) the transaction is approved by the court after notice.

In general, transactions involving trustee self dealing (selling trust property to trustee individually or buying property, as trustee, from himself individually) are voidable by beneficiaries without regard to good faith and fair consideration. See *Zimmerman v. Harmon*, 25 S.C. Eq. (4 Rich. Eq.) 165 (S.C. 1851) and *McCants v. Bee*, 6 S.C. Eq. (1 McCord Eq.) 383 (S.C. 18). Also, see Restatement, Second, Trusts Section 170, *comments b. and h. on subsection (1)*.

In subsection (b)(1), the first exception to the "voidable" rule provides that a beneficiary may not automatically void a conflict of interest transaction if the transaction is authorized by the terms of the trust. Former SCPC Section

trustee's fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction. Subsection (b) carries out the "no further inquiry" rule by making transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. See Restatement (Second) of Trusts Section 170 cmt. b (1959).

The rule is less severe with respect to transactions involving trust property entered into with persons who have close business or personal ties with the trustee. Under subsection (c), a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.

Even where the presumption under subsection (c) does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary interests existed and that the transaction was affected by the conflict. The right of a beneficiary to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R.

62-7-706 implicitly provided for that exception. If the transaction was authorized by the trust agreement, it could be assumed that the court would approve the transaction. There is no prior South Carolina case law directly on point regarding authorization in the trust agreement for the conflict of interest transaction. However, there is general common law to that effect. The most commonly recognized exception to the duty of loyalty rule is where the settlor expressly or impliedly approved of the conflict of interest position or transaction. George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees*, Section 543 (Rev. 2d ed. 1993) (where the testator/settlor created the conflict situation when his will or trust was drawn, by naming a particular person as personal representative/trustee who, after the opening of the estate/trust, would be exposed to a conflict between personal and representational interests, there is an implied exemption from the duty of loyalty, absent fraud or bad faith on the part of the fiduciary.)

Subsection (b)(2) provides the second exception to the "voidable" rule: a beneficiary may not automatically void a conflict of interest transaction if the transaction is approved by the court. Former SCPC Section 62-7-706 provided that conflict of interest transactions could be approved by the court. Prior South Carolina case law provided similarly. *Sollee v. Croft*, 28 S.C. Eq. (7 Rich. Eq.) (S.C. 1854) (the court may permit a conflict of interest transaction.) Also, see Restatement, Second, Trusts Section 170, *comment f. on subsection (1)*; *Honeywell v. Dominick*, 223 S.C. 365, 75 S.E.2d 59 (S.C. 1953) (notwithstanding the general rule prohibiting a trustee from buying trust property at his own sale, the court may approve such a transaction upon finding a justifiable exception).

Subsection (b)(3), the third exception to the "voidable" rule, provides that a beneficiary's right to void a conflict of interest transaction is

<p>Section 9.12(a).  As provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was authorized by the terms of the trust or approved by the court, or if the beneficiary failed to commence a judicial proceeding within the time allowed or chose to ratify the transaction, either prior to or subsequent to its occurrence. In determining whether a beneficiary has consented to a transaction, the principles of representation from Article 3 may be applied. Subsection (b)(5), which is derived from Section 3-713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim that the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without automatically being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that avoids a conflict between the trustee's fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special fiduciary, as authorized by subsection (i), to work out the details and complete the transaction. Subsection (d) creates a presumption that a transaction between a trustee and a beneficiary not involving trust property is an abuse by the trustee of a confidential relationship with the beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that the trustee's influence with the beneficiary remained. Furthermore, whether or not the trust has terminated, there must be proof that the trustee obtained an advantage from the relationship. The fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited in an arm's length transaction. Subsection (d) is based on Cal. Prob. Code Section 16004(c). See also 2A Austin W. Scott &amp; William F. Fratcher</p>	<p>subject to the limitation periods in SCTC Section 62-7-1005. Former SCPC Section 62-7-307 provided that claims against a trustee for breach of trust could be commenced within one year after receipt of final account disclosing the matter (actual disclosure) and in no event more than three years after a beneficiary's receipt of a final account or statement, regardless of disclosure (constructive disclosure). See <i>Moyer v. M.S. Bailey &amp; Son</i>, 347 S.C. 353, 555 S.E.2d 406 (S.C. Ct. App. 2001) (applying the provisions of former SCPC Section 62-7-307). See also <i>Rembert v. Gressette</i>, 318 S.C. 519, 458 S.E.2d 552 (S.C. Ct. App. 1995) (beneficiaries may lose claims against trustees due to laches).  Subsection (b)(4) contains the fourth exception to the "voidable" rule, providing that the transaction is not voidable by the beneficiary if the beneficiary consents to, ratifies, or releases the trustee with regard to the transaction as set forth in SCTC Section 62-7-1009. Former SCPC Section 62-7-307 implied that beneficiaries could consent to a breach; see also SCPC Section 62-3-713, governing personal representatives, which provides that a beneficiary's right to void a conflict transaction may be lost by consent. See <i>Byrd v. King</i>, 245 S.C. 247, 140 S.E.2d 158 (S.C. 1965), applying Restatement, Second, Trusts Section 216, holding that a beneficiary may not hold the trustee liable for breach of trust if the beneficiary consented to the trustee's act or omission. The comments to Restatement Section 216 set forth numerous fact-sensitive applications of the rule.  Subsection (b)(5), the fifth exception to the "voidable" rule, provides that a transaction contracted for prior to the person becoming trustee or before he contemplated becoming trustee is not automatically voidable by a beneficiary. There was no prior SC statutory or case law counterpart.  Whereas Section 62-7-802(b) applies an irrebuttable presumption to void certain conflict of interest transactions, Section</p>
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Section 170.25 (4th ed. 1987), which states the same principle in a slightly different form: “Where he deals directly with the beneficiaries, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable.”

Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee that involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts Section 170 cmt. k (1959). While normally associated with corporations and with their directors and officers, what is usually referred to as the corporate opportunity doctrine also applies to other types of fiduciary. The doctrine prohibits the trustee’s pursuit of certain business activities, such as entering into a business in direct competition with a business owned by the trust, or the purchasing of an investment that the facts suggest the trustee was expected to purchase for the trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and Comparative Advantage*, 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, *Contract and Trust in Corporate Law: The Case of Corporate Opportunity*, 21 Del. J. Corp. L. 5 (1996). See also *Principles of Corporate Governance: Analysis and Recommendations* Section 5.05 (American Law Inst. 1994).

Subsection (f) creates an exception to the no further inquiry rule for trustee investment in mutual funds. This exception applies even though the mutual fund company pays the financial-service institution trustee a fee for providing investment advice and other services, such as custody, transfer agent, and distribution, that would otherwise be provided by agents of the fund. Mutual funds offer several advantages for fiduciary investing. By comparison with common trust funds, mutual fund shares may be distributed in-kind when trust interests terminate, avoiding liquidation and the associated recognition of gain for tax

62-7-802(c) applies a rebuttable presumption of voidability for transactions involving trust property entered into with persons who have close business or personal ties with the trustee. There was no prior South Carolina statutory counterpart. See *Scottish-American Mtg. Co. v. Clowney*, 70 S.C. 229, 49 S.E. 569 (S.C. 1904) (sale of trust property by trustee to trustee’s spouse is voidable at the option of the beneficiary). Restatement, Second, Trusts Section 170 provides that a transaction with the trustee’s spouse can be set aside as though it was made with the trustee himself. *Id.*, *comment, e. to subsection (4)*. A transaction with a non-spouse person who “is related to the trustee” makes the transaction suspicious but not ipso facto improper. *Id.*

SCTC subsection (c)(4) substitutes certain language for that in the UTC version and adds subsection (c)(5), not found in UTC Section 802, to clarify that the “interest,” either “of” or “in” the trustee, must be “substantial” in order that such “interest” “might affect the best judgment of the trustee.” This is consistent with Scott on Trusts, Secs. 170.10 - 13 and the corresponding sections of the Restatement of Trusts.

Subsection (d) addresses transactions between the trustee and a beneficiary that do not involve trust property. Subsection (d) creates a presumption that the trustee abused the confidential relationship, thereby requiring the trustee to rebut the presumption with evidence that the transaction was fair to the beneficiary. There was no South Carolina statutory counterpart. See *Guinyard v. Atkins*, 282 S.C. 61, 317 S.E.2d 137 (S.C. Ct. App. 1984) (transactions between a trustee and beneficiaries may be sustained where there is clear affirmative proof of fair consideration, perfect candor, and absence of advantage.) *Guinyard* involved a trust property transaction, but arguably would also apply to a non-trust property transaction between trustee and beneficiary. Restatement, Second, Trusts Section 170(2) permits transactions of the type

purposes. Mutual funds commonly offer daily pricing, which gives trustees and beneficiaries better information about performance. Because mutual funds can combine fiduciary and nonfiduciary accounts, they can achieve larger size, which can enhance diversification and produce economies of scale that can lower investment costs.

Mutual fund investment also has a number of potential disadvantages. It adds another layer of expense to the trust, and it causes the trustee to lose control over the nature and timing of transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate, or from which the trustee receives extra fees has given rise to litigation implicating the trustee's duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory services to and receive compensation from the very funds in which they invest trust assets, the contention is made that investing the assets of individual trusts in these funds is imprudent and motivated by the effort to generate additional fee income. Because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee's total compensation, both direct and indirect, is excessive.

Subsection (f) attempts to retain the advantages of mutual funds while at the same time making clear that such investments are subject to traditional fiduciary responsibilities. Nearly all of the States have enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation. Portions of subsection (f) are based on these statutes. Subsection (f) makes clear that such dual investment-fee arrangements are not automatically presumed to involve a conflict between the trustee's personal and fiduciary interests, but subsection (f) does not otherwise waive or lessen a trustee's fiduciary

described in subsection (d) only if the trustee satisfies the heightened standard of fairness and full disclosure.

Subsection (e) allows a beneficiary to void a transaction involving nontrust property entered into by the trustee personally if the transaction constituted an opportunity belonging to the trust. There was no South Carolina statutory or case law counterpart. See, however, Restatement, Second, Trusts Section 170, *comment k. to subsection (1)*.

Subsection (f) creates an exception to the no-further-inquiry rule for trustee investments in mutual funds, and allows trustees to take additional compensation for services provided to the investment company, subject to a duty of disclosure and subject to the duties imposed by the Prudent Investor Act. See Part 9. There was no prior South Carolina case law counterpart. Subsection (f) includes the word "otherwise" found in the 2004 Amendments to UTC Section 802.

Subsection (g) makes share voting or other exercise of entity control by a trustee a fiduciary function. Former SCPC Section 62-7-704(c)(3), (13), (14), (15), and (26) provides for trustee powers with respect to entity control. The exercise of said powers was subject to the prudent man rule and had to be exercised in the best interest of the beneficiary and consistent with the purposes of the trust. See *Weston v. Weston*, 210 S.C. 1, 41 S.E.2d 372 (S.C. 1947) (it is the duty of the trustee in voting shares of corporate stock to act in the best interests of the beneficiary).

Subsection (h) sets forth exceptions to the duty of loyalty, which apply if the transaction was fair to the beneficiary.

Subsection (h)(1) and (2) provides that a trustee is free to contract with the beneficiary about the terms of appointment and compensation. Subsection (h)(3) permits transactions involving the trust with other fiduciary estates in which the trustee is also the fiduciary or in which the beneficiary of the trust has an interest. Subsection (h)(4) permits

obligations. The trustee, in deciding whether to invest in a mutual fund, must not place its own interests ahead of those of the beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent investor rule.

To obtain the protection afforded by subsection (f), the trustee must disclose at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the additional compensation was determined. Furthermore, the selection of a mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into account under Section 708 in setting the trustee's regular compensation. See also Uniform Prudent Investor Act Sections 7 and 9 and Comments; Restatement (Third) of Trusts: Prudent Investor Rule Section 227 cmt. m (1992).

Subsection (f) applies whether the services to the fund are provided directly by the trustee or by an affiliate. While the term "affiliate" is not used in subsection (c), the individuals and entities listed there are examples of affiliates. The term is also used in the regulations under ERISA. An "affiliate" of a fiduciary includes (1) any person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership of which the fiduciary is an officer, director or partner. See 29 C.F.R. Section 2510.3-21(e).

Subsection (g) addresses an overlap between trust and corporate law. It is based on Restatement of Trusts (Second) Section 193 cmt. a (1959), which provides that "[i]t is the duty of the trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and that the fiduciary responsibility of a trustee in voting a control block "is heavier than where he holds only a small fraction of the shares." Similarly, the Department of Labor construes ERISA's duty

the trustee to deposit trust assets in a financial institution operated by the trustee. Subsection (h)(5) permits the trustee to advance money for the protection of the trust. There was no prior South Carolina statute on the subject of a trustee's ability to contract with a beneficiary about terms of appointment and compensation. Former SCPC Section 62-7-205 permitted a trustee to fix his own fees (if not governed by the trust instrument) subject to the right of the beneficiary to object. Former SCPC Section 62-7-704(c)(4) permitted transactions of the type described in subsection (h)(3). Former SCPC Section 67-7-704(6) permitted transactions of the type described in subsection (h)(4). Former SCPC Section 67-7-704(c)(18) permitted transactions of the type described in subsection (h)(5). There was no South Carolina case law counterpart.

Subsection (i) confirms that the court may appoint a special fiduciary to act with respect to any transaction that might violate the duty of loyalty if entered into by the trustee. There was no South Carolina statutory or case law counterpart.

of loyalty to make share voting a fiduciary function. See 29 C.F.R. Section 2509.94-2. When the trust owns the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the trustee determines to hold in corporate form. The trustee may not use the corporate form to escape the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would require the trustee to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality.

Subsection (h) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. Subsection (h)(1)-(2) clarify that a trustee is free to contract about the terms of appointment and rate of compensation. Consistent with Restatement (Second) of Trusts Section 170 cmt. r (1959), subsection (h)(3) authorizes a trustee to engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent's estate or a conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. The authority of a trustee to deposit funds in a financial institution operated by the trustee, as provided in subsection (h)(4), is recognized in Restatement (Second) of Trusts Section 170 cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee's responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits. Subsection (h)(5) authorizes a trustee to advance money for the protection of the trust. Such advances usually are of small amounts and are made in emergencies or as a matter of

convenience. Pursuant to Section 709(b), the trustee has a lien against the trust property for any advances made.

#### SOUTH CAROLINA COMMENT

Section 62-7-802(a) sets forth the trustee's particular duty of loyalty owed to beneficiaries. See former South Carolina Probate Code Section 62-7-301, which states that a trustee has a general duty to administer the trust "for the benefit of the beneficiaries ..." South Carolina case law provided similarly. See *McNeil v. Morrow*, 30 S.C. Eq. (9 Rich.Cas.) 172 (S.C. 1832); *Cartee v. Lesley*, 290 S.C. 333, 350 S.E.2d 388 (S.C. 1986); *Yates v. Yates*, 292 S.C. 49, 354 S.E.2d 800 (S.C. Ct. App. 1987).

Section 62-7-802(b) states the general rule governing trust property transactions affected by the trustee's conflict of interest. Such a transaction is voidable by a beneficiary unless one of the stated exceptions is shown to apply.

Regarding the general power of a beneficiary to void a conflict of interest transaction, see former SCPC Section 62-7-706, which implied such a power. In the analogous situation of a personal representative's conflict of interest transaction, SCPC Section 62-3-713 provides that any transaction affected by "a substantial conflict of interest" is voidable unless (1) the decedent's will or contract expressly authorized the transaction, or (2) the transaction is approved by the court after notice.

In general, transactions involving trustee self dealing (selling trust property to trustee individually or buying property, as trustee, from himself individually) are voidable by beneficiaries without regard to good faith and fair consideration. *Coleman Karesh, Trusts*, 46 (1977), citing *Zimmerman v. Harmon*, 25 S.C. Eq. (4 Rich. Eq.)165 (S.C.1851) and *McCants v. Bee*, 6 S.C. Eq. (1 McCord Eq.) 383 (S.C. 18). Also, see Restatement, Second, Trusts Section 170, comments b. and h. on subsection (1).

In subsection (b)(1), the first exception to the “voidable” rule provides that a beneficiary may not automatically void a conflict of interest transaction if the transaction is authorized by the terms of the trust. Former SCPC Section 62-7-706 implicitly provided for that exception. If the transaction was authorized by the trust agreement, it could be assumed that the court would approve the transaction. There is no prior South Carolina case law directly on point regarding authorization in the trust agreement for the conflict of interest transaction. However, there is general common law to that effect. The most commonly recognized exception to the duty of loyalty rule is where the settlor expressly or impliedly approved of the conflict of interest position or transaction. George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees*, Section 543 (Rev. 2d ed. 1993) (where the testator/settlor created the conflict situation when his will or trust was drawn, by naming a particular person as personal representative/trustee who, after the opening of the estate/trust, would be exposed to a conflict between personal and representational interests, there is an implied exemption from the duty of loyalty, absent fraud or bad faith on the party of the fiduciary.) Subsection (b)(2) provides the second exception to the “voidable” rule: a beneficiary may not automatically void a conflict of interest transaction if the transaction is approved by the court. Former SCPC Section 62-7-706 provided that conflict of interest transactions could be approved by the court. Prior South Carolina case law provided similarly. *Sollee v. Croft*, 28 S.C. Eq. (7 Rich. Eq.) (S.C. 1854) (the court may permit a conflict of interest transaction.) Also, see Restatement, Second, Trusts Section 170, comment f. on subsection (1); *Honeywell v. Dominick*, 223 S.C. 365, 75 S.E.2d 59 (S.C. 1953) (notwithstanding the general rule prohibiting a trustee from buying trust property at his own sale, the court may approve such a

transaction upon finding a justifiable exception).

Subsection (b)(3), the third exception to the “voidable” rule, provides that a beneficiary’s right to void a conflict of interest transaction is subject to the limitation periods in SCTC Section 62-7-1005. Former SCPC Section 62-7-307 provided that claims against a trustee for breach of trust could be commenced within one year after receipt of final account disclosing the matter (actual disclosure) and in no event more than three years after a beneficiary’s receipt of a final account or statement, regardless of disclosure (constructive disclosure). See *Moyer v. M.S. Bailey & Son*, 347 S.C. 353, 555 S.E.2d 406 (S.C. Ct. App. 2001) (applying the provisions of former SCPC Section 62-7-307). See also *Rembert v. Gressette*, 318 S.C. 519, 458 S.E.2d 552 (S.C. Ct. App. 1995) (beneficiaries may lose claims against trustees due to laches). Subsection (b)(4) contains the fourth exception to the “voidable” rule, providing that the transaction is not voidable by the beneficiary if the beneficiary consents to, ratifies, or releases the trustee with regard to the transaction as set forth in SCTC Section 62-7-1009. Former SCPC Section 62-7-307 implied that beneficiaries could consent to a breach; see also SCPC Section 62-3-713, governing personal representatives, which provides that a beneficiary’s right to void a conflict transaction may be lost by consent. See *Byrd v. King*, 245 S.C. 247, 140 S.E.2d 158 (S.C. 1965), applying Restatement, Second, Trusts Section 216, holding that a beneficiary may not hold the trustee liable for breach of trust if the beneficiary consented to the trustee’s act or omission. The comments to Restatement Section 216 set forth numerous fact-sensitive applications of the rule.

Subsection (b)(5), the fifth exception to the “voidable” rule, provides that a transaction contracted for prior to the person becoming trustee or before he contemplated becoming trustee is not automatically voidable by a

beneficiary. There was no prior SC statutory or case law counterpart.

Whereas Section 62-7-802(b) applies an irrebuttable presumption to void certain conflict of interest transactions, Section 62-7-802(c) applies a rebuttable presumption of voidability for transactions involving trust property entered into with persons who have close business or personal ties with the trustee. There was no prior South Carolina statutory counterpart. See *Scottish-American Mtg. Co. v. Clowney*, 70 S.C. 229, 49 S.E. 569 (S.C. 1904) (sale of trust property by trustee to trustee's spouse is voidable at the option of the beneficiary). Restatement, Second, Trusts Section 170 provides that a transaction with the trustee's spouse can be set aside as though it was made with the trustee himself. *Id.*, comment, e. to subsection (4). A transaction with a non-spouse person who "is related to the trustee" makes the transaction suspicious but not ipso facto improper. *Id.*

SCTC subsection (c)(4) substitutes certain language for that in the UTC version and adds subsection (c)(5), not found in UTC Section 802, to clarify that the "interest," either "of" or "in" the trustee, must be "substantial" in order that such "interest" "might affect the best judgment of the trustee". This is consistent with *Scott on Trusts*, Secs. 170.10--13 and the corresponding sections of the Restatement of Trusts.

Subsection (d) addresses transactions between the trustee and a beneficiary that do not involve trust property. Subsection (d) creates a presumption that the trustee abused the confidential relationship, thereby requiring the trustee to rebut the presumption with evidence that the transaction was fair to the beneficiary. There was no South Carolina statutory counterpart. See *Guinyard v. Atkins*, 282 S.C. 61, 317 S.E.2d 137 (S.C. Ct. App. 1984) (transactions between a trustee and beneficiaries may be sustained where there is clear affirmative proof of fair consideration, perfect candor, and absence of advantage.)



Guinyard involved a trust property transaction, but arguably would also apply to a non-trust property transaction between trustee and beneficiary. Restatement, Second, Trusts Section 170(2) permits transactions of the type described in subsection (d) only if the trustee satisfies the heightened standard of fairness and full disclosure.

Subsection (e) allows a beneficiary to void a transaction involving nontrust property entered into by the trustee personally if the transaction constituted an opportunity belonging to the trust. There was no South Carolina statutory or case law counterpart. See, however, Restatement, Second, Trusts Section 170, comment k. to subsection (1).

Subsection (f) creates an exception to the no-further-inquiry rule for trustee investments in mutual funds, and allows trustees to take additional compensation for services provided to the investment company, subject to a duty of disclosure and subject to the duties imposed by the Prudent Investor Act. See Part 9. There was no prior South Carolina case law counterpart. Subsection (f) includes the word “otherwise” found in the 2004 Amendments to UTC Section 802.

Subsection (g) makes share voting or other exercise of entity control by a trustee a fiduciary function. Former SCPC Section 62-7-704(c)(3), (13), (14), (15), and (26) provides for trustee powers with respect to entity control. The exercise of said powers was subject to the prudent man rule and had to be exercised in the best interest of the beneficiary and consistent with the purposes of the trust. See *Weston v. Weston*, 210 S.C. 1, 41 S.E.2d 372 (S.C. 1947) (it is the duty of the trustee in voting shares of corporate stock to act in the best interests of the beneficiary).

Subsection (h) sets forth exceptions to the duty of loyalty, which apply if the transaction was fair to the beneficiary.

Subsection (h)(1) and (2) provides that a trustee is free to contract with the beneficiary about the terms of appointment and

compensation. Subsection (h)(3) permits transactions involving the trust with other fiduciary estates in which the trustee is also the fiduciary or in which the beneficiary of the trust has an interest. Subsection (h)(4) permits the trustee to deposit trust assets in a financial institution operated by the trustee. Subsection (h)(5) permits the trustee to advance money for the protection of the trust. There was no prior South Carolina statute on the subject of a trustee's ability to contract with a beneficiary about terms of appointment and compensation. Former SCPC Section 62-7-205 permitted a trustee to fix his own fees (if not governed by the trust instrument) subject to the right of the beneficiary to object. Former SCPC Section 62-7-704(c)(4) permitted transactions of the type described in subsection (h)(3). Former SCPC Section 67-7-704 (6) permitted transactions of the type described in subsection (h)(4). Former SCPC Section 67-7-704(c)(18) permitted transactions of the type described in subsection (h)(5). There was no South Carolina case law counterpart. Subsection (i) confirms that the court may appoint a special fiduciary to act with respect to any transaction that might violate the duty of loyalty if entered into by the trustee. There was no South Carolina statutory or case law counterpart.

**SECTION 62-7-803. Impartiality.**

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

**COMMENT**

The duty of impartiality is an important aspect of the duty of loyalty. This section is identical to Section 6 of the Uniform Prudent Investor Act, except that this section also applies to all aspects of trust administration and to decisions by a trustee with respect to distributions. The

**SECTION 62-7-803.**

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

**REPORTER'S COMMENT**

The duty of impartiality is an important aspect of the duty of loyalty. Former SCPC Section 62-7-302(F)(2), retained and incorporated in Part 9, provided similarly. Former SCPC Sections 62-7-301 and 62-7-305 set forth the general duties of administering the

<p>Prudent Investor Act is limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions. In fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law. For an example of such authority, see Uniform Principal and Income Act Section 104 (1997). The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust. A settlor who prefers that the trustee, when making decisions, generally favor the interests of one beneficiary over those of others should provide appropriate guidance in the terms of the trust. See Restatement (Second) of Section 183 cmt. a (1959).</p> <p><b>SOUTH CAROLINA COMMENT</b> Former SCPC Section 62-7-302(F)(2), retained and incorporated in Part 9, provided similarly. Former SCPC Sections 62-7-301 and 62-7-305 set forth the general duties of administering the trust for the benefit of the beneficiaries and according to the objectives of the settlor. In <i>Johnson v. Thornton</i>, 264 S.C. 252, 214 S.E.2d 124 (S.C. 1975), the court recognized the existence of a trustee’s duty to deal impartially with two or more beneficiaries. See also Restatement, Second, Trusts Section 183.</p> <p><b>SECTION 62-7-804. Prudent administration.</b></p> <p>A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other</p>	<p>trust for the benefit of the beneficiaries and according to the objectives of the settlor. In <i>Johnson v. Thornton</i>, 264 S.C. 252, 214 S.E.2d 124 (S.C. 1975), the court recognized the existence of a trustee’s duty to deal impartially with two or more beneficiaries. See also Restatement, Second, Trusts Section 183.</p> <p><b>SECTION 62-7-804.</b></p> <p>A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other</p>
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circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

**COMMENT**

The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty does not depend on whether the trustee receives compensation. The duty may be altered by the terms of the trust. See Section 105. This section is similar to Section 2(a) of the Uniform Prudent Investor Act and Restatement (Third) of Trusts: Prudent Investor Rule Section 227 (1992).

The language of this section diverges from the language of the previous Restatement. The prior Restatement can be read as applying the same standard--"man of ordinary prudence would exercise in dealing with his own property"--regardless of the type or purposes of the trust. See Restatement (Second) of Trusts Section 174 cmt. a (1959). This section appropriately bases the standard on the purposes and other circumstances of the particular trust.

A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.

**SOUTH CAROLINA COMMENTS**

Former SCPC Section 62-7-702(2) defined a prudent man as a trustee whose exercise of judgment and care complies with the requirements of former Section 62-7-302, which is retained and incorporated in Part 9.

**SECTION 62-7-805. Costs of administration.**

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

**REPORTER'S COMMENT**

The duty to administer a trust with prudence is a fundamental duty of the trustee. Former SCPC Section 62-7-702(2) defined a prudent man as a trustee whose exercise of judgment and care complies with the requirements of former Section 62-7-302, which is retained and incorporated in Part 9.

A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 62-7-1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.

**SECTION 62-7-805.**

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

**COMMENT**

This section is similar to Section 7 of the Uniform Prudent Investor Act and is consistent with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule Section 227(c)(3) (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 708 and 709. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of administration has long been part of the law of trusts. See Restatement (Second) of Trusts Section 188 (1959).

**SOUTH CAROLINA COMMENT**

Former SCPC Section 62-7-302(F)(3), retained and incorporated in Part 9, provided similarly.

**SECTION 62-7-806. Trustee’s skills.**

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, shall use those special skills or expertise.

**COMMENT**

This section is similar to Section 7-302 of the Uniform Probate Code, Restatement (Second) of Trusts Section 174 (1959), and Section 2(f) of the Uniform Prudent Investor Act.

**SOUTH CAROLINA COMMENT**

Former SCPC Section 62-7-302(C)(6), retained and incorporated in Part 9, provided similarly.

**REPORTER’S COMMENT**

This section is consistent with the South Carolina Prudent Investor Act, Section 62-7-933, and is consistent with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule Section 227(c)(3) (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 62-7-708 and 62-7-709. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of administration has long been part of the law of trusts. *See* Restatement (Second) of Trusts Section 188 (1959).

Former SCPC Section 62-7-302(F)(3), retained and incorporated in Part 9, provided similarly.

**SECTION 62-7-806.**

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, shall use those special skills or expertise.

**REPORTER’S COMMENT**

This section is similar to Restatement (Second) of Trusts Section 174 (1959), and consistent with the South Carolina Prudent Investor Act, Section 62-7-933.

Former SCPC Section 62-7-302(C)(6), retained and incorporated in Part 9, provided similarly.

**SECTION 62-7-807. Delegation by trustee.**

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

**COMMENT**

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from Section 9 of the Uniform Prudent Investor Act. See also John H. Langbein, *Reversing the Nondelegation Rule of Trust Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be

**SECTION 62-7-807.**

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

**REPORTER'S COMMENT**

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. Former SCPC Section 62-7-302(H)(1), retained and incorporated in Part 9, provided similarly. The language is derived from Section 9 of the Uniform Prudent Investor Act. See also John H. Langbein, *Reversing the Nondelegation Rule of Trust Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent

prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 703(e).

**SOUTH CAROLINA COMMENT**

Former SCPC Section 62-7-302(H)(1), retained and incorporated in Part 9, provided similarly.

**SECTION 62-7-808.** Powers to direct.

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

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

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

**COMMENT**

Subsection (a) is an application of Section 603(a), which provides that a revocable trust is subject to the settlor's exclusive control as long as the settlor has capacity. Because of the settlor's degree of control, subsection (a) of this section authorizes a trustee to rely on a direction from the settlor even if it is contrary

trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 62-7-703.

**SECTION 62-7-808.**

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

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

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

**REPORTER'S COMMENT**

Subsection (a) is an application of Section 62-7-603(a), which provides that a revocable trust is subject to the settlor's exclusive control. Because of the settlor's degree of control, subsection (a) of this section authorizes a trustee to rely on a direction from the settlor even if it is contrary to the terms of

to the terms of the trust. The direction of the settlor might be regarded as an amendment of the trust. Subsection (a) has limited application upon a settlor's incapacity. An agent, conservator, or guardian has, authority to give the trustee instructions contrary to the terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's powers with respect to revocation, amendment, or distribution as provided in Section 602(e).

Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts Section 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts Section 64(2) (Tentative Draft No. 3, approved 2001). "Advisers" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers.

A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party's approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a serious breach of trust. See Restatement (Second) of Trusts Section 185 cmt. g (1959); Section 703(g) (duties of cotrustees).

Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding

the trust. The direction of the settlor might be regarded as an amendment of the trust.

Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts Section 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts Section 64(2) (Tentative Draft No. 3, approved 2001). "Advisers" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers. See SCTC Sections 62-7-818 and 62-7-819.

A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party's approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a serious breach of trust. See Restatement (Second) of Trusts Section 185 cmt. g (1959); Section 703(g) (duties of cotrustees).

Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. See ERISA Section 404(c) (29 U.S.C. Section 1104(c)). But for the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of others. In that event and as provided in



interests in employee benefit plans or individual retirement accounts. See ERISA Section 404(c) (29 U.S.C. Section 1104(c)). But for the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of others. In that event and as provided in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. See Section 701.

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

The provisions of this section may be altered in the terms of the trust. See Section 105. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. See I.R.C. Section 675(4).

#### SOUTH CAROLINA COMMENT

There was no prior South Carolina statutory or

subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. See Section 62-7-701.

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

The provisions of this section may be altered in the terms of the trust. See Section 62-7-105. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. See I.R.C. Section 675(4).

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<p>case law counterpart.</p> <p><b>SECTION 62-7-809.</b> Control and protection of trust property.</p> <p>A trustee shall take reasonable steps to take control of and protect the trust property.</p> <p><b>COMMENT</b>  This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee’s duty of prudent administration as provided in Section 804. See also Sections 816(1) (power to collect trust property), 816(11) (power to insure trust property), and 816(12) (power to abandon trust property). The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. See Restatement (Second) of Trusts Section 175 cmt. a, c &amp; d (1959). This section, like the other sections in this article, is subject to alteration by the terms of the trust. See Section 105. For example, the settlor may provide that the spouse may occupy the settlor’s former residence rent free, in which event the spouse’s occupancy would prevent the trustee from taking possession.</p> <p><b>SOUTH CAROLINA COMMENT</b>  There was no prior South Carolina statutory or case law counterpart.</p> <p><b>SECTION 62-7-810.</b> Recordkeeping and identification of trust property.</p> <p>(a) A trustee shall keep adequate records of the administration of the trust.  (b) A trustee shall keep trust property separate from the trustee’s own property.  (c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be</p>	<p><b>SECTION 62-7-809.</b></p> <p>A trustee shall take reasonable steps to take control of and protect the trust property.</p> <p><b>REPORTER’S COMMENT</b>  This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee’s duty of prudent administration as provided in Section 62-7-804. <i>See also</i> Sections 62-7-816(1) (power to collect trust property), 62-7-816(11) (power to insure trust property), and 62-7-816(12) (power to abandon trust property). The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. <i>See</i> Restatement (Second) of Trusts Section 175 cmt. a, c &amp; d (1959). This section, like the other sections in this article, is subject to alteration by the terms of the trust. <i>See</i> Section 62-7-105. For example, the settlor may provide that the spouse may occupy the settlor’s former residence rent free, in which event the spouse’s occupancy would prevent the trustee from taking possession.</p> <p>There was no prior South Carolina statutory or case law counterpart.</p> <p><b>SECTION 62-7-810.</b></p> <p>(a) A trustee shall keep adequate records of the administration of the trust.  (b) A trustee shall keep trust property separate from the trustee’s own property.  (c) Except as otherwise provided in subsection (d), a trustee shall cause the trust</p>
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designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

#### COMMENT

The duty to keep adequate records stated in subsection (a) is implicit in the duty to act with prudence (Section 804) and the duty to report to beneficiaries (Section 813). For an application, see *Green v. Lombard*, 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). See also Restatement (Second) of Trusts Sections 172, 174 (1959).

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Subsection (b), which addresses the duty not to mingle, is derived from Section 179 of the Restatement (Second) of Trusts (1959). Subsection (c) makes the requirement that assets be earmarked more precise than that articulated in Restatement (Second) Section 179 by requiring that the interest of the trust must appear in the records of a third party, such as a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's own internal records is insufficient. Section 816(7)(B), which allows a trustee to hold securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked because the trustee's holdings are indicated in the records maintained by an independent party, such as in an account at a brokerage firm.

Earmarking is not practical for all types of assets. With respect to assets not subject to registration, such as tangible personal property

property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

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#### REPORTER'S COMMENT

The duty to keep adequate records stated in subsection (a) is implicit in the duty to act with prudence (Section 62-7-804) and the duty to report to beneficiaries (Section 62-7-813). For an application, see *Green v. Lombard*, 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). See also Restatement (Second) of Trusts Sections 172, 174 (1959). This Section is related to Section 62-7-813, which requires the trustee to keep the beneficiaries reasonably informed about the administration of the trust.

Subsection (c) allows the trustee to maintain assets in nominee name rather than holding individual assets in the name of the trustee.

Subsection (d) allows a trustee to use the property of two or more trusts to make joint investments. This allows the use of common trust funds or mutual funds which can be an economical method of managing assets of the trust.

and bearer bonds, arranging for the trust's ownership interest to be reflected on the records of a third-party custodian would not be feasible. For this reason, subsection (c) waives separate record keeping for these types of assets. Under subsection (b), however, the duty of the trustee not to mingle these or any other trust assets with the trustee's own remains absolute.

Subsection (d), following the lead of a number of state statutes, allows a trustee to use the property of two or more trusts to make joint investments, even though under traditional principles a joint investment would violate the duty to earmark. A joint investment frequently is more economical than attempting to invest the funds of each trust separately. Also, the risk of misappropriation or mistake is less when the trust property is invested jointly with the property of another trust than when pooled with the property of the trustee or other person.

**SOUTH CAROLINA COMMENT**

There was no prior South Carolina statutory or case law counterpart.

This Section is related to Section 62-7-813, which requires the trustee to keep the beneficiaries reasonably informed about the administration of the trust.

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**SECTION 62-7-811.** Enforcement and defense of claims.

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

**SECTION 62-7-811.**

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**COMMENT**

This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. See also Section 816(14) (power to pay, contest, settle, or release claims).

**SOUTH CAROLINA COMMENT**

This section does not impose any new duties upon trustees. It has been held in South Carolina that a trustee who fails to collect upon a debt owed the trust, or to make an effort to do so, is liable to the trust. *Neely v. Peoples Bank of Anderson*, 133 S.C. 43, 130 S.E. 550 (S.C. 1925). See also former SCPC Section 62-7-704(c)(19), which provided that a trustee had the power to pay or contest claims, settle claims by or against the trust, and to release claims owned by the trust, which is similar to SCTC Section 62-7-816(14).

**SECTION 62-7-812.** Exercise of powers by successor trustees; liability.

Unless directed otherwise by the court or by the trust instrument, a successor trustee appointed by the court or by the trust instrument succeeds to all the powers, duties, and discretionary authority given to the predecessor trustee. Upon reasonable request, a successor trustee is entitled to a statement of the accounts of the trust from a predecessor trustee. A successor trustee may accept the account rendered and shall be under no duty to examine the acts or omissions of the predecessor trustee and shall not be liable for failure to seek redress for any act or omission of the predecessor trustee. The trustee of a testamentary trust may accept the account rendered by a personal representative and shall be under no duty to examine the acts or

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omissions of the predecessor personal representative and shall not be liable for failure to seek redress for any act or omission of the predecessor personal representative.

**SOUTH CAROLINA COMMENT**

South Carolina Trust Code Section 62-7-812 does not adopt Uniform Trust Code Section 812. Instead, SCTC Section 62-7-812 retains and incorporates former SCPC Section 62-7-707(c). SCTC Section 62-7-703 has provisions similar to former SCPC Section 62-7-707(a), (b), and (d).

**SECTION 62-7-813.** Duty to inform and report.

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

(b) A trustee:

(1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

(2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c); and

(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of

omissions of the predecessor personal representative and shall not be liable for failure to seek redress for any act or omission of the predecessor personal representative.

**REPORTER'S COMMENT**

Section 62-7-812 does not adopt Uniform Trust Code Section 812. Instead, Section 62-7-812 retains and incorporates former SCPC Section 62-7-707(c). Section 62-7-703 has provisions similar to former SCPC Section 62-7-707(a), (b), and (d).

**SECTION 62-7-813.**

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~~(2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;~~

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~~(4) shall notify the qualified beneficiaries in advance of any change in the method or rate~~

the trustee's compensation.

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(e) Subsections (b)(2) and (b)(3) of this section apply only to a trustee who accepts a trusteeship on or after the effective date of this article, to an irrevocable trust created on or after the effective date of this article, and to a revocable trust which becomes irrevocable on or after the effective date of this article.

#### COMMENT

The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee. For the common law duty to keep the beneficiaries informed, see Restatement (Second) of Trusts Section 173 (1959). This section makes the duty to keep the beneficiaries informed more precise by limiting it to the qualified beneficiaries. For the definition of qualified beneficiary, see Section 103(12). The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have filed a specific request with the trustee. See Section

~~of the trustee's compensation.~~

~~(e) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.~~

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~~(e) SubSections (b)(2) and (b)(3) of this section apply only to a trustee who accepts a trusteeship on or after the effective date of this article, to an irrevocable trust created on or after the effective date of this article, and to a revocable trust which becomes irrevocable on or after the effective date of this article. Unless the terms of a trust expressly provide otherwise, while a trust is revocable the trustee's duties under this section are owed exclusively to the settlor.~~

~~(b) Unless the terms of a trust expressly provide otherwise, a trustee who accepts a trusteeship or undertakes the administration of an irrevocable trust created on or after the effective date of this article, or of a revocable trust which becomes irrevocable whether by the death of the settlor or by the terms of the trust on or after the effective date of this article, shall:~~

~~(1) within ninety days after the trustee accepts a trusteeship or undertakes administration of an irrevocable trust or a~~

110(a) (request for notice).

For the extent to which a settlor may waive the requirements of this section in the terms of the trust, see Section 105(b)(8)-(9).

The trustee is under a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust. See Restatement (Second) of Trusts Section 173 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a beneficiary in the absence of a specific request for the information. See Restatement (Second) of Trusts Section 173 cmt. d (1959). Thus, the duty articulated in subsection (a) is ordinarily satisfied by providing the beneficiary with a copy of the annual report mandated by subsection (c). However, special circumstances may require that the trustee provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. See Restatement (Second) of Trusts Section 173 cmt. d (1959). Furthermore, to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely-held business interests, and other assets that are difficult to value or to replace. See *In re Green Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988); *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer.

Subsection (a) provides a different standard if a beneficiary, whether qualified or not, makes a

revocable trust that has become irrevocable whether by the death of the settlor or by the terms of the trust, notify the qualified beneficiaries, as defined in Section 62-7-103(12), of:

(A) the existence of the trust;  
(B) the identity of the settlor or settlers;  
(C) the trustee's name, address and telephone number;

(D) the right to request in writing a copy of the trust instrument; and

(E) the right to request in writing a copy of any trustee's report described in (c)(1) below;

(2) throughout the administration of the trust, keep the distributees and the permissible distributees, as defined in Section 62-7-103(21) and (25), reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, provided that the attorney-client privilege between the trustee and the trustee's attorney is not violated;

(3) upon the reasonable written request of a beneficiary other than a qualified beneficiary unless unreasonable under the circumstances, provide to the beneficiary a copy of the trust instrument redacted to include only those provisions of the trust that are relevant to the beneficiary's interest in the trust, as the trustee determines, and unless unreasonable under the circumstances, respond to a beneficiary's written request for information related to the administration of the trust;

(4) notify the distributees and permissible distributees in advance of any change in the method or rate of the trustee's compensation; and

(5) notwithstanding any of the above, not be required to notify any beneficiary in advance of transactions relating to the trust property.

(c) Unless the terms of a trust expressly provide otherwise, a trustee who accepts a trusteeship or undertakes the administration of an irrevocable trust created on or after the



request for information. In that event, the trustee must promptly comply with the beneficiary's request unless unreasonable under the circumstances. Further supporting the principle that a beneficiary should be allowed to make an independent assessment of what information is relevant to protecting the beneficiary's interest, subsection (b)(1) requires the trustee on request to furnish a beneficiary with a complete copy of the trust instrument and not merely with those portions the trustee deems relevant to the beneficiary's interest. For a case reaching the same result, see *Fletcher v. Fletcher*, 480 S.E. 2d 488 (Va. Ct. App. 1997). Subsection (b) (1) is contrary to Section 7-303(b) of the Uniform Probate Code, which provides that "[u]pon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest...."

The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question. "The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383 (1981). On the other hand, subsection (a) of this section requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee's attorney. There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances. In the leading case, *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976),

effective date of this article, or of a revocable trust which becomes irrevocable on or after the effective date of this article, shall:

(1) have a continuing duty to:

(A) keep the distributees and permissible distributees, or other qualified beneficiaries who request information in writing, reasonably informed as to the administration of the trust; and

(B) send annually, and upon the termination of the trust, a written report of the trust property which may be in any format which provides the distributees and permissible distributees, or other qualified beneficiaries who have requested in writing, with information necessary to protect their interests. The report may include a copy of the fiduciary income tax return, or copies of bank or brokerage statements, or an informal list of assets and if feasible, the market values of those assets, the liabilities, the receipts and the disbursements, including the source and amount of the trustee's compensation;

(2) upon resignation of the trustee and unless a cotrustee remains in office, send a written report as described in (c)(1) to the distributees and permissible distributees; and in the case of the death or incapacity of a trustee, the report may be sent by the trustee's personal representative, conservator or guardian.

(d) To the extent that there is no conflict of interest, the trustee's duties to inform and report under subsections (b) and (c) are deemed satisfied if the information and report are given to the beneficiary's representative as described in Sections 62-7-302 through 62-7-305.

(e) Any distributee or permissible distributee may waive the right to a trustee's report and other information described under this section and, with respect to future reports and other information, withdraw a waiver previously given.

#### REPORTER'S COMMENT

The 2012 Amendments completely revise the

the court reasoned that the beneficiary, not the trustee, is the attorney's client: "As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client ..." This beneficiary-as-client theory has been criticized on the ground that it conflicts with the trustee's fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. See Louis H. Hamel, Jr., *Trustee's Privileged Counsel: A Rebuttal*, 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee's Attorney/Client Privilege*, 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee's attorney-client privilege. *Wells Fargo Bank v. Superior Court (Boltwood)*, 990 P.2d 591 (Cal. 2000); *Huie v. De Shazo*, 922 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory continues to be applied to ERISA trusts. See, e.g., *United States v. Mett*, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a pension trust the beneficiaries are the settlors of their own trust because the trust is funded with their own earnings. Accordingly, in ERISA attorney-client cases "[t]here are no competing interests such as other stockholders or the intentions of the Settlor." Gibbs & Hanson, 21 ACTEC Notes at 238. For further discussion of the attorney-client privilege and whether there is a duty to disclose to the beneficiaries, see ACTEC Commentaries on the Model Rules of Professional Conduct, *Commentary on MRPC 1.2* (3d ed. 1999); Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541 (1996).

To enable beneficiaries to protect their interests effectively, it is essential that they know the identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified

previous version of 62-7-813 and more clearly define the duties of the trustee to inform and report as well as the classes of beneficiaries to whom the trustee's duties extend. The language is intended to balance the trustee's duties with the rights of the various classes of beneficiaries to receive information and reports. In regard to the initial duty to inform, qualified beneficiaries are entitled to receive information as provided in subsection (b)(1); thereafter, only distributees and permissible distributees have the right to receive information as provided in subsections (b)(2) and (b)(4); and under (b)(3) a nonqualified beneficiary may receive only a redacted copy of a trust agreement and only upon request. In regard to the duty to report, subsection (c)(1) provides that the distributees and permissible distributees have the right to receive a report as described therein. Other qualified beneficiaries may receive the report only upon written request and nonqualified beneficiaries are not entitled to a report.

beneficiaries within 60 days of the trustee's acceptance of office and of the trustee's name, address and telephone number. Similar to the obligation imposed on a personal representative following admission of the will to probate, subsection (b)(3) requires the trustee of a revocable trust to inform the qualified beneficiaries of the trust's existence within 60 days after the settlor's death. These two duties can overlap. If the death of the settlor happens also to be the occasion for the appointment of a successor trustee, the new trustee of the formerly revocable trust would need to inform the qualified beneficiaries both of the trustee's acceptance and of the trust's existence. Subsection (b)(4) deals with the sensitive issue of changes, usually increases, in trustee compensation. Changes can include changes in a periodic base fee, rate of percentage compensation, hourly rate, termination fee, or transaction charge. Regarding the standard for setting trustee compensation, see Section 708 and Comment. Subsection (c) requires the trustee to furnish the current beneficiaries and other beneficiaries who request it with a copy of a trustee's report at least annually and upon termination of the trust. Unless a cotrustee remains in office, the former trustee also must provide a report to all of the qualified beneficiaries upon the trustee's resignation or removal. If the vacancy occurred because of the former trustee's death or adjudication of incapacity, a report may, but need not be provided by the former trustee's personal representative, conservator, or guardian.

The Uniform Trust Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently

clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, *Fiduciary Accounting Guide* (2d ed. 1998). Subsection (d) allows trustee reports and other required information to be waived by a beneficiary. A beneficiary may also withdraw a consent. However, a waiver of a trustee's report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.

**SOUTH CAROLINA COMMENT**

The corresponding section under the former law was SCPC Section 62-7-303, which required a trustee to notify requisite beneficiaries within 30 days of becoming the trustee of an irrevocable trust of the existence of the trust and, upon request, to provide a copy of the trust document and periodic accountings.

SCTC Section 62-7-813 expands upon these trustee responsibilities. The former SCPC 30-day notice period is expanded to 60 days after accepting a trusteeship or having knowledge that a trust is no longer irrevocable. Section 62-7-813 clarifies and codifies the trustee's general responsibility to keep the beneficiaries reasonably informed about the administration of the trust and of the material facts necessary to protect their respective interests. Section 62-7-813 also specifically grants to the beneficiary a right to waive the right to receive a trust report.

This section includes subsection (e), which is included in the 2004 Amendments to the UTC.

**SECTION 62-7-814.** Discretionary powers; tax savings.

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust,

**SECTION 62-7-814.**

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust,

<p>including the use of such terms as “absolute”, “sole”, or “uncontrolled”, the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.</p> <p>(b) A power whose exercise is limited or prohibited by subsection (c) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.</p> <p>(c) Subject to subsection (d), and unless the application of this section is clearly and convincingly negated in the will, the trust document, terms of the trust, or a written instrument appointing a fiduciary, expressly indicating that a rule in this subsection does not apply, any power conferred upon the fiduciary, in his capacity as a fiduciary (and not including any power conferred upon him in his capacity as a beneficiary), which would, except for this section, constitute, in whole or in part, a general power of appointment cannot be exercised by him in favor of himself, his estate, his creditors, or the creditors of his estate.</p> <p>(1) The fiduciary can, however, exercise the power in favor of someone other than himself, his estate, his creditors and the creditors of his estate.</p> <p>(2) If a power comes within subsection (c) and the power is conferred upon two or more fiduciaries, it can be exercised by the fiduciary or the fiduciaries who are not disqualified from exercising the power as if they were the only fiduciary or fiduciaries.</p> <p>(3) If all of the serving fiduciaries are disqualified from exercising a power, the court that would have jurisdiction to appoint a fiduciary under the instrument, if there were no fiduciary currently serving, shall exercise, or shall appoint a special fiduciary whose only power is to exercise the power that cannot be</p>	<p>including the use of such terms as ‘absolute’, ‘sole’, or ‘uncontrolled’, the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.</p> <p>(b) A power whose exercise is limited or prohibited by subsection (c) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.</p> <p>(c) Subject to subsection (d), and unless the application of this section is clearly and convincingly negated in the will, the trust document, terms of the trust, or a written instrument appointing a fiduciary, expressly indicating that a rule in this subsection does not apply, any power conferred upon the fiduciary, in his capacity as a fiduciary (and not including any power conferred upon him in his capacity as a beneficiary), which would, except for this section, constitute, in whole or in part, a general power of appointment cannot be exercised by him in favor of himself, his estate, his creditors, or the creditors of his estate.</p> <p>(1) The fiduciary can, however, exercise the power in favor of someone other than himself, his estate, his creditors and the creditors of his estate.</p> <p>(2) If a power comes within subsection (c) and the power is conferred upon two or more fiduciaries, it can be exercised by the fiduciary or the fiduciaries who are not disqualified from exercising the power as if they were the only fiduciary or fiduciaries.</p> <p>(3) If all of the serving fiduciaries are disqualified from exercising a power, the court that would have jurisdiction to appoint a fiduciary under the instrument, if there were no fiduciary currently serving, shall exercise, or shall appoint a special fiduciary whose only power is to exercise the power that cannot be</p>
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exercised by the other fiduciaries by reason of subsection (c).

(4) A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(d) Subsection (c) does not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code, as amended, was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code as amended.

#### COMMENT

Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a), a trustee's action must always be in good faith, with regard to the purposes of the trust, and in accordance with the trustee's other duties, including the obligation to exercise reasonable skill, care and caution. See Sections 801 (duty to administer trust) and 804 (duty to act with prudence). The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity. Regarding the standards for exercising discretion and construing particular language of discretion, see Restatement (Third) of Trusts Section 50 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 187 (1959). See also Edward C. Halbach, Jr., Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425 (1961). An abuse by the trustee of the discretion granted in the terms of the trust is a breach of trust that can

exercised by the other fiduciaries by reason of subsection (c).

(4) A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(d) Subsection (c) does not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code, as amended, was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code as amended.

#### REPORTER'S COMMENT

The corresponding statute under the former South Carolina law was SCPC Section 62-7-603. The intent of both former SCPC Section 62-7-603 and current SCTC Section 62-7-814 is to avoid inadvertent income tax and estate tax consequences that might result under certain circumstances where a beneficiary is also serving as a trustee.

The introductory language to subsection (A) of former SCPC Section 62-7-603 appears to be more demonstrative than the corresponding language of Uniform Trust Code Section 814(b). Consequently, current SCTC Section 62-7-814 incorporates that introductory clause from former SCPC Section 62-7-603(A) that current SCTC Section 62-7-814 does not limit the intent and protection of former SCPC Section 62-7-603.

Former SCPC Section 62-7-603 also limited certain fiduciary powers so that the trustee was not deemed to have a general power of appointment. A corresponding clause was not expressly contained in the UTC version of Section 814. Thus, the appropriate language from former SCPC Section 62-7-603 is included at current SCTC Section 62-7-814(c).

Despite the breadth of discretion purportedly

result in surcharge. See Section 1001(b) (remedies for breach of trust).

Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by Sections 411-417. Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that the drafters concluded that it is a topic that this Code should address. It is also a topic on which numerous States have enacted corrective statutes.

A tax curative provision differs from a statute such as Section 416 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent's death. See Rev. Rul. 73-142, 1973-1 C.B. 405. There is specific federal authority authorizing modification of trusts for

granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a), a trustee's action must always be in good faith, with regard to the purposes of the trust, and in accordance with the trustee's other duties, including the obligation to exercise reasonable skill, care and caution. See Sections 62-7-801 (duty to administer trust) and 62-7-804 (duty to act with prudence). The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity. Regarding the standards for exercising discretion and construing particular language of discretion, see Restatement (Third) of Trusts Section 50 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 187 (1959). See also Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425 (1961). An abuse by the trustee of the discretion granted in the terms of the trust is a breach of trust that can result in surcharge. See Section 62-7-1001(b) (remedies for breach of trust).

Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This Trust Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically

a number of reasons (see Comment to Section 416) but not on the specific issues addressed in this section. Subsections (b) through (d), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

Subsection (b)(1) states the main rule. Unless the terms of the trust expressly indicate that the rule in this subsection is not to apply, the power to make discretionary distributions to a beneficiary-trustee is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the trustee's gross estate or result in a taxable gift upon the trustee's release or exercise of the power. Trusts of which the trustee-beneficiary is also a settlor are not subject to this subsection. In such a case, limiting the discretion of a settlor-trustee to an ascertainable standard would not be sufficient to avoid inclusion of the trust in the settlor's gross estate. See generally John J. Regan, Rebecca C. Morgan & David M. English, *Tax, Estate and Financial Planning for the Elderly* Section 17.07[2][h]. Furthermore, the inadvertent inclusion of a trust in a settlor-trustee's gross estate is a far less frequent and better understood occurrence than is the inadvertent inclusion of the trust in the estate of a nonsettlor trustee-beneficiary.

Subsection (b)(2) addresses a common trap, the trustee who is not a beneficiary but who has power to make discretionary distributions to those to whom the trustee owes a legal obligation of support. Discretion to make distributions to those to whom the trustee owes a legal obligation of support, such as to the trustee's minor children, results in inclusion of the trust in the trustee's gross estate even if the power is limited by an ascertainable standard. The applicable regulation provides that the ascertainable standard exception applies only to distributions for the benefit of the decedent, not to distributions to those to whom the decedent owes a legal obligation of support.

amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by Sections 62-7-411 through 62-7-417.

Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that this Code addresses it. It is also a topic on which numerous states have enacted corrective statutes.

A tax curative provision differs from a statute such as Section 62-7-416 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent's death. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. There is specific federal authority authorizing modification of trusts for a number of reasons (*see* Comment to UTC Section 416) but not on the specific issues addressed in this section. Subsections (b) through (d), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

QTIP marital trusts are subject to this section. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself



See Treas. Reg. Section 20.2041-1(c)(2). Subsection (c) deals with cotrustees and adopts the common planning technique of granting the broader discretion only to the independent trustee. Cotrustees who are beneficiaries of the trust or who have a legal obligation to support a beneficiary may exercise the power only as limited by subsection (b). If all trustees are so limited, the court may appoint a special fiduciary to make a decision as to whether a broader exercise is appropriate. Subsection (d) excludes certain trusts from the operation of this section. Trusts qualifying for the marital deduction will be includable in the surviving spouse's gross estate regardless of whether this section applies. Consequently, if the spouse is acting as trustee, there is no need to limit the power of the spouse-trustee to make discretionary distributions for the spouse's benefit. Similar reasoning applies to the revocable trust, which, because of the settlor's power to revoke, is automatically includable in the settlor's gross estate even if the settlor is not named as a beneficiary. QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate. The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out

constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate.

The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. *See* Rev. Rul. 69-345, 1969-1 C.B. 226.

of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. See Rev. Rul. 69-345, 1969-1 C.B. 226.

**SOUTH CAROLINA COMMENT**

The corresponding statute under the former South Carolina law was SCPC Section 62-7-603. The intent of both SCPC Section 62-7-603 and SCTC Section 62-7-814 is to avoid inadvertent income tax and estate tax consequences that might result under certain circumstances where a beneficiary is also serving as a trustee.

The introductory language to subsection (A) of former SCPC Section 62-7-603 appears to be more demonstrative than the corresponding language of Uniform Trust Code Section 814(b). Consequently, SCTC Section 62-7-814 incorporates that introductory clause from former SCPC Section 62-7-603 (A) that SCTC Section 62-7-814 does not limit the intent and protection of former SCPC Section 62-7-603.

Former SCPC Section 62-7-603 also limited certain fiduciary powers so that the trustee was not deemed to have a general power of appointment. A corresponding clause was not expressly contained in the UTC version of Section 814. Thus, the appropriate language from former SCPC Section 62-7-603 is included at SCTC Section 62-7-814(c).

**SECTION 62-7-815.** General powers of trustee.

- (a) A trustee, without authorization by the court, may exercise:
  - (1) powers conferred by the terms of the trust; and
  - (2) except as limited by the terms of the trust:
    - (A) all powers over the trust property which an unmarried competent owner has over individually owned property;

**SECTION 62-7-815.**

- (a) A trustee, without authorization by the court, may exercise:
  - (1) powers conferred by the terms of the trust; and
  - (2) except as limited by the terms of the trust:
    - (A) all powers over the trust property which an unmarried competent owner has over individually owned property;

(B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and  
(C) any other powers conferred by this part.  
(b) The exercise of a power is subject to the fiduciary duties prescribed by this part.

**COMMENT**

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy.

The powers conferred elsewhere in this Code that are subsumed under this section include all of the specific powers listed in Section 816 as well as other powers described elsewhere in this Code. See Sections 108(c) (transfer of principal place of administration), 414(a) (termination of uneconomic trust with value less than \$50,000), 417 (combination and division of trusts), 703(e) (delegation to cotrustee), 802(h) (exception to duty of loyalty), 807 (delegation to agent of powers and duties), 810(d) (joint investments), and Article 9 (Uniform Prudent Investor Act). The powers conferred by this Code may be exercised without court approval. If court approval of the exercise of a power is desired, a petition for court approval should be filed.

A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

2003 Amendment. The amendment, which changes an “ or” to an “and” between subsections (a)(1) and (a)(2), corrects an

(B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and  
(C) any other powers conferred by this part.  
(b) The exercise of a power is subject to the fiduciary duties prescribed by this part.

**REPORTER’S COMMENT**

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy.

A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

Former SCPC Section 62-7-704 contained the default powers that were available to all trustees when the trust instrument did not provide specific powers. Former SCPC Section 62-7-704 granted general powers that a prudent person would perform incident to the collection, preservation, management, use and distribution of the trust estate, and it also contained various specific powers. SCTC Section 62-7-815 broadens the former SCPC list of powers that apply to all trustees by stating that a trustee has all of the powers over trust property that an individual has over his own property.

inadvertent style glitch. As the comments to Section 815 make clear, the drafters intended that the trustee have both the powers stated in the terms of the trust and the powers specified in this Act, not that they be alternatives.

**SOUTH CAROLINA COMMENT**

Former SCPC Section 62-7-704 contained the default powers that were available to all trustees when the trust instrument did not provide specific powers. Former SCPC Section 62-7-704 granted general powers that a prudent person would perform incident to the collection, preservation, management, use and distribution of the trust estate, and it also contained various specific powers. SCTC Section 62-7-815 broadens the former SCPC list of powers that apply to all trustees by stating that a trustee has all of the powers over trust property that an individual has over his own property.

**SECTION 62-7-816.** Specific powers of trustee.

Without limiting the authority conferred by Section 62-7-815, a trustee may:

- (1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;
- (2) acquire or sell property, for cash or on credit, at public or private sale;
- (3) exchange, partition, or otherwise change the character of trust property;
- (4) deposit trust money in accounts--all types including margin accounts--in a regulated financial-service institution;
- (5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- (6) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, create and/or continue a business or other enterprise and take

**SECTION 62-7-816.**

Without limiting the authority conferred by Section 62-7-815, a trustee may:

- (1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;
- (2) acquire or sell property, for cash or on credit, at public or private sale;
- (3) exchange, partition, or otherwise change the character of trust property;
- (4) deposit trust money in accounts--all types including margin accounts--in a regulated financial-service institution;
- (5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- (6) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, create and/or continue a business or other enterprise and take

<p>any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;</p> <p>(7) with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:</p> <p>(A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;</p> <p>(B) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;</p> <p>(C) pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and</p> <p>(D) deposit the securities with a depository or other regulated financial- service institution;</p> <p>(8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, including by way of example qualified conservation and façade easements, and make or vacate plats and adjust boundaries;</p> <p>(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;</p> <p>(10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;</p> <p>(11) insure the property of the trust against damage or loss and insure the trustee, the trustee’s agents, and beneficiaries against</p>	<p>any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;</p> <p>(7) with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:</p> <p>(A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;</p> <p>(B) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;</p> <p>(C) pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and</p> <p>(D) deposit the securities with a depository or other regulated financial- service institution;</p> <p>(8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, including by way of example qualified conservation and façade easements, and make or vacate plats and adjust boundaries;</p> <p>(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;</p> <p>(10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;</p> <p>(11) insure the property of the trust against damage or loss and insure the trustee, the</p>
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<p>liability arising from the administration of the trust;</p> <p>(12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;</p> <p>(13) with respect to possible liability for violation of environmental law:</p> <p>(A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;</p> <p>(B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;</p> <p>(C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;</p> <p>(D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and</p> <p>(E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;</p> <p>(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;</p> <p>(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;</p> <p>(16) exercise elections with respect to federal, state, and local taxes;</p> <p>(17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;</p>	<p>trustee's agents, and beneficiaries against liability arising from the administration of the trust;</p> <p>(12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;</p> <p>(13) with respect to possible liability for violation of environmental law:</p> <p>(A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;</p> <p>(B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;</p> <p>(C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;</p> <p>(D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and</p> <p>(E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;</p> <p>(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;</p> <p>(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;</p> <p>(16) exercise elections with respect to federal, state, and local taxes;</p> <p>(17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the</p>
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<p>(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;</p> <p>(19) pledge trust property to guarantee loans made by others to the beneficiary;</p> <p>(20) appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;</p> <p>(21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:</p> <p>(A) paying it to the beneficiary's agent under a Power of Attorney, to the beneficiary's conservator or, if the beneficiary does not have a conservator, to the beneficiary's guardian;</p> <p>(B) paying it to the beneficiary's custodian under the Uniform Gifts or Transfers to Minors Act or custodial trustee under the Uniform Custodial Trust Act, and, for that purpose, creating a custodianship or custodial trust;</p> <p>(C) if the trustee does not know of an agent under a Power of Attorney, conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or</p> <p>(D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;</p> <p>(22) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust</p>	<p>right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;</p> <p>(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;</p> <p>(19) pledge trust property to guarantee loans made by others to the beneficiary;</p> <p>(20) appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;</p> <p>(21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:</p> <p>(A) paying it to the beneficiary's agent under a Power of Attorney, to the beneficiary's conservator or, if the beneficiary does not have a conservator, to the beneficiary's guardian;</p> <p>(B) paying it to the beneficiary's custodian under the Uniform Gifts or Transfers to Minors Act or custodial trustee under the Uniform Custodial Trust Act, and, for that purpose, creating a custodianship or custodial trust;</p> <p>(C) if the trustee does not know of an agent under a Power of Attorney, conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or</p> <p>(D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;</p> <p>(22) on distribution of trust property or the</p>
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property for those purposes, and adjust for resulting differences in valuation;

(23) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and

(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

(27) allocate items of income or expense to either trust income or principal, as permitted or provided by the trust instrument and applicable law, but this power shall not be construed as prescribing the method of accounting for principal and income;

(28) to divide any trust into separate shares or separate trusts or to create separate trusts if the trustee reasonably deems it appropriate and the division or creation is consistent with the settlor's intent and facilitates the trust's administration without defeating or impairing the interests of the beneficiaries.

#### COMMENT

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. See Section 105. The powers listed are also subsumed under the general authority granted in Section 815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little

division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(23) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and

(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

(27) allocate items of income or expense to either trust income or principal, as permitted or provided by the trust instrument and applicable law, but this power shall not be construed as prescribing the method of accounting for principal and income;

(28) to divide any trust into separate shares or separate trusts or to create separate trusts if the trustee reasonably deems it appropriate and the division or creation is consistent with the settlor's intent and facilitates the trust's administration without defeating or impairing the interests of the beneficiaries.

#### REPORTER'S COMMENT

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. See Section 62-7-105. The powers listed are also subsumed under the general authority granted in Section 62-7-815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has over



of substance not already granted by Section 815 and powers conferred elsewhere in the Code, which are listed in the Comment to Section 815. While the Committee drafting this Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list.

As provided in Section 815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the Uniform Trust Code, modify a trustee duty that would otherwise apply. See, e.g., Sections 802(h) (exceptions to duty of loyalty) and 810(d) (joint investments as exception to earmarking requirement).

Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in Section 801. The trustee has a duty to enforce claims as provided in Section 811, the successful prosecution of which can result in collection of trust property. Pursuant to Section 812, the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, see

individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little of substance not already granted by Section 62-7-815 and powers conferred elsewhere in the Code. While the Committee drafting the Uniform Trust Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list.

As provided in Section 62-7-815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the SCTC, modify a trustee duty that would otherwise apply. See, e.g., Sections 62-7-802(h) (exceptions to duty of loyalty) and 62-7-810(d) (joint investments as exception to earmarking requirement).

Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in Section 62-7-801. The trustee has a duty to enforce claims as provided in Section 62-7-811, the successful prosecution of which can result in collection of trust property. Pursuant to Section

<p>Section 816(13) (power to decline property with possible environmental liability).</p> <p>Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor Rule Section 190 (1992). In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 804. This duty may dictate that the sale be made with security.</p> <p>Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by Section 802(h)(4).</p> <p>Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole limitation on such borrowing is the general obligation to invest prudently. See Restatement (Third) of Trusts: Prudent Investor Rule Section 191 (1992). Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property for the period that the trust was in existence.</p> <p>Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Article 9.</p> <p>Paragraph (7), regarding powers with respect to securities, codifies and amplifies the principles of Restatement (Second) of Trusts Section 193 (1959).</p> <p>Paragraph (9), authorizing the leasing of property, negates the older view, reflected in Restatement (Second) of Trusts Section 189 cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable</p>	<p>62-7-812, the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, see Section 62-7-816(13) (power to decline property with possible environmental liability).</p> <p>Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor Rule Section 190 (1992). In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 62-7-804. This duty may dictate that the sale be made with security.</p> <p>Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by Section 62-7-802(h)(4). South Carolina Trust Code Section 62-7-816 subsection (4) added “in accounts” to the UTC version and expressly provides for the deposit of money in “all types” of accounts, and specifically references the inclusion of “margin accounts.”</p> <p>Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole limitation on such borrowing is the general obligation to invest prudently. See Restatement (Third) of Trusts: Prudent Investor Rule Section 191 (1992). Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property for the period that the trust was in existence.</p> <p>Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Section 62-7-933. SCTC Section 62-7-816</p>
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<p>to all investments.</p> <p>Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts Section 190 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of Article 9.</p> <p>Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. See Section 809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.</p> <p>Paragraph (13) is one of several provisions in the Uniform Trust Code designed to address trustee concerns about possible liability for violations of environmental law. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (14); pay expenses, paragraph (15)). Numerous States have legislated on the subject of environmental liability of fiduciaries. For a representative state statute, see Tex. Prop. Code Ann. Section 113.025. See also Sections 701(c)(2) (designated trustee may inspect property to determine potential violation of environmental or other law or for any purpose) and 1010(b) (trustee not personally liable for violation of environmental law arising from ownership or control of trust property).</p> <p>Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 811 requires that a trustee need take only “reasonable” steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. See</p>	<p>subsection (6) added language to the UTC version which authorizes a trustee to “create” a business.</p> <p>Paragraph (7), regarding powers with respect to securities, codifies and amplifies the principles of Restatement (Second) of Trusts Section 193 (1959).</p> <p>Paragraph (9), authorizing the leasing of property, negates the older view, reflected in Restatement (Second) of Trusts Section 189 cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.</p> <p>Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts Section 190 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of Part 9.</p> <p>Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. See Section 62-7-809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.</p> <p>Paragraph (13) is one of several provisions in the SCTC designed to address trustee concerns about possible liability for violations of environmental law. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (14); pay expenses, paragraph (15)). See Sections 62-7-701(c)(2) (designated trustee may inspect property to determine potential violation of environmental</p>
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<p>Restatement (Second) of Trusts Section 192 (1959) (power to compromise, arbitrate and abandon claims).</p> <p>Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation, see Section 708. See also Section 709 (repayment of trustee expenditures). While prior court approval is not required, Section 813(b)(4) requires the trustee to inform the qualified beneficiaries in advance of a change in the method or rate of compensation.</p> <p>Paragraph (16) authorizes a trustee to make elections with respect to taxes. The Uniform Trust Code leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries' interests.</p> <p>Paragraph (17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership of annuities or life insurance.</p> <p>Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary's interest in the trust. See Restatement (Second) of Trusts Section 255 (1959). However, the interest of a</p>	<p>or other law or for any purpose) and 62-7-1010(b) (trustee not personally liable for violation of environmental law arising from ownership or control of trust property).</p> <p>Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 62-7-811 requires that a trustee need take only "reasonable" steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. See Restatement (Second) of Trusts Section 192 (1959) (power to compromise, arbitrate and abandon claims).</p> <p>Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation, see Section 62-7-708. See also Section 62-7-709 (repayment of trustee expenditures).</p> <p>Paragraph (16) authorizes a trustee to make elections with respect to taxes. The SCTC leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries' interests.</p> <p>Paragraph (17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership of annuities or life insurance.</p> <p>Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to</p>
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<p>beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. See Section 502.</p> <p>Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only when there is a need to manage real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.</p> <p>Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary.</p> <p>Paragraph (22) authorizes a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.</p> <p>Paragraph (23) authorizes a trustee to resolve disputes through mediation or arbitration. The drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by Section 111. In representing beneficiaries and others in connection with arbitration or mediation, the representation principles of Article 3 may be</p>	<p>the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary's interest in the trust. <i>See</i> Restatement (Second) of Trusts Section 255 (1959). However, the interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. <i>See</i> Section 62-7-502.</p> <p>Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only when there is a need to manage real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.</p> <p>Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary. South Carolina Trust Code Section 62-7-816 subsections (21) (a) &amp; (c) added the phrase "agent under a power of attorney" to the UTC version. It is important for the practitioner to be cautious of SCPC Section 62-5-501, which may provide for a priority payee under these subsections.</p> <p>Paragraph (22) authorizes a trustee to make non-pro-rata distributions and allocate</p>
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applied. Settlers wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995).

Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 709 and Comment. See also Section 811 (duty to defend actions).

Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

#### **SOUTH CAROLINA COMMENT**

South Carolina Trust Code Section 62-7-816 added to the UTC version subsections (27) and (28) to retain and incorporate specific powers the trustee had under former South Carolina law but which were not specifically included in the Uniform Trust Code version.

particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.

Paragraph (23) authorizes a trustee to resolve disputes through mediation or arbitration. In representing beneficiaries and others in connection with arbitration or mediation, the representation principles of Part 3 may be applied. Settlers wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995).

Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 62-7-709 and Comment. *See also* Section 62-7-811 (duty to defend actions).

Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

South Carolina Trust Code Section 62-7-816 added to the UTC version subsections (27) and (28) to retain and incorporate specific powers the trustee had under former South Carolina law but which were not specifically included in the Uniform Trust Code version

#### **SECTION 62-7-816A.**

(a) Unless the terms of the instrument expressly provide otherwise, a trustee with the discretion to make distributions of principal or income to or for the benefit of one or more beneficiaries of a trust, the original trust, may exercise that discretion by appointing all or part of the property subject to that discretion in

favor of another trust for the benefit of one or more of those beneficiaries, the second trust. This power may be exercised without the approval of a court, but court approval is necessary if the terms of the original trust expressly prohibit the exercise of such power or require court approval.

(b) The trustee of the original trust may exercise this power whether or not there is a current need to distribute principal or income under any standard provided in the original trust. The trustee's special power to appoint trust principal or income in further trust under this section includes the power to create the second trust.

(c) The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument, and the trustee of the second trust may be either the trustee of the original trust or another trustee.

(d) The terms of the second trust are subject to the following requirements:

(1) The beneficiaries of the second trust may include only beneficiaries of the original trust.

(2) A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust cannot have the future beneficial interest accelerated to a present interest in the second trust.

(3) The terms of the second trust may not contain any provision nor reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of an original trust document if the inclusion of the provision or reduction in the original trust document would have disqualified any assets of the original trust for any federal or state income, estate, or gift tax deduction received on account of any assets of the original trust, or if the inclusion of the provision or reduction in the original trust document would have reduced the amount of any federal or state income, estate, or gift tax deduction received. In addition, the terms of the second trust may not reduce any retained interest of a beneficiary of the original trust if

the interest is a qualified interest under Internal Revenue Code Section 2702.

(4) If contributions to the original trust have been excluded from the gift tax by the application of Internal Revenue Code Section 2503(b) and Section 2503(c), then the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest would have vested and become distributable under the terms of the original trust.

(5) If a beneficiary of the original trust has a power of withdrawal over trust property, then either:

(A) the terms of the second trust must provide a power of withdrawal in the second trust identical to the power of withdrawal in the original trust; or

(B) sufficient trust property must remain in the original trust to satisfy the outstanding power of withdrawal.

(6) If the power to distribute principal or income in the original trust is subject to an ascertainable standard, then the power to distribute income or principal in the second trust must be subject to the same ascertainable standard as in the original trust and must be exercisable in favor of the same beneficiaries as in the original trust.

(7) The second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income of the original trust. The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust.

(e) A trustee may not exercise the power to appoint principal or income under subsection (a) of this section if the trustee is a beneficiary of the original trust, but the remaining cotrustee or a majority of the remaining cotrustees may act for the trust. If all the trustees are beneficiaries of the original trust,



then the court may appoint a special fiduciary with authority to exercise the power to appoint principal or income under subsection (a) of this section.

(f) The exercise of the power to appoint principal or income under subsection (a) of this section:

(1) is considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate or the creditors of the trustee's estate;

(2) does not result in the trustee or cotrustees of the original trust being considered the settlor of the second trust;

(3) is not prohibited by a spendthrift provision or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(g) To effect the exercise of the power to appoint principal or income under subsection (a) of this section, all of the following apply:

(1) The exercise of the power to appoint must be made by an instrument in writing, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, including the terms of the second trust, and the effective date of the exercise of the power. The instrument must be filed with the records of the original trust.

(2) The trustee shall give written notice to all qualified beneficiaries of the original trust, at least ninety days prior to the effective date of the exercise of the power to appoint, of the trustee's intention to exercise the power. The notice must include a copy of the instrument described in subitem (1) of this subsection.

(3) If all qualified beneficiaries waive the notice period by a signed written instrument delivered to the trustee, the trustee's power to appoint principal or income is exercisable after notice is waived by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power.

(h) Nothing in this section must be construed to create or imply a duty of the

trustee to exercise the power to distribute principal or income, and no inference of impropriety must be made as a result of a trustee not exercising the power to appoint principal or income conferred under subsection (a) of this section. Nothing in this section must be construed to abridge the right of any trustee who has a power to appoint property in further trust that arises under the terms of the original trust or under any other section of this article or under another provision of law or under common law. The terms of an original trust may modify or waive the notice requirements under subsection (g), reduce or increase restrictions on altering the interests of beneficiaries under subsection (d), and may otherwise contain provisions that are inconsistent with the requirements of this section.

(i) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee's special power to appoint to another trust pursuant to subsection (a) of this section. Furthermore, if a qualified beneficiary objects to the exercise of the power to appoint, the trustee shall bring an action to approve or disapprove the proposed exercise.

(j) The provisions of Section 62-7-109 regarding notices and the sending of documents to persons under this article apply for the purposes of notices and the sending of documents under this section.

#### REPORTER'S COMMENT

Providing decanting authority to a trustee, authority to appoint the property of an original trust to a second trust, provides flexibility to adapt the terms of a trust on account of unforeseen circumstances or drafting error. In effect, statutory decanting authority makes it possible to modify an irrevocable trust when doing so would be in the best interests of the beneficiaries. Decanting authority can be used to achieve significant benefits in many different circumstances, including: (1)

modifying administrative provisions where a change in law allowed conversion of an income interest into a unitrust interest; (2) allowing a trustee to delegate investment decisions to another fiduciary to reduce potential inability; (3) changing the situs of a trust to a state with more favorable law; (4) relocating trust assets to a state that does not impose a state income tax; (5) combining multiple trusts to reduce administrative costs; (6) dividing trusts to reduce disagreements among beneficiaries; (7) limiting the authority of interested trustees; (8) correcting drafting errors to mitigate the impact of attorney malpractice; and (9) conforming the distribution provisions of a trust to the requirements of a special needs trust.

The New York and Florida statutes are modeled after existing case law and limit decanting authority to circumstances where the trustee is given absolute discretion over distributions. The South Carolina statute eliminates this requirement to maximize flexibility, while including subsection (d)(6) to prevent a trustee from exercising decanting authority to expand a trustee's discretion beyond that provided in the original trust document. Allowing the trustee of a trust that prohibits decanting to petition for court approval would allow a trustee to petition a court to allow decanting on account of unforeseen circumstances, such as where it becomes necessary to conform a trust to the requirements of a special needs trust. The South Carolina statute also omits the provision in the North Carolina statute requiring both the original and second trusts to be irrevocable.

States recognizing decanting authority as a matter of case law have sometimes differed as to when a trustee may decant and how far the authority extends. Subsection (b) clarifies questions that arose under common law or under other state statutes.

Subsection (c) also clarifies questions that arose under common law or other state statutes. It eliminates uncertainty and concerns over

issues that might otherwise make a fiduciary hesitant to take advantage of the benefits offered by the exercise of decanting authority. The recently enacted North Carolina statute addresses these issues in a definitions section. Because the provision in the subsection contain substantive rules, the provisions would likely be easier to locate within the text of the statute, as opposed to a separate definitions section.

Subdivisions (d)(1) and (d)(2) prevent a trustee from exercising decanting authority to improperly add beneficiaries or increase a beneficiary's interest in the trust. Early decanting statutes in New York, Alaska, Delaware, Tennessee and South Dakota instead required that the power be exercised for the benefit of the "proper objects" of the exercise of the power, a phrase that has proven to be difficult to define. The South Carolina statute follows the model of the Arizona, Florida, New Hampshire and North Carolina statutes, which provide much more clarity.

Subdivision (d)(3) restricts a trustee's ability to modify a beneficiary's fixed interest. Some states, most recently North Carolina, prohibit any reduction of a fixed interest. Delaware's statute has no limitation, whereas South Dakota prohibits reduction for marital trusts, charitable remainder trusts, and grantor retained annuity trusts. Under subdivision (d)(3), modification would be prohibited where the creation of the interest was tax motivated. Also, subdivisions (g)(2) and (i) should prevent any modification not in the beneficiary's best interest, as should SCTC Section 62-7-801. In effect, reduction or elimination would be available only for creditor protection purposes, including conforming a trust to the requirements of a special needs trust.

Subdivision (d)(4) prevents a trustee from utilizing decanting authority to delay a beneficiary's ability to withdraw amounts gifted by way of the annual exclusion. Under some of the first decanting statutes, it might be possible for trustee to extend the vesting period of certain trust for minors (as well as other

beneficiaries). A form of this preventative provision was first included in the South Dakota statute, and all of the statutes enacted since then-in Arizona, New Hampshire and North Carolina-also include a similar provision.

Subdivision (d)(5) prevents a trustee from exercising decanting power to usurp a beneficiary's power of withdrawal over trust property. Most states require a trustee to maintain sufficient trust property to satisfy the beneficiary's power of withdrawal, forcing the trustee to maintain two distinct trusts and potentially leading to additional expenses. North Carolina was the first state to provide the option of simply providing the beneficiary an identical power of withdrawal in the second trust to allow for a complete merger, while simultaneously preserving the beneficiary's power of withdrawal; the proposed statute follows this approach.

Subdivision (d)(6) prevents a trustee from using decanting authority to increase the discretion afforded to the holder of a power of appointment subject to an ascertainable standard, or increase the potential objects to whom the holder of a special power of appointment could appoint trust property. The primary purpose is to prevent conversion of a special power of appointment into a general power of appointment.

As an alternative to an outright distribution to a beneficiary of a discretionary trust, subdivision (d)(7) allows a trustee to instead provide the beneficiary with a power of appointment. It also clarifies that the power of appointment created is subject to any rule against perpetuities.

Like SCTC §62-7-814(c), subsection (e) of the proposed statute is intended to prevent the adverse tax consequences that would result if an interested trustee inadvertently was deemed to have general power of appointment. The subsection also preserves the ability to decant in the instance of an interested trustee.

Subsection (f) ensures that exercise of the

<p><b>SECTION 62-7-817.</b> Distribution upon termination.</p> <p>(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a</p>	<p>power does not create a general power of appointment, is subject to any rule against perpetuities, and is available to the trustee of an irrevocable trust.</p> <p>Subsection (g) provides the procedural requirements for effecting a decanting, including requisite notice. Subdivision (g)(3) allows a beneficiary to waive the notice period without waiving the right to seek relief for a trustee’s breach of a fiduciary duty.</p> <p>Subsection (h) shields a trustee from liability for unforeseeable complications, while assuring that the codification of decanting authority serves to provide statutory protection for the trustee seeking to decant, without curtailing any authority that already exists. The first sentence at least partially protects a trustee from liability for any unforeseeable complication that could have potentially been avoided by an earlier decanting. The second sentence preserves any similar, more extensive right the trustee already has under case law or the original trust document, while the third sentence confirms the original settlor’s broad authority to draft decanting provisions that are either more lenient or restrictive than the authority provided under the proposed statute.</p> <p>Subsection (i) allows either a trustee or qualified beneficiary to seek court approval or disapproval of a proposed exercise of decanting power when there is any doubt as to the propriety of the proposed decanting. This subsection allows a trustee to obtain the assurance that a proposed decanting will be respected, while allowing a beneficiary the opportunity to prevent a proposed exercise of the decanting power before it is carried out by the trustee, rather than trying to force a trustee to reverse the effects of a decanting after it has already been completed.</p> <p><b>SECTION 62-7-817.</b></p> <p>(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries</p>
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proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) it was induced by improper conduct of the trustee; or

(2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

#### COMMENT

This section contains several provisions governing distribution upon termination. Other provisions of the Uniform Trust Code relevant to distribution upon termination include Section 816(26) (powers upon termination to windup administration and distribution), and 1005 (limitation of action against trustee).

Subsection (a) is based on Section 3-906(b) of the Uniform Probate Code. It addresses the dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made available under subsection (a) facilitates the making of non-pro-rata distributions. However, whenever practicable it is normally better practice to obtain the advance written consent of the beneficiaries to a proposed plan of distribution. Subsection (b) recognizes that upon an event terminating or partially terminating a trust,

a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) it was induced by improper conduct of the trustee; or

(2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

#### REPORTER'S COMMENT

SCPC Section 62-3-906(b), which provides for a proposal for distribution by a personal representative, is analogous to this SCTC Section 62-7-817(a).

This section contains several provisions governing distribution upon termination. Other provisions of the SCTC relevant to distribution upon termination include Section 62-7-816(26) (powers upon termination to windup administration and distribution), and 62-7-1005 (limitation of action against trustee).

Subsection (a) addresses the dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made available under subsection (a) facilitates the making of non-pro-rata distributions. However, whenever practicable it is normally better practice to obtain the advance written consent of the beneficiaries to a proposed plan of distribution.

expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary's death.

Subsection (c) is an application of Section 1009. Section 1009 addresses the validity of any type of release that a beneficiary might give. Subsection (c) is more limited, dealing only with releases given upon termination of the trust. Factors affecting the validity of a release include adequacy of disclosure, whether the beneficiary had a legal incapacity, and whether the trustee engaged in any improper conduct. See Restatement (Second) of Trusts Section 216 (1959).

#### SOUTH CAROLINA COMMENT

SCPC Section 62-3-906(b), which provides for a proposal for distribution by a personal representative, is analogous to SCTC Section 62-7-817(a).

Subsection (b) recognizes that upon an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary's death.

Subsection (c) is an application of Section 62-7-1009. Section 62-7-1009 addresses the validity of any type of release that a beneficiary might give. Subsection (c) is more limited, dealing only with releases given upon termination of the trust. Factors affecting the validity of a release include adequacy of disclosure, whether the beneficiary had a legal incapacity, and whether the trustee engaged in any improper conduct. See Restatement (Second) of Trusts Section 216 (1959).

#### **SECTION 62-7-818.**

The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons. These powers and discretion may include, but are not limited to, the following:

(1) modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder;



(2) increase or decrease the interests of any beneficiaries to the trust;

(3) modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument;

(4) remove and appoint a trustee, trust advisor, investment committee member, or distribution committee member;

(5) terminate the trust;

(6) veto or direct trust distributions;

(7) change situs or governing law of the trust, or both;

(8) appoint a successor trust protector;

(9) interpret terms of the trust instrument at the request of the trustee;

(10) advise the trustee on matters concerning a beneficiary; and

(11) amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust.

The powers referenced in subitems (5), (6) and (11) may be granted notwithstanding the provisions of Sections 62-7-410 through 62-7-412, inclusive.

#### REPORTER'S COMMENT

There was no prior South Carolina statutory case law counterpart to this section. This section expands and defines the powers of the trust protector. See comments to SCTC Section 62-7-808 (b) - (d).

#### **SECTION 62-7-819.**

(a) Whenever a trust instrument provides that a trustee is to follow the direction of a trust investment advisor with respect to investment decisions or distribution decisions, then, except to the extent that the trust instrument provides otherwise, the trustee has no duty to:

(1) monitor the conduct of the trust investment advisor;

(2) provide advice to the trust investment advisor; or

(3) communicate with or warn or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different from the manner directed by the advisor.

(b) Absent clear and convincing evidence to the contrary, the actions of the trustee pertaining to matters within the scope of the trust investment advisor's authority, such as confirming that the trust investment advisor's directions have been carried out and recording and reporting actions taken at the trust investment advisor's direction, are presumed to be administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee under the governing instrument and these administrative actions are not deemed to constitute an undertaking by the trustee to monitor the trust investment advisor or otherwise participate in actions within the scope of the trust investment advisor's authority.

(c) For purposes of this section, 'investment decision' means, with respect to any investment, the retention, purchase, sale, exchange, tender or other transaction affecting the ownership thereof, or rights therein.

#### REPORTER'S COMMENT

There was no prior South Carolina statutory case law counterpart to this section. This section defines the powers of a trust investment advisor.