

1 | **[ARTICLE] 3A [FOR DISCUSSION: PLACEHOLDER NUMBERING]**

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3 | **SERIES TRUSTS**

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6 | **INITIAL ISSUES FOR DISCUSSION**

- 7 | •Should this article, and all series references in the other articles, be bracketed? There is
- 8 | apprehension in many states about series provisions. Bracketing our series provisions
- 9 | will provide guidance for those states that want to adopt the act but without the series
- 10 | provisions. Lani Ewart tells us, for example, that Hawaii falls into this category.
- 11 | •Should we restrict the applicability of this article to statutory trusts that qualify as an
- 12 | investment company under the 1940 Act? Limiting series trusts to 1940 Act entities
- 13 | eliminates many of the regulatory policy questions because such entities are already
- 14 | heavily regulated under federal securities laws.
- 15 | •Should we have a provision to guide the state-level taxation of series trusts. That is, should
- 16 | we address whether each series is a separate entity for tax purposes. That is a very
- 17 | different question from whether each series is a separate entity for state entity law
- 18 | purposes. On the latter, see the outline for Section 302A below.
- 19 | •Should one or more of the sections of this article be mandatory?
- 20 |
- 21 |

22 | **TENTATIVE OUTLINE OF SECTIONS WITH SUGGESTED CONTENT**

23 |

24 | **[For Discussion: Which of the provisions of this article should be added to the schedule of**

25 | **mandatory rules in Section 103(c)?]**

26 |

27 |

28 | **SECTION 301A. SERIES OF STATUTORY TRUST.** The governing instrument

29 | may:

30 | (1) provide for ~~classes, groups, or~~ series of trustees, beneficial owners, or beneficial

31 | interests, having such relative rights, powers, and duties as the governing instrument may

32 | provide, and provide for the creation of additional ~~classes, groups, or~~ series of trustees, beneficial

33 | owners, or beneficial interests, having such relative rights, powers, and duties as may be

34 | established, including rights, powers, and duties senior or subordinate to existing ~~classes, groups~~

35 | ~~or~~ series of trustees, beneficial owners, or beneficial interests;

36 | (2) provide for designated series of trustees, beneficial owners, or beneficial interests

37 | having separate rights, powers, or duties with respect to profits and losses associated with

1 specified property or obligations, and permit the series to have a separate business purpose or  
2 investment objective; and

3 (3) grant to, or withhold from, all or certain trustees or beneficial owners, or a specified  
4 ~~class, group, or series~~ of trustees or beneficial owners, the right to vote, separately or with any or  
5 all other ~~classes, groups, or series~~ of the trustees or beneficial owners, on any matter.

### 6 **Comment**

7  
8 **Principal Sources** – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust  
9 Act §34-518.

10  
11 This section confirms that a statutory trust may be organized with one or more series.  
12 The organization of a master statutory trust with several series is particularly common among  
13 statutory trusts that are registered investment companies under the Investment Company Act of  
14 1940, as amended, 15 U.S.C. Sections 80a-1 et seq. (the “1940 Act”). Rule 18f-2 under the  
15 1940 Act permits an investment company to have multiple series, provided that any matter  
16 required by the 1940 Act or other applicable law to be submitted to the holders of the  
17 outstanding voting securities of a series company shall not be deemed to have been effectively  
18 acted upon unless approved by the holders of a majority of the outstanding voting securities of  
19 each series of stock affected by such matter. Rule 18f-2 also specifies certain instances where  
20 the vote is required by all of the security holders of the investment company and other instances  
21 where only the security holders of a series are required to vote.

22  
23  
24 **SECTION 302A. SERIES NOT SEPARATE ENTITY.** A series of a statutory trust is  
25 not an entity separate from the statutory trust.

26 ~~———— [Proposal: Each series is not a separate entity. On this approach, a series could not hold~~  
27 ~~property or sue and be sued in its own name separate from the statutory trust. Nor could a series~~  
28 ~~qualify to do business in another state (the trust would do so). Nor could a certificate of~~  
29 ~~existence/good standing be issued for a particular series. This is the current approach of the~~  
30 ~~Delaware Statutory Trust Act, and it is strongly favored by the mutual fund industry.]~~

31 ~~———— [The alternative, which is common in LLC statutes with series provisions, is separate~~  
32 ~~entity treatment. See, for example, the Illinois LLC Act (805 ILCS 180/37-40(b)): “A series~~

1 with limited liability shall be treated as a separate entity to the extent set forth in the articles of  
2 organization. Each series with limited liability may, in its own name, contract, hold title to  
3 assets, grant security interests, sue and be sued and otherwise conduct business and exercise the  
4 powers of a limited liability company under this Act. The limited liability company and any of  
5 its series may elect to consolidate their operations as a single taxpayer to the extent permitted  
6 under applicable law, elect to work cooperatively, elect to contract jointly or elect to be treated  
7 as a single business for purposes of qualification to do business in this or any other state. Such  
8 elections shall not affect the limitation of liability set forth in this Section except to the extent  
9 that the series have specifically accepted joint liability by contract.”]

10 **Comment**

11  
12 **Principal Source**

13  
14 ~~Assuming a series is not a separate entity, the next question is whether to make this~~  
15 ~~section mandatory. Allowing a separate entity series—that is, making this section~~  
16 ~~default—would require considerable additional statutory infrastructure.]~~

17 [For Discussion: What, if anything, should this comment give by way of general  
18 explanation or specific guidance? For example, should the comment discuss the  
19 impossibility (or not) of bankruptcy by a series? Should the comment remark that not  
20 treating each series as a separate entity is essential for compatibility with current practice  
21 in the mutual fund industry? Should the comment observe that the Delaware act  
22 (implicitly) rejects separate entity status for series?]

23  
24  
25 **SECTION 303A. NAME OF SERIES.** The name of each series must contain the  
26 entire name of the statutory trust and must be distinguishable from the names of the other series  
27 of the trust. ~~[For discussion: Should we have a reservation of name procedure for series on~~  
28 ~~the model of Section 208 for statutory trusts? And how does this section relate to the~~  
29 ~~(probable) lack of entity status for each series?]~~

30 **Comment**

31 **Principal Source** – 805 ILCS 180/37-40(c)

1  
2 [For Discussion: What if any general explanation or specific guidance should the  
3 comment to this section provide?] Commentary here.  
4

5 SECTION 304A. APPORTIONMENT AMONG SERIES.

6 {(a) A series of a statutory trust is chargeable by the trust or another series thereof for any  
7 debt, obligation, or other liability incurred or otherwise existing with respect to or traceable to  
8 the series to be charged. Default rule to the effect that each series is charged fully for the  
9 expenses (including taxes?) traceable to each series.}

10 {(b) Each series of a statutory trust is chargeable with an equal share of any debt,  
11 obligation or other liability incurred or otherwise existing with respect to the trust that is not  
12 traceable to a series thereof. Default rule to the effect that each series shares pro rata (how is that  
13 computed?) in the general expenses of the trust (e.g., trustee commissions, filing fees, etc.).}

14 Comment

15 ——— Principal Source ———  
16

17  
18 [For Discussion: (1) Can we improve the language of (a)? The point of paragraph  
19 (a) is to make each series responsible for debts and costs traceable to the series.

20 (2) Can we improve the language of (b)? The point of paragraph (b) is to supply a  
21 default rule of for apportionment among the series for trust-level debts and costs. As  
22 written, paragraph (b) creates a default of equal apportionment. Although equal  
23 apportionment is unlikely to be “right” rule, the “right” rule will be transaction specific  
24 and so necessarily the province of the governing instrument. Perhaps a useful analogy is to  
25 the voting rights default rules of section 506. As the comment to that section explains, “The  
26 drafting committee contemplated that the governing instrument typically will address  
27 voting rules by providing a per capital or other share-based allocation of voting rights.  
28 However, the drafting committee declined the suggestion to try to incorporate such a rule  
29 as a default. Such rules are necessarily transaction-specific and hence infeasible to specify  
30 in a one-size-fits-all default.”

31 (3) In addition to addressing the foregoing matters (including emphasis of the  
32 default nature of this section), what other commentary, if any, should be provided  
33 here?] Commentary here.  
34

35 SECTION 305A. LIABILITY OF SERIES. [For Discussion: Should this section

1 ~~appear earlier~~ and section 304A appear in reverse order?] If the governing instrument of a  
2 statutory trust ~~creates~~ has one or more series as provided in section 301A, a debt, obligation, or  
3 other liability incurred, ~~contracted for,~~ or otherwise existing with respect to a particular series is  
4 enforceable against the assets of the series only, and not against the assets of the trust generally  
5 or any other series thereof, and none of the debts, obligations, or other liabilities incurred,  
6 contracted for, or otherwise existing with respect to the trust generally or any other series thereof  
7 is enforceable against the assets of the series if:

8 (1) separate and distinct records are maintained for the series and the assets associated  
9 with the series are held in separate and distinct records, directly or indirectly, including through a  
10 nominee or otherwise, and accounted for in separate and distinct records separately from the  
11 other assets of the trust, or any other series thereof; and ~~[For Discussion: (1) Additional~~  
12 ~~requirements, if any, with respect to the segregation and identification of assets among~~  
13 ~~various series. (2) What result if the trustee does not earmark? Presumably the failure to~~  
14 ~~earmark would be a breach of trust, remediable in a derivative or direct suit against the~~  
15 ~~trustee initiated by a beneficial owner, and the creditor could recover against the trust as a~~  
16 ~~whole unless the creditor was not a bona fide purchaser for value.]~~

17 (2) notice of the possibility of one or more series ~~limitation on liabilities of a series~~ is set  
18 forth in the certificate of trust pursuant to Section 201. ~~[For Discussion: (1) Additional~~  
19 ~~disclosure requirements, if any, to limit series liability. (2) Whether to require a public~~  
20 ~~filing that names the individual series, and hence subsequent filings on the creation of a~~  
21 ~~new series or the dissolution of existing series. Currently Section 201 requires only notice~~  
22 ~~that the trust might issue one or more series.]~~

23 **Comment**  
24

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2  
3 **Principal Sources** – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust  
4 Act §34-518.

5  
6 This section provides that if a statutory trust creates separate series under Section 301A,  
7 the debts, liabilities, and other obligations of a particular series are enforceable against the assets  
8 of that series only, but only if (1) separate records are maintained for each series and (2) notice  
9 of the limitation on liabilities of a series is set forth in the certificate of trust. ~~Under Section 201~~  
10 ~~the certificate of trust is made part of the public record and must indicate whether the statutory~~  
11 ~~trust might create one or more series.~~

12  
13 The earmarking requirement of paragraph (1) safeguards the separate interests of the  
14 beneficial owners of each series by clarifying the boundaries between the assets and liabilities of  
15 each series. For similar reasons, the earmarking requirement also protects third parties that deal  
16 with a series trust. Third parties are further protected by paragraph (2), which conditions limited  
17 liability across series on notice in the certificate of trust that the trust might have one or more  
18 series.

19  
20 Failure to satisfy paragraph (1) through adequate earmarking exposes the property of one  
21 series to the claims of the creditors of another series. In such a case, the failure to maintain  
22 separate records would likely amount to a breach of trust under Section 404, remediable by a  
23 beneficial owner in a derivative or direct suit against the trustee.

24  
25  
26 **SECTION 306A. [CAPTION] [~~For Discussion: What would be an appropriate~~**  
27 **~~caption?~~ SERIES TRUST AS INVESTMENT COMPANY.** If a statutory trust is a registered  
28 investment company under the Investment Company Act of 1940, [as amended,] 15 U.S.C.  
29 Section 80a-1 et seq., [and any regulations issued thereunder,] any ~~class, group, or~~ series of  
30 beneficial interests established by the governing instrument of the trust is a ~~class, group, or~~ series  
31 preferred ~~as to~~ in distribution of assets or payment of dividends over all other ~~classes, groups, or~~  
32 series ~~in~~ with respect to assets specifically allocated to the ~~class, group, or~~ series under Section  
33 18, or any amendment or successor provision, of the Investment Company Act of 1940, [as  
34 amended,] 15 U.S.C. Section 80a-1 et seq., [and any regulations issued thereunder,].

35 **Comment**  
36

1           **Principal Sources** – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust  
2 Act §34-518.

3  
4           The section addresses Section 18 of the 1940 Act, which governs the capital structure of  
5 an investment company. The 1940 Act was intended to prevent inequitable or discriminatory  
6 provisions that fail to protect the preferences and privileges of the holders of shares and  
7 excessive borrowing or issuance of senior securities (where there are preferences of rights  
8 among classes) that expose the fund and its shareholders to additional risk. Accordingly, Section  
9 18 defines and places restrictions on “senior securities” while at the same time allowing  
10 segregated pools of assets (i.e., separate funds or series) to be created under a single trust, and  
11 separate classes of shares representing interests in the same pool of assets with certain limited  
12 instances where there are different voting rights or dividend preferences.  
13

14           **SECTION 307A. DISSOLUTION OF SERIES.**

15           ~~—————[For Discussion: Should series dissolution follow the template of Article 7? And~~  
16 ~~should Article 7 be modified given the validation of series trusts? Our prior attempt at a~~  
17 ~~Delaware Act-based series dissolution provision follows.]~~[For Discussion: When we  
18 discussed Article 3A at the Fall 2007 Chicago meeting, we tentatively decided to address  
19 dissolution of a series in Article 7. But when we turned to article 7, we failed to take up the  
20 issue. The key questions therefore remain open: (1) where should series dissolution be  
21 addressed, and (2) how? The Delaware Act’s provisions on dissolution of a series (12 Del.  
22 Code §3808(f)-(g)) are reproduced below:

23           (f) Except to the extent otherwise provided in the governing instrument of the  
24 statutory trust, a series established in accordance with § 3804(a) of this title may be  
25 dissolved and its affairs wound up without causing the dissolution of the statutory  
26 trust or any other series thereof. Unless otherwise provided in the governing  
27 instrument of the statutory trust, the dissolution, winding up, liquidation or  
28 termination of the statutory trust or any series thereof shall not affect the limitation  
29 of liability with respect to a series established in accordance with § 3804(a) of this  
30 title. A series established in accordance with § 3804(a) of this title is dissolved and its  
31 affairs shall be wound up at the time or upon the happening of events specified in  
32 the governing instrument of the statutory trust. Except to the extent otherwise  
33 provided in the governing instrument of a statutory trust, the death, incapacity,  
34 dissolution, termination or bankruptcy of a beneficial owner of such series shall not  
35 result in the termination or dissolution of such series and such series may not be  
36 terminated or revoked by a beneficial owner of such series or other person except in

1 accordance with the terms of the governing instrument of the statutory trust.

2  
3 (g) Upon dissolution of a series of a statutory trust, the persons who under the  
4 governing instrument of the statutory trust are responsible for winding up such  
5 series' affairs may, in the name of the statutory trust and for and on behalf of the  
6 statutory trust and such series, take all actions with respect to the series as are  
7 permitted under subsection (d) of this section and shall provide for the claims and  
8 obligations of the series and distribute the assets of the series as provided under  
9 subsection (e) of this section. Any person, including any trustee, who under the  
10 governing instrument is responsible for winding up such series' affairs who has  
11 complied with subsection (e) of this section shall not be personally liable to the  
12 claimants of the dissolved series by reason of such person's actions in winding up  
13 the series.]

14 ~~———— (a) A series established in accordance with Section 104(b)(4) to (6) [requires updating]~~  
15 ~~may be dissolved and its affairs wound up without causing the dissolution of the statutory trust~~  
16 ~~or any other series thereof in accordance with the following rules:~~

17 ~~———— (1) The dissolution, winding up, liquidation, or termination of any series does not~~  
18 ~~affect the limitation of liability with respect to a series established in accordance with Section~~  
19 ~~304(d) [requires updating].~~

20 ~~———— (2) A series established in accordance with Section 104(b)(4) to (6) [requires~~  
21 ~~updating] is dissolved and its affairs must be wound up at the time or upon the happening of~~  
22 ~~events specified in the governing instrument of the statutory trust.~~

23 ~~———— (3) Upon dissolution of a series of a statutory trust, the persons that under the~~  
24 ~~governing instrument of the statutory trust are responsible for winding up the series's affairs, in~~  
25 ~~the name of the statutory trust and for and on behalf of the statutory trust and the series, may take~~  
26 ~~all actions with respect to the series as are permitted under Section 604(a) [now ]Article] 7] and~~  
27 ~~shall provide for the claims and obligations of the series and distribute the assets of the series as~~  
28 ~~provided Section 604(b) [now ]Article] 7].~~

29 ~~———— (b) Any person, including a trustee, that under the governing instrument is responsible for~~  
30 ~~winding up the affairs of a series under subsection (a) which has complied with this section is~~

1 not liable to the claimants of the dissolved series by reason of the person's actions in winding up  
2 the series.

3 **Comment**

4 ~~—— Principal Source — Delaware Statutory Trust Act §3808.~~

5  
6 ~~—— [Commentary here.]~~

7  
8 **SECTION 308A. FOREIGN SERIES TRUSTS.** [For Discussion: Does Article 8, as  
9 written, adequately address foreign series trust issues?]

10 ~~—— [For Discussion: (1) Should foreign series trusts should be addressed here or in~~  
11 ~~Article 8? (2) May a series or a foreign statutory trust qualify to do business in this state?~~  
12 ~~Presumably not if a series of a domestic statutory trust is not recognized as an entity. (3) A~~  
13 ~~foreign series trust should probably be governed by the law of its state of formation, which~~  
14 ~~raises the question of whether such a trust may have more rights than a domestic series~~  
15 ~~trust. Presumably not. Compare Section 801. (4) What other requirements, if any, are~~  
16 ~~necessary for a certificate of qualification for a foreign series trust?]~~

17  
18 ~~—— [Here is the foreign series provision in the Illinois LLC Act (805 ILCS 180/37-40(o)):~~

19 ~~If a foreign limited liability company, as permitted in the jurisdiction of its organization, has~~  
20 ~~established a series having separate rights, powers or duties and has limited the liabilities of such~~  
21 ~~series so that the debts, liabilities and obligations incurred, contracted for or otherwise existing~~  
22 ~~with respect to a particular series are enforceable against the assets of such series only, and not~~  
23 ~~against the assets of the limited liability company generally or any other series thereof, or so that~~  
24 ~~the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with~~  
25 ~~respect to the limited liability company generally or any other series thereof are not enforceable~~  
26 ~~against the assets of such series, then the limited liability company, on behalf of itself or any of~~  
27 ~~its series, or any of its series on their own behalf may register to do business in the State in~~  
28 ~~accordance with Section 45-5 of this Act. The limitation of liability shall be so stated on the~~  
29 ~~application for admission as a foreign limited liability company and a certificate of designation~~  
30 ~~shall be filed for each series being registered to do business in the State by the limited liability~~  
31 ~~company. Unless otherwise provided in the operating agreement, the debts, liabilities and~~  
32 ~~obligations incurred, contracted for or otherwise existing with respect to a particular series of~~  
33 ~~such a foreign limited liability company shall be enforceable against the assets of such series~~  
34 ~~only, and not against the assets of the foreign limited liability company generally or any other~~  
35 ~~series thereof and none of the debts, liabilities, obligations and expenses incurred, contracted for~~  
36 ~~or otherwise existing with respect to such a foreign limited liability company generally or any~~  
37 ~~other series thereof shall be enforceable against the assets of such series.]~~

38 **Comment**

