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## SENATE BILL NO. 345

Offered January 8, 2014

Prefiled January 7, 2014

A *BILL to amend and reenact § 64.2-770 of the Code of Virginia, relating to trust directors; defenses to liability.*

\_\_\_\_\_  
Patron—Edwards

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Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:****1. That § 64.2-770 of the Code of Virginia is amended and reenacted as follows:****§ 64.2-770. 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 (i) the terms of a trust ~~(i)~~ confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee and (ii) subsection E does not apply, 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.

E. The provisions of this subsection shall apply if the settlor incorporates this subsection into the trust instrument by specific reference. The provisions of this subsection shall also apply if this subsection is incorporated into the trust instrument by a nonjudicial settlement agreement under § 64.2-709 by specific reference.

1. For the purpose of this subsection, a "trust director" means any person who is not a trustee and who has, pursuant to the governing instrument, a power to direct the trustee on any matter. No person shall be a "trust director" for purposes of this subsection merely by holding a general or limited power of appointment over the trust assets.

Notwithstanding anything in the trust instrument to the contrary, the trust director shall be deemed a fiduciary who, as such, is ~~(i)~~ required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries ~~and (ii).~~ *The trust director is liable for any loss that results from a breach of a the trust director's fiduciary duty. Unless the governing instrument provides otherwise, the trust director may assert defenses to liability on the same basis as a trustee serving under the governing instrument, other than defenses provided to the trustee under this subsection. Notwithstanding the foregoing, a term of a trust relieving a trust director of liability for breach of trust is unenforceable to the extent that it (i) relieves the trust director of liability for breach of fiduciary duty committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries or (ii) was inserted as the result of an abuse by the trust director of a fiduciary or confidential relationship to the settlor. An exculpatory term drafted or caused to be drafted by the trust director is invalid as an abuse of a fiduciary or confidential relationship unless the trust director proves that the existence and contents of the exculpatory term were adequately communicated to the settlor.*

2. A trustee who acts in accordance with a direction in the governing instrument that the trustee is to follow the trust director's direction or act only with the trust director's consent or direction shall not, other than in cases of willful misconduct or gross negligence on the part of the directed trustee, be liable for any loss resulting directly or indirectly from any act taken or not taken by the trustee (i) pursuant to the trust director's direction or (ii) as a result of the trust director's failure to direct, consent, or act, after receiving a request by the trustee for such direction, consent, or action.

3. A trustee shall not, except as otherwise expressly provided in the trust instrument, have any duty to (i) monitor the trust director's conduct; (ii) provide the trust director with information, other than material facts related to the trust administration expressly requested in writing by the trust director; (iii) inform or warn any beneficiary or third party that the trustee disagrees with any of the trust director's actions or directions; (iv) notify the trust director that the trustee disagrees with any of the trust director's actions or directions; (v) do anything to prevent the trust director from giving any direction or

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59 taking any action; or (vi) compel the trust director to redress its action or direction.

60 4. The actions of the trustee pertaining to matters within the scope of the authority of the trust  
61 director, including confirming that the trust director's directions have been carried out and recording and  
62 reporting actions taken pursuant to the trust director's direction, shall, absent clear and convincing  
63 evidence to the contrary, presumptively be considered administrative actions by the trustee and not be  
64 considered to constitute either monitoring the trust director's actions or participating in the actions of the  
65 trust director.