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FISCAL IMPACT REPORT

ORIGINAL DATE 2/01/18

SPONSOR Ingle LAST UPDATED _____ HB _____

SHORT TITLE Uniform Directed Trust Act SB 101

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of Bill

Senate Bill 101 enacts the Uniform Directed Trust Act (UDTA), which governs trusts in which a person other than a trustee has a power over some aspect of the trust’s administration (known as a directed trust). That person may be called a “trust protector”, “trust adviser”, or, as used in the UDTA, “trust director”. The UDTA provides that a person is a trust director whether or not the terms of the trust use that terminology, and regardless of the person’s status as a beneficiary or settlor of the trust. The UDTA permits a trust director to exercise a power of direction by the terms of a trust to the extent the power is exercisable when a person is not serving as a trustee.

Unless the terms of the trust provide otherwise: (1) a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director by the terms of the trust; and (2) trust directors with joint powers shall act by majority decision. Section 6. A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or further power under Section 6(B)(1) regarding a payback provision and a charitable interest in the trust, including giving notice regarding the interest to the attorney general (Section 7).

Other provisions of the UDTA:

- Set forth the duty and liability of the trust director, including any duty or liability imposed by the trust on a trust director in addition to those imposed in the UDTA (Section 8);
- Set forth the duty and liability of a directed trustee, providing that a directed trustee shall not comply with a trust director’s exercise or nonexercise of a power of direction or other Section 6(B)(1) power if compliance would constitute willful misconduct (Section 9);
- Provide that a directed trustee that has reasonable doubt about its duty under Section 9 may petition a court for instructions (Section 9);
- Provide that the terms of the trust may impose a duty or liability on a directed trustee in addition to those imposed by the UDTA (Section 9); and
- Provide that unless the terms of the trust provide otherwise, neither a trustee or trust director has a duty to monitor the other, or as to a trust director monitor another trust director, nor inform or give advice to a settlor, beneficiary, trustee or trust director concerning an instance in which the trustee or trust director might have acted differently from the other (Section 11).

Additional sections of the UDTA govern the duty to provide information to a trust director of a trustee (Section 10); the limitation of actions period against a trust director for breach of trust (Section 13); defenses available in an action in such an action (Section 14); and jurisdiction over a trust director (Section 15).

The UDTA is applicable to trusts whose principal place of administration in New Mexico. (Section 3). Its application is limited to: 1) decisions or actions occurring on or after its January 1, 2019 effective date for trusts created before that date; and (2) trusts that change the principal place of administration to New Mexico after that date. Jurisdiction in New Mexico is established when the trust director or trustee’s principal place of business is located in New Mexico, the trust director or trustee is a resident of New Mexico, or all or part of the administration of the trust occurs in New Mexico. The UDTA does not apply to a power of appointment that enables a person acting in a non-fiduciary capacity to designate a recipient of an ownership interest in, or another power of appointment over trust property (Section 5).

SB 101 also amends these related sections of existing law:

A. Uniform Trust Decanting Act (UTDA)

- **Section 46-12-102:** amends “terms of the trust” to include “the trust’s provisions as established, determined or amended by a trustee or trust director in accordance with applicable law,” in addition to a court order or a nonjudicial settlement agreement under Section 46A-1-111 NMSA 1978.

B. Uniform Trust Code (UTC)

- **Section 46A-1-103:** amends “terms of the trust” to include “the trust’s provisions as established, determined or amended by a trustee or trust director in accordance with applicable law,” in addition to a court order or a nonjudicial settlement agreement under Section 46A-1-111 NMSA 1978;
- **Section 46A-1-105:** clarifies that the terms of a trust prevail over any

provision of the UTC except, as to the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, that duty is subject to Sections 9, 11 and 12 of the UDTA;

- **Section 46A-6-603:** provides that while a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust;
- **Section 46A-7-703:** provides that subject to Section 12 of the UDTA: (1) a co-trustee is required to participate in the performance of a trustee's function unless the co-trustee is unavailable to perform the function because of absence, illness, disqualification under other law or other temporary incapacity, or the co-trustee has properly delegated the performance of the function to another trustee; and (2) each trustee shall exercise reasonable care to prevent a co-trustee from committing a serious breach of trust, and compel a co-trustee to redress a serious breach of trust.

The effective date of this bill is January 1, 2019.

FISCAL IMPLICATIONS

No fiscal impact to the State is anticipated.

SIGNIFICANT ISSUES

AOC reports that in July 2017, the National Conference of Commissioners on Uniform State Laws ("Commission") approved and recommended the UDTA for enactment. AOC cites this language from the Commission's Prefatory Note:

The Uniform Directed Trust Act addresses an increasingly common arrangement in contemporary estate planning and asset management known as a "directed trust." In a directed trust, the terms of the trust grant a person other than a trustee a power over some aspect of the trust's administration. There is no consistent vocabulary to describe the person other than a trustee that holds a power in a directed trust. Several terms are common in practice, including "trust protector," "trust adviser," and "trust director." There is much uncertainty in existing law about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary duty of a trustee, sometimes called an "administrative trustee" or "directed trustee," with regard to actions taken or directed by the nontrustee. Existing uniform trusts and estates acts address the issue inadequately. Existing nonuniform state laws are in disarray.

Under the Uniform Directed Trust Act, a power over a trust held by a nontrustee is called a "power of direction." The holder of a power of direction is called a "trust director." A trustee that is subject to a power of direction is called a "directed trustee." The main contribution of the act is to address the many complications created by giving a power of direction to a trust director, including the fiduciary duty of a trust director and the fiduciary duty of a directed trustee.

Uniform Directed Trust Act, Prefatory Note, p.1,

http://www.uniformlaws.org/shared/docs/divided%20trusteeship/UDTA_Final_2017nov3.pdf

NMAG provides this additional general explanation of the UDTA:

The UDTA provides clear, functional rules that allow a settlor to freely structure a directed trust while preserving key fiduciary safeguards for beneficiaries. The UDTA also provides sensible default rules for a variety of matters that might be overlooked in the drafting of a directed trust, including information sharing among trustees and trust directors, the procedures for accepting appointment as a trust director, the distinction between a power of direction and a nonfiduciary power of appointment, and many other matters. See <http://uniformlaws.org/Act.aspx?title=Directed%20Trust%20Act>.

Both AOC and NMAG report that no state has enacted the UDTA. AOC notes that New Mexico is the only state that has introduced it, and SB 101 is not substantially different from the UDTA as approved by the Commission.

TECHNICAL ISSUES

NMAG points out that the term “designated jurisdiction” as used in Section 3(B) is not defined.

MD/sb