

UNIFORM STATUTORY TRUST ENTITY ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-EIGHTEENTH YEAR
IN SANTA FE, NEW MEXICO
JULY 9-16, 2009

WITH PREFATORY NOTE AND COMMENTS

COPYRIGHT © 2009

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

March 31, 2010

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 118th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

DRAFTING COMMITTEE ON UNIFORM STATUTORY TRUST ENTITY ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

JUSTIN L. VIGDOR, 2400 Chase Square, Rochester, NY 14604, *Chair*

THOMAS J. BUIREWEG, 121 W. Washington, Suite 300, Ann Arbor, MI 48104

ANN E. CONAWAY, Widener University School of Law, 4601 Concord Pike, Wilmington, DE 19803

LANI LIU EWART, 1099 Alakea St., Suite 1800, Honolulu, HI 96813

THOMAS L. JONES, University of Alabama School of Law, University Station, P.O. Box 865557, Tuscaloosa, AL 35486-0050

DIMITRI G. KARCAZES, 55 E. Monroe St., Suite 3300, Chicago, IL 60603

JOHN H. LANGBEIN, Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215

L. GENE LEMON, 1136 W. Butler Dr., Phoenix, AZ 85021-4428

HARRY M. WALSH, 456 Summit Ave. #206, St. Paul, MN 55102

ROBERT H. SITKOFF, Harvard Law School, 1575 Massachusetts Ave., Cambridge, MA 02138, *Reporter*

EX OFFICIO

MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563, *President*

ANNE L. MCGIHON, 837 Sherman St., Denver, CO 80203, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

ELLISA OPSTBAUM HABBART, 300 Martin Luther King Blvd., Suite 200, Wilmington, DE 19801, *ABA Advisor*

WILLIAM H. CLARK, JR., One Logan Square, 18th and Cherry Streets, Philadelphia, PA 19103-6996, *ABA Section Advisor*

ROBERT R. KEATINGE, 555 17th St., Suite 3200, Denver, CO 80202-3979, *ABA Section Advisor*

THOMAS E. RUTLEDGE, 2000 PNC Plaza, 500 W. Jefferson St., Louisville, KY 40202-2874, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

UNIFORM STATUTORY TRUST ENTITY ACT

TABLE OF CONTENTS

Prefatory Note..... 1

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. 5
SECTION 102. DEFINITIONS..... 6
SECTION 103. GOVERNING INSTRUMENT. 9
SECTION 104. MANDATORY RULES..... 14
SECTION 105. APPLICABILITY OF TRUST LAW..... 17
SECTION 106. RULE OF CONSTRUCTION. 18

[ARTICLE] 2

FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

SECTION 201. CERTIFICATE OF TRUST. 20
SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF TRUST;
STATEMENT OF CORRECTION. 21
SECTION 203. SIGNING OF RECORDS..... 22
SECTION 204. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY OF
STATE]; EFFECTIVE TIME AND DATE. 22
SECTION 205. CORRECTING FILED RECORD..... 24
SECTION 206. CERTIFICATE OF GOOD STANDING..... 25
SECTION 207. NAME OF STATUTORY TRUST. 26
SECTION 208. RESERVATION OF NAME..... 28
SECTION 209. AGENT FOR SERVICE OF PROCESS. 30
SECTION 210. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF
PROCESS. 30
SECTION 211. RESIGNATION OF AGENT FOR SERVICE OF PROCESS. 31
SECTION 212. SERVICE OF PROCESS, NOTICE, OR DEMAND..... 32
SECTION 213. [ANNUAL] [BIENNIAL] REPORT FOR [SECRETARY OF STATE]..... 33

[ARTICLE] 3

GOVERNING LAW; AUTHORIZATION; DURATION; POWERS

SECTION 301. GOVERNING LAW 36
SECTION 302. STATUTORY TRUST AS ENTITY..... 36
SECTION 303. PERMISSIBLE PURPOSES. 37
SECTION 304. STATUTORY TRUST SOLELY LIABLE FOR DEBT, OBLIGATION,
OR OTHER LIABILITY OF STATUTORY TRUST. 39
SECTION 305. NO CREDITOR RIGHTS IN TRUST PROPERTY. 40
SECTION 306. DURATION..... 40
SECTION 307. POWER TO HOLD PROPERTY; TITLE TO TRUST PROPERTY. 42
SECTION 308. POWER TO SUE AND BE SUED..... 42

**[ARTICLE 4]
SERIES TRUSTS**

SECTION 401. STATUTORY TRUST HAVING SERIES.....	44
SECTION 402. LIABILITY OF SERIES TRUST.....	45
SECTION 403. DUTIES OF TRUSTEE IN SERIES TRUST.....	47
SECTION 404. DISSOLUTION OF SERIES.....	47

**[ARTICLE 5]
TRUSTEES AND TRUST MANAGEMENT**

SECTION 501. MANAGEMENT OF STATUTORY TRUST.....	49
SECTION 502. TRUSTEE POWERS.....	49
SECTION 503. ACTION BY TRUSTEES.....	50
SECTION 504. PROTECTION OF PERSON DEALING WITH TRUSTEE.....	50
SECTION 505. STANDARDS OF CONDUCT FOR TRUSTEES.....	52
SECTION 506. GOOD-FAITH RELIANCE.....	53
SECTION 507. INTERESTED TRANSACTIONS.....	55
SECTION 508. TRUSTEE'S RIGHT TO INFORMATION.....	56
SECTION 509. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.....	56
SECTION 510. DIRECTION OF TRUSTEES.....	58
SECTION 511. DELEGATION BY TRUSTEE.....	59
SECTION 512. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT COMPANY.....	61

**[ARTICLE] 6
BENEFICIARIES AND BENEFICIAL RIGHTS**

SECTION 601. BENEFICIAL INTEREST.....	63
SECTION 602. VOTING OR CONSENT BY BENEFICIAL OWNERS.....	63
SECTION 603. CONTRIBUTION BY BENEFICIAL OWNER.....	64
SECTION 604. DISTRIBUTION TO BENEFICIAL OWNER.....	66
SECTION 605. REDEMPTION OF BENEFICIAL INTEREST.....	67
SECTION 606. CHARGING ORDER.....	67
SECTION 607. TRANSACTION WITH BENEFICIAL OWNER.....	69
SECTION 608. BENEFICIAL OWNER'S RIGHT TO INFORMATION.....	69
SECTION 609. ACTION BY BENEFICIAL OWNER.....	70

**[ARTICLE] 7
CONVERSION AND MERGER**

SECTION 701. DEFINITIONS.....	73
SECTION 702. CONVERSION.....	74
SECTION 703. ACTION ON PLAN OF CONVERSION BY CONVERTING STATUTORY TRUST.....	75
SECTION 704. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.....	76
SECTION 705. EFFECT OF CONVERSION.....	77
SECTION 706. MERGER.....	79
SECTION 707. ACTION ON PLAN OF MERGER BY CONSTITUENT STATUTORY TRUST.....	80

SECTION 708. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.....	81
SECTION 709. EFFECT OF MERGER.	82
SECTION 710. [ARTICLE] NOT EXCLUSIVE.....	84

[ARTICLE] 8

DISSOLUTION AND WINDING UP

SECTION 801. EVENTS CAUSING DISSOLUTION.	85
SECTION 802. ARTICLES OF DISSOLUTION.	85
SECTION 803. WINDING UP.....	86
SECTION 804. NOTICE TO CLAIMANT.....	87
SECTION 805. PUBLICATION OF NOTICE.	88
SECTION 806. ADMINISTRATIVE DISSOLUTION.....	90
SECTION 807. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION. ..	91
SECTION 808. REVIEW OF REJECTION OF REINSTATEMENT.	92

[ARTICLE] 9

FOREIGN STATUTORY TRUSTS

SECTION 901. GOVERNING LAW.....	94
SECTION 902. APPLICATION FOR CERTIFICATE OF REGISTRATION.....	95
SECTION 903. ACTIVITIES NOT CONSTITUTING DOING BUSINESS.	95
SECTION 904. FILING OF CERTIFICATE OF REGISTRATION.....	97
SECTION 905. CERTIFIED COPY OF CERTIFICATE OF REGISTRATION.....	97
SECTION 906. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.	98
SECTION 907. REVOCATION OF CERTIFICATE OF REGISTRATION.....	98
SECTION 908. CANCELLATION OF CERTIFICATE OF REGISTRATION.....	100
SECTION 909. EFFECT OF FAILURE TO HAVE CERTIFICATE OF REGISTRATION..	100
SECTION 910. ACTION BY [ATTORNEY GENERAL].	101

[ARTICLE] 10

MISCELLANEOUS PROVISIONS

SECTION 1001. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	102
SECTION 1002. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.	102
SECTION 1003. SAVINGS CLAUSE.....	102
SECTION 1004. RESERVATION OF POWER TO AMEND OR REPEAL.	103
SECTION 1005. APPLICATION TO EXISTING RELATIONSHIPS.....	103
SECTION 1006. REPEALS.	105
SECTION 1007. EFFECTIVE DATE.....	106

UNIFORM STATUTORY TRUST ENTITY ACT

Prefatory Note

Introduction. In large part because of uncertainty over the legal status of the business trust at common law, use of the common-law trust as a mode of business organization declined over the course of the twentieth century. Today, most commercial enterprise that is not organized as a sole proprietorship makes use of the partnership, limited liability company, or corporate forms of organization.

To address the legal uncertainty surrounding the common-law business trust, at least thirty states have enacted legislation that validates the trust as a permissible form of business organization. But the entity that arises under the more recent of these statutes is better understood as a “statutory business trust,” “statutory trust entity,” or “statutory trust” than as a common-law business trust with statutory validation.

A statutory trust differs from a common-law trust in important respects. A common-law trust, whether its purpose is donative or commercial, arises from private action without the involvement of a public official. Because a common-law trust is not a juridical entity, it must sue and be sued, own property, and transact in the name of the trustee and in the trustee’s capacity as such. By contrast, a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue and be sued, own property, and transact in its own name. A statutory trust is formed by the filing of a certificate of trust by a public official, typically the Secretary of State, in the public record.

The modern business trust statutes do not prohibit use of a common-law trust for commercial purposes. Instead, such a statute offers the transactional planner an additional option, which is governed by the act. Common-law trusts, whether donative or commercial, remain subject to the principles of law and equity applicable to private and charitable trusts.

Since the 1980s, statutory trust entities have thrived in a variety of niches, particularly in the organization of mutual funds and in the practice of asset securitization. *See* Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 *Bus. Law.* 559 (2003); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 *Yale L.J.* 165 (1997); Sheldon A. Jones, Laura M. Moret & James M. Storey, *The Massachusetts Business Trust and Registered Investment Companies*, 13 *Del. J. Corp. L.* 421 (1988). The statutory trust has also come to be used in certain tax-advantaged real estate transactions. *See, e.g.,* Rev. Rul. 2004-86, 2004-33 *I.R.B.* 191.

The primary stimulus for the drafting of the Uniform Statutory Trust Entity Act has been the increasing popularity of statutory trust entities. Increasing use of the statutory trust as a mode of business organization has led to a recognition that in many states the status of such trusts is unclear and that much of the existing legislation is out-of-date or incomplete. The case law on statutory trusts is sparse.

The Uniform Statutory Trust Entity Act validates the statutory trust as a permissible form of business organization and invites the states to bring the disparate and often inadequate existing state laws into uniformity.

Models for Drafting. Although the Uniform Statutory Trust Entity Act is the first Uniform Act on the subject of statutory business trusts, comprehensive statutory trust legislation exists in several states. Notable examples include the statutory trust acts of Connecticut, Delaware, Maryland, New Hampshire, Nevada, South Dakota, Wyoming, and Virginia, all of which were consulted in the drafting of this act.

In drafting the substantive provisions of the Uniform Statutory Trust Entity Act, the drafting committee was influenced primarily by the Delaware Statutory Trust Act. In choosing to take the Delaware Statutory Trust Act as its starting point, the drafting committee was strongly influenced by state-level data on statutory trust usage over the last few years. These data, first collected by the reporter and then later updated by the International Association of Commercial Administrators, indicate that the Delaware Statutory Trust Act dominates the field, both in new statutory trust formations and in the aggregate number of statutory trusts.

In drafting the public filing and other procedural provisions not unique to the statutory trust form, the drafting committee took the Uniform Limited Partnership Act (2001) and the Revised Uniform Limited Liability Company Act (2006) as its starting points, and looked also to the Model Business Corporation Act (2005). For guidance on the common law of trusts, the drafting committee took the Uniform Trust Code (2000) as its starting point, and looked also to the Restatement (Third) of Trusts (2003, 2007) and Restatement (Second) of Trusts (1959).

Observers and Advisors. The drafting committee benefited from regular consultation with a variety of expert observers and advisors, including representatives from the American Bankers Association, American Bar Association, and Investment Company Institute.

Innovative Provisions. Although much of the Uniform Statutory Trust Entity Act reflects a reorganization and refinement of provisions found in the Delaware Statutory Trust Act, the Uniform Act contains several innovations including: (1) specification of rules that are not subject to override in the statutory trust's governing instrument (Section 104); (2) clearer guidance on the applicability of ordinary trust law to a statutory trust (Section 105); (3) prohibition against a statutory trust having a predominantly donative purpose (Section 303); (4) an entire article on series trusts (Article 4); (5) a charging order provision (Section 606); (6) systematic treatment of conversion and merger (Article 7), and of dissolution (Article 8); and (7) clearer guidance on the relationship between the common-law trust and statutory trust entities (Section 1005).

Default and Mandatory Rules. Most of the Uniform Statutory Trust Entity Act consists of default rules that apply only if the governing instrument does not address a particular issue. The governing instrument may override nearly all of the Act's provisions (see Section 103). The exceptions — that is, the mandatory rules that are not subject to override — are scheduled in Section 104.

Relationship to Common-Law Trusts and the Uniform Trust Code. In the culture of American law the common-law trust is typically thought of as a vehicle for effecting donative transfers. The leading compilations of the common law of trusts tend to exclude business trusts from their coverage. *See, e.g.*, Restatement (Third) of Trusts § 1, cmt. b (2003); 1 Austin W. Scott, William F. Fratcher & Mark L. Ascher, 1 Scott and Ascher on Trusts § 2.1.2 (5th ed. 2006). The justification stated in the Restatement is representative: “[T]he business trust is a business arrangement that is best dealt with in connection with business associations.”

There is, however, no separate body of general business law that applies to a common-law trust that has a business purpose. The common law of trusts applies to all trusts arising under the common law, including those that have a business purpose, to the extent that the common law is not displaced by the trust instrument or by specialized legislation. For this reason, although the Uniform Trust Code “is directed primarily at trusts that arise in an estate planning or other donative context,” the UTC also applies to trusts that have a business or commercial purpose to the extent that neither the trust instrument nor other legislation displace the UTC’s provisions. Uniform Trust Code § 102, cmt. (2000).

The Uniform Statutory Trust Entity Act is not a codification of general business law principles applicable to common-law business trusts. Nothing in this act displaces the common law of trusts, or the Uniform Trust Code, with respect to such trusts. On the contrary, Section 1005(a) confirms the continued applicability to a common-law business trust of the state’s laws pertaining to trusts. Section 1005(b) allows a common-law trust that does not have a predominantly donative purpose to become a statutory trust by filing a certificate of trust under Section 201.

The Uniform Statutory Trust Entity Act more closely resembles a generic corporate or unincorporated entity code than it does the Uniform Trust Code. Like a corporation, limited liability company, and limited partnership, but unlike a common-law trust, a statutory trust is a juridical entity that may undertake transactions in its own name, separate from that of the trustee and the beneficial owners. *See* Sections 302, 307-308. Like those entities, but unlike a common-law trust, a statutory trust is formed when a public official files a creation document in the public record. *Compare* Section 201 (delivery of a certificate of trust for filing), *with* Uniform Trust Code § 401 (2000) (no filing to create a common-law trust), *and* Restatement (Third) of Trusts § 10 (2003) (same).

Section 105 provides that ordinary trust law supplements this act, but only to the extent not modified or displaced by this act or the governing instrument. This act modifies or displaces a host of ordinary trust law principles, including the trustee’s fiduciary standards of conduct (see Section 505), which in this act are drawn from corporate law. Drawing variously on corporate and unincorporated entity law in addition to trust law is consistent with the structure of the Delaware Statutory Trust Act, which likewise includes provisions that draw variously on all three traditions.

Although the drafting committee contemplated that a statutory trust under this act will be used primarily as a mode of business organization, Section 603(a) confirms that a person may become a beneficial owner of a statutory trust without an exchange of consideration. It is

therefore possible that a statutory trust could be used as a substitute for the common-law trust in noncommercial contexts. To ensure that a statutory trust is not used to evade mandatory rules applicable to common-law trusts that enforce public policy limitations on donative transfers, Section 303(b) provides that a statutory trust may not have a predominantly donative purpose. For discussion of the nonapplicability to a statutory trust of the mandatory rules applicable to common-law trusts (including Uniform Trust Code § 105 (2000)), see the Comments to Sections 104, 105, and 303.

Series Trusts. This is the first Uniform Act to recognize the series entity concept (see Article 4). Under the structure of this act, a series is a segregation or partitioning of property within a statutory trust. If a statutory trust organizes as a series trust under Section 401, then under Section 402, a debt, obligation, or liability asserted against the property associated with a particular series is enforceable against the property associated with that series only, and not against the property associated with any other series or the trust generally. However, a series is not an entity separate from the statutory trust (see Section 401(b)). Thus, in litigation involving a series trust, the proper party is the statutory trust itself, even if the matter pertains exclusively to property associated with a series of the trust.

Citation Convention. Citations to federal and state statutes and regulations are to such statutes and regulations as they appeared on Lexis or Westlaw at year-end 2009. Citations to other uniform acts are to such acts as revised through the 2009 Annual Meeting of the Uniform Law Commission.

UNIFORM STATUTORY TRUST ENTITY ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Statutory Trust Entity Act.

Comment

Because this act provides for the creation and use of a statutory trust as a form of business organization, it might seem that “Uniform Statutory Trust Act,” “Uniform Statutory Business Trust Act,” or “Uniform Business Trust Act” would be a better short title. However, after consultation with experts in the structured finance, bankruptcy, mutual fund, and estate planning industries, the drafting committee rejected those and other such titles in favor of “Uniform Statutory Trust Entity Act.”

The drafting committee included the word “Entity” in the act’s title for two reasons. First, the creature of this act is indeed an entity (see Section 302). It has the power to sue and be sued, own property, and transact in its own name (see Sections 307 and 308). A common-law trust, by contrast, is not a juridical entity, but rather a fiduciary relationship in which the trustee holds the trust property in a fiduciary capacity. *See* Restatement (Third) of Trusts § 2 (2003). Second, the word “Entity” in the title differentiates this act from the Uniform Trust Code, which is a codification of the common law of trusts. *See* Uniform Trust Code Prefatory Note (2000).

The drafting committee had three reasons for eschewing the phrase “business trust.” First, under this act a statutory trust need not have a business or commercial purpose. On the contrary, Section 303 confirms that a statutory trust may have any lawful purpose other than a predominantly donative purpose.

Second, the drafting committee sought to avoid any implication regarding whether a statutory trust would qualify as a “business trust” under federal bankruptcy law. Under the bankruptcy code, the definition of a “debtor” eligible for bankruptcy includes a “person,” 11 U.S.C. § 101(13) (2009), the definition of “person” includes a “corporation,” *id.* § 101(41), and the definition of “corporation” includes a “business trust.” *Id.* § 101(9)(v). Bankruptcy eligibility is an important issue for trusts that are used as special purpose entities in structured finance transactions, a principal use of the modern statutory trust. Such trusts are often designed to be “bankruptcy remote.” As in the leading case of *In re Secured Equipment Trust of Eastern Air Lines, Inc.*, 38 F.3d 86 (2d Cir. 1994), in certain configurations trusts used in securitization transactions have been held not to be “business trusts” under the bankruptcy code.

Third, the drafting committee was influenced by the preference for “statutory trust” over “business trust” in the Delaware Statutory Trust Act. In 2002, Delaware recast the “Delaware Business Trust Act” as the “Delaware Statutory Trust Act,” replacing nearly every reference to “business trust” with “statutory trust.” *See* 73 Del. Laws 329 (2002). To conform with prevailing

usage under the Delaware Statutory Trust Act, the entity that arises under this act is called a “statutory trust,” not a “statutory trust entity” (see Section 102(16)).

SECTION 102. DEFINITIONS. In this [act]:

(1) “Beneficial owner” means the owner of a beneficial interest in a statutory trust or foreign statutory trust.

(2) “Certificate of trust” means the record filed by the [Secretary of State] under Section 201. The term includes the record as amended or restated.

(3) “Common-law trust” means a fiduciary relationship with respect to property arising from a manifestation of intent to create that relationship and subjecting the person that holds title to the property to duties to deal with the property for the benefit of charity or for one or more persons, at least one of which is not the sole trustee, whether the purpose of the trust is donative or commercial. The term includes the type of trust known at common law as a “business trust”, “Massachusetts trust”, or “Massachusetts business trust”.

(4) “Designated office” means:

(A) for a statutory trust, the street address that it is required to designate under Section 201(b)(2); or

(B) for a foreign statutory trust, its principal office.

(5) “Foreign statutory trust” means a trust that is formed under the laws of a jurisdiction other than this state which would be a statutory trust if formed under the laws of this state.

(6) “Governing instrument” means the trust instrument and certificate of trust.

(7) “Jurisdiction”, used to refer to a political entity, means the United States, a state, a foreign country, or a subdivision of a foreign country.

(8) “Person” means an individual, corporation, statutory trust, estate, partnership, limited

liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity. The term does not include a common-law trust.

(9) “Property” means all property, whether real, personal, or mixed, or tangible or intangible, or any interest therein.

(10) “Qualified foreign statutory trust” means a foreign statutory trust that is registered to do business in this state pursuant to a certificate of registration filed by the [Secretary of State].

(11) “Record”, used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) “Related party”, with respect to a party that is a trustee, officer, employee, manager, or beneficial owner, means:

(A) the spouse of the party;

(B) a child, parent, sibling, grandchild, or grandparent of the party, or the spouse of one of them;

(C) an individual having the same residence as the party;

(D) a trust or estate of which a related party described in subparagraph (A), (B), or (C) is a substantial beneficiary;

(E) a trust, estate, legally incapacitated individual, conservatee, or minor for which the party is a fiduciary; or

(F) a person that directly or indirectly controls, is controlled by, or is under common control with, the party.

(13) “Series trust” means a statutory trust that has one or more series created under

Section 401.

(14) “Sign” means, with the present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(15) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) “Statutory trust”, except in the phrase “foreign statutory trust”, means an entity formed under this [act].

(17) “Trust” includes a common-law trust, statutory trust, and foreign statutory trust.

(18) “Trust instrument” means a record other than the certificate of trust which provides for the governance of the affairs of a statutory trust and the conduct of its business. The term includes a trust agreement, a declaration of trust, and bylaws.

(19) “Trustee” means a person designated, appointed, or elected as a trustee of a statutory trust or foreign statutory trust in accordance with the governing instrument or applicable law.

Comment

Principal Sources – Delaware Statutory Trust Act § 3801 (2009); Uniform Limited Partnership Act § 102 (2001).

Paragraphs (2), (6), and (18) define “certificate of trust,” “governing instrument,” and “trust instrument” respectively. The certificate of trust is the record that under Section 201 must be delivered to a public official for filing to form a statutory trust. The trust instrument is the transaction document that provides for the governance of the statutory trust. Unlike the certificate of trust, the trust instrument need not be made part of the public record, and typically it is not. Together, the certificate of trust and the trust instrument compose the governing instrument. The terms “governing instrument” and “trust instrument” are in the singular to

conform with prevailing usage even though there may be more than one document that qualifies as a trust instrument. Section 103(c) makes authorization of multiple instruments explicit. Conflicts between the certificate of trust and another trust instrument are resolved pursuant to Section 201(e).

Paragraphs (3), (16), and (17) define “common-law trust,” “statutory trust,” and “trust” respectively. In accordance with Restatement (Third) of Trusts § 2 (2003), the term “common-law trust” is defined as a fiduciary relationship with respect to property, except that as defined here the term expressly includes a common-law business trust. Thus, any trust that arises under the common law, whether the trust’s purpose is donative, commercial, or otherwise, is a “common-law trust” for purposes of this act. A “statutory trust” is the entity formed under this act. The term “trust” includes a common-law trust, statutory trust, and foreign statutory trust.

Paragraph (8), which defines “person,” includes “statutory trust” but not “common-law trust.” Under the structure of this act, a statutory trust is a juridical person that may sue or be sued and hold property in the name of the trust, whereas a common-law trust is a fiduciary relationship with respect to property. In a common-law trust, the trustee sues, is sued, and holds property in the name of the trustee in the trustee’s fiduciary capacity. For further discussion, see the Prefatory Note under the heading Relationship to Common-Law Trusts and the Uniform Trust Code.

Paragraphs (5) and (10) define “foreign statutory trust” and “qualified foreign statutory trust” respectively. A foreign statutory trust is a trust formed under the laws of another jurisdiction that would be a statutory trust if formed under the laws of this state. A qualified foreign statutory trust is a foreign statutory trust that has registered to do business in this state pursuant to Section 902.

Paragraph (12) defines the term “related party,” which is used in Sections 507 and 607 concerning certain interested transactions. In using but not defining the term “substantial” in Paragraph (12)(D), the drafting committee contemplated that a totality of the circumstances test would apply. Section 512 defines the term “independent trustee” with respect to a statutory trust that is an investment company under the Investment Company Act of 1940, as amended, 15 U.S.C. §§ 80a-1 et seq. (2009).

Paragraph (13) defines the term “series trust” as a statutory trust that has one or more series under Section 401. The series concept is explained in the Comments to Sections 401 to 404.

Paragraph (19) defines “trustee” as a person designated as such in accordance with the governing instrument or applicable law. For further discussion see the Comment to Section 501.

SECTION 103. GOVERNING INSTRUMENT.

(a) Except as otherwise provided in subsection (b) or Section 104, the governing

instrument governs:

(1) the management, affairs, and conduct of the business of a statutory trust; and

(2) the rights, interests, duties, obligations, and powers of, and the relations among, the trustees, the beneficial owners, the statutory trust, and other persons.

(b) To the extent the governing instrument does not otherwise provide for a matter described in subsection (a), this [act] governs the matter.

(c) The governing instrument may include one or more instruments, agreements, declarations, bylaws, or other records and refer to or incorporate any record.

(d) The governing instrument may be amended with the approval of all the beneficial owners.

(e) Subject to Section 104, without limiting the terms that may be included in a governing instrument, the governing instrument may:

(1) provide the means by which beneficial ownership is determined and evidenced;

(2) limit a beneficial owner's right to transfer its beneficial interest;

(3) provide for one or more series under [Article] 4;

(4) to the extent that voting rights are granted under the governing instrument,

include terms relating to:

(A) notice of the date, time, place, or purpose of any meeting at which any matter is to be voted on;

(B) waiver of notice;

(C) action by consent without a meeting;

(D) establishment of record dates;

(E) quorum requirements;

(F) voting:

(i) in person;

(ii) by proxy;

(iii) by any form of communication that creates a record,

telephone, or video conference; or

(iv) in any other manner; or

(G) any other matter with respect to the exercise of the right to vote;

(5) provide for the creation of one or more classes of trustees, beneficial owners, or beneficial interests having separate rights, powers, or duties;

(6) provide for any action to be taken without the vote or approval of any particular trustee or beneficial owner, or classes of trustees, beneficial owners, or beneficial interests, including:

(A) amendment of the governing instrument;

(B) merger, conversion, or reorganization;

(C) appointment of trustees;

(D) sale, lease, exchange, transfer, pledge, or other disposition of all or any part of the property of the statutory trust or the property of any series thereof; and

(E) dissolution of the statutory trust;

(7) provide for the creation of a statutory trust, including the creation of a statutory trust to which all or any part of the property, liabilities, profits, or losses of a statutory trust may be transferred or exchanged, and for the conversion of beneficial interests in a statutory trust, or series thereof, into beneficial interests in the new statutory trust or series thereof;

(8) provide for the appointment, election, or engagement of agents or independent contractors of the statutory trust or delegates of the trustees, or agents, officers, employees, managers, committees, or other persons that may manage the business and affairs of the statutory trust, designate their titles, and specify their rights, powers, and duties;

(9) provide rights to any person, including a person that is not a party to the governing instrument;

(10) subject to paragraph (11), specify the manner in which the governing instrument may be amended, including, unless waived by all persons for whose benefit the condition or requirement was intended:

(A) a condition that a person that is not a party to the instrument must approve the amendment for it to be effective; and

(B) a requirement that the governing instrument may be amended only as provided in the governing instrument or as otherwise permitted by law;

(11) provide that a person may comply with paragraph (10) by a representative authorized by the person orally, in a record, or by conduct;

(12) provide that a person becomes a beneficial owner, acquires a beneficial interest, and is bound by the governing instrument if the person complies with the conditions for becoming a beneficial owner set forth in the governing instrument, such as payment to the statutory trust or to a previous beneficial owner;

(13) provide that the statutory trust or the trustees, acting for the statutory trust, hold beneficial ownership of any income earned on securities held by the statutory trust that are issued by any business entity formed, organized, or existing under the laws of any jurisdiction;

(14) provide for the establishment of record dates; and

(15) grant to, or withhold from, a trustee or beneficial owner, or class of trustees or beneficial owners, the right to vote, separately or with any or all other trustees or beneficial owners, or class of trustees or beneficial owners, on any matter.

Comment

Principal Sources – Delaware Statutory Trust Act § 3806 (2009).

Default Rules. Subsections (a) and (b) emphasize that this act primarily states default rules. Nearly all of the act’s provisions may be overridden by the terms of the governing instrument, leaving the act to apply only if the governing instrument does not include an applicable provision. The exceptions — that is, the provisions of this act that are mandatory and not subject to override by the governing instrument — are scheduled in Section 104.

Governing Instrument. Subsection (c) confirms that the governing instrument may span more than one document. For further discussion, see the Comment to Section 102.

Amending the Governing Instrument. Subsection (d) states as a default rule that the governing instrument may be amended with the approval of all the beneficial owners. This rule applies only if the governing instrument does not make an alternative provision for amendment. In such a case, subsection (d) provides a fallback mechanism for amending the governing instrument, overriding the stricter common-law rules of trust modification that would otherwise apply pursuant to Section 105. Consistent with prevailing current practice, the drafting committee assumed that in most instances the governing instrument will provide for amendment by means other than unanimous consent of the beneficial owners, a possibility that is expressly contemplated by subsection (e)(6)(A) and (10). In the absence of a contrary provision in the governing instrument, the default rule of unanimity stated in subsection (d) with respect to amending the governing instrument prevails over the general rule of majority vote stated in Section 602(1).

Illustrative Statement of Permissive Terms. The purpose of subsection (e) is to collect various permissive rules regarding the scope of the governing instrument in a single provision. Most are based on provisions that are scattered throughout the Delaware Statutory Trust Act. Additional illustrative permissive provisions regarding allowable remedies for a beneficial owner’s breach are collected in Section 603(c).

The list of permissive rules stated in subsection (e) is meant to be illustrative and not to limit the generality of subsection (a). The drafting committee concluded that the demand of third parties and transactional planners to see language that expressly authorizes a specific term justified inclusion of a detailed list in addition to the broad statement of freedom of contract in subsection (a) and Section 106(a). Statutory confirmation reduces transaction costs by resolving doubts in practice over the permissibility of a provision in the governing instrument or a proposed transaction. *Cf.* Uniform Trust Code § 816 (2000).

SECTION 104. MANDATORY RULES. The governing instrument may not:

- (1) vary the requirements of [Article] 2;
- (2) vary the choice of governing law under Section 301;
- (3) negate the exclusion of a predominantly donative purpose under Section 303;
- (4) vary the provisions pertaining to series trusts in Sections 401, 402(b), 403, and 404(c);
- (5) vary the standards of conduct for trustees under Section 505, but the governing instrument may prescribe the standards by which good faith, best interests of the statutory trust, and care that a person in a similar position would reasonably believe appropriate under similar circumstances are determined, if the standards are not manifestly unreasonable;
- (6) vary the obligation under Section 506 to act in good faith if a trustee or other person is not to be liable for relying on a term of the governing instrument, a record of the statutory trust, or an opinion, report, or statement of another person, but the governing instrument may prescribe the standards for assessing whether the reliance was in good faith, if the standards are not manifestly unreasonable;
- (7) restrict the right of a trustee to information under Section 508, but the governing instrument may prescribe the standards for assessing whether information is reasonably related to the trustee's discharge of the trustee's duties as trustee, if the standards are not manifestly unreasonable;
- (8) vary the prohibition under Section 509 of indemnification, advancement of expenses, or exoneration for conduct involving bad faith, willful misconduct, or reckless indifference;
- (9) vary the obligation of a trustee under Section 510(c) not to follow a direction that is manifestly contrary to the terms of the governing instrument or would constitute a serious breach

of fiduciary duty by the trustee;

(10) restrict the right of a judgment creditor of a beneficial owner to seek a charging order under Section 606;

(11) restrict the right of a beneficial owner to information under Section 608, but the governing instrument may prescribe the standards for assessing whether information is reasonably related to the beneficial owner's interest, if the standards are not manifestly unreasonable;

(12) restrict the right of a beneficial owner to bring an action under Section 609, but the governing instrument may subject the right to additional standards and restrictions, including a requirement that beneficial owners owning a specified amount or type of beneficial interest, including in a series trust an interest in the series, join in bringing the action, if the additional standards and restrictions are not manifestly unreasonable;

(13) vary the provisions pertaining to conversion and merger in Sections 701, 704, 705, 708, and 709;

(14) vary the provisions pertaining to dissolution in Sections 801(1) and 802 through 808;

(15) vary the provisions relating to foreign statutory trusts in [Article] 9; or

(16) vary the miscellaneous provisions in [Article] 10.

Comment

Principal Sources – Delaware Statutory Trust Act § 3806 (2009); Uniform Trust Code § 105 (2000); Revised Uniform Limited Liability Company Act § 110 (2006); Uniform Limited Partnership Act § 110 (2001); Revised Uniform Partnership Act § 103 (1997); Uniform Limited Liability Company Act § 103 (1996).

Mandatory Rules. This section schedules the provisions of this act that are not subject to override in the governing instrument. The provisions included in this schedule are the only rules that have mandatory application to a statutory trust.

Most of the provisions scheduled in this section concern public filing and notice requirements, the rights of nonparties, choice of law, or permissible purposes for a statutory trust (paragraphs (1), (2), (3), (4), (10), (13), (14), (15), and (16)). With two exceptions, all the provisions of this act concerning the powers and duties of a trustee, relations among trustees, and the rights and interests of a beneficial owner may be overridden or at least modified by the terms of the governing instrument.

The first exception is the mandatory prohibition of indemnification, advancement of expenses, or exoneration for conduct involving bad faith, willful misconduct, or reckless indifference in paragraph (8). This exception is familiar trust law. *See* Uniform Trust Code § 1008 (2000); Restatement (Third) of Trusts § 96 (T.D. No. 5, 2009); Austin W. Scott, William F. Fratcher & Mark L. Ascher, 4 Scott and Ascher on Trusts § 24.27.3 (5th ed. 2007). In a similar vein, Delaware Statutory Trust Act § 3806(e) (2009) provides that the “governing instrument may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a trustee ... ; provided, that a governing instrument may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.” Limitations on permissible exoneration are also familiar corporate and alternative entity law. *See, e.g.*, Delaware General Corporation Law § 102(b)(7) (2009); Delaware Limited Liability Company Act § 18-1101(c), (e) (2009); Model Business Corporation Act § 2.02(b)(4)-(5) (2005).

The second exception is provided by paragraph (9), which makes mandatory the invalidity under Section 510(c) of a direction to a trustee or other person that is manifestly contrary to the terms of the governing instrument or that would constitute a serious breach of fiduciary duty. The reference to serious breach of fiduciary duty is meant to exclude an inconsequential, immaterial, or technical breach that does not harm the trust or a beneficial owner. For some purposes, trust law distinguishes between serious and other breaches of trust. *See, e.g.*, Uniform Trust Code § 706(b)(1) (2000); 2 Scott and Ascher on Trusts, *supra*, § 11.10. However, the effect of paragraph (9) is limited by paragraph (5), which allows the governing instrument to modify the trustee’s fiduciary standards of conduct under Section 505 if the modification is not manifestly unreasonable.

“Manifestly Unreasonable.” Paragraphs (5), (6), (7), (11), and (12) allow the governing instrument to modify the provisions of this act pertaining to the trustee’s fiduciary obligation; the nonliability of a person for good faith reliance on the governing instrument, records of the statutory trust, or the opinions of experts; the right of a trustee to information; the right of a beneficial owner to information; and the right of a beneficial owner to bring an action. However, the governing instrument may modify these provisions only if the modification is not “manifestly unreasonable.” In opting for the “manifestly unreasonable” standard instead of Delaware’s “good faith and fair dealing” formulation, *see* Delaware Statutory Trust Act § 3806(c) and (e), the drafting committee took notice of the use of the term “manifestly unreasonable” in Revised Uniform Limited Liability Company Act § 110(d) (2006); Uniform Limited Partnership Act § 110(b) (2001); Revised Uniform Partnership Act § 103(b)(3)(i), (5) (1997); and Uniform Limited Liability Company Act § 103(b)(2)(i), (4) (1996), and intended a similar meaning here. *See* Mark

J. Loewenstein, *Fiduciary Duties and Unincorporated Business Entities: In Defense of the “Manifestly Unreasonable” Standard*, 41 *Tulsa L. Rev.* 411 (2006).

Relationship to Mandatory Rules in the Common Law of Trusts and the Uniform Trust Code. Section 105 provides that the law of this state pertaining to common-law trusts supplements this act. However, that section also provides that the governing instrument may override or modify the application to the statutory trust of any rule pertaining to common-law trusts. Accordingly, in a jurisdiction that has also enacted the Uniform Trust Code (2000), the UTC will apply to a statutory trust only to the extent that the UTC’s provisions are not displaced by this act or the governing instrument. No provision of the UTC, including the rules stated in Uniform Trust Code § 105 that are mandatory with respect to a common-law trust, is mandatory with respect to a statutory trust. Likewise, any common-law rule that is mandatory with respect to a common-law trust may nonetheless be overridden with respect to a statutory trust by the governing instrument of the statutory trust. The governing instrument of a statutory trust may override or modify any rule of trust law other than those scheduled in this section.

Public policy limits on donative transfers and testamentary freedom underpin various mandatory rules applicable to a common-law trust. *See* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 *Nw. U. L. Rev.* 1105 (2004). To prevent evasion of those limits by use of a statutory trust, Section 303(b) provides that a statutory trust may not have “a predominantly donative purpose.” For further discussion of the relationship between this act, the common law, and the Uniform Trust Code, see the Prefatory Note to this act under the heading “Relationship to Common-Law Trusts and the Uniform Trust Code” and the Comments to Sections 105 and 303.

Registered Investment Companies. The Investment Company Act of 1940, as amended, 15 U.S.C. §§ 80a-1 et seq. (2009), supersedes this act with respect to a statutory trust that registers as an investment company. For such a trust, the 1940 Act imposes additional mandatory rules, for example those noted in the Comments to Sections 207 (name of statutory trust); 503 (action by trustees); 507 (interested transactions); 509 (indemnification, advancement, and exoneration); and 511 (delegation by trustee). The 1940 Act may also apply to a statutory trust, superseding this act, if the trust meets the definition of an investment company under the 1940 Act but is otherwise exempt from registration.

SECTION 105. APPLICABILITY OF TRUST LAW. The law of this state pertaining to common-law trusts supplements this [act]. However, a governing instrument may supersede or modify application to the statutory trust of any law of this state pertaining to common-law trusts.

Comment

Principal Sources – Delaware Statutory Trust Act § 3809 (2009); Uniform Trust Code § 106 (2000).

Trust Law Supplements This Act. This section provides that the law pertaining to common-law trusts supplements this act and the terms of the governing instrument. In looking to trust law to supplement this act and the governing instrument, the drafting committee followed Delaware Statutory Trust Act § 3809 (2009), which likewise looks to trust law.

No Mandatory Rules Other Than Those Scheduled in Section 104. This section confirms that, except for the mandatory rules scheduled in Section 104, the governing instrument may override any rule pertaining to common-law trusts that would otherwise be applicable to a statutory trust under this section.

Relationship to the Uniform Trust Code. In a jurisdiction that has enacted the Uniform Trust Code (2000), the effect of this section is to make the UTC applicable to a statutory trust, but only to the extent that the UTC's provisions — including the mandatory rules scheduled in Uniform Trust Code § 105 (2000) — are not displaced by this act or by the statutory trust's governing instrument. For further discussion, see the Comment to Section 104.

Remedies. Under this section, the law of remedies for breach of trust applies to a statutory trust unless the governing instrument provides otherwise. On remedies in trust law, see Uniform Trust Code §§ 1001-1003 (2000); Austin W. Scott, William F. Fratcher & Mark L. Ascher, 4 Scott and Ascher on Trusts § 24.9 (5th ed. 2007). However, when a breach of trust injures the trust rather than a beneficial owner directly, such remedies are properly sought in a derivative suit rather than in a direct suit by the beneficial owner, because a statutory trust is itself an entity. Section 609 governs actions by a beneficial owner.

SECTION 106. RULE OF CONSTRUCTION.

(a) This [act] must be liberally construed to give maximum effect to the principle of freedom of contract and to the enforceability of governing instruments.

(b) The presumption that a civil statute in derogation of the common law is construed strictly does not apply to this [act].

Comment

Principal Sources – Delaware Statutory Trust Act § 3825 (2009); Uniform Statute and Rule Construction Act § 18 (1995).

Subsection (a) emphasizes the freedom of contract afforded by this act, which is primarily a default statute. The only mandatory rules applicable to a statutory trust are those scheduled in Section 104. The drafting committee contemplated that subsection (a) of this section would apply to the construction of Section 104.

Subsection (b) directs the courts not to apply to this act the canon of construction that statutes in derogation of the common law are to be strictly construed. The drafting committee included this provision because many of this act's provisions are designed specifically to override one or more common-law trust principles that would otherwise be applicable to a statutory trust under Section 105. Such provisions deliberately derogate the common law of trusts and should be interpreted in accordance with that purpose.

[ARTICLE] 2

FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

SECTION 201. CERTIFICATE OF TRUST.

(a) To form a statutory trust, a person must deliver a certificate of trust to the [Secretary of State] for filing.

(b) A certificate of trust must state:

(1) the name of the statutory trust, which must comply with Section 207;

(2) the street and mailing address of the designated office of the trust;

(3) the name and street and mailing address of the initial agent of the trust for service of process; and

(4) if the trust may have one or more series, a statement to that effect.

(c) A certificate of trust may contain any term in addition to those required by subsection (b).

(d) Subject to Section 204(c), a statutory trust is formed when a certificate of trust that complies with subsection (b) is filed by the [Secretary of State].

(e) A filed certificate of trust, a filed statement of cancellation or change, or filed articles of conversion or merger prevail over inconsistent terms of a trust instrument.

Comment

Principal Sources – Uniform Limited Partnership Act § 201 (2001); Delaware Statutory Trust Act § 3810 (2009).

Unlike a common-law trust, a statutory trust is a creature of statute. A statutory trust comes into existence only if (1) a certificate of trust is prepared and delivered to the specified public official for filing, and (2) the public official files the certificate (see Section 204). Filing rules are typical of limited liability entities. Such rules serve a notice function, alerting interested parties to the creation and existence of a new juridical entity with limited liability. The certificate of trust also identifies the statutory trust’s agent for service of process and, in connection with

Section 401, puts third parties on notice if the statutory trust might segregate its property and associated liabilities by creating one or more series.

Although formed by a public filing, a statutory trust is also a creature of contract. As such, it will be possible, though improper, for the trust instrument to be inconsistent with the certificate of trust or other public filings relating to the statutory trust. Subsection (e) provides that the public filing controls in such circumstances.

Under Section 104(1), the governing instrument may not override this section.

SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF TRUST; STATEMENT OF CORRECTION.

(a) To amend its certificate of trust, a statutory trust must deliver to the [Secretary of State] for filing an amendment, articles of conversion, or articles of merger stating:

- (1) the name of the trust;
- (2) the date of filing of its initial certificate; and
- (3) the changes to the certificate.

(b) A trustee that knows or has reason to know that any information in a filed certificate of trust was incorrect when the certificate was filed or has become incorrect shall promptly:

- (1) cause the certificate to be amended; or
- (2) deliver to the [Secretary of State] for filing a statement of correction.

(c) A restated certificate of trust must be delivered to the [Secretary of State] for filing in the same manner as an amendment.

Comment

Principal Sources – Uniform Limited Partnership Act § 202 (2001); Delaware Statutory Trust Act § 3810 (2009).

Subsection (a) provides a mechanism for updating a statutory trust's filed certificate of trust. The certificate of trust may also be updated by a statement of change under Section 210 or by a report under Section 213. Subsection (b) imposes an obligation directly on the trustee rather than on the statutory trust.

Under Section 104(1), the governing instrument may not override this section.

SECTION 203. SIGNING OF RECORDS.

(a) A record delivered by the statutory trust to the [Secretary of State] for filing pursuant to this [act] must be signed by at least one of the trustees.

(b) Any person may sign by an attorney in fact any record filed pursuant to this [act].

Comment

Principal Sources – Uniform Limited Partnership Act § 204 (2001); Delaware Statutory Trust Act § 3811 (2009).

Subsection (b) confirms that the signing of a public record by a trustee is a delegable act, ensuring that the outmoded nondelegation rule of the common law of trusts will not apply. *See* Uniform Trust Code § 807 (2000); Restatement (Third) of Trusts § 80 (2007).

Under Section 104(1), the governing instrument may not override this section.

SECTION 204. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY OF STATE]; EFFECTIVE TIME AND DATE.

(a) A record authorized or required to be delivered to the [Secretary of State] for filing under this [act] must be captioned to describe the subject of the record and be in a medium permitted by the [Secretary of State]. If all filing fees have been paid, unless the [Secretary of State] determines that the record does not comply with the filing requirements of this [act], the [Secretary of State] shall file the record and make available a copy of the filed record to the person on whose behalf the record was filed.

(b) On request and payment of the required fee, the [Secretary of State] shall send to any person a certified copy of a record filed in the office of the [Secretary of State] pursuant to this [act].

(c) Except as otherwise provided in Sections 205 and 211, a record delivered to the [Secretary of State] for filing under this [act] may specify an effective time and a delayed effective date. Except as otherwise provided in this [act], a record filed by the [Secretary of State] is effective:

(1) if the record does not specify an effective time or delayed effective date, on the date and at the time the record is filed as evidenced by the [Secretary of State's] endorsement of the date and time on the record;

(2) if the record specifies an effective time but not a delayed effective date, on the date the record is filed at the time specified in the record;

(3) if the record specifies a delayed effective date but not an effective time, at 12:01 a.m. on the earlier of:

(A) the specified date; or

(B) the 90th day after the record is filed; or

(4) If the record specifies an effective time and a delayed effective date, at the specified time on the earlier of:

(A) the specified date; or

(B) the 90th day after the record is filed.

Comment

Principal Sources – Uniform Limited Partnership Act § 206 (2001); Delaware Statutory Trust Act § 3812 (2009).

Two steps are necessary for a record prepared by a private person to become part of the public record under this act. First, someone must put a properly prepared version of the record into the possession of the public official specified in the act as the filing officer. Second, the filing officer must determine that the record complies with the filing requirements of this act and officially make the record part of the public record. This act refers to the first step as “delivery to the [Secretary of State] for filing” and refers to the second step as “filing.” Hence, “filing” is the official action.

Under subsection (a), the caption need only indicate the title of the record — for example, “Certificate of Trust” or “Statement of Change for Statutory Trust.” Filing officers typically note on a filed record the fact, date, and time of filing. Copies provided by the filing officer under subsection (a) should contain that notation. This act does not provide a remedy if the filing officer wrongfully fails or refuses to file a record. *Compare* Uniform Limited Partnership Act § 206 (2001) (providing no remedy for wrongful failure or refusal to file), *with* Model Business Corporation Act § 1.26 (2005) (providing for judicial review of refusal to file).

Subsection (c) allows most records to have a delayed effective date, up to 90 days after the date the record is filed by the filing officer. A record specifying a longer delay will not be rejected. Instead, under subsection (c)(3) and (4), the delayed effective date is adjusted by operation of law to the “90th day after the record is filed.” This act does not require the filing officer to notify anyone of the adjustment.

Under Section 104(1), the governing instrument may not override this section.

SECTION 205. CORRECTING FILED RECORD.

(a) If, at the time of filing, a record contained incorrect information or was defectively or erroneously signed, a statutory trust or qualified foreign statutory trust shall deliver to the [Secretary of State] for filing a statement of correction to correct the record.

(b) A statement of correction under subsection (a):

- (1) may not state a delayed effective date;
- (2) must describe the record to be corrected, including its filing date, or attach a copy of the record as filed;
- (3) must specify the incorrect information and the reason it is incorrect or the manner in which the signing is defective or erroneous; and
- (4) must correct the incorrect information or defective or erroneous signature.

(c) A statement of correction filed by the [Secretary of State] under subsection (a) is effective:

- (1) except as otherwise provided in paragraph (2), retroactively as of the effective

date of the record the statement corrects; or

(2) with respect to a person that relied on the uncorrected record and would be adversely affected by the correction, when filed.

Comment

Principal Source – Uniform Limited Partnership Act § 207 (2001).

A statement of correction is appropriate only to correct inaccuracies that existed or signatures that were defective “at the time of filing.” A statement of correction may not be used to amend or revise a record that was accurate when filed but has become inaccurate as a result of subsequent events.

Under subsection (c), a statement of correction relates back to the filing of the defective record except against parties that have relied on the uncorrected record and would be adversely affected if the correction related back.

Under Section 104(1), the governing instrument may not override this section.

SECTION 206. CERTIFICATE OF GOOD STANDING.

(a) The [Secretary of State], on request and payment of the required fee, shall furnish to the person making the request a certificate of good standing for a statutory trust if the records filed with the [Secretary of State] show that:

- (1) the [Secretary of State] has filed a certificate of trust;
- (2) all fees, taxes, and penalties due under this [act] or other law to the [Secretary of State] have been paid;
- (3) the most recent [annual] [biennial] report of the trust required by Section 213 has been filed by the [Secretary of State];
- (4) a statement of cancellation or dissolution has not been filed by the [Secretary of State]; and
- (5) the [Secretary of State] has not filed a notice of administrative dissolution

under Section 806 or, if the [Secretary of State] has filed such a notice, that the [Secretary of State] has filed a declaration of reinstatement under Section 807.

(b) A certificate of good standing must state:

(1) the name of the trust;

(2) that the trust was formed under the laws of this state and the date of formation; and

(3) that subsection (a) has been satisfied.

(c) Subject to any qualification stated in the certificate, a certificate of good standing issued by the [Secretary of State] is conclusive evidence that the statutory trust is in good standing as of the date the certificate is issued.

Comment

Principal Source – Uniform Limited Partnership Act § 209 (2001).

A certificate of good standing can reveal only information present in the public record. Under this act significant information bearing on the governance of a statutory trust may be outside the public record.

Section 905 provides for the issuance of a certified copy of the certificate of registration for a qualified foreign statutory trust.

Under Section 104(1), the governing instrument may not override this section.

SECTION 207. NAME OF STATUTORY TRUST.

(a) Except as otherwise provided in subsection (c), the name of a statutory trust must be distinguishable in the records of the [Secretary of State] from:

(1) the name of any person that is already incorporated, organized, formed, or authorized to do business in this state; and

(2) any name reserved under Section 208 [or other state laws allowing the

reservation or registration of business names, including fictitious or assumed name statutes].

(b) The name of a statutory trust may contain the words “company”, “association”, “club”, “foundation”, “fund”, “institute”, “society”, “union”, “syndicate”, “limited”, or “trust”, or words or abbreviations of similar import, and may contain the name of a beneficial owner, a trustee, or any other person.

(c) A person may apply to the [Secretary of State] to use a name that does not comply with subsection (a). The [Secretary of State] shall authorize use of the name applied for if, as to a conflicting name:

(1) the present user, registrant, or owner of the conflicting name consents in a signed record to the use and submits an undertaking in a form satisfactory to the [Secretary of State] to dissolve or to change the conflicting name to a name that complies with subsection (a) and is distinguishable in the records of the [Secretary of State] from the name applied for;

(2) the applicant delivers to the [Secretary of State] a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant’s right to use in this state the name applied for; or

(3) the applicant delivers to the [Secretary of State] proof satisfactory to the [Secretary of State] that the present user, registrant, or owner of the conflicting name:

(A) has merged with the applicant;

(B) has been converted into the applicant; or

(C) has transferred substantially all of its property, including the conflicting name, to the applicant.

(d) Subject to Section 906, this section applies to any foreign statutory trust that does business in this state, has a certificate of registration to do business in this state, or has applied

for a certificate of registration.

Comment

Principal Sources – Uniform Limited Partnership Act § 108 (2001); Delaware Statutory Trust Act § 3814 (2009).

The drafting committee considered but decided against requiring the name of a statutory trust to contain a traditional limited liability appellation. Such a requirement would be inconsistent with current practice under Delaware Statutory Trust Act § 3814 (2009). However, the drafting committee contemplated that an enacting jurisdiction with a strong policy regarding names of limited liability entities might modify this section accordingly.

Other regulatory law will sometimes limit the range of permissible names notwithstanding this section. For example, the names of mutual funds typically do not contain a limited liability appellation, but Section 35(d) of the Investment Company Act of 1940, which is applicable to a statutory trust that is a registered investment company, prohibits “materially deceptive or misleading” names. 15 U.S.C. § 80a-34(d) (2009); *see also* Rule 35d-1, 17 C.F.R. § 270.35d-1 (2009) (listing types of names that have been deemed materially deceptive or misleading).

Under Section 104(1), the governing instrument may not override this section.

SECTION 208. RESERVATION OF NAME.

(a) The exclusive right to the use of a name that complies with Section 207 may be reserved by:

(1) a person intending to form a statutory trust under this [act] and to adopt the name;

(2) a statutory trust or a qualified foreign statutory trust intending to adopt the name;

(3) a foreign statutory trust intending to obtain a certificate of registration to do business in this state and adopt the name;

(4) a person intending to organize a foreign statutory trust and intending to have it obtain a certificate of registration to do business in this state and adopt the name;

(5) a foreign statutory trust formed under the name; or

(6) a foreign statutory trust formed under a name that does not comply with Section 207, but the name reserved under this paragraph may differ from the foreign statutory trust's name only to the extent necessary to comply with Section 207.

(b) A person may apply to reserve a name under subsection (a) by delivering to the [Secretary of State] for filing an application that states the name to be reserved and the paragraph of subsection (a) that applies. If the [Secretary of State] finds that the name is available for use by the applicant, the [Secretary of State] shall file a statement of name reservation and thereby reserve the name for the exclusive use of the applicant for a 120-day period.

(c) A person that has reserved a name pursuant to subsection (b) may reserve the same name for additional 120-day periods. A person having a current reservation for a name may not apply for an additional 120-day period for the same name until 90 days have elapsed under the current reservation.

(d) A person that has reserved a name under this section may deliver to the [Secretary of State] for filing:

(1) a notice of transfer that states the reserved name, the name and street and mailing address of some other person to which the reservation is to be transferred, and the paragraph of subsection (a) that applies to the person; or

(2) a notice of termination of the person's reservation.

Comment

Principal Source – Uniform Limited Partnership Act § 109 (2001).

Under Section 104(1), the governing instrument may not override this section.

SECTION 209. AGENT FOR SERVICE OF PROCESS.

(a) A statutory trust or a qualified foreign statutory trust shall designate and maintain in this state an agent for service of process.

(b) An agent for service of process of a statutory trust or qualified foreign statutory trust must be an individual who is a resident of this state or a person incorporated, organized, formed, or authorized to do business in this state which maintains an office in this state.

Comment

Principal Sources – Uniform Limited Partnership Act § 114 (2001); Delaware Statutory Trust Act § 3804 (2009).

Under Section 201(b)(3), the designation of a statutory trust’s agent for service of process is made in the certificate of trust. Under Section 902(a)(4), the designation of a foreign statutory trust’s agent for service of process is made in the application for a certificate of registration. The designation may be changed pursuant to a statement of change under Section 210, by an amendment to the certificate of trust under Section 202, or by a report under Section 213.

Under Section 104(1), the governing instrument may not override this section.

SECTION 210. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF PROCESS. A statutory trust or qualified foreign statutory trust may change its agent for service of process, the address of its agent for service of process, or its designated office by delivering to the [Secretary of State] for filing a statement of change containing:

- (1) the name of the trust;
- (2) the street and mailing address of the current designated office of the trust;
- (3) if the designated office is to be changed, the street and mailing address of the new designated office;
- (4) the name and street and mailing address of the current agent of the trust for service of process; and

(5) if the current agent for service of process or an address of the agent is to be changed, the new information.

Comment

Principal Source – Uniform Limited Partnership Act § 115 (2001).

This section uses the term “may” rather than “must” in the first sentence because a statutory trust or qualified foreign statutory trust may also change its agent for service of process, the address of the agent, or the trust’s designated office by an amendment to its certificate of trust under Section 202. If the information currently in the public record is accurate, a statutory trust or qualified foreign statutory trust may also change its agent for service of process, the address of the agent, or the trust’s designated office in a report under Section 213.

Under Section 104(1), the governing instrument may not override this section.

SECTION 211. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.

(a) To resign as an agent for service of process of a statutory trust or qualified foreign statutory trust, the agent must deliver to the [Secretary of State] for filing a statement of resignation containing:

- (1) the name of the trust;
- (2) the name of the agent; and
- (3) a statement that the agent resigns as agent for service of process.

(b) A resigning agent shall transmit a copy of a statement of resignation to the designated office of the statutory trust or qualified foreign statutory trust and a copy to the principal office if the address of the office appears in the records of the [Secretary of State] and is different from the address of the designated office.

(c) An agency for service of process terminates on the 31st day after the [Secretary of State] files the statement of resignation under subsection (a).

Comment

Principal Source – Uniform Limited Partnership Act § 116 (2001).

This section provides the exclusive means for an agent to resign without cooperation from the statutory trust or qualified foreign statutory trust and the only way the agent, rather than the statutory trust or qualified foreign statutory trust, can effect a change in the public record.

Unlike most records authorized or required to be delivered to the filing officer for filing under this act, see Section 204(c), a statement of resignation may not provide for a delayed effective date. Subsection (c) mandates the effective date of the agent's resignation. An effective date included in a statement of resignation is disregarded.

To satisfy Section 209(a), the statutory trust or qualified foreign statutory trust must designate a new agent for service of process before the effective date of the current agent's resignation. If the statutory trust or qualified foreign statutory trust fails to do so, under Section 212(b) service on the statutory trust or qualified foreign statutory trust may be made on the Secretary of State, and after 30 days the trust is subject to administrative dissolution under Section 806.

Under Section 104(1), the governing instrument may not override this section.

SECTION 212. SERVICE OF PROCESS, NOTICE, OR DEMAND.

(a) An agent for service of process appointed by a statutory trust or qualified foreign statutory trust is an agent of the trust for service of any process, notice, or demand required or permitted by law to be served on the trust.

(b) If a statutory trust or qualified foreign statutory trust no longer has a registered agent, or if its registered agent cannot with reasonable diligence be served, the trust may be served by registered or certified mail, return receipt requested, at its principal office in accordance with any applicable rules and procedures. Service is effected under this subsection at the earliest of:

- (1) the date the agent for the statutory trust or qualified foreign statutory trust receives the process, notice, or demand;
- (2) the date shown on the return receipt, if signed on behalf of the trust; or
- (3) five days after the process, notice, or demand is deposited with the United

States Postal Service, if correctly addressed and with sufficient postage.

(c) If process, notice, or demand cannot be served on a statutory trust or qualified foreign statutory trust pursuant to subsection (b), service may be made by handing a copy to the manager, clerk, or other individual in charge of any regular place of business or activity of the trust if the individual served is not a plaintiff in the action.

(d) This section does not affect the right to serve process, notice, or demand in any other manner provided by law.

Comment

Principal Sources – Uniform Limited Partnership Act § 117 (2001); Model Registered Agents Act § 13 (2006).

Under Section 104(1), the governing instrument may not override this section.

SECTION 213. [ANNUAL] [BIENNIAL] REPORT FOR [SECRETARY OF STATE].

(a) A statutory trust or qualified foreign statutory trust must deliver to the [Secretary of State] for filing [an annual] [a biennial] report that contains the name of the trust and:

(1) for a statutory trust:

(A) the street and mailing address of its designated office; and

(B) the name and street and mailing address of its agent for service of

process; or

(2) for a qualified foreign statutory trust:

(A) any alternate name adopted under Section 906;

(B) the name of the state or other jurisdiction of formation of the trust;

(C) the street and mailing address of its principal office and, if the laws of

the jurisdiction of formation of the trust require it to maintain an office in that jurisdiction, the street and mailing address of that office; and

(D) the name and street and mailing address of its agent for service of process in this state.

(b) Information in [an annual] [a biennial] report under this section must be current as of the date the report is delivered to the [Secretary of State] for filing.

(c) The first [annual] [biennial] report under this section must be delivered to the [Secretary of State] after [January 1] and before [April 1] of the year following the calendar year in which a statutory trust was formed or a qualified foreign statutory trust was authorized to do business in this state. The report must be delivered to the [Secretary of State] after [January 1] and before [April 1] of each subsequent [second] calendar year.

(d) If [an annual] [a biennial] report under this section does not contain the information required in subsection (a), the [Secretary of State] shall notify the trust promptly and return the report to it for correction. If the report is corrected to contain the information required in subsection (a) and is delivered to the [Secretary of State] not later than the 30th day after the date of the notice, the report is timely delivered.

(e) If [an annual] [a biennial] report under this section contains an address of a designated office or the name or address of an agent for service of process which differs from the information shown in the records of the [Secretary of State] immediately before the filing, the differing information in the report is deemed a statement of change under Section 210.

Comment

Principal Source – Uniform Limited Partnership Act § 210 (2001).

A statutory trust or qualified foreign statutory trust that fails to comply with this section is subject to administrative dissolution under Section 806. To account for the diversity of

reporting practices across the states, this section provides alternative bracketed language for annual and biennial reports.

Under Section 104(1), the governing instrument may not override this section.

[ARTICLE] 3

GOVERNING LAW; AUTHORIZATION; DURATION; POWERS

SECTION 301. GOVERNING LAW. The law of this state governs:

- (1) the internal affairs of a statutory trust;
- (2) the liability of a beneficial owner as beneficial owner and a trustee as trustee for a debt, obligation, or other liability of a statutory trust or a series thereof; and
- (3) the enforceability of a debt, obligation, or other liability of the statutory trust or a series thereof against the property of the trust or any series thereof.

Comment

Principal Sources – Revised Uniform Limited Liability Company Act § 106 (2006); Uniform Limited Partnership Act § 106 (2001); Connecticut Statutory Trust Act § 34-502 (2009).

Under paragraph (1), the law of this state governs the internal affairs of a statutory trust even if the trust operates in other states. The term “internal affairs” includes the interpretation and enforcement of the governing instrument and the relations among the trustees, beneficial owners, and the statutory trust. *See* Restatement (Second) of Conflict of Laws § 302, cmt. a (1971) (defining “internal affairs” with reference to corporate law as “the relations inter se of the corporation, its shareholders, directors, officers or agents”).

Paragraphs (2) and (3) confirm that the law of this state governs the liability of a beneficial owner or a trustee for the debts, obligations, or other liabilities of a statutory trust, and the enforceability of any claim against a statutory trust or the property associated with a series thereof. These rules are stated separately from paragraph (1), lest they be thought not to involve internal affairs. *See, e.g.*, Restatement (Second) of Conflict of Laws § 307 (1971) (treating shareholders’ liability separately from the internal affairs doctrine).

Section 901 states parallel rules for qualified foreign statutory trusts that are analogous to those of this section.

Under Section 104(2), the governing instrument may not override this section.

SECTION 302. STATUTORY TRUST AS ENTITY. A statutory trust is an entity separate from its trustees and beneficial owners.

Comment

Principal Sources – Delaware Statutory Trust Act § 3810.

A common-law trust, whether its purpose is donative or commercial, arises from private action without the involvement of a public official. *See* Uniform Trust Code § 401 (2000); Restatement (Third) of Trusts § 10 (2003). Because a common-law trust is not a juridical entity, it must sue and be sued, own property, and transact in the name of the trustee in the trustee's capacity as such. By contrast, as confirmed by this section, a statutory trust is an entity separate from its trustees and beneficial owners. Consequently, a statutory trust has capacity to sue and be sued, own property, and transact in its own name (see Sections 307 and 308), and the trust is solely liable for a debt, obligation, or other liability of the trust (see Section 304).

SECTION 303. PERMISSIBLE PURPOSES.

(a) Except as otherwise provided in subsection (b), a statutory trust may have any lawful purpose.

(b) A statutory trust may not have a predominantly donative purpose.

Comment

Principal Source – Delaware Statutory Trust Act § 3801 (2009).

Under this section, a statutory trust may be formed for any lawful purpose except a predominantly donative purpose. Section 401(c) states a similar rule for the series of a statutory trust.

Because this act authorizes the formation of a statutory trust, and because this section permits a statutory trust to have any lawful purpose other than a predominately donative purpose, any prior judicial decision that holds that a common-law business trust violates the state's corporate law, trust law, or public policy is not applicable to a statutory trust. *See, e.g.*, Robert C. Brown, *Common Law Trusts as Business Enterprises*, 3 Ind. L.J. 595, 597-98 (1928); Leland S. Duxbury, *Business Trusts and Blue Sky Laws*, 8 Minn. L. Rev. 465, 475-76 (1924). Such decisions reflect the concern that a common-law business trust could be used to evade regulatory limitations on the corporate form.

The limitation to lawful purposes addresses the concern that some states limit the types of organizations that may be used in regulated industries such as banking and insurance.

The exclusion of a predominantly donative purpose addresses the concern that a statutory trust might be used in an estate planning or other donative context to evade public policy limitations on donative transfers and common-law trusts. *See, e.g.*, Uniform Trust Code § 105 (2000); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105

(2004). By prohibiting a statutory trust from having a predominantly donative purpose, the drafting committee avoided the need to design a comprehensive schedule of mandatory rules applicable to statutory trusts with such a purpose, a problematic undertaking in view of the increasing differentiation among the states on these matters, particularly with respect to the rights of the settlor's creditors in a self-settled trust and the continued application of the Rule Against Perpetuities to interests held in trust. *See, e.g.*, Robert H. Sitkoff & Max M. Schanzenbach, Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 Yale L.J. 356 (2005).

Examples of mandatory rules applicable to common-law trusts that parties might otherwise try to avoid by using a statutory trust include the following:

- 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;
- the requirement that a trust and its terms be for the benefit of one or more ascertainable beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
- the power of the court to modify or terminate a trust;
- the effect of a spendthrift provision and the rights of the settlor's and the beneficiary's creditors and assignees to reach the property of a trust;
- the power of the court to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high;
- the power of the court to remove a trustee for a serious breach of trust;
- the duty of the trustee to give information and make reports concerning the administration of the trust to the beneficiary;
- the effect of an exoneration clause that purports to limit or eliminate the duties or liabilities of a trustee to a beneficiary;
- the rights of a party, other than a trustee or beneficiary, that transacts with the trustee in the trustee's capacity as such;
- the rules against perpetuities, accumulations of income, and suspension of the power of alienation; and
- the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

Most of the foregoing rules are referenced in Uniform Trust Code § 105 (2000), the UTC's schedule of mandatory rules. For discussion of why the rules that are mandatory with respect to a common-law trust are not mandatory with respect to a statutory trust, see the Comments to Sections 103 and 105.

The drafting committee declined the suggestion to prohibit a statutory trust from having a charitable purpose. The committee reasoned that a statutory trust with a charitable purpose would be covered by existing regulatory law applicable to charitable entities. *See, e.g.*, Marion R. Fremont-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* 187-427 (2004).

Under Section 104(3), the governing instrument may not override this section.

**SECTION 304. STATUTORY TRUST SOLELY LIABLE FOR DEBT,
OBLIGATION, OR OTHER LIABILITY OF STATUTORY TRUST.**

(a) A debt, obligation, or other liability of a statutory trust or series thereof is solely a debt, obligation, or other liability of the trust or series thereof. A beneficial owner, trustee, agent of the trust, or agent of the trustee is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the trust or series thereof solely by reason of being or acting as a trustee, beneficial owner, agent of the trust, or agent of the trustee.

(b) Except as otherwise provided in [Article] 4, property of a statutory trust held in the name of the trust or by the trustee in the trustee's capacity as trustee is subject to attachment and execution to satisfy a debt, obligation, or other liability of the trust.

Comment

Principal Sources – Delaware Statutory Trust Act § 3803 (2009); Revised Uniform Limited Liability Company Act § 304 (2006); Uniform Limited Partnership Act §§ 303, 404 (2001); Uniform Trust Code § 507 (2000) Revised Uniform Partnership Act § 306 (1997); Uniform Limited Liability Company Act § 303 (1996).

This section implements the concept that a statutory trust is an entity separate from its trustees and beneficial owners in three ways. First, this section confirms that a trustee, as such, is not liable for a debt, obligation, or liability of the statutory trust or a series thereof. This section therefore overrides the outmoded common-law rule that made the trustee liable for the debts of the trust and then gave the trustee a right to indemnity out of the trust fund. *Compare* Restatement (Second) of Trusts §§ 244, 261 (1959) (stating the old rule), *with* Uniform Trust Code § 1010 (2000) (eliminating the personal liability of the trustee for a debt, obligation, or liability arising in the trustee's fiduciary capacity); *see also* Austin W. Scott, William F. Fratcher & Mark L. Ascher, 4 Scott and Ascher on Trusts §§ 26.1-26.7 (5th ed. 2007). However, nothing in this section limits the personal liability of a trustee to the statutory trust for breach of duty under Section 505.

Second, this section confirms that the statutory trust is solely liable for the debts, obligations, and liabilities of the trust.

Third, this section confirms the limited liability of a beneficial owner and trustee by providing that neither is liable for a debt, obligation, or liability of a statutory trust. A disclosed agent of the beneficial owner or trustee acting within the scope of the agent's authority is likewise not liable for a debt, obligation, or liability of the statutory trust. This section therefore confirms that the "control test" of *Williams v. Inhabitants of Milton*, 102 N.E. 355 (Mass. 1913), and Restatement (Second) of Agency § 14B (1958), is not applicable to a statutory trust. Under the control test, if a beneficiary of a common-law business trust had a say in the administration of the trust or the right to remove and replace the trustee, the beneficiary might be held liable for the debts of the trust. By contrast, under this section a beneficial owner may participate in the management of the statutory trust without exposure to liability for the debts of the statutory trust. *See* Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts § 19.3, in 2 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* (3d ed. 2009 Supp.).

SECTION 305. NO CREDITOR RIGHTS IN TRUST PROPERTY. A creditor of a beneficial owner or trustee may not obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of a statutory trust or any series thereof.

Comment

Principal Sources - Delaware Statutory Trust Act § 3805 (2009); Uniform Limited Partnership Act § 701 (2001); Uniform Trust Code § 507 (2000); Uniform Limited Liability Company Act § 501 (1996); Revised Uniform Partnership Act § 203 (1997).

By confirming that a creditor of a beneficial owner or a trustee has no recourse against the property of the statutory trust, this section implements the concept that a statutory trust is an entity separate from its trustees and beneficial owners.

With respect to a trustee, the rule of this section is familiar from the operation of common-law trusts. *See* Uniform Trust Code § 507 (2000); Restatement (Third) of Trusts § 42, cmt. c (2003); Restatement (Second) of Trusts § 308 (1959). The rule of this section is also consistent with federal bankruptcy law. Property in which a trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. *See* 11 U.S.C. § 541(d) (2009).

With respect to a beneficial owner, the parallel provision in the Delaware Statutory Trust Act is discussed in Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts § 19.4, in 2 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* (3d ed. 2009 Supp.).

SECTION 306. DURATION.

(a) A statutory trust has perpetual duration.

(b) A statutory trust, or any series thereof, may not be terminated or revoked except in accordance with this [act] or the terms of the governing instrument.

(c) The death, incapacity, dissolution, termination, or bankruptcy of a beneficial owner or trustee does not result in the termination or dissolution of a statutory trust or any series thereof.

(d) A statutory trust or any series thereof does not terminate because the same person is the sole trustee and sole beneficial owner.

Comment

Principal Source – Delaware Statutory Trust Act § 3808 (2009).

Subsection (a) provides a default rule of perpetual duration for a statutory trust. By contrast, the Rule Against Perpetuities curtails the duration of a common-law trust. *See* Restatement (Third) of Trusts § 29, cmt. h(1) (2003). Accordingly, unless the governing instrument provides otherwise, under this section a statutory trust is exempt from the Rule Against Perpetuities. The drafting committee concluded that the dead-hand worries that underpin the Rule do not apply to a statutory trust. Under Section 303(b), a statutory trust may not have a predominantly donative purpose.

Subsection (b) confirms that a statutory trust may only be terminated in accordance with the terms of this act or the governing instrument. *See* Sections 801 and 806. Accordingly, a statutory trust is not subject to the common-law rules of trust termination that would otherwise be applicable under Section 105. Those rules mediate the tension between donor's intent and subsequent contrary preferences of the beneficiaries, *see* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 *Cornell L. Rev.* 621, 658-63 (2004), an issue that is not applicable to a statutory trust, because such a trust may not have a predominantly donative purpose. Instead, the drafting committee contemplated that the governing instrument would provide for termination of the statutory trust or modification of the governing instrument if such provisions are desirable.

Subsection (c) confirms that the rule of partnership law under which a partnership is dissolved upon the death or incapacity of one of the partners does not apply to a statutory trust.

Subsection (d) overrides the application to a statutory trust under Section 105 of the common-law rule of merger whereby legal and equitable title to trust property merge and the trust terminates if the same person is the sole trustee and sole beneficiary. *See* Restatement (Third) of Trusts § 69 (2003); Restatement (Second) of Trusts § 341 (1959); Comment, *The Doctrine of Merger as Applied to Commercial Trusts*, 29 *Yale L.J.* 97 (1919).

SECTION 307. POWER TO HOLD PROPERTY; TITLE TO TRUST

PROPERTY. A statutory trust may hold or take title to property in its own name, or in the name of a trustee in the trustee's capacity as trustee, whether in an active, passive, or custodial capacity.

Comment

Principal Source – Delaware Statutory Trust Act §§ 3801, 3805 (2009).

By providing that a statutory trust may transact and hold property in its own name, this section implements the concept that a statutory trust is an entity separate from its trustees and beneficial owners. The property of a common-law trust, by contrast, must be held in the name of the trustee in the trustee's fiduciary capacity.

This section also permits a statutory trust to take title to property in the name of the trustee in the trustee's fiduciary capacity, similar to a common-law trust. The drafting committee reasoned that allowing a statutory trust to do so would facilitate transactions with or by a statutory trust in a state that has not provided for a statutory trust entity in its title recording and other property laws. However, nothing in this section affects the liability rules stated in Sections 304 and 305. Even if the statutory trust takes title to certain property in the name of the trustee in the trustee's fiduciary capacity, the statutory trust and not the trustee is liable for a debt, obligation, or other liability arising from ownership of the property. A similar outcome obtains in a common-law trust, in which the trustee is protected from personal liability for a debt, obligation, or other liability arising from ownership or control of trust property, or is personally liable only to the extent of the capacity of the trust estate to support indemnification of the trustee. *See* Uniform Trust Code § 1010 (2000); Austin W. Scott, William F. Fratcher & Mark L. Ascher, 4 *Scott and Ascher on Trusts* § 26.4 (5th ed. 2007).

To police the boundary of the trustee's personal property and the property of the trust, the common law imposes on the trustee duties to earmark trust property and not to commingle it with the trustee's own. *See* Uniform Trust Code § 810 (2000); Restatement (Third) of Trusts § 84 (2007). The drafting committee contemplated that, under appropriate circumstances, Section 505(b) will require similar conduct by a trustee of a statutory trust that takes title to property in the name of the trustee in the trustee's fiduciary capacity.

SECTION 308. POWER TO SUE AND BE SUED. A statutory trust may sue and be sued in its own name.

Comment

Principal Sources – Delaware Statutory Trust Act § 3804 (2009); Uniform Limited

Partnership Act § 105 (2001).

By confirming that a statutory trust has the power to sue and be sued in its own name, this section implements the concept that a statutory trust is an entity separate from its trustees and beneficial owners.

[ARTICLE 4]

SERIES TRUSTS

SECTION 401. STATUTORY TRUST HAVING SERIES.

(a) The governing instrument may provide for the creation by the statutory trust of one or more series with respect to specified property of the statutory trust if:

(1) records are maintained for the series which reasonably identify the property of the series, including by specific listing, category, type, quantity, or computational or allocational formula or procedure, such as a percentage or share of any property, or by any other method by which the identity of the property of the series is objectively determinable; and

(2) notice that the trust may have one or more series is set forth in the certificate of trust as required by Section 201(b)(4).

(b) A series of a statutory trust is not an entity separate from the statutory trust.

(c) A series of a statutory trust may have a separate purpose from the trust or any other series thereof if the purpose of the series is lawful and not a predominantly donative purpose.

Comment

Principal Sources – Delaware Statutory Trust Act § 3806 (2009); Delaware Limited Liability Company Act § 18-215 (2009).

This section states the conditions that must be satisfied if a statutory trust is to have one or more series, making the trust a series trust, a term defined in Section 102(13). A series is a segregation or partitioning of property within a statutory trust. Under Section 402, if a statutory trust has organized as a series trust under this section, a debt, obligation, or liability associated with the property of a particular series is enforceable only against property of that series, and not against the property of the trust generally or any other series thereof. The series concept, and its segregation or partitioning of property, is therefore different from the creation of classes for governance purposes, which Section 103(e)(5) authorizes. Under the structure of this act, a class is an internal grouping of trustees, beneficial owners, or beneficial interests for governance purposes — for example, to separate specified rights, powers, or duties among and between classes.

Subsection (a) provides that a statutory trust may organize as a series trust if (1) records

are maintained that reasonably identify the property associated with the series, and (2) notice that the trust may have one or more series is set forth in the certificate of trust. The earmarking requirement of subsection (a)(1) safeguards the interests of the beneficial owners and of the trust's creditors in respect of each series by clarifying the boundaries between the property and liabilities of each series. Creditors and other third parties are further protected by subsection (a)(2), which requires notice in the certificate of trust that the statutory trust might have one or more series.

Subsection (b) confirms that for ordinary state law purposes, a series is not an entity separate from the statutory trust. Thus, in litigation involving a series trust, the proper party is the statutory trust itself (see Section 308), even if the matter pertains exclusively to property associated with a series of the trust. Whether a series is a separate entity for federal tax or other purposes is beyond the purview of this act. The potential for disparate entity status under state organizational law and federal tax or other regulatory law is familiar from the operation of common-law trusts. For example, a common-law trust is not an entity under state trust law, but it is taxed as an entity under federal tax law. *See* Jeffrey G. Sherman, All You Really Need To Know About Subchapter J You Learned from This Article, 63 Mo. L. Rev. 1 (1998).

Subsection (c) confirms that a series may have any lawful purpose other than a predominantly donative purpose, and that a series may have a purpose separate from the purpose of the statutory trust. The limitation to a lawful purpose that is not predominantly donative is analogous to the limitation in Section 303 on the permissible purposes of a statutory trust, the rationale for which is discussed in the Comment to that section.

In confirming that a series may have a separate purpose from the statutory trust or any other series thereof, the drafting committee took notice of the fact that the organization of a master trust with multiple series is common among statutory trusts that are registered as investment companies under the Investment Company Act of 1940. Mutual fund complexes commonly organize their various funds, which may have different investment goals and objectives, as separate series of a single statutory trust. *See* Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts § 19.11, in 2 R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations and Business Organizations (3d ed. 2009 Supp.); Joseph R. Fleming, Regulation of Series in Investment Companies, 44 Bus. Law. 1179 (1989).

In a series trust that is an investment company under the Investment Company Act of 1940, any series of beneficial interests established by the governing instrument is a series preferred in distribution of property or payment of dividends over all other series with respect to property specifically allocated to the series under Section 18 of the Investment Company Act. *See* 15 U.S.C. § 80a-18 (2009); *see also* Delaware Statutory Trust Act § 3805(h) (2009).

Under Section 104(4), the governing instrument may not override this section.

SECTION 402. LIABILITY OF SERIES TRUST.

(a) In a series trust:

(1) a debt, obligation, or other liability incurred or otherwise existing with respect to the property of a particular series is enforceable against the property of the series only, and not against the property of the trust generally or any other series thereof; and

(2) a debt, obligation, or other liability incurred or otherwise existing with respect to the trust generally or the property of any other series thereof is not enforceable against the property of the series.

(b) The association, disassociation, or reassociation of property of a statutory trust or a series thereof to or with the trust or a series thereof, including by conversion or merger under [Article] 7, is deemed to be a transfer between separate persons under [Uniform Fraudulent Transfers Act or other state fraudulent transfer statute].

Comment

Principal Sources – Delaware Statutory Trust Act § 3804 (2009); Delaware Limited Liability Company Act § 18-215 (2009).

This section implements the concept that the creation of one or more series under Section 401 effects a partitioning or segregation of property. Subsection (a) provides that if a statutory trust properly creates one or more series under Section 401, a debt, liability, or other obligation associated with the property of a particular series is enforceable only against the property of that series, and is not enforceable against the property of another series or the trust generally. Likewise, a debt, liability, or other obligation associated with the property of another series or of the trust generally is not enforceable against the property of the series. Thus, a creditor whose claim arises in connection with certain property of a particular series has recourse against the property of that series only, and a creditor whose claim arises in connection with property not associated with a particular series has no recourse against the property of that series.

The drafting committee contemplated that an interest secured by a lien on particular trust property would follow that property even if the property was reassociated from one series to another, from a series to the trust generally, or from the trust generally to a series.

Because subsection (a) is not mandatory (it is not scheduled in Section 104), a third party dealing with a series trust could condition the party's dealings with the trust on a waiver by the trust of the liability rules stated in subsection (a).

Subsection (b) addresses the concern that that the series concept might be used to avoid creditors abusively. To protect creditors from abusive movement of property within a series trust,

subsection (b) provides that the association, disassociation, or reassociation of property with the statutory trust generally or a series thereof is subject to the state's fraudulent transfer law. Because under subsection (b), each series and the trust generally are treated as separate entities for purposes of the state's fraudulent transfer law, creditors have precisely the same protection against abusive movement of property within a series trust as the state's fraudulent transfer law affords against abusive movement of property among separate entities.

Under Section 104(4), the governing instrument may not override subsection (b).

SECTION 403. DUTIES OF TRUSTEE IN SERIES TRUST. If there is at least one trustee of a series trust that, in discharging its duties, is obligated to consider the interests of the trust and all series thereof, the governing instrument may provide that one or more other trustees, in discharging their duties, may consider only the interests of the trust or one or more series thereof.

Comment

Section 401(c) confirms that the various series of a statutory trust may have different purposes and objectives. In such circumstances, it may be sensible for each series to be managed by a trustee whose duties and obligations are limited to the best interests of the particular series. This section allows for the appointment of a trustee whose duties are limited to a particular series so long as there is at least one trustee whose duties run to the trust generally and all series thereof. The drafting committee reasoned that, because a series is not a separate entity (see Section 401(b)), there must always be a trustee whose duties run to the trust and all series thereof.

Under Section 104(4), the governing instrument may not override this section.

SECTION 404. DISSOLUTION OF SERIES.

(a) A series of a series trust may be dissolved or its property distributed without causing the dissolution of the trust or any other series thereof.

(b) A series of a series trust is dissolved, and its activities must be wound up, on the occurrence of an event or circumstance that the governing instrument states causes dissolution of the series or upon the dissolution of the trust.

(c) On dissolution of a series of a series trust, the persons that under the governing instrument are responsible for winding up the affairs of the series may cause the trust to take all actions permitted under Section 803 and shall take actions with respect to the claims and obligations of the series as provided in Sections 803 through 805.

(d) A person, including a trustee, that under the governing instrument is responsible for winding up the affairs of a series of a series trust is not liable to the creditors of the dissolved series by reason of the person's actions in winding up the series.

Comment

Principal Sources – Delaware Statutory Trust Act § 3808 (2009); Revised Uniform Limited Liability Company Act §§ 701-702 (2006).

Although a series is not a separate entity from the series trust of which it is a part (see Section 401(b)), a series may have a separate purpose from the rest of the trust (see Section 401(c)), and its property is segregated from the rest of the property of the trust (see Section 402). As such, a series has many of the attributes of a separate entity, particularly with respect to the rights of third parties. To protect third parties who deal with a series trust, this section provides for the orderly dissolution of a series.

Subsection (a) provides that the dissolution of a series does not trigger the dissolution of the series trust or any other series thereof.

Subsection (b) provides that a series is dissolved only under the circumstances specified in the governing instrument. The drafting committee reasoned that, because a statutory trust may have perpetual existence (see Section 306), so too a series of the trust may have perpetual existence.

Subsection (c) provides for the mechanics of dissolution of a series. Under subsection (c), the rules applicable to the dissolution of a statutory trust stated in Sections 803 through 805, which govern winding up and creditors' rights, apply to the dissolution of a series.

Subsection (d) protects a person, including a trustee, from personal liability for a debt, obligation, or other liability associated with the property of a dissolved series over which the person had responsibility for winding up. This provision therefore complements Section 304, which provides that a debt, obligation, or other liability of a statutory trust is solely the debt, obligation, or other liability of the trust.

Under Section 104(4), the governing instrument may not override subsection (c).

[ARTICLE 5]

TRUSTEES AND TRUST MANAGEMENT

SECTION 501. MANAGEMENT OF STATUTORY TRUST. The business and affairs of a statutory trust must be managed by or under the authority of its trustees.

Comment

Principal Sources – Delaware Statutory Trust Act § 3806 (2009); Delaware General Corporation Law § 141 (2009); Model Business Corporation Act § 8.01 (2005).

Section 102(19) defines the term “trustee” as a person designated, appointed, or elected as such in accordance with the governing instrument or applicable law. Section 103(e)(6)(C) confirms that the governing instrument may provide for trustee appointment. However, because this act does not provide for trustee appointment, if the governing instrument does not provide for trustee appointment, then under Section 105 the state’s law pertaining to trustee appointment in common-law trusts controls. On trustee appointment, removal, and succession in common-law trusts, see Uniform Trust Code §§ 701-702, 704-706 (2000); Restatement (Third) of Trusts §§ 31-37 (2003); *see also* Austin W. Scott, William F. Fratcher & Mark L. Ascher, 2 Scott and Ascher on Trusts §§ 11.9 - 11.11 (5th ed. 2006).

SECTION 502. TRUSTEE POWERS. A trustee may exercise:

- (1) powers conferred by the governing instrument;
- (2) except as limited by the governing instrument, any other powers necessary or convenient to carry out the business and affairs of the statutory trust; and
- (3) other powers conferred by this [act].

Comment

Principal Source – Uniform Trust Code § 815 (2000).

This section overrides the application to a statutory trust under Section 105 of the outmoded common-law rule that a trustee has only those powers granted by the trust instrument. The purpose of this section is to grant trustees the broadest possible powers. *See* Uniform Trust Code § 815 (2000); Restatement (Third) of Trusts § 85, cmt. a (2007). However, in exercising or not exercising the broad powers conferred by this section, the trustee must comply with the standards of conduct stated in Section 505. *See* Uniform Trust Code § 815, cmt. (2000); Restatement (Third) of Trusts §§ 70, 86 (2007); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 640-43 (1995).

SECTION 503. ACTION BY TRUSTEES. On any matter that is to be acted on by trustees, the following rules apply:

(1) The trustees act by majority of the trustees.

(2) The trustees may act without a meeting, without previous notice, and without a vote, if the minimum number of trustees necessary to authorize or take the action at a meeting at which all trustees entitled to vote thereon were present and voted consent in a signed record. However, prompt notice of the action must be given to those trustees that did not consent.

(3) A trustee may vote in person or by proxy, but, if by proxy, the proxy must be in a signed record.

Comment

Principal Sources – Delaware Statutory Trust Act § 3806 (2009); Delaware General Corporation Law § 228 (2009); Uniform Trust Code § 703 (2000).

In accord with Uniform Trust Code § 703(a) (2000) and Restatement (Third) of Trusts § 39 (2003), paragraph (1) rejects the common-law rule requiring unanimity among the trustees of a private trust, and replaces it with a default rule allowing action by a majority of the trustees.

The remainder of this section allows for maximum flexibility in the mechanics of action by the trustees. Section 103(e)(4) confirms that the governing instrument may override the rules stated in this section.

The Investment Company Act of 1940 requires a mutual fund's investment advisory contract, underwriting contract, fidelity bond, independent public accountants, and other such matters to be approved by the trustees (directors) of the mutual fund. *See* 15 U.S.C. §§ 80a-15(a), 80a-31(a) (2009); 17 C.F.R. § 270.17g-1 (2009). Investment advisory and underwriting contracts, and selection of independent public accountants must be approved by the noninterested trustees (directors) at an in-person meeting. *See* 15 U.S.C. §§ 80a-15(c), 80a-31(a) (2009).

SECTION 504. PROTECTION OF PERSON DEALING WITH TRUSTEE.

(a) A person that in good faith assists a trustee, or in good faith and for value deals with

a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's power, is protected from liability as if the trustee properly exercised the power.

(b) A person that in good faith deals with a trustee need not inquire into the extent of a trustee's power or the propriety of the exercise of the power.

(c) A person that in good faith delivers property to a trustee need not ensure its proper use.

(d) A person that in good faith and without knowledge that the trusteeship has terminated assists a former trustee as if the former trustee were still a trustee, or in good faith and for value deals with a former trustee as if the former trustee were still a trustee is protected from liability as if the former trustee were still a trustee.

Comment

Principal Source – Uniform Trust Code § 1012 (2000).

Subsection (a) protects two different classes of persons: (1) persons that assist a trustee with a transaction, and (2) persons that deal with the trustee for value. As long as the person provided the assistance or dealt with the trustee in good faith and without knowledge that the trustee was exceeding or improperly exercising the trustee's powers, the person is protected from liability to the statutory trust and the beneficial owners.

Subsection (b) confirms that a person is not charged with a duty to inquire into the extent of a trustee's power or the propriety of its exercise so long as the person is acting in good faith. Such a person may assume that the trustee has the necessary power and need not request or examine the trust's governing instrument. Subsection (b) therefore overrides the application to a statutory trust under Section 105 of the outmoded common-law rule that third parties that deal with the trustee are charged with constructive notice of the trust's governing instrument and its contents. *See* Austin W. Scott, William F. Fratcher & Mark L. Ascher, 5 Scott and Ascher on Trusts § 29.2 (5th ed. 2008).

Subsection (c) protects a person that in good faith delivers property to a trustee. The standard of protection in Restatement (Second) of Trusts § 321 (1959) is phrased differently, but the result is similar. Under the Restatement, the person delivering property to a trustee is liable only if at the time of the delivery the person had notice that the trustee was misapplying or intending to misapply the property.

Section (d) extends the protections afforded by this section to assistance provided to or

dealings for value with a former trustee. If the person acted in good faith, the person is protected as if the former trustee still held the office.

This section is based on Uniform Trust Code § 1012 (2000), but differs from that provision in that subsections (a), (b), and (d) are not limited to persons other than a beneficiary.

SECTION 505. STANDARDS OF CONDUCT FOR TRUSTEES.

(a) Subject to Section 403, in exercising the powers of trusteeship, a trustee shall act in good faith and in a manner the trustee reasonably believes to be in the best interests of the statutory trust.

(b) A trustee shall discharge its duties with the care that a person in a similar position would reasonably believe appropriate under similar circumstances.

Comment

Principal Source – Model Business Corporation Act § 8.30 (2005).

Fiduciary Duties. This section subjects the trustee’s exercise or nonexercise of the broad powers granted by Section 502 to fiduciary duties of loyalty (subsection (a)) and care (subsection (b)). This section therefore confirms the applicability to a statutory trust of the core principle of trust administration “that a trustee presumptively has comprehensive powers to manage the trust estate and otherwise to carry out the terms and purpose of the trust, but that all powers held in the capacity of trustee must be exercised, or not exercised, in accordance with the trustee’s fiduciary obligations.” Restatement (Third) of Trusts § 70, cmt. a (2007).

Corporate Versus Trust Fiduciary Law. The drafting committee opted to model the particulars of the trustee’s fiduciary duties on the corporate fiduciary obligation rather than the more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of commercial actors. The drafting committee took Model Business Corporation Act § 8.30 (2005) as its model for the corporate fiduciary obligation. For a statement of the duties of prudence and loyalty in trust law, see Restatement (Third) of Trusts §§ 77-78 (2007). For a comparison of trust and corporate fiduciary law, see Robert H. Sitkoff, Trust Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82 (2003).

In imposing a corporate-style fiduciary obligation on the trustees of a statutory trust, the drafting committee departed from the model of the Delaware Statutory Trust Act, which does not prescribe the applicable fiduciary standards. Under the Delaware Act, unless the governing instrument provides otherwise, the applicable fiduciary standards are those of the common law of

trusts. *See* Delaware Statutory Trust Act § 3809 (2009); *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1110-1118 (Del. Ch. 2008); *see also* Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts § 19.7, in 2 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* (3d ed. 2009 Supp.). In departing from the Delaware Act, the drafting committee was influenced by reports from the committee's Delaware-based advisors and observers that the usual practice in Delaware statutory trusts is to override the default trust fiduciary obligation in favor of corporate-style fiduciary rules. As such, this section is consistent with Delaware statutory trust practice.

Good Faith. The drafting committee declined the suggestion to define the term good faith on the grounds that such a definition necessarily would be over- and under-inclusive. Instead, the committee contemplated that the term would be interpreted in light of its evolving meaning in the business and trust law cases. Imposing a duty to act in good faith without defining the contours of good faith is familiar trust, statutory trust, corporate, and alternative entity law. *See, e.g.*, Uniform Trust Code § 105(b)(2) (2000); Delaware Statutory Trust Act § 3806(c), (e) (2009); Model Business Corporation Act § 8.30 (2005); Revised Uniform Limited Liability Company Act § 110(c)(5) (2006).

Series Trusts. Subsection (a) is made subject to Section 403, which allows in a series trust for a trustee's duties and obligations to be limited to the best interests of a particular series if there is at least one trustee whose duties and obligations run to the trust and all series thereof. For further discussion, see the Comment to Section 403.

Mandatory and Default Fiduciary Law. Under Section 104(5), the governing instrument may not override the trustee's standards of conduct under this section. However, the governing instrument may prescribe the standards by which good faith, best interests of the statutory trust, and care that a person in a similar position would reasonably believe appropriate under similar circumstances are determined if the prescribed standards are not manifestly unreasonable. A mandatory core of fiduciary obligation is familiar trust, statutory trust, corporate, and alternative entity law. *See, e.g.*, Uniform Trust Code § 105(b)(2) (2000); Restatement (Third) of Trusts § 86, cmt. b (2007); Delaware Statutory Trust Act § 3806(c), (e) (2009) (duty of good faith); Delaware General Corporation Law § 102(b)(7) (2009); Delaware Limited Liability Company Act § 18-1101(c), (e) (2009) (duty of good faith); Model Business Corporation Act § 2.02(b)(4)-(5) (2005).

SECTION 506. GOOD-FAITH RELIANCE. A trustee, officer, employee, manager, or committee of a statutory trust, or other person designated pursuant to Section 103(e)(8), is not liable to the trust or to a beneficial owner for breach of any duty, including a fiduciary duty, to the extent the breach results from good-faith reliance on:

- (1) a term of the governing instrument;

- (2) a record of the statutory trust; or
- (3) an opinion, report, or statement of another person that the person to which the opinion, report, or statement is made or delivered reasonably believes is within the other person's professional or expert competence and is made or delivered to the trustee, officer, employee, manager, or committee of a statutory trust, or other person designated pursuant to Section 103(e)(8).

Comment

Principal Sources – Uniform Trust Code § 1006 (2000); Delaware Statutory Trust Act § 3806 (2009).

Uniform Trust Code § 1006 (2000); Uniform Prudent Investor Act §1 (1994); Delaware Statutory Trust Act § 3806 (2009).

A trustee, officer, employee, manager, committee, or other person administering a statutory trust should be able to rely on (1) the terms of the governing instrument, (2) the records of the statutory trust, and (3) the opinions of experts. This section protects a person that so relies from liability to the trust or to a beneficial owner, but only to the extent that the person's breach of trust resulted from such reliance and only if the person's reliance was in good faith. This section does not foreclose injunctive or other such equitable relief.

The drafting committee contemplated that in assessing whether a person's reliance was in good faith, the courts will require the person to show that the person's reliance was objectively reasonable. *Cf.* Restatement (Third) of Trusts § 77, cmt. b(2) (2007) ("Taking the advice of legal counsel evidences prudence on the part of the trustee. Reliance on advice of counsel, however, is not a complete defense to an alleged breach of trust, because that would reward a trustee who shopped for legal advice that would support the trustee's desired course of conduct or who otherwise acted unreasonably in procuring or following legal advice. In seeking and considering advice of counsel, the trustee has a duty to act with prudence. Thus, if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence.").

The governing instrument may provide that a person is liable to the statutory trust or to a beneficial owner for breach of trust even if the person's breach of trust resulted from the person's good faith reliance on (1) the terms of the governing instrument, (2) the records of the statutory trust, or (3) the opinions of experts. However, under Section 104(6), the governing instrument may not vary the obligation of a person to act in good faith if the person is to be protected from liability under this section, albeit the governing instrument may prescribe the standards for assessing whether the person's reliance was in good faith if those standards are not manifestly unreasonable.

SECTION 507. INTERESTED TRANSACTIONS.

(a) In this section, “covered party” means a trustee, officer, employee, or manager of a statutory trust, or a related party of a trustee, officer, employee, manager, or other person designated pursuant to Section 103(e)(8).

(b) Subject to subsection (c), a covered party may lend money to, borrow money from, act as a surety, guarantor, or endorser for, guarantee or assume an obligation of, provide collateral for, or do other business with the statutory trust and, subject to law other than this [act], has the same rights and obligations with respect to those matters as a person that is not a covered party.

(c) A transaction described in subsection (b) is voidable by the statutory trust unless the covered party shows that the transaction is fair to the trust.

Comment

Principal Sources – Delaware Statutory Trust Act § 3806 (2009); Delaware General Corporation Law § 144 (2009).

Consistent with the use of the term “best interests” instead of “sole interest” in Section 505(a), this section abrogates the no-further-inquiry rule of the common law of trusts, which makes a self-dealing or conflicted transaction by the trustee voidable by the beneficiaries even if the transaction is fair and in the best interests of the trust and the beneficiaries. *See* Restatement (Third) of Trusts § 78 (2007); John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?, 114 Yale L.J. 929 (2005); Melanie B. Leslie, Trusting Trustees: Fiduciary Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005).

Instead, this section follows the corporate model so that an interested transaction is voidable by the statutory trust unless the related party shows that the transaction is fair to the trust. *See* Model Business Corporation Act § 8.61(b)(3) (2005). Because this section is not scheduled in Section 104, however, the rule of this section is subject to override in the governing instrument.

The Investment Company Act of 1940, which applies to a statutory trust that is a registered investment company, prohibits a trustee, officer, employee, manager, and their related parties from lending money to, borrowing money from, and engaging in other transactions with

the mutual fund without exemptive relief from the Securities and Exchange Commission. *See* 15 U.S.C. § 80a-17(a)-(b), (d) (2009).

SECTION 508. TRUSTEE’S RIGHT TO INFORMATION. A trustee has the right to receive from a statutory trust or another trustee information relating to the affairs of the trust which is reasonably related to the trustee’s discharge of the trustee’s duties as trustee. The trustee may enforce this right by summary proceeding in the [appropriate court].

Comment

Under Section 104(7), the governing instrument may not override the trustee’s right to information under this section. However, the trustee’s right to information is limited to information “reasonably related to the trustee’s discharge of the trustee’s duties as trustee,” and the governing instrument may prescribe the standards by which “reasonably related” is determined if those standards are not manifestly unreasonable.

By linking the trustee’s information rights to the scope of the trustee’s duties as trustee, this section makes the trustee’s right to information function-specific. This section therefore facilitates the creation of a limited-role or directed trustee that will not have access to confidential information unrelated to the trustee’s limited role — for example, a trustee whose duties run exclusively to a particular series as is contemplated by Section 403. At the same time, this section ensures that such a trustee will have access to information reasonably related to discharging the trustee’s duties in connection with the trustee’s limited role.

Allowing summary or expedited proceedings for access to information is familiar business entity law. *See* Model Business Corporation Act §§ 16.04-16.05 (2005).

Section 608 addresses a beneficial owner’s right to information.

SECTION 509. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.

(a) A statutory trust may indemnify and hold harmless a trustee, beneficial owner, or other person with respect to any claim or demand against the person by reason of the person’s relationship with the trust if the claim or demand does not arise from the person’s bad faith, willful misconduct, or reckless indifference.

(b) Expenses, including reasonable attorney’s fees and costs, incurred by a trustee,

beneficial owner, or other person in connection with a claim or demand against the person by reason of the person's relationship to a statutory trust may be paid by the trust before the final disposition of the claim or demand, upon an undertaking by or on behalf of the person to repay the trust if the person is ultimately determined not to be entitled to be indemnified under subsection (a).

(c) A term in the governing instrument relieving or exonerating a trustee from liability is unenforceable to the extent it relieves or exonerates the trustee from liability for conduct involving bad faith, willful misconduct, or reckless indifference.

Comment

Principal Sources – Delaware Statutory Trust Act § 3817 (2009); Delaware General Corporation Law § 145 (2009); Uniform Trust Code § 1008 (2000).

Under this section the governing instrument may provide for indemnification, advancement of expenses, or exoneration, but not for conduct involving bad faith, willful misconduct, or reckless indifference. Section 104(8) makes this limitation mandatory. This section does not affect the power of a court to issue injunctive or other such equitable relief for breach of trust.

Prohibiting indemnification and exoneration for conduct involving bad faith, willful misconduct, or reckless indifference is familiar trust law. *See* Uniform Trust Code § 1008 (2000); Restatement (Third) of Trusts § 96, cmt. c (T.D. No. 5, 2009); Austin W. Scott, William F. Fratcher & Mark L. Ascher, 4 *Scott and Ascher on Trusts* § 24.27.3 (5th ed. 2007).

The Delaware Statutory Trust Act is to similar effect. Section 3806(e) of that Act provides that the “governing instrument may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a trustee ... ; provided, that [the] governing instrument may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.” Similar limits are common in corporate and alternative entity law. *See* Delaware General Corporation Law § 102(b)(7) (2009); Delaware Limited Liability Company Act § 18-1101(c), (e) (2009); Model Business Corporation Act § 2.02(b)(4)-(5) (2005).

In *Nakahara v. The NS 1991 American Trust*, 739 A.2d 770 (Del. Ch. 1998), the court held that a Delaware statutory trust had the power to advance litigation expenses, but denied the trustees' request for indemnification on the grounds of unclean hands.

An indemnification provision in the governing instrument of a statutory trust that

operates as a mutual fund is subject to Section 17(h) of the Investment Company Act of 1940, which generally prohibits a fund from including in its organizational documents any provision that protects a trustee or officer of a fund against liability to the fund or its shareholders by reason of “willful misfeasance, bad faith, gross negligence or reckless disregard” of the person’s duties as trustee or officer. 15 U.S.C. § 80a-17(h) (2009).

The SEC has taken the position that, before advancing legal fees to a trustee of a mutual fund, the “fund’s board must either (1) obtain assurances, such as by obtaining insurance or receiving collateral provided by the [trustee], that the advance will be repaid if the [trustee] is found to have engaged in disabling conduct, or (2) have a reasonable belief that the [trustee] has not engaged in disabling conduct and ultimately will be entitled to indemnification.” Interpretive Matters Concerning Independent Directors of Investment Companies, Investment Company Act of 1940, S.E.C. Rel. No. 24083 (Oct. 14, 1999), 1999 WL 820629, *10. The SEC has also taken the position that there is a rebuttable presumption that an independent trustee (see Section 512) has not engaged in disabling conduct. *Id.*

SECTION 510. DIRECTION OF TRUSTEES.

(a) The governing instrument may authorize any person, including a beneficial owner, to direct a trustee or other person in the management of a statutory trust.

(b) The governing instrument may provide that neither the power to direct a trustee or other person nor the exercise of the power by any person, including a beneficial owner, causes the person to be a trustee or imposes on the person duties, including fiduciary duties, or liabilities relating to these duties, to a statutory trust or beneficial owner.

(c) If the governing instrument confers on a person a power to direct actions by a trustee or other person, the trustee or other person shall act in accordance with an exercise of the power, unless the direction is manifestly contrary to the terms of the governing instrument or the trustee knows or has reason to know that following the direction would constitute a serious breach of fiduciary duty by the trustee.

Comment

Principal Sources – Delaware Statutory Trust Act § 3806 (2009); Uniform Trust Code § 808 (2000).

Subsection (a) authorizes the use of a directed trustee, meaning a trustee that must act in accordance with the directions of another person. Subsection (b) confirms that the governing instrument may provide that a person that has the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to the statutory trust or to a beneficial owner. Under trust default law in many states, a person that has a power to direct the trustee is presumptively a fiduciary. *See* Uniform Trust Code § 808(d) (2000); Restatement (Third) of Trusts § 75, cmts. c, e, and f (2007).

Following Uniform Trust Code § 808(b), subsection (c) provides that the trustee must refuse to follow a direction that is manifestly contrary to the terms of the governing instrument or that the trustee knows or has reason to know would constitute a serious breach of fiduciary duty. *See also* Restatement (Third) of Trusts § 75; Mary Clarke & Diana S.C. Zeydel, *Directed Trusts: The Statutory Approaches to Authority and Liability*, 35 Est. Plan. 14 (2008); Richard W. Nenno, *Directed Trusts: Can Directed Trustees Limit Their Liability?*, 21 Prob. & Prop. 45 (Nov./Dec. 2007).

The reference in subsection (c) to a “serious” breach of fiduciary duty is designed to exclude an inconsequential, immaterial, or technical breach that does not harm the trust or a beneficial owner. For some purposes, such as trustee removal, trust law distinguishes between “serious” and other breaches of trust. *See* Uniform Trust Code § 706(b)(1) (2000); Restatement (Second) of Trusts § 107, cmt. b (1959); Austin W. Scott, William F. Fratcher & Mark L. Ascher, 2 *Scott and Ascher on Trusts* § 11.10 (5th ed. 2006).

In determining whether a direction is “manifestly contrary to the terms of the governing instrument” or “would constitute a serious breach of fiduciary duty by the trustee,” the trustee must comply with the standards of conduct stated in Section 505. The drafting committee contemplated that, in accord with conventional trust practice, a trustee could apply to the appropriate court for a determination of whether an instruction falls within the exclusion of subsection (c). *See* Restatement (Third) of Trusts § 71 (2007).

Under Section 104(9), the obligation of a trustee not to follow a direction that is manifestly contrary to the terms of the governing instrument or that would constitute a serious breach of trust is not subject to override by the governing instrument.

In conjunction with Section 511, this section facilitates the practice of creating a limited purpose trustee — for example, in a securitization transaction the naming of a person who is responsible for computing distributions or whose consent is required before the statutory trust can petition for bankruptcy.

SECTION 511. DELEGATION BY TRUSTEE.

(a) A trustee may delegate duties and powers. The trustee shall exercise the care a person in a similar position would reasonably believe appropriate under similar circumstances in:

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation; 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) Subject to subsection (a), a trustee may delegate duties and powers to a co-trustee.

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

(d) A trustee that complies with subsection (a) is not liable to a beneficial owner or to the statutory trust for an act or omission of the agent of the trustee to which a function was delegated.

(e) An agent of a trustee submits to the jurisdiction of the courts of this state by accepting a delegation of powers or duties from a trustee with respect to a claim related to the agency.

Comment

Principal Sources – Uniform Trust Code § 807 (2000); Delaware Statutory Trust Act § 3806 (2009).

This section is intended to facilitate delegation to specialists by reversing the outmoded common-law rule that prohibited delegation by a trustee. *See* John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105 (1994). In authorizing delegation, this section follows the Delaware Statutory Trust Act and modern law with respect to common-law trusts. *See* Delaware Statutory Trust Act § 3806(i) (2009); Uniform Trust Code § 807 (2000); Restatement (Third) of Trusts § 80 (2007); *see also* Uniform Prudent Investor Act § 9 (1994).

Subsections (a), (c), (d), and (e) are patterned on Uniform Trust Code § 807, which is derived from Uniform Prudent Investor Act § 9. However, this section deviates from those Acts on the issue of delegation to a co-trustee. Subsection (b) treats delegation to a co-trustee in the same manner as delegation to another person. By contrast, traditional law disfavors delegation by one co-trustee to another. *See* Uniform Trust Code § 703(e); Restatement (Third) of Trusts § 81, cmt. c(1). The traditional rule is based on the assumption that, if the donor named more than one

trustee, the donor intended each to be a check on the others. That policy does not fit commercial statutory trust practice, in which limited-purpose trustees are common.

There is an intrinsic tension in trust law between granting trustees broad powers that facilitate flexible and efficient trust administration, on the one hand, and protecting trust beneficiaries from the misuse of such powers on the other hand. Delegation, which is a species of trustee power, raises the same tension. If the trustee delegates effectively, the beneficiaries obtain the advantage of the agent's specialized skills or whatever other attributes induced the trustee to delegate. But if the trustee delegates to a knave or an incompetent, the delegation can work harm upon the beneficiaries.

This section is designed to strike the appropriate balance between the advantages and the hazards of delegation. It authorizes delegation under the limitations of subsections (a) and (c). Subsection (a) requires the trustee to exercise the care a person in a similar position would reasonably believe appropriate under similar circumstances in selecting the agent, in establishing the terms of the delegation, and in monitoring the agent's compliance with the terms of the delegation.

The trustee's duty of care in framing the terms of the delegation should protect the beneficial owners against overbroad delegation. For example, a trustee could not prudently agree to a delegation agreement containing an exculpation clause that leaves the statutory trust without recourse against reckless action or bad faith by the agent. Leaving the trust without a remedy for willful wrongdoing is inconsistent with the trustee's duty of care in formulating the terms of the delegation.

Although subsection (d) exonerates the trustee from personal responsibility for the agent's conduct when the delegation satisfies the standards of subsection (a), subsection (c) makes the agent responsible to the statutory trust. The beneficial owners can, therefore, rely upon the trustee to enforce the terms of the delegation.

Mutual funds often receive a common set of services from an organization, typically the investment advisor or an affiliate, that specializes in operating mutual funds. The trustees monitor the service providers and the Investment Company Act of 1940 requires the trustees to approve the contracts with the advisor or affiliate. *See* 15 U.S.C. § 80a-15 (2009).

SECTION 512. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT COMPANY.

(a) In this section, "affiliated person" and "interested person" have the meanings set forth in the Investment Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq. [or any successor statute] [and any regulations issued thereunder].

(b) If a statutory trust is registered as an investment company under the Investment Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [or any successor statute] [and any regulations issued thereunder,] a trustee is an independent trustee for all purposes under this [act] if the trustee is not an interested person of the trust. The receipt of compensation both for service as an independent trustee of the trust and for service as an independent trustee of one or more other investment companies managed by a single investment adviser or an affiliated person of an investment adviser, does not affect the status of the trustee as an independent trustee under this section.

Comment

Principal Source – Delaware Statutory Trust Act § 3801 (2009).

This section addresses the question of trustee independence in circumstances in which a trustee serves as a director on multiple mutual fund boards within the same fund complex. In *Strougo v. Scudder, Stevens & Clark, Inc.*, 964 F. Supp. 783 (S.D.N.Y. 1997) (applying Maryland law), the plaintiffs brought a derivative suit against a fund’s investment adviser alleging excessive fees. The plaintiffs did not, however, make a demand on the fund’s directors prior to filing suit. The court excused the plaintiffs from the demand requirement because the directors served on multiple boards within the complex, receiving “substantial remuneration,” and thus were not independent in light of their close financial relationship with the investment adviser. *Id.* at 793-95.

The Maryland legislature effectively overruled *Strougo* in 1998 by amending the Maryland corporate code to provide that directors who are not “interested persons” under the Investment Company Act of 1940 are deemed disinterested under Maryland law. *See* Md. Code Corps. & Ass’ns § 2-405.3 (2009). A similar provision took effect in Massachusetts in 1999, *see* Mass. Gen. Laws. ch. 182, § 2B (2009), and in Delaware in 2000, *see* Delaware Statutory Trust Act § 3801(h) (2009). Almost all mutual funds are organized as Maryland corporations, Massachusetts trusts, or Delaware statutory trusts. Consistent with the Maryland, Massachusetts, and Delaware legislation, this section rejects *Strougo* by deeming a trustee to be independent if the trustee is not an interested person under the Investment Company Act of 1940 (*see* 15 U.S.C. § 80a-2(19) (2009)).

[ARTICLE] 6

BENEFICIARIES AND BENEFICIAL RIGHTS

SECTION 601. BENEFICIAL INTEREST.

(a) A beneficial interest in a statutory trust is freely transferable.

(b) A beneficial interest in a statutory trust is personal property regardless of the nature of the property of the trust.

(c) A beneficial interest in a statutory trust is not an interest in specific property of the statutory trust.

(d) A beneficial owner does not have a preemptive right to subscribe to any additional issue of beneficial interests or any other interest of a statutory trust.

Comment

Principal Sources – Delaware Statutory Trust Act § 3805 (2009); Revised Uniform Limited Liability Company Act § 404 (2006).

Subsection (a) provides as a default rule that a beneficial interest in the statutory trust is freely transferable. This subsection therefore overrides the rule in some states that makes a common-law trust spendthrift by default. *See* Jeffrey A. Schoenblum, 2009 Multistate Guide to Estate Planning Table 9.05, Part 1, Column 2 (identifying such states). Because the rule stated in subsection (a) is not scheduled in Section 104, it is subject to override by the governing instrument. Section 103(e)(2) further confirms that the governing instrument may limit the transferability of a beneficial interest. In the event that a beneficial owner's beneficial interest is not freely transferable, Section 606 provides for a charging order against the beneficial owner's rights to distributions.

SECTION 602. VOTING OR CONSENT BY BENEFICIAL OWNERS. On any matter that is to be acted on by beneficial owners, the following rules apply:

(1) The beneficial owners act by majority of the beneficial interests.

(2) The beneficial owners may take the action without a meeting, without notice, and without a vote, if beneficial owners having at least the minimum number of votes necessary to

authorize or take the action at a meeting at which all beneficial owners entitled to vote thereon were present and voted consent in a signed record. However, prompt notice of the action must be given to those beneficial owners that did not consent.

(3) A beneficial owner may vote in person or by proxy, but if by proxy, the proxy must be contained in a signed record.

Comment

Principal Sources – Delaware Statutory Trust Act § 3806 (2009); Delaware General Corporation Law § 228 (2009).

Except for conversion, merger, or dissolution under Articles 7 and 8, and amendment of the governing instrument under Section 103(d), nothing in this act provides for the beneficial owners to act on any matter. However, the governing instrument may provide the beneficial owners such a right. This section supplies default rules for voting by the beneficial owners in such circumstances. In the usual case, the governing instrument will address voting rules by providing a per capital or other share-based allocation of voting rights. The drafting committee declined the suggestion to try to incorporate such a rule as a default, however, because such rules are necessarily transaction-specific and hence infeasible to specify in a default. *Cf.* Revised Uniform Partnership Act § 401(f) (1997) (giving each partner “equal rights in the management and conduct of the partnership business”).

The Investment Company Act of 1940 specifies the percentage of votes necessary to approve certain actions related to the investment company. In other instances, that Act requires the action to be approved at a shareholders’ meeting called for that purpose. In such instances, approval of the action by the shareholders’ written consent without notice would not be valid. For example, Section 16(a) provides that “[n]o person shall serve as a director of a registered investment company unless elected to that office by the holders of the outstanding voting securities of such company, at an annual or a special meeting duly called for that purpose.” 15 U.S.C. § 80a-16(a) (2009). In addition, investment companies seeking the vote of shareholders on specific actions must comply with rules governing the communication to, and solicitation of, their shareholders. *See* Rules 14a-1 to 14b-2, 17 C.F.R. §§ 240.14a-1 to 240.14b-2 (2009). These rules are significantly more comprehensive than most state laws governing communications to shareholders and other aspects of shareholder meetings.

Section 103(e)(4) confirms that the governing instrument may override the rules stated in this section.

SECTION 603. CONTRIBUTION BY BENEFICIAL OWNER.

(a) A contribution of a beneficial owner to a statutory trust may be in cash, property, or

services rendered or a promissory note or other obligation to contribute cash or property or to perform services. A person may become a beneficial owner of a statutory trust and may receive a beneficial interest in a statutory trust without making a contribution or being obligated to make a contribution to the trust.

(b) A beneficial owner is liable to the statutory trust for failure to perform an obligation to contribute cash or property or to perform services, even if the beneficial owner is unable to perform because of death, disability, or any other reason. If a beneficial owner does not make the required contribution of cash, property, or services, the beneficial owner is obligated, at the option of the trust, to contribute cash equal to that part of the value of the contribution that has not been made. This obligation is in addition to any other right, including the right to specific performance, that the trust has against the beneficial owner under the governing instrument or applicable law.

(c) The governing instrument may provide that a beneficial owner that fails to make a required contribution, or comply with the terms and conditions of the governing instrument, is subject to specified penalties for or consequences of the failure, including:

- (1) reduction or elimination of the defaulting beneficial owner's proportionate interest in the statutory trust or series thereof;
- (2) subordination of the defaulting beneficial owner's beneficial interest to that of nondefaulting beneficial owners;
- (3) forced sale or forfeiture of the defaulting beneficial owner's beneficial interest;
- (4) imposition of an obligation to repay a loan to the statutory trust by another beneficial owner of the amount necessary to meet the defaulting beneficial owner's commitment;

(5) redemption or sale of the defaulting beneficial owner's beneficial interest at a value fixed by appraisal or by formula; and

(6) specific performance of an obligation under the governing instrument.

Comment

Principal Source – Delaware Statutory Trust Act § 3802 (2009).

Although statutory trusts are used primarily as a mode of business organization, subsection (a) acknowledges that a beneficial owner may obtain a beneficial interest without an exchange of consideration, an event that is not uncommon in existing commercial practice. However, a statutory trust may not be used to effect a donative transfer, because Section 303(b) prohibits a statutory trust from having a “predominantly donative purpose.”

Subsection (c) authorizes the specified penalties for a beneficial owner's failure to comply with the governing instrument. *Cf.* Delaware Limited Liability Company Act § 18-502(c) (2009).

Section 103(e)(1) confirms that the governing instrument may specify the means for determining beneficial ownership. Section 103(e)(12) confirms that the governing instrument may specify the conditions under which a person becomes a beneficial owner.

SECTION 604. DISTRIBUTION TO BENEFICIAL OWNER.

(a) When a beneficial owner becomes entitled to receive a distribution, with respect to the distribution, the beneficial owner has the status of, and is entitled to all remedies available to, a creditor of the statutory trust.

(b) A beneficial owner does not have a right to demand or receive a distribution from the trust in any form other than money.

(c) The trust may distribute an asset in kind if each part of the asset is fungible with each other part and each beneficial owner receives a percentage of the asset equal in value to the beneficial owner's share of the distribution.

Comment

Principal Sources – Delaware Statutory Trust Act § 3805 (2009); Revised Uniform

Limited Liability Company Act § 404 (2006).

In a statutory trust that is a registered investment company organized as an open-end mutual fund, a shareholder (beneficial owner) may request a redemption of any or all of his shares (beneficial interests), and the statutory trust is obligated to honor the redemption request and pay the redemption proceeds within seven days (except under limited circumstances such as an emergency). *See* 15 U.S.C. § 80a-22(e) (2009). The redemption proceeds must be in the form of cash unless the open-end mutual fund has filed with the Securities and Exchange Commission a notification of election on Form N-18F-1. *See* 17 C.F.R. § 270.18f-1 (2009). In such a case, the open-end mutual fund may pay the redemption in kind (i.e., distribute assets of the fund instead of cash) to a shareholder that during the previous 90-day period has redeemed either (1) \$250,000 or more of shares, or (2) shares equal to one or more percent of the net asset value of the fund. *Id.*

Section 103(e)(14) confirms that the governing instrument may provide for the establishment of record dates for distributions.

SECTION 605. REDEMPTION OF BENEFICIAL INTEREST. A statutory trust may acquire, by purchase, redemption, or otherwise, any beneficial interest in the trust or series thereof. A beneficial interest acquired under this section is canceled.

Comment

Principal Source – Delaware Statutory Trust Act § 3818 (2009).

A registered investment company organized as an open-end mutual fund generally is obligated to honor redemption requests by its shareholders at the net asset value per share next calculated after receipt of the request, with payment to be made in cash (or, in some cases, in kind) within seven days of the request. *See* 15 U.S.C. § 80a-22 (2009); 17 CFR § 270.22c-1 (2009). In narrowly defined circumstances, this redemption right and obligation may be postponed. *See* 15 U.S.C. § 80a-22(e) (2009). The redemption proceeds may be reduced by various fees retained by the fund and/or its selling agent (i.e., redemption fees and sales loads). *See* 17 CFR §§ 270.22c-2, 270.6c-10 (2009).

SECTION 606. CHARGING ORDER.

(a) If a beneficial interest is not freely transferable by a beneficial owner so that the transferee has all rights of the transferor, a judgment creditor of a beneficial owner may satisfy the judgment against the beneficial owner's beneficial interest only as provided in this section.

(b) On application by a judgment creditor of a beneficial owner, the [appropriate court] may issue a charging order against the beneficial owner's right to distributions from the trust for the unsatisfied part of the judgment and:

(1) appoint a receiver of the distributions subject to the charging order, with the power to enforce the beneficial owner's right to a distribution; and

(2) make other orders necessary to give effect to the charging order.

(c) A charging order issued under subsection (b) is a lien on the beneficial owner's right to distributions and requires the statutory trust to pay over to the judgment creditor any distribution that would otherwise be paid to the beneficial owner until the judgment has been satisfied.

(d) A statutory trust or beneficial owner that is not subject to a charging order issued under subsection (b) may pay to the judgment creditor the full amount due under the judgment lien and thereby succeed to the rights of the judgment creditor, including the charging order.

(e) This [act] does not deprive a beneficial owner or a transferee of the beneficial interest of any exemption applicable to the beneficial interest.

Comment

Principal Source – Revised Uniform Limited Liability Company Act § 503 (2006).

Under Section 601(a), a beneficial interest in a statutory trust is presumptively freely transferable. However, that provision is not scheduled in Section 104, and accordingly, the governing instrument may restrict the transferability of a beneficial interest, as Section 103(e)(2) confirms.

This section allows a judgment creditor of a beneficial owner to obtain a charging order against the beneficial owner's right to distributions from the statutory trust if, under the governing instrument, the beneficial owner's beneficial interest is not transferable to the creditor in satisfaction of the judgment. In such circumstances, the charging order entitles the creditor to receive any distribution due to the beneficial owner until the judgment has been satisfied. Charging orders are familiar partnership and alternative entity law. *See, e.g.*, Revised Uniform

Limited Liability Company Act § 503 (2006); Uniform Limited Partnership Act § 703 (2001); Revised Uniform Partnership Act § 504 (1997).

Under Section 104(10), the governing instrument may not restrict the right of a judgment creditor of a beneficial owner to seek a charging order under this section.

SECTION 607. TRANSACTION WITH BENEFICIAL OWNER. Subject to Section 507, a beneficial owner or related party of a beneficial owner may lend money to, borrow money from, act as a surety, guarantor, or endorser for, guarantee or assume an obligation of, provide collateral for, or do other business with the statutory trust and, subject to law other than this [act], has the same rights and obligations with respect to those matters as a person that is not a beneficial owner.

Comment

Principal Source – Delaware Statutory Trust Act § 3806 (2009).

This section validates transactions between a statutory trust and a beneficial owner or a related party of a beneficial owner, unless the beneficial owner or related party of the beneficial owner is a covered party under Section 507, in which case the rules of that section apply.

SECTION 608. BENEFICIAL OWNER’S RIGHT TO INFORMATION. A beneficial owner has the right to receive from the statutory trust or a trustee information relating to the affairs of a statutory trust which is reasonably related to the beneficial owner’s interest. The beneficial owner may enforce this right by summary proceeding in the [appropriate court].

Comment

Principal Source – Delaware Limited Liability Company Act § 18-305 (2009).

Under Section 104(11), a beneficial owner’s right to information under this section is not subject to override by the governing instrument. However, a beneficial owner’s right to information under this section is limited to information “reasonably related to the beneficial owner’s interest,” and under Section 104(11), the governing instrument may prescribe the standards by which “reasonably related” is determined if those standards are not manifestly unreasonable.

Imposing a mandatory, minimum right to information necessary for the beneficiary to be able to enforce the trust is familiar law. *See* Restatement (Third) of Trusts § 82, cmt. a(2) (2007) (providing that “a beneficiary is always entitled ... to request such information as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust”); *see also* Austin W. Scott, William F. Fratcher & Mark L. Ascher, 3 Scott and Ascher on Trusts § 17.5 (5th ed. 2007); T.P. Gallanis, The Trustee’s Duty to Inform, 85 N.C. L. Rev. 1595 (2007).

The drafting committee declined the suggestion to include in this section a schedule of accessible information on the grounds that such a schedule necessarily would be over- and under-inclusive. Instead, the committee contemplated that the term “reasonably related” would provide a more suitable right to information, because the beneficiary may obtain a court order in a summary proceeding for the release of any type of information that bears on the beneficial owner’s beneficial interest.

Allowing summary or expedited proceedings for access to information is familiar business entity law. *See, e.g.*, Model Business Corporation Act §§ 16.04-16.05 (2005).

Section 508 addresses a trustee’s right to information.

SECTION 609. ACTION BY BENEFICIAL OWNER.

(a) A beneficial owner may maintain a direct action against a statutory trust to redress an injury sustained by, or to enforce a duty owed to, the beneficial owner if the beneficial owner can prevail without showing an injury or breach of duty to the trust.

(b) A beneficial owner may maintain a derivative action to redress an injury sustained by, or enforce a duty owed to, a statutory trust if:

(1) the beneficial owner first makes a demand on the trustees, requesting that the trustees cause the trust to bring an action to redress the injury or enforce the right, and the trustees do not bring the action within a reasonable time; or

(2) a demand would be futile.

(c) A derivative action on behalf of a statutory trust may be maintained only by a person that is a beneficial owner at the time the action is commenced and:

(1) was a beneficial owner when the conduct giving rise to the action occurred; or

(2) acquired the status as a beneficial owner by operation of law or pursuant to the terms of the governing instrument from a person that was a beneficial owner at the time of the conduct.

(d) In a derivative action on behalf of the statutory trust, the complaint must state with particularity:

(1) the date and content of the plaintiff's demand and the trustees' response to the demand; or

(2) the reason the demand should be excused as futile.

(e) Except as otherwise provided in subsection (f):

(1) any proceeds or other benefits of a derivative action on behalf of a statutory trust, whether by judgment or settlement, are the property of the trust and not of the plaintiff; and

(2) if the plaintiff receives any proceeds or other benefits, the plaintiff shall immediately remit them to the trust.

(f) If a derivative action on behalf of a statutory trust is successful in whole or in part, the court may award the plaintiff reasonable attorney's fees, costs, and other expenses from the recovery by the trust.

(g) A derivative action on behalf of a statutory trust may not be voluntarily dismissed or settled without the court's approval.

Comment

Principal Sources – Uniform Limited Partnership Act §§ 1001-1005 (2001); ALI Principles of Corporate Governance § 7.01(a)-(b) (1994); Delaware Statutory Trust Act § 3816 (2009).

Under Section 104(12), the governing instrument may not eliminate the right of a beneficial owner to bring an action under this section. However, Section 104(12) permits the

governing instrument to subject the right to additional standards and restrictions, including the requirement that beneficial owners owning a specified amount or type of beneficial interest join in bringing the action, provided that the additional standards and restrictions are not manifestly unreasonable.

In protecting the right to bring suit, but allowing that right to be subjected to additional standards and restrictions that are not manifestly unreasonable, the drafting committee balanced two policy objectives that are in tension. On the one hand, without the right to bring an action, a beneficial owner might have no recourse in the event of trustee misconduct. On the other hand, without appropriate safeguards, a meritless action might be brought with the aim of extracting a nuisance settlement. *See, e.g.*, Reinier Kraakman, Hyun Park & Steven Shavell, *When Are Shareholder Suits in Shareholder Interests?*, 82 *Georgetown L.J.* 1733 (1994).

For a discussion of remedies, see the Comment to Section 105.

[ARTICLE] 7

CONVERSION AND MERGER

SECTION 701. DEFINITIONS. In this [article]:

- (1) “Constituent organization” means an organization that is party to a merger.
- (2) “Constituent statutory trust” means a constituent organization that is a statutory trust.
- (3) “Converted organization” means the organization into which a converting organization converts pursuant to Sections 702 through 705.
- (4) “Converting organization” means an organization that converts into another organization pursuant to Section 702.
- (5) “Converting statutory trust” means a converting organization that is a statutory trust.
- (6) “Governing law” means the law that governs an organization’s internal affairs.
- (7) “Organization” means a common-law trust that does not have a predominantly donative purpose; general partnership, including a limited liability partnership; limited partnership, including a limited liability limited partnership; limited liability company; corporation; or foreign statutory trust. The term includes a domestic or foreign organization whether or not organized for profit.
- (8) “Organizational documents” means the records that create an organization and determine its internal governance and the relations among the persons that own it, have an interest in it, or are members of it.
- (9) “Surviving organization” means an organization into which one or more other organizations are merged, whether the surviving organization preexisted the merger or was created by the merger.

Comment

Principal Source – Uniform Limited Partnership Act § 1101 (2001).

This section contains definitions specific to this article.

Paragraph (7) includes within the definition of organization a common-law trust that does not have a predominantly donative purpose. Thus, such a trust may convert to or merge with a statutory trust under this article if the trust's governing law permits a conversion or merger. Unlike the formation of a new statutory trust by filing a certificate of trust under Section 201, an option that Section 1005 expressly affords to a common-law trust, conversion or merger under this article preserves continuity in the organization's relationships with third parties (see Section 705). The exclusion of a common-law trust with a predominantly donative purpose follows from the rule of Section 303, which is explained in the Comment to that section.

Under Section 104(13), the governing instrument may not override the definitions stated in this section.

SECTION 702. CONVERSION.

(a) An organization other than a statutory trust may convert to a statutory trust, and a statutory trust may convert to another organization pursuant to this section and Sections 703 through 705 and a plan of conversion, if:

- (1) the conversion is not prohibited by the governing law of the other organization; and
- (2) the other organization complies with its governing law in effecting the conversion.

(b) A plan of conversion must be in a record and must include:

- (1) the name and form of the organization before conversion;
- (2) the name and form of the organization after conversion;
- (3) the terms and conditions of the conversion, including the manner of and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration; and

(4) the organizational documents of the converted organization.

Comment

Principal Sources – Uniform Limited Partnership Act § 1102 (2001); Model Entity Transactions Act § 406 (2005).

In a statutory conversion, an existing organization changes its form, the jurisdiction of its governing law, or both. For example, a statutory trust formed under the laws of one jurisdiction might convert to a corporation, limited liability company, or limited partnership under the laws of the same or another jurisdiction (referred to in some statutes as “domestication”).

In contrast to a merger, which involves at least two entities, a conversion involves only one. The converting and converted organizations are the same organization (see Section 705(a)). For this act to apply to a conversion, either the converting or converted organization must be a statutory trust subject to this act.

A plan of conversion may provide that some persons with interests in the converting organization will receive interests in the converted organization while other persons with interests in the converting organization will receive some other form of consideration. A “squeeze out” conversion is therefore possible.

SECTION 703. ACTION ON PLAN OF CONVERSION BY CONVERTING STATUTORY TRUST.

(a) A plan of conversion must be consented to by all trustees and all beneficial owners of a converting statutory trust.

(b) A converting statutory trust may amend a plan of conversion or abandon the planned conversion:

(1) as provided in the plan; and

(2) except as prohibited by the plan, by the same consent as was required to approve the plan.

Comment

Principal Source – Uniform Limited Partnership Act § 1103 (2001).

Because this section is not scheduled in Section 104, the requirement in subsection (a) of unanimous consent by all trustees and beneficiaries is a default rule that the governing

instrument may override, as Section 103(e)(6)(B) confirms. Thus, the governing instrument may prescribe a different quantum of consent or provide a different approval mechanism, and might subject a beneficial owner to a conversion, including a “squeeze out” conversion, without consent and with no appraisal remedy. If the converting organization is a statutory trust subject to this act, the trustee of the converting organization is subject to the standards of conduct stated in this act. Those standards of conduct would apply to the process and terms under which the conversion occurs. However, if the governing instrument allows for a conversion with less than unanimous consent, the mere fact that a beneficial owner objects to a conversion does not mean that a trustee that has favored, arranged, consented to, or effected the conversion has breached a duty under this act.

In the case of a statutory trust that is a registered investment company organized as an open-end mutual fund, a shareholder may elect to redeem any or all beneficial interests in the statutory trust at the current net asset value per share, *see* 17 C.F.R. § 270.22c-1 (2009), which is a price that is akin to an appraisal value. Except for limited circumstances, a mutual fund is required to pay proceeds to the redeeming shareholder within seven days of the date of redemption request. *See* 15 U.S.C. § 80a-22(e) (2009). A mutual fund generally does not afford dissenting rights to its shareholders because any shareholder of a mutual fund being converted may redeem fund shares at net asset value prior to the closing date of the proposed conversion.

SECTION 704. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.

(a) After a conversion is approved:

(1) a converting statutory trust shall deliver to the [Secretary of State] for filing articles of conversion, which must include:

(A) a statement that the trust has been converted into another organization;

(B) the name and form of the converting organization and the jurisdiction of its governing law;

(C) a statement that the conversion was approved as required by this [act];

(D) a statement that the conversion is not prohibited by the governing law of the converted organization; and

(E) if the converted organization is a foreign organization not authorized

to do business in this state, the street and mailing address of an office that the [Secretary of State] may use for the purposes of Section 705(c); and

(2) if the converting organization is not a statutory trust, the converting organization shall deliver to the [Secretary of State] for filing a certificate of trust, which must include, in addition to the information required by Section 201:

(A) a statement that the trust was converted from another organization;

(B) the name and form of the converting organization and the jurisdiction of its governing law; and

(C) a statement that the conversion was approved in a manner that complied with the organization's governing law.

(b) A conversion becomes effective when the certificate of conversion is effective as provided in Section 204(c).

Comment

Principal Source – Uniform Limited Partnership Act § 1104 (2001).

Under subsection (b), the governing law of the converted organization determines the effective date of a conversion.

Under Section 104(13), the governing instrument may not override this section.

SECTION 705. EFFECT OF CONVERSION.

(a) An organization that has been converted pursuant to this [article] is for all purposes the same organization that existed before the conversion.

(b) When a conversion under this [article] takes effect:

(1) all property owned by the converting organization remains vested in the converted organization;

(2) all debts, obligations, and other liabilities of the converting organization,

including those existing with respect to the property of a series thereof, continue as debts, obligations, or other liabilities of the converted organization limited to the property of any series thereof as provided for by the plan of conversion and the governing law of the converted organization;

(3) an action or proceeding pending by or against the converting organization continues as if the conversion had not occurred;

(4) except as prohibited by law other than this [act], the rights, privileges, immunities, powers, and purposes of the converting organization remain vested in the converted organization;

(5) except as otherwise provided in the plan of conversion, the terms and conditions of the plan of conversion take effect; and

(6) except as otherwise agreed, the conversion does not dissolve a converting statutory trust or any series thereof for the purposes of Section 801.

(c) A converted organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability for which the converting statutory trust is liable, if, before the conversion, the converting statutory trust was subject to suit in this state on the debt, obligation, or other liability. A converted organization that is a foreign organization and not authorized to do business in this state may be served with process in accordance with Section 212.

Comment

Principal Source – Uniform Limited Partnership Act § 1105 (2001); Model Entity Transactions Act § 406 (2006).

Subsection (a) confirms that conversion changes an organization's legal form, but does not create a new organization. Unlike a merger, a conversion involves a continuing organization.

Under subsection (b), a conversion does not transfer any of the organization's rights or obligations.

Under Section 104(13), the governing instrument may not override this section.

SECTION 706. MERGER.

(a) A statutory trust may merge with one or more other constituent organizations pursuant to this section and Sections 707 through 709 and a plan of merger if:

(1) the merger is not prohibited by the governing law of any constituent organization; and

(2) each of the other organizations complies with its governing law in effecting the merger.

(b) A plan of merger must be in a record and must include:

(1) the name and form of each constituent organization;

(2) the name and form of the surviving organization and, if the surviving organization is to be created by the merger, a statement to that effect;

(3) the terms and conditions of the merger, including the manner and basis for converting or exchanging the interests in each constituent organization into any combination of money, interests in the surviving organization, and other consideration;

(4) if the surviving organization is to be created by the merger, the surviving organization's organizational documents; and

(5) if the surviving organization is not to be created by the merger, any amendments to be made by the merger to the surviving organization's organizational documents.

Comment

Principal Source – Uniform Limited Partnership Act § 1106 (2001).

For this act to apply to a merger, at least one of the constituent organizations must be a statutory trust subject to this act.

A plan of merger may provide that some persons with interests in a constituent organization will receive interests in the surviving organization, while other persons with interests in the same constituent organization will receive some other form of consideration. A “squeeze out” merger is therefore possible. The standards of conduct stated in this act apply to a trustee of a constituent organization that is a statutory trust subject to this act. Those duties would apply to the process and terms under which a “squeeze out” merger occurs. See the Comment to Section 703.

SECTION 707. ACTION ON PLAN OF MERGER BY CONSTITUENT

STATUTORY TRUST.

(a) A plan of merger must be consented to by all trustees and all beneficial owners of a constituent statutory trust.

(b) After a merger is approved, and at any time before a filing is made under Section 708, a constituent statutory trust may amend the plan or abandon the planned merger:

(1) as provided in the plan; and

(2) except as prohibited by the plan, with the same consent as was required to approve the plan.

Comment

Principal Source – Uniform Limited Partnership Act § 1107 (2001).

Because this section is not scheduled in Section 104, the requirement in subsection (a) of unanimous consent by all trustees and beneficiaries is a default rule that the governing instrument may override, as Section 103(e)(6)(B) confirms. Thus, the governing instrument may state a different quantum of consent or provide a completely different approval mechanism, and a beneficial owner might be subject to a merger, including a “squeeze out” merger, without consent and with no appraisal remedy. The trustee of a constituent statutory trust is subject to the standards of conduct stated in this act, and those standards would apply to the process and terms under which the merger occurs. However, if the governing instrument allows for a merger with less than unanimous consent, the mere fact that a beneficial owner objects to a merger does not mean that a trustee that has favored, arranged, consented to, or effected the merger has breached a duty under this act.

As discussed in the Comment to Section 703, an open-end mutual fund generally does not afford dissenting rights to its shareholders, because any shareholder of an acquired mutual fund may redeem acquired fund shares at net asset value prior to the closing date of the proposed reorganization of the acquired fund.

SECTION 708. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.

(a) After each constituent organization has approved a merger, articles of merger must be signed on behalf of:

(1) each constituent statutory trust, by one or more trustees or other authorized representative; and

(2) each other constituent organization, by an authorized representative.

(b) Articles of merger under this section must include:

(1) the name and form of each constituent organization and the jurisdiction of its governing law;

(2) the name and form of the surviving organization, the jurisdiction of its governing law, and, if the surviving organization is created by the merger, a statement to that effect;

(3) if the surviving organization is to be created by the merger:

(A) if it will be a statutory trust, the trust's certificate of trust; or

(B) if it will be an organization other than a statutory trust, the organizational document that creates the organization;

(4) if the surviving organization preexisted the merger, any amendments provided for in the plan of merger for the organizational document that created the organization;

(5) a statement as to each constituent organization that the merger was approved as required by the organization's governing law;

(6) if the surviving organization is a foreign organization not authorized to do business in this state, the street and mailing address of an office that the [Secretary of State] may use for the purposes of Section 709(b); and

(7) any additional information required by the governing law of any constituent organization.

(c) Articles of merger must be delivered to the office of the [Secretary of State] for filing.

(d) A merger becomes effective under this [article]:

(1) if the surviving organization is a statutory trust, on the later of:

(A) filing of the articles of merger by the [Secretary of State]; or

(B) subject to Section 204(c)(2), (3), or (4), as specified in the articles of merger; or

(2) if the surviving organization is not a statutory trust, as provided by the governing law of the surviving organization.

Comment

Principal Source – Uniform Limited Partnership Act § 1108 (2001).

Under Section 104(13), the governing instrument may not override this section.

SECTION 709. EFFECT OF MERGER.

(a) When a merger becomes effective:

(1) the surviving organization continues or comes into existence;

(2) each constituent organization that merges with the surviving organization ceases to exist as a separate organization;

(3) all property owned by each constituent organization that ceases to exist vests

in the surviving organization;

(4) all debts, obligations, and other liabilities of each constituent organization that ceases to exist, including those existing with respect to the property of a series thereof, continue as debts, obligations, or other liabilities of the surviving organization limited to the property thereof as provided for by the plan of merger and the governing law of the surviving organization;

(5) an action or proceeding pending by or against any constituent organization that ceases to exist continues as if the merger had not occurred;

(6) except as prohibited by law other than this [act], all rights, privileges, immunities, powers, and purposes of each constituent organization that ceases to exist vest in the surviving organization;

(7) except as otherwise provided in the plan of merger, the terms and conditions of the plan of merger take effect;

(8) if the surviving organization is created by the merger and:

(A) if it is a statutory trust, the certificate of trust becomes effective; or

(B) if it is an organization other than a statutory trust, the organizational document that creates the organization becomes effective; and

(9) if the surviving organization preexisted the merger, any amendment provided for in the articles of merger for the organizational document that created the organization becomes effective.

(b) A surviving organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability of a constituent organization if, before the merger, the constituent organization was subject to suit in this state on

the debt, obligation, or other liability. A surviving organization that is a foreign organization not authorized to do business in this state may be served with process in accordance with Section 212.

Comment

Principal Source – Uniform Limited Partnership Act § 1109 (2001).

Under Section 104(13), the governing instrument may not override this section.

SECTION 710. [ARTICLE] NOT EXCLUSIVE. This [article] does not preclude an organization from being converted or merged under law other than this [act].

Comment

Principal Source – Uniform Limited Partnership Act § 1113 (2001).

[ARTICLE] 8

DISSOLUTION AND WINDING UP

SECTION 801. EVENTS CAUSING DISSOLUTION. A statutory trust is dissolved only by:

(1) an administrative dissolution under Section 806; or

(2) the filing of articles of dissolution under Section 802:

(A) on the occurrence of an event or circumstance that the governing instrument states causes dissolution; or

(B) with the approval of all the beneficial owners.

Comment

Principal Source – Revised Uniform Limited Liability Company Act § 701 (2006).

This section provides that a statutory trust may be dissolved only by delivering articles of dissolution under Section 802 or by administrative dissolution under Section 806. Under Section 306, the governing instrument need not provide for an event or circumstance that triggers dissolution, and may provide that the trust cannot be dissolved even with the approval of all the beneficial owners. In the absence of a contrary provision in the governing instrument, the default rule of unanimity stated in paragraph (2)(B) of this section prevails over the general rule of majority vote stated in Section 602(1). However, under Section 104(14), the governing instrument cannot override administrative dissolution.

SECTION 802. ARTICLES OF DISSOLUTION.

(a) If dissolution of a statutory trust is authorized under Section 801, the trust shall deliver to the [Secretary of State] for filing articles of dissolution setting forth:

(1) the name of the trust; and

(2) the date of the dissolution.

(b) Except as otherwise provided in Section 204(c), a statutory trust is dissolved when articles of dissolution that comply with subsection (a) are filed by the [Secretary of State].

Comment

Principal Source – Model Business Corporation Act § 14.03 (2005).

The filing of articles of dissolution under subsection (a) makes the decision to dissolve a matter of public record and establishes the time when the statutory trust must begin the process of winding up under Section 803. Subsection (b) governs the effective date of the dissolution.

Under Section 104(14), the governing instrument may not override this section.

SECTION 803. WINDING UP.

(a) A dissolved statutory trust shall wind up its activities, and the trust and each series thereof continues after dissolution only for the purpose of its winding up.

(b) In winding up its activities, a statutory trust shall:

(1) discharge the trust's debts, obligations, and other liabilities, settle and close the trust's activities, and marshal and distribute the property of the trust; and

(2) distribute any surplus property after complying with paragraph (1) to the beneficial owners in proportion to their beneficial interests.

(c) In winding up its activities, a statutory trust may:

(1) preserve the trust's activities and property as a going concern for a reasonable time;

(2) institute, maintain, and defend actions and proceedings, whether civil, criminal, or administrative;

(3) transfer the trust's property;

(4) settle disputes; and

(5) perform other acts necessary or appropriate to its winding up.

(d) Trustees of a dissolved statutory trust that has disposed of claims under Section 804 or 805 are not liable for breach of duty with respect to claims against the trust that are barred or

satisfied under Section 804 or 805.

(e) The dissolution of a statutory trust does not terminate the authority of its agent for service of process.

(f) On application of any person that shows good cause, the [appropriate court] may appoint a person to be a receiver for a dissolved statutory trust with the power to undertake any action that might have been done by the trust during its winding up if the action is necessary for final settlement of the trust.

Comment

Principal Sources – Revised Uniform Limited Liability Company Act §§ 702, 708 (2006); Model Business Corporation Act § 14.09 (2005); Delaware Limited Liability Company Act § 18-805 (2009).

Upon the effective date of the articles of dissolution under Section 802, a statutory trust may continue only for the purpose of winding up.

In winding up the statutory trust within a reasonable time, the trustees are neither required to undertake a fire sale of the property of the statutory trust on unfavorable terms nor permitted to continue the trust endlessly under the guise of winding up. The question of what period of time is “reasonable” under subsection (c)(1) turns on the totality of the circumstances. *See* Restatement (Third) of Trusts § 89, cmt. b (2007).

Subsection (f) provides for the possibility that after winding up additional unfinished business of the statutory trust is discovered.

Under Section 104(14), the governing instrument may not override this section.

SECTION 804. NOTICE TO CLAIMANT.

(a) Except as otherwise provided in subsection (c), a dissolved statutory trust may dispose of a known claim against it by sending notice to the claimant in a record of the dissolution of the trust. The notice must:

- (1) specify the information required to be included in the claim;
- (2) provide a mailing address to which the claim is to be sent;

(3) state the deadline for receipt of the claim, which may not be less than 120 days after the date the notice is sent to the claimant; and

(4) state that the claim will be barred if not received by the deadline.

(b) A claim against a dissolved statutory trust is barred if the requirements of subsection (a) are met and:

(1) the claim is not received by the specified deadline; or

(2) if the claim is timely received but rejected by the trust:

(A) the trust notifies the claimant in a record that the claim is rejected and will be barred unless the claimant commences an action against the trust to enforce the claim by the 90th day after the claimant receives the notice; and

(B) the claimant does not commence the required action not later than the 90th day.

(c) This section does not apply to a claim based on:

(1) an event occurring after the effective date of dissolution; or

(2) a liability that on that date is unmatured or contingent.

Comment

Principal Sources – Revised Uniform Limited Liability Company Act § 703 (2006); Model Business Corporation Act § 14.06 (2005).

The drafting committee intended for the term “sending notice” to be interpreted as requiring a mode of transmission reasonably contemplated to reach the claimant.

Under Section 104(14), the governing instrument may not override this section.

SECTION 805. PUBLICATION OF NOTICE.

(a) A dissolved statutory trust may publish notice of its dissolution and request persons having claims against the trust to present them in accordance with the notice.

(b) A notice under subsection (a) must:

(1) be published at least once in a newspaper of general circulation in the [county] in this state in which the dissolved statutory trust's principal office is located or, if it has none in this state, in the [county] in which the trust's designated office was last located;

(2) describe the information required for a claim;

(3) provide a mailing address to which the claim may be sent; and

(4) state that a claim against the trust is barred unless an action to enforce the claim is commenced not later than [three] years after publication of the notice.

(c) If a dissolved statutory trust publishes a notice in accordance with subsection (b), unless the claimant commences an action to enforce a claim against the trust not later than [three] years after the publication date of the notice, the claim of each of the following claimants is barred:

(1) a claimant that did not receive notice in a record under Section 804;

(2) a claimant whose claim was timely sent to the trust but was rejected or not acted on; and

(3) a claimant whose claim is contingent at, or based on an event occurring after, the effective date of dissolution.

(d) A claim not barred under this section may be enforced against undistributed property.

(e) If property of the trust has been distributed after dissolution, a claim not barred under this section may be enforced against a beneficial owner to the extent of that beneficial owner's proportionate share of the property distributed to the beneficial owner after dissolution.

However, a beneficial owner's total liability for all claims under this subsection does not exceed the total amount of property distributed to the beneficial owner after dissolution.

Comment

Principal Sources – Revised Uniform Limited Liability Company Act § 704 (2006); Model Business Corporation Act § 14.07 (2005).

This section aims to balance the need for repose and certainty of title with fairness to a future claimant whose claim arises after the dissolution process is complete and the statutory trust's property has been distributed to the beneficial owners.

Following Model Business Corporation Act § 14.07 (2005), subsection (c) continues the liability of a dissolved statutory trust for subsequent claims for a period of three years after the trust publishes notice of its dissolution pursuant to subsections (a) and (b). The drafting committee reasoned that three years was a reasonable compromise between the competing considerations of providing a remedy to future claimants and providing a basis for the trustee to estimate liabilities so that the trust might distribute its property free of all claims and the beneficial owners might receive that property secure in the knowledge that the property will not be reclaimed. However, in recognition of the arbitrariness of the three-year cutoff, and to signal that enacting jurisdictions might balance the interests differently, the drafting committee put the number three in brackets.

Under Section 104(14), the governing instrument may not override this section.

SECTION 806. ADMINISTRATIVE DISSOLUTION.

(a) The [Secretary of State] may dissolve a statutory trust administratively if the trust:

- (1) is without an agent for service of process in this state for [30] days;
- (2) does not file an [annual] [biennial] report not later than the 60th day after the

due date; or

- (3) does not pay, not later than the 60th day after the due date, any fee, tax, or penalty due to the [Secretary of State].

(b) If the [Secretary of State] determines that a ground exists for administratively dissolving a statutory trust, the [Secretary of State] shall file a notice of dissolution and send a copy of the notice to the trust's agent for service of process, or if the trust does not have an agent for service of process in this state, to the trust's designated office. The notice must state:

- (1) the effective date of the dissolution, which must be at least [60] days after the

date the [Secretary of State] sends the copy; and

(2) the reason for the dissolution.

(c) Unless a statutory trust cures the grounds for dissolution under subsection (a) stated in the notice of dissolution before the date stated in the notice, the [Secretary of State] shall dissolve the trust administratively by preparing, signing, and filing a declaration of dissolution that states the grounds for dissolution. The [Secretary of State] shall send a copy of the declaration to the trust's agent for service of process, or if the trust does not have an agent for service of process in this state, to the trust's designated office.

Comment

Principal Sources – Revised Uniform Limited Liability Company Act § 705 (2006); Model Business Corporation Act § 14.20 (2005).

This section provides a mechanism for involuntary dissolution of a statutory trust that fails to maintain an agent for service of process, does not file its annual (or biennial) report, or does not pay the required taxes or fees. Allowing for administrative dissolution in such circumstances reduces the number of records maintained by the Secretary of State, avoids further wasteful attempts to compel compliance by an abandoned statutory trust, and returns the trust's name to the pool of available names.

Under Section 104(14), the governing instrument may not override this section.

SECTION 807. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION.

(a) A statutory trust that has been dissolved administratively may apply to the [Secretary of State] for reinstatement. The application must be delivered to the [Secretary of State] for filing and state:

(1) the name of the trust and the effective date of its dissolution;

(2) that the grounds for dissolution did not exist or have been cured; and

(3) that the trust's name satisfies the requirements of Section 207.

(b) If the [Secretary of State] determines that an application under subsection (a) contains the required information and that the information is correct, the [Secretary of State] shall prepare a declaration of reinstatement that states this determination, sign and file the original of the declaration of reinstatement, and send a copy to the trust's agent for service of process.

(c) When a reinstatement becomes effective, it relates back to for all purposes and takes effect as of the effective date of the administrative dissolution as if the dissolution had not occurred, except for the rights of a person arising out of an act or omission in reliance on the dissolution before the person knew or had reason to know of the reinstatement.

Comment

Principal Sources – Revised Uniform Limited Liability Company Act § 706 (2006); Revised Uniform Partnership Act § 802 (1997).

Subsection (c) provides that reinstatement after an administrative dissolution relates back to the date of the dissolution except with respect to a person that acted in reliance on the dissolution.

Under Section 104(14), the governing instrument may not override this section.

SECTION 808. REVIEW OF REJECTION OF REINSTATEMENT.

(a) If the [Secretary of State] rejects a statutory trust's application for reinstatement following administrative dissolution, the [Secretary of State] shall send a notice that states the reason for rejection to the trust's agent for service of process or, if the trust does not have an agent for service of process, to the trust's designated office.

(b) A statutory trust may obtain review of the rejection by petitioning the [appropriate court] to set aside the dissolution. The petition must be delivered to the [Secretary of State] and contain a copy of the [Secretary of State's] declaration of dissolution, the trust's application for

reinstatement, and the [Secretary of State's] notice of rejection.

(c) The court may order the [Secretary of State] to reinstate a dissolved statutory trust or take other action the court considers appropriate.

Comment

Principal Source – Revised Uniform Limited Liability Company Act § 707 (2006).

Under Section 104(14), the governing instrument may not override this section.

[ARTICLE] 9

FOREIGN STATUTORY TRUSTS

SECTION 901. GOVERNING LAW.

(a) The law of the jurisdiction of formation of a foreign statutory trust governs:

(1) the internal affairs of the trust;

(2) the liability of a beneficial owner as beneficial owner and trustee as trustee for a debt, obligation, or other liability of the trust or a series thereof; and

(3) the enforceability of a debt, obligation, or other liability of the foreign statutory trust or any series thereof against the property of the trust or series.

(b) The [Secretary of State] may not deny a foreign statutory trust a certificate of registration because of any difference between the law of its jurisdiction of formation and the laws of this state.

(c) A certificate of registration does not authorize a foreign statutory trust to engage in any business or exercise any power that a statutory trust may not engage in or exercise in this state.

Comment

Principal Sources – Revised Uniform Limited Liability Company § 801 (2006); Uniform Limited Partnership Act § 901 (2001); Delaware Statutory Trust Act § 3851 (2009).

Subsection (a) parallels and is analogous in scope and effect to Section 301, which is applicable to a domestic statutory trust. In an enacting state that does not provide for series trusts, subsection (a)(3) would nonetheless recognize foreign series trusts. Subsection (b) allows for a foreign statutory trust to operate domestically even if the law governing that trust is different from the laws governing domestic statutory trusts, but under subsection (c) a foreign statutory trust cannot engage in any business or exercise any power that a domestic statutory trust could not.

Under Section 104(15), the governing instrument may not override this section.

SECTION 902. APPLICATION FOR CERTIFICATE OF REGISTRATION.

(a) To register to do business in this state, a foreign statutory trust may apply for a certificate of registration to do business in this state by delivering an application to the [Secretary of State] for filing. The application must contain:

- (1) the name of the trust and, if the name does not comply with Section 207, an alternate name adopted pursuant to Section 906(a);
- (2) the name of the state or other jurisdiction of formation of the trust;
- (3) the street and mailing address of the trust's principal office and, if the laws of the jurisdiction of formation of the trust require it to maintain an office in that jurisdiction, the street and mailing address of the required office; and
- (4) the name and street and mailing address of the trust's initial agent for service of process in this state.

(b) A foreign statutory trust shall deliver with a completed application under subsection (a) a certificate of good standing or a record of similar import signed by the [Secretary of State] or other official having custody of the foreign statutory trust's publicly filed records in the state or other jurisdiction of formation of the foreign statutory trust.

Comment

Principal Source – Uniform Limited Partnership Act § 902 (2001).

Under Section 104(15), the governing instrument may not override this section.

SECTION 903. ACTIVITIES NOT CONSTITUTING DOING BUSINESS.

(a) Activities of a foreign statutory trust which do not constitute doing business in this state within the meaning of this [article] include:

- (1) maintaining, defending, mediating, arbitrating, or settling an action or

proceeding;

(2) holding meetings of its trustees or carrying on any other activity concerning its internal affairs;

(3) maintaining accounts or depositing assets in financial institutions;

(4) maintaining offices or agencies for the transfer, exchange, and registration of the trust's own beneficial interests or securities or maintaining trustees or depositories with respect to those beneficial interests or securities;

(5) selling through independent contractors;

(6) soliciting or obtaining orders, whether by mail or electronic means or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contractual obligations;

(7) creating or acquiring indebtedness, mortgages, or security interests in real or personal property;

(8) securing or collecting debts or enforcing mortgages or other security interests in property securing the debts, and holding, protecting, or maintaining property so acquired;

(9) conducting an isolated transaction that is completed by the 30th day and is not in the course of similar transactions; and

(10) doing business in interstate commerce.

(b) This section does not apply in determining the contacts or activities that may subject a foreign statutory trust to service of process, taxation, or regulation under law of this state other than this [act].

(c) A person does not do business in this state solely because of being a trustee or a beneficial owner of a foreign statutory trust that does do business in this state.

Comment

Principal Source – Uniform Limited Partnership Act § 903 (2001).

The schedule of activities in subsection (a) that do not constitute doing business in the state are illustrative and not exhaustive. As revised in 2006, the Delaware Statutory Trust Act contains a similar schedule. *See* Delaware Statutory Trust Act § 3863 (2009), added by 2006 Delaware Laws Ch. 418 § 20 (H.B. 445).

Under Section 104(15), the governing instrument may not override this section.

SECTION 904. FILING OF CERTIFICATE OF REGISTRATION. Unless the [Secretary of State] determines that an application for a certificate of registration does not comply with the filing requirements of this [act], the [Secretary of State], on payment of all filing fees, shall file the application, prepare, sign, and file a certificate of registration to do business in this state, and send a copy of the filed certificate, together with a receipt for the fees, to the foreign statutory trust or its representative.

Comment

Principal Source – Uniform Limited Partnership Act § 904 (2001).

Under Section 104(15), the governing instrument may not override this section.

SECTION 905. CERTIFIED COPY OF CERTIFICATE OF REGISTRATION.

(a) The [Secretary of State], on request and payment of the required fee, shall furnish a certified copy of the certificate of registration for a qualified foreign statutory trust if the records filed with the [Secretary of State] show that the [Secretary of State] has filed a certificate of registration, has not revoked the certificate of registration, and has not filed a notice of cancellation.

(b) Subject to any limitation stated in the certificate, the certified copy of the certificate of registration issued by the [Secretary of State] to a foreign statutory trust may be relied upon as

conclusive evidence that the trust is authorized to do business in this state as of the date of the certificate.

Comment

Principal Source – Uniform Limited Partnership Act § 209 (2001).

Under Section 104(15), the governing instrument may not override this section.

SECTION 906. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.

(a) A foreign statutory trust whose name does not comply with Section 207 may not obtain a certificate of registration until it adopts, for the purpose of doing business in this state, an alternate name that complies with Section 207. A foreign statutory trust that adopts an alternate name under this subsection and obtains a certificate of registration with the name need not comply with [this state’s fictitious or assumed name statute]. After obtaining a certificate of registration with an alternate name, a foreign statutory trust shall do business in this state under the name unless the trust is authorized under [this state’s fictitious or assumed name statute] to do business in this state under another name.

(b) If a qualified foreign statutory trust changes its name to one that does not comply with Section 207, it may not thereafter do business in this state until it complies with subsection (a) and obtains an amended certificate of registration.

Comment

Principal Source – Uniform Limited Partnership Act § 905 (2001).

Under Section 104(15), the governing instrument may not override this section.

SECTION 907. REVOCATION OF CERTIFICATE OF REGISTRATION.

(a) The [Secretary of State] may revoke the certificate of registration of a qualified

foreign statutory trust if the trust does not:

(1) appoint and maintain an agent for service of process;

(2) deliver for filing a statement of change not later than the 60th day after a change has occurred in the name or address of the agent;

(3) file an [annual] [biennial] report pursuant to Section 213 not later than the 60th day after the due date; or

(4) pay, by the 60th day after the due date, any fee, tax, or penalty due to the [Secretary of State].

(b) To revoke a certificate of registration of a foreign statutory trust, the [Secretary of State] must prepare, sign, and file a notice of revocation and send a copy to the trust's agent for service of process in this state, or if the trust does not appoint and maintain a agent for service of process in this state, to the trust's designated office. The notice must state:

(1) the effective date of the revocation, which must be at least [60] days after the date the [Secretary of State] sends the copy; and

(2) the basis for the revocation.

(c) Unless a foreign statutory trust cures the grounds for revocation under subsection (a) stated in the notice of revocation before the date stated in the notice, the authority of the trust to do business in this state ceases on that date.

(d) If a foreign statutory trust cures the grounds stated in the notice of revocation under subsection (b), the [Secretary of State] shall indicate that the trust is reinstated on the filed notice. The reinstatement of the trust relates back to for all purposes and takes effect as of the date of the notice of revocation, except for the rights of a person arising out of an act or omission in reliance on the dissolution before the person knew or had reason to know of the reinstatement.

Comment

Principal Source – Uniform Limited Partnership Act § 906 (2001).

Under Section 104(15), the governing instrument may not override this section.

SECTION 908. CANCELLATION OF CERTIFICATE OF REGISTRATION.

(a) To cancel its certificate of registration to do business in this state, a qualified foreign statutory trust must deliver to the [Secretary of State] for filing a notice of cancellation that states:

- (1) the name of the trust;
- (2) the date of filing of its initial certificate of registration;
- (3) that the certificate of registration is being canceled; and
- (4) any other information as determined by the trustee filing the statement.

(b) A certificate of registration is canceled when the notice of cancellation becomes effective under Section 204.

Comment

Principal Source – Uniform Limited Partnership Act § 907 (2001).

Under Section 104(15), the governing instrument may not override this section.

SECTION 909. EFFECT OF FAILURE TO HAVE CERTIFICATE OF REGISTRATION.

(a) A foreign statutory trust doing business in this state may not maintain an action or proceeding in this state unless it has a certificate of registration to do business in this state.

(b) The failure of a foreign statutory trust to have a certificate of registration to do business in this state does not impair the validity of a contract or act of the trust or preclude the

trust from defending an action or proceeding in this state.

(c) A trustee or beneficial owner of a foreign statutory trust is not liable for a debt, obligation, or other liability of the trust solely because the trust did business in this state without a certificate of registration.

(d) If a foreign statutory trust does business in this state without a certificate of registration or cancels its certificate of registration, the trust may be served in accordance with Section 212 for actions arising out of doing business in this state.

Comment

Principal Source – Uniform Limited Partnership Act § 907 (2001).

Under Section 104(15), the governing instrument may not override this section.

SECTION 910. ACTION BY [ATTORNEY GENERAL]. The [Attorney General] may maintain an action to enjoin a foreign statutory trust from doing business in this state in violation of this [article].

Comment

Principal Source – Uniform Limited Partnership Act § 908 (2001).

Under Section 104(15), the governing instrument may not override this section.

[ARTICLE] 10

MISCELLANEOUS PROVISIONS

SECTION 1001. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Comment

Principal Source – Uniform Limited Partnership Act § 1201 (2001).

Under Section 104(16), the governing instrument may not override this section.

SECTION 1002. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

Principal Source – Uniform Limited Partnership Act § 1203 (2001).

Under Section 104(16), the governing instrument may not override this section.

SECTION 1003. SAVINGS CLAUSE. This [act] does not affect an action commenced, proceeding brought, or right accrued before this [act] takes effect.

Comment

Principal Source – Uniform Limited Partnership Act § 1207 (2001).

Under Section 104(16), the governing instrument may not override this section.

SECTION 1004. RESERVATION OF POWER TO AMEND OR REPEAL. The [name of state legislature] has power to amend or repeal all or part of this [act] at any time and all statutory trusts and foreign statutory trusts subject to this [act] are governed by the amendment or repeal.

Comment

Principal Source – Model Business Corporation Act § 1.02 (2005).

This section, which under Section 104(16) the governing instrument may not override, addresses the concern that under the Constitution a subsequent amendment to this act could not be applied to an existing statutory trust or foreign statutory trust. The Official Comment to Model Business Corporation Act § 1.02 (2005), on which this section is based, explains:

Provisions similar to section 1.02 have their genesis in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to section 1.02. The purpose of section 1.02 is to avoid any possible argument that a corporation has contractual or vested rights in any specific statutory provision and to ensure that the state may in the future modify its corporation statutes as it deems appropriate and require existing corporations to comply with the statutes as modified.

All articles of incorporation or certificates of authority granted under the Model Act are subject to the reservation of power set forth in section 1.02. Further, corporations “governed” by this Act — which includes all corporations formed or qualified under earlier, general incorporation statutes that contain a reservation of power — are also subject to the reservation of power of section 1.02 and bound by subsequent amendments to the Act.

Many states have constitutional provisions mandating the reservation of power to amend or modify corporate statutes and charters. In these states section 1.02 is also supported by specific constitutional authorization.

SECTION 1005. APPLICATION TO EXISTING RELATIONSHIPS.

(a) This [act] does not limit, prohibit, or invalidate the existence, acts, or obligations of any common-law trust created or doing business in this state before, on, or after [the effective date of the act]. The law of this state other than this [act] pertaining to trusts apply to common-

law trusts.

(b) A common-law trust created under the law of this state before, on, or after [the effective date of this [act]] that does not have a predominantly donative purpose may elect to be governed by this [act] by filing a certificate of trust under Section 201.

[(c) A trust created pursuant to a statute of this state that was required by that statute to file a certificate of trust with [the Secretary of State] before [the effective date of this [act]] may elect to be governed by the provisions of this [act] by filing an amendment to its certificate of trust under Section 202.]

[(d) On [two years after the effective date of this [act]], this [act] governs the organization and internal affairs of all trusts created pursuant to a statute of this state that was required by that statute to file a certificate of trust with the [Secretary of State] before the effective date of this [act].]

Comment

Principal Source – Uniform Limited Partnership Act § 1206 (2001).

This act governs all statutory trusts formed on or after the act's effective date. For pre-existing statutory trusts, this section establishes an optional "elect-in" period and a mandatory, all-inclusive date of two years following the effective date. Beginning on the all-inclusive date, each pre-existing statutory trust that has not previously elected in becomes subject to this act — including the schedule of mandatory rules in Section 104 — by operation of law.

Subsections (a) and (b) confirm that this act does not govern a common-law trust unless the trust forms a statutory trust by filing a certificate of trust under Section 201. However, consistent with Section 303, subsection (b) permits only a common-law trust that does not have a predominantly donative purpose to become a statutory trust. An alternative mode for a common-law trust to become a statutory trust is provided by the conversion provisions of Article 7. Unlike the formation of a new statutory trust by filing a certificate of trust under Section 201, the conversion provisions of Article 7 allow for the conversion of a common-law trust into a statutory trust while preserving continuity in the trust's relationships with third parties. See the Comments to Sections 701 and 705.

The drafting committee contemplated that some enacting jurisdictions might modify this section — particularly subsections (c) and (d), which are bracketed to signal that uniformity is

not expected — to address other transition problems arising from differences between this act and prior law. For example, an enacting jurisdiction might choose to allow trusts formed under a prior statute to remain governed by the prior statute for longer than the two years suggested in subsection (d).

This section pertains only to domestic statutory trusts. There are no comparable transition provisions for foreign statutory trusts. Thus, once this act is effective (see Section 1007), it applies immediately to all foreign statutory trusts, whether formed before or after the act's effective date.

Under Section 104(16), the governing instrument may not override this section.

SECTION 1006. REPEALS. [On [all-inclusive date], the] [The] following are repealed:

(1) [the state Statutory Trust Act as amended and in effect immediately before [the effective date of this [act]]];

(2) [the state Business Trust Act as amended and in effect immediately before [the effective date of this [act]]]; and

(3) [the state Real Estate Investment Trust Act as amended and in effect immediately before [the effective date of this [act]]].

Comment

Principal Source – Uniform Limited Partnership Act § 1205 (2001).

Paragraphs (1) and (2) supply model language for enacting jurisdictions that have previously enacted a statutory or business trust act.

Paragraph (3) supplies model language for enacting jurisdictions that have previously enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a REIT, is not a type of trust but rather is a tax status awarded to any entity that qualifies under 26 U.S.C. §§ 856 et seq. (2009), or that qualifies as a real estate mortgage investment conduit under 26 U.S.C. § 860D (2009). Although the Internal Revenue Code at one time favored the trust form for the organization of a REIT, the Code today does not regulate the form of REIT entity. *See* Sheldon A. Jones, Laura M. Moret & James M. Storey, *The Massachusetts Businesses Trust and Registered Investment Companies*, 13 Del. J. Corp. L. 421, 453-454 (1988). Accordingly, there is no longer any reason why a REIT must be organized as a trust, whether statutory or common-law. Prior to this liberalization of the Internal Revenue Code, several states enacted REIT

statutes that authorize the creation of a trust entity designed to qualify as a REIT under the Code. Because a statutory trust under this act could serve the same purpose, the drafting committee contemplated that enacting jurisdictions might take the occasion of enacting this act to repeal their REIT statutes.

Under Section 104(16), the governing instrument may not override this section.

SECTION 1007. EFFECTIVE DATE. This [act] takes effect

Comment

Principal Source – Uniform Limited Partnership Act § 1204 (2001).

Under Section 104(16), the governing instrument may not override this section.