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# A BILL FOR AN ACT

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RELATING TO A FIDUCIARY'S STANDARD OF CARE AND PERFORMANCE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1       SECTION 1. The legislature finds that other states have  
2   been aggressively enacting legislation with the goal of  
3   attracting trust business and that Hawaii residents are creating  
4   trusts in these states or moving the situs of existing trusts  
5   outside of Hawaii. The legislature finds that as a result, the  
6   State is losing business. In addition, Hawaii residents who are  
7   presently hesitant to establish directed trusts (generally, a  
8   trust where the trust administration duties and the investment  
9   management duties are separated) without the protections  
10   afforded by a statute that clearly allows them to do so, are  
11   forced to endure additional costs and inconveniences when  
12   forming such trusts elsewhere. Thirty-four states currently  
13   have laws in place that allow for directed trusts. Although  
14   Hawaii law arguably allows for directed trusts, estate planners  
15   and advisors continue to recommend that their clients establish  
16   directed trusts in, or move their existing trusts to, other  
17   states until directed trusts are clearly authorized by Hawaii  
18   law.



1 The purpose of this Act is to protect Hawaii's economy from  
2 attempts to lure local trust business to other states by:

3 (1) Allowing the settlor of a trust to designate the  
4 investment and other responsibilities to an advisor  
5 and maintain the administrative functions with the  
6 trustee;

7 (2) Limiting the trustee's liability for investments,  
8 transactions, and other functions over which the  
9 trustee does not exercise responsibility; and

10 (3) Waiving a dissenting trustee's fiduciary duty for  
11 specific transactions subject to certain limitations.

12 SECTION 2. Section 554G-4.5, Hawaii Revised Statutes, is  
13 amended by amending subsection (c) to read as follows:

14 "(c) Notwithstanding subsection (b), whenever there is a  
15 dispute, deadlock, or difference of opinion between a trustee  
16 and an advisor, the transferor may direct that the determination  
17 of the advisor shall be binding upon the trustee; provided that  
18 the trustee shall bear no liability or accountability for any  
19 act or transaction entered into or omitted as a result of the  
20 enforcement of the advisor's determination. The trustee's  
21 administrative and non-administrative fiduciary duty to the  
22 beneficiaries shall be waived as to the specific act or



1 ~~[executed]~~ transaction~~[+]~~ entered into or omitted as a result of  
2 the enforcement of the advisor's determination; provided that  
3 ~~[the]~~;

4 (1) The trustee dissents in writing ~~[before]~~:

5 (A) Before the act or transaction is completed~~[-]~~;

6 (B) To a failure to act; or

7 (C) In a reasonably timely manner to enter into a  
8 transaction; or

9 (2) If the advisor is appointed by the transferor under  
10 the terms of the trust and section 560:7-302 applies  
11 to the trust and the advisor, the trustee is not  
12 required to dissent in writing for the waiver of the  
13 trustee's administrative and nonadministrative  
14 fiduciary duties to the beneficiaries to take effect."

15 SECTION 3. Section 560:7-302, Hawaii Revised Statutes, is  
16 amended to read as follows:

17 **"§560:7-302 Trustee's standard of care and performance~~[-]~~;**  
18 **standards for trustee actions under an advisor's authority.** (a)

19 Except as otherwise provided by the terms of the trust, the  
20 trustee shall observe the standards in dealing with the trust  
21 assets that would be observed by a prudent person dealing with  
22 the property of another, and if the trustee has special skills



1 or is named trustee on the basis of representations of special  
2 skills or expertise, the trustee is under a duty to use those  
3 skills.

4 (b) Whenever the terms of a trust direct that an advisor,  
5 rather than the trustee, shall have authority for certain  
6 fiduciary actions, the standard of care and performance for  
7 actions that are within the scope of the advisor's authority  
8 under the terms of a trust shall be as follows:

9 (1) Where one or more persons are given authority by the  
10 terms of a trust, and accept this authority, to  
11 direct, consent to, or disapprove a trustee's actual  
12 or proposed investment decisions, distribution  
13 decisions, or any other decision of the trustee, those  
14 persons shall be considered to be advisors and shall  
15 have the duties and obligations of fiduciaries when  
16 exercising the given authority, unless the trust  
17 provides otherwise;

18 (2) If a trust provides that a trustee is to follow the  
19 direction of an advisor, and the trustee acts in  
20 accordance with the advisor's direction, then except  
21 in cases of wilful misconduct or gross negligence on  
22 the part of the trustee so directed, the trustee shall



1 not be liable for any loss resulting directly or  
2 indirectly from any such act;

3 (3) If a trust provides that a trustee is to make  
4 decisions with the consent of an advisor, then except  
5 in cases of wilful misconduct or gross negligence on  
6 the part of the trustee, the trustee shall not be  
7 liable for any loss resulting directly or indirectly  
8 from any act taken or omitted as a result of the  
9 advisor's failure to provide consent after having been  
10 requested to do so by the trustee; and

11 (4) Whenever a trust provides that a trustee is to follow  
12 the direction of an advisor with respect to investment  
13 decisions, distribution decisions, or any other  
14 decision of the trustee, then except to the extent  
15 that the terms of the trust provide otherwise, the  
16 trustee shall have no duty to:

17 (A) Monitor the conduct of the advisor;

18 (B) Provide advice to the advisor or consult with the  
19 advisor; or

20 (C) Communicate with or warn or apprise any  
21 beneficiary or third party concerning instances  
22 in which the trustee would or might have



1           exercised the trustee's own discretion in a  
2           manner different from the manner directed by the  
3           advisor.

4           Absent clear and convincing evidence to the contrary,  
5           the actions of the trustee pertaining to matters  
6           within the scope of the advisor's authority, such as  
7           confirming that the advisor's directions have been  
8           carried out and recording and reporting actions taken  
9           at the advisor's direction, shall be presumed to be  
10          administrative actions taken by the trustee solely to  
11          allow the trustee to perform the duties assigned to  
12          the trustee under the trust, and the administrative  
13          actions shall not be deemed to constitute an  
14          undertaking by the trustee to monitor the advisor or  
15          otherwise participate in actions within the scope of  
16          the advisor's authority.

17          (c) For purposes of this section:

18          "Advisor" includes a protector that has been granted powers  
19          and authority by the terms of a trust, including:

20          (1) The power to remove and appoint trustees, advisors,  
21          trust committee members, and other protectors;



1        (2) The power to modify or amend the trust to achieve  
2        favorable tax status or to facilitate the efficient  
3        administration of the trust; and

4        (3) The power to modify, expand, or restrict the terms of  
5        a power of appointment granted to a beneficiary by the  
6        trust.

7        "Investment decision" means the retention, purchase, sale,  
8        exchange, tender, or other transaction affecting the ownership  
9        of or rights in any investment, or the valuation of nonpublicly  
10       traded investments."

11       SECTION 4. Statutory material to be repealed is bracketed  
12       and stricken. New statutory material is underscored.

13       SECTION 5. This Act shall take effect upon its approval.



**Report Title:**

Directed Trusts; Standard of Care and Performance for Trustee  
Actions Under an Advisor

**Description:**

Accommodates the formation of directed trusts by specifying  
standards of care and performance for fiduciary actions subject  
to an advisor's authority under the terms of the trust. (SD1)

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not legislation or evidence of legislative intent.*

