

Chapter 33

Administrative Provisions (§ 3301, 3313 and 3317)

CHAPTER 33 – ADMINISTRATIVE PROVISIONS

§ 3301. Application of chapter; definitions [For application of this section, see 79 Del. Laws, c. 172, § 6]

- (a) This chapter shall govern fiduciaries, as well as agents in certain instances, now or hereafter acting under governing instruments.
- (b) The term “agents” shall mean custodians (other than those acting under the Uniform Transfers to Minors Act, Chapter 45 of this title), escrow agents, managing agents and other persons holding, other than in the capacity of a fiduciary as defined in this section, property belonging to another person whether that other person is a fiduciary or a nonfiduciary.
- (c) The term “clearing corporation” shall refer to a “clearing corporation” as defined in § 8-102 of Title 6.
- (d) The term “fiduciary” shall mean trustees, personal representatives, guardians, custodians under the Uniform Transfers to Minors Act (Chapter 45 of this title) agents to the extent delegated duties by another fiduciary and other fiduciaries.
- (e) The term “governing instrument” shall mean a will, trust agreement or declaration, court order or other instrument that creates or defines the duties and powers of a fiduciary and shall include any instrument that modifies a governing instrument or, in effect, alters the duties and powers of a fiduciary or other terms of a governing instrument.
- (f) The terms “legal investment” or “authorized investment” or words of similar import, as used in any governing instrument, shall mean any investment which is permitted by the terms of § 3302 of this title.
- (g) The term “wilful misconduct” shall mean intentional wrongdoing, not mere negligence, gross negligence or recklessness and “wrongdoing” means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.
- (h) For purposes of construing a governing instrument, unless a contrary statement appears in such governing instrument:
 - (1) The term “fiduciary fund” means the trust, estate, guardianship account, or account established under a Uniform Transfers to Minors Act [Chapter 45 of this title] that is being administered by a fiduciary.
 - (2) The term “interested person” means any living person who:
 - a. Is an income beneficiary or remainder beneficiary of a trust;
 - b. Has a vested interest in a decedent’s estate;
 - c. Receives benefits as a ward from a guardianship account; or
 - d. Is the minor with respect to an account established under a Uniform Transfers to Minors Act [Chapter 45 of this title].
 - (3) The term “issue” shall denote a distribution per stirpes, such that the children of the person whose issue is referred to shall be taken to be the heads of the respective stocks of issue and a person legally adopted, whether under or over the age of 18 years at adoption, shall thereafter be considered to be a child and issue of the adopting person and an issue of the ascendants of the adopting person, and the issue of the person so adopted shall be considered to be issue of the adopting person and the adopting person’s ascendants.
 - (4) The term “wilful misconduct” means intentional wrongdoing, not mere negligence, gross negligence or recklessness and “wrongdoing” means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.

25 Del. Laws, c. 226, § 3; Code 1915, § 3875; 37 Del. Laws, c. 259, § 1; 40 Del. Laws, c. 230, § 1; Code 1935, § 4401; 43 Del. Laws, c. 224, § 1; 44 Del. Laws, c. 171, § 1; 12 Del. C. 1953, § 3301; 59 Del. Laws, c. 271, § 2; 76 Del. Laws, c. 254, § 2; 77 Del. Laws, c. 98, §§ 3-5; 77 Del. Laws, c. 330, §§ 1, 2; 78 Del. Laws, c. 117, § 2; 79 Del. Laws, c. 172, § 2.

§ 3313. Advisers.

- (a) Where 1 or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity.
- (b) If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.
- (c) If a governing instrument provides that a fiduciary is to make decisions with the consent of an adviser, then except in cases of wilful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's objection to such act or failure to provide such consent after having been requested to do so by the fiduciary.
- (d) For purposes of this section, unless the terms of the governing instrument provide otherwise, "investment decision" means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein (including the powers to borrow and lend for investment purposes), all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.
- (e) Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary or shall not take specified actions except at the direction of an adviser, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:
 - (1) Monitor the conduct of the adviser;
 - (2) Provide advice to the adviser or consult with the adviser; or
 - (3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser.

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

- (f) For purposes of this section, the term "adviser" shall include a "protector" who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:
 - (1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;
 - (2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and
 - (3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument.

65 Del. Laws, c. 422, § 5; 69 Del. Laws, c. 279, § 1; 74 Del. Laws, c. 82, § 3; 76 Del. Laws, c. 90, § 2; 76 Del. Laws, c. 254, § 5; 78 Del. Laws, c. 117, § 3; 79 Del. Laws, c. 197, § 1; 80 Del. Laws, c. 153, § 3.

§ 3317. Co-fiduciaries; duty to keep informed.

Except as otherwise provided in a governing instrument, each trust fiduciary (including trustees, advisers, protectors, and other fiduciaries) has a fiduciary duty upon request to keep all of the other fiduciaries for the trust reasonably informed

about the administration of the trust with respect to any specific duty or function being performed by such fiduciary to the extent that providing such information to the other fiduciaries is reasonably necessary for the other fiduciaries to perform their duties; provided, however, that a fiduciary requesting and receiving any such information shall have no duty to: monitor the conduct of the fiduciary providing the information; provide advice to or consult with the fiduciary providing the information; or communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary receiving the information would or might have exercised the fiduciary's own discretion in a manner different from the manner in which such discretion was actually exercised by the fiduciary providing the information.

77 Del. Laws, c. 330, § 6.