UNIFORM STATUTORY TRUST ENTITY ACT (2009)
(Last Amended 2013)

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ON UNIFORM STATE LAWS

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IN ALL THE STATES

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WITH PREFATORY NOTE AND COMMENTS

August 19, 2015

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UNIFORM STATUTORY TRUST ENTITY ACT

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UNIFORM STATUTORY TRUST ENTITY ACT (2009)
(Last Amended 2013)

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 a host of 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. *See* Jesse Dukeminier & Robert H. Sitkoff, Wills, Trusts, and Estates 393-94 (9th ed. 2013). By contrast, a statutory trust arising under the modern statutes 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. *See, e.g.*, Delaware Statutory Trust Act §§3803(a)-(b), 3804(a), 3810(a)(2) (2009). 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. *See, e.g.*, *id.* §3810(a).

The modern business trust statutes do not prohibit use of a common-law trust for commercial purposes. Instead, these statutes offer transactional planners an additional option, a statutory trust entity, that is governed by the act. Common-law trusts, whether donative or commercial, abide in accordance with the principles of law and equity applicable to such 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, 2004-2 C.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.

For guidance on the law governing a common-law trust, the drafting committee took the Uniform Trust Code as its starting point and looked also to the Second and Third Restatements of Trusts. The public filing and other procedural provisions not unique to the statutory trust form follow the template of the harmonized uniform unincorporated entity acts as of 2013.

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 is 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 the common law of trusts 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); and (5) clearer guidance on the relationship between common-law trusts and statutory trust entities (Section 108).

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 or limit 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 given 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 other law. 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 law displaces the UTC's provisions. Uniform Trust Code §102, cmt. (2000) (Last Amended 2010). In some states, a specialized case law has arisen applicable to a common-law trust with a business purpose, as the rules that evolved for a common-law trust with a donative purpose are sometimes inapt for a business trust.

The Uniform Statutory Trust Entity Act is not a codification of general business law principles applicable to a common-law business trust. Nothing in this act displaces the common law, the Uniform Trust Code, or other specialized law with respect to such trusts. To the contrary, Section 108(a) confirms the continued applicability to a common-law business trust of the state's laws pertaining to such trusts. Section 108(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) (Last Amended 2010) (no filing to create a common-law trust), *and* Restatement (Third) of Trusts §10 (2003) (same).

Section 105 provides that 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 common-law principles, including the trustee's fiduciary standards of conduct (see Section 505), which in this act are drawn from corporate law. The hybrid nature of the Uniform Statutory Trust Entity Act, in that it draws variously on corporate and unincorporated entity law in addition to trust law, was brought clearly into view during the project to harmonize the uniform unincorporated entity acts and subsequent revision of the comments to this act. 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 604(b) 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 a noncommercial context. To ensure that a statutory trust is not used to evade mandatory rules applicable to a common-law trust that enforce public policy limitations on donative transfers, *see, e.g.*, John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U. L. Rev. 1105 (2004), 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 and the intersection of this act with Uniform Trust Code §105 (2000) (Last Amended 2010), 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, in accordance with the procedure prescribed by Section 403. 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, as prescribed by Section 403.

Historical Note. This Prefatory Note and the Comments to the individual sections of this act were revised in 2014, in some instances extensively, to account for amendments to the act made in 2011 and 2013 as part of the harmonization of unincorporated business entity acts. Those revisions, which were a collaborative effort by Professor Robert H. Sitkoff, the Reporter for the original drafting committee; Professor Daniel S. Kleinberger, a Co-Reporter for the harmonization drafting committee; and Professor Harry J. Haynsworth, the Chair of the harmonization committee, are too numerous to schedule with individual historical notes across the act. The comments to the provisions on public filings with the Secretary of State (Article 2), dissolution and winding up (Article 7), foreign statutory trusts (Article 8), and fundamental reorganizations (Article 9) largely replicate those to the other harmonized acts.

PREFATORY NOTE REGARDING 2011 AND 2013 AMENDMENTS

Introduction. Beginning in 2009, just after the Uniform Statutory Trust Entity Act was first promulgated, and concluding four years later in 2013, the Uniform Law Commission undertook an intensive effort to harmonize, to the extent possible, all uniform acts pertaining to unincorporated organizations. As part of the harmonization project, the Uniform Statutory Trust Entity Act underwent four types of changes: (1) substantive; (2) major harmonization changes; (3) minor harmonization changes; and (4) relocation within this particular "spoke" of provisions that are part of the "HUB" in the new Uniform Business Organizations Code (Code).

Substantive Changes. In the course of the harmonization project, which brought together experts in corporate entities, unincorporated entities, and trusts, several substantive improvements were made to this act independent of harmonization. Three of these substantive changes warrant mention here. First, the provisions on series trusts in Article 4 were revised to elaborate and clarify the concept and its implementation. For example, Section 401(d) was added to address the distinction between governance classes and the series concept, which in this act is a partitioning of property. Section 402(b) was added to confirm that the limitations on distributions provided for by Sections 615 and 616 apply also to a distribution from a series trust. Section 403, perhaps the most important of the new series provisions, was added to prescribe rules for bringing a claim and enforcing a judgment against a series trust.

Second, the predicate for protection from liability under Section 506 for actions taken in reliance on the governing instrument, a record of the statutory trust, or an expert opinion was changed from "good faith reliance" to "reasonable reliance." This change, which conforms Section 506 to the language of Uniform Trust Code §1006 (2000) (Last Amended 2010), on which Section 506 was based, confirms that the standard of conduct necessary to invoke the protection from liability has an objective component, as had been intended by the original drafting committee.

Third, the charging order remedy of Section 606 of the act as originally promulgated in 2009 was replaced with new Section 602. This new section addresses the transferability of a beneficial interest in a statutory trust and the rights of a creditor of a beneficial owner to levy on the owner's interest in the trust. The provisions of new Section 602 that protect a creditor of a beneficial owner, which is based in part on Uniform Trust Code §504 (Last Amended 2010), are a more direct and simpler implementation of the purpose of the original drafting committee in including a charging order provision. The operation and rationale for new Section 602 is explained in its accompanying comment.

Major Harmonization Revisions. Various of the harmonization revisions are arguably substantive rather than merely technical in that they alter procedures or standards of conduct as prescribed by the act in its original form. The principal such revisions fall into four categories warranting mention here.

First, all of the provisions on public filings with the Secretary of State (Article 2), dissolution and winding up (Article 7), foreign statutory trusts (Article 8), and fundamental reorganizations (Article 9) have been extensively rewritten to be consistent with the other unincorporated entity acts and the Code. Of particular note is that Article 9 now recognizes interest exchange and domestication transactions in addition to mergers and conversions, which were the only types of fundamental reorganizations recognized by the act as originally promulgated.

Second, the standard in Sections 104(10) and 509(d) dealing with indemnification, advancement of expenses, exoneration, and insurance has been changed from "bad faith, willful misconduct, or reckless indifference" to "bad faith, willful or intentional misconduct, or knowing violation of law." This change conforms the act to the similar language used in all the other unincorporated entity statutes and the Code.

Third, a provision for a special litigation committee for use in a derivative action has been added as Section 613. This new provision is substantively identical to Uniform Limited Partnership Act §905 (2001) (Last Amended 2013) and Uniform Limited Liability Company Act §805 (2006) (Last Amended 2013).

Fourth, new Sections 615 and 616 limit distributions by a statutory trust and impose liability for improper distributions. These provisions, which are similar to those found in other unincorporated entity acts and the Code, also apply to distributions by a series of a statutory trust (see Section 402(b)).

Minor Harmonization Changes. Minor changes in language for the sake of harmonization were made throughout the act. These changes are too numerous to schedule here. A representative example is Section 202(b), which was revised as follows:

> (b) To amend its certificate of trust, a statutory trust must deliver to the [Secretary of State] for filing an amendment stating:
>
> (1) the name of the trust;
>
> (2) the date of filing of its initial certificate of ; and
>
> (3) ~~the changes~~ <u>the text of</u> the amendment ~~makes to the certificate as most recently amended or restated~~.

Relocation and Renumbering of HUB-Based Provisions. The harmonization process included both harmonization of various stand-alone acts and compilation of a Uniform Business Code. The Code comprises a "HUB" (somewhat analogous to Article 1 of the Uniform Commercial Code) and various spokes. Each spoke pertains to a different type of organization, such as limited liability company, which is Article 5, and statutory trust, which is Article 8. Naturally, spokes in the Code do not repeat the provisions from the HUB. In contrast, each stand-alone act includes provisions that appear in the HUB in the Code.

So that the section numbers in this "spoke" correspond with the spoke provisions in the Code, "HUB"-based provisions of this act have been renumbered to appear at the end of articles. For an example, see Sections 203-221, which contain Secretary of State filing, name, and registered agent provisions.

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UNIFORM STATUTORY TRUST ENTITY ACT (2009)
(*Last Amended 2013*)

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Statutory Trust Entity Act ([year of enactment]).

Comment

Because this act provides for the creation 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) (Last Amended 2010).

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) (2014), 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(20)).

SECTION 102. DEFINITIONS. In this [act]:

(1) "Beneficial owner" means the owner of a beneficial interest in a statutory trust.

(2) "Certificate of trust" means the certificate required by Section 201. The term includes the certificate 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) "Contribution", except in the phrase "right of contribution", means property or a benefit described in Section 604 which is provided by a person to a statutory trust to become a beneficial owner or in the person's capacity as a beneficial owner.

(5) "Distribution" means a transfer of money or other property from a statutory trust on account of a beneficial interest. The term includes a redemption or other purchase by a statutory trust of a beneficial interest.

(6) "Foreign statutory trust" means a trust formed under the law of a jurisdiction other than this state which would be a statutory trust if formed under the law of this state.

(7) "Governing instrument" means the trust instrument and certificate of trust.

(8) "Jurisdiction", used to refer to a political entity, means the United States, a state, a

foreign country, or a political subdivision of a foreign country.

(9) “Jurisdiction of formation” means the jurisdiction whose law governs the internal affairs of an entity.

(10) “Person” means an individual, business corporation, nonprofit corporation, partnership, limited partnership, limited liability company, [general cooperative association,] limited cooperative association, unincorporated nonprofit association, statutory trust, business trust, common-law business trust, estate, 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.

(11) “Principal office” means the principal executive office of a statutory trust or foreign statutory trust, whether or not the office is located in this state.

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

(13) “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.

(14) “Registered agent” means an agent of a statutory trust or foreign statutory trust which is authorized to receive service of any process, notice, or demand required or permitted by law to be served on the trust.

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

(16) “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.

(17) "Series trust" means a statutory trust that has one or more series created under Section 401.

(18) "Sign" means, with 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.

(19) "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.

(20) "Statutory trust", except in the phrase "foreign statutory trust" and in [Article] 9, means an entity formed under this [act] or that becomes subject to this [act] under [Article] 9 or Section 108.

(21) "Transfer" includes:

(A) an assignment;

(B) a conveyance;

(C) a sale;

(D) a lease;

(E) an encumbrance, including a mortgage or security interest;

(F) a gift; and

(G) a transfer by operation of law.

(22) "Trust" includes a common-law trust, statutory trust, and foreign statutory trust.

(23) "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 activities and affairs. The term includes a trust agreement, a declaration of trust, and bylaws.

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

Comment

This section contains definitions for terms used throughout the act. Section 901 contains definitions specific to the provisions of Article 9 on mergers, interest exchanges, conversions, and domestications. The principal source used by the drafting committee in fashioning definitions unique to the statutory trust form was Delaware Statutory Trust Act §3801 (2009).

Paragraphs (2), (6), and (23) define "certificate of trust," "governing instrument," and "trust instrument" respectively. A certificate of trust is the record that under Section 201 must be delivered to a public official for filing to form a statutory trust. A trust instrument is the transaction document that provides for the governance of the statutory trust. Unlike a certificate of trust, a 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 under Section 201(e).

Paragraphs (3), (20) and (22) 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 under this act 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 (10) defines "person" in a manner that deviates from the other unincorporated entity acts. Under this act, the term includes a "statutory trust" but not a "common-law trust," differentiating among kinds of trusts. Under the structure of this act, consistent with the definitions in paragraphs (3), (20), and (22), 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."

Paragraph (6) defines "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 under Section 802.

Paragraph (16) 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 (16)(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. (2014).

Paragraph (17) 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 in Article 4.

Paragraph (24) 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 Section 104, the governing instrument governs:

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

(2) the rights, interests, duties, obligations, and powers of, and the relations among, the trustees, a person designated under subsection (e)(8) or (9), the beneficial owners, and the statutory trust.

(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) subject to Section 404, provide for the creation of one or more classes of trustees, beneficial owners, or beneficial interests having separate rights, powers, or duties;

(6) subject to Section 404, 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, interest exchange, conversion, or domestication;

(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 activities 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;

(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; and

(16) alter the prohibition in Section 615(a)(2) so that the prohibition requires only

that the statutory trust's total assets not be less than the sum of its total liabilities.

Comment

The principal source used by the drafting committee in fashioning this section was 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, which is defined in Section 102(7) as the trust instrument (see Section 102(23)) plus the certificate of trust (see Section 201)), 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. Subsection (d) thus 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 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 (e)(10). Unless the governing instrument provides otherwise, 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 603(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 permissive rules on remedies for a beneficial owner's breach are collected in Section 604(e).

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 expressly authorizing a specific term justified inclusion of a detailed list. Statutory confirmation reduces transaction costs by avoiding doubt about the permissibility of a provision in the governing instrument or a proposed transaction (compare Uniform Trust Code §816 (2000) (Last Amended 2010)).

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

(1) vary any requirement, procedure, or other provision of this [act] pertaining to:

(A) registered agents; or

(B) the [Secretary of State], including provisions pertaining to records authorized or required to be delivered to the [Secretary of State] for filing under this [act];

(C) the application of this [act] to existing relationships under Section 108 or the reservation of power to amend or repeal under Section 109;

(2) vary the law applicable under Sections 301 and 801;

(3) negate the exclusion of a predominantly donative purpose under Section 303(b);

(4) vary the provisions pertaining to the duration of a statutory trust under Section 306(a);

(5) vary the capacity of a statutory trust under Section 308 to sue and be sued in its own name;

(6) vary the provisions pertaining to series trusts in Sections 401, 402(b), 402(c), 403, 404, and 405(c);

(7) 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;

(8) vary the obligation of a trustee or other person under Section 506 to act reasonably if the 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 reasonable, if the standards are not manifestly unreasonable;

(9) 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;

(10) vary the prohibition under Section 509 of indemnification, advancement of expenses, or exoneration for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law;

(11) 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;

(12) vary the provisions pertaining to the transfer of a beneficial interest and the power of a court under Section 602(a), (c), and (d);

(13) 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;

(14) restrict the right of a beneficial owner to bring an action under Section 609 or 610, 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;

(15) vary the rules under Section 613, if a statutory trust appoints a special litigation committee;

(16) vary the right of a beneficial owner under Section 923(a)(2), 933(a)(2), 943(a)(2), or 953(a)(2) to approve a merger, interest exchange, conversion, or domestication;

(17) vary the required contents of a plan of merger under Section 922(a), plan of interest exchange under Section 932(a), a plan of conversion under Section 942(a), or a plan of domestication under Section 952(a); or

(18) vary [Article] 7;

(19) vary [Article] 10; or

(20) restrict the rights under this [act] of a person other than a trustee, person designated under Section 103(e)(8) and (9), or beneficial owner.

Comment

The principal sources used by the drafting committee in fashioning this section were Delaware Statutory Trust Act §3806 (2009), Uniform Trust Code §105 (2000) (Last Amended 2010), Uniform Limited Liability Company Act §105 (2006) (Last Amended 2013), and Uniform Limited Partnership Act §105 (2001) (Last Amended 2013).

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)-(6), (12), and (18)-(20)). Two of the provisions, paragraphs (16) and (17), concern certain procedural safeguards in a merger, interest exchange, conversion, or domestication.

Internal Affairs. With three 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 or intentional misconduct, or knowing violation of law in paragraph (10). A comparable rule, albeit expressed in a different verbal formulation, exists in the common law of trusts, *see, e.g.*, Uniform Trust Code §1008 (2000) (Last Amended 2010); Restatement (Third) of Trusts §96 (2012), and applies to a statutory trust under Delaware law. *See* Delaware Statutory Trust Act §3806(e) (2009) (providing 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). As harmonized, the formulation used in this act is the same as in Uniform Limited Liability Company Act §105 (2006) (Last Amended 2013), Uniform Partnership Act §105 (1997) (Last Amended 2013), and Uniform Limited Partnership Act §105 (2001) (Last Amended 2013).

The second exception is paragraph (11), 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) (Last Amended 2010). However, the effect of paragraph (11) is limited by paragraph (7), which allows the governing instrument to modify the trustee's fiduciary standards of conduct under Section 505 if the modification is not manifestly unreasonable.

The third exception is paragraph (15), which makes mandatory the rules under Section 613 for the use of a special litigation committee in derivative litigation. However, as recognized by paragraph (15), a statutory trust need not make use of such a committee. Accordingly, what paragraph (15) requires is that, if a statutory trust appoints a special litigation committee, the committee be subject to the rules of Section 613.

"Manifestly Unreasonable." Paragraphs (7)-(9) and (13)-(14) allow the governing instrument to modify the provisions of this act pertaining to the trustee's fiduciary obligation; the nonliability of a person for reasonable 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, any such modification must not be "manifestly unreasonable." In opting for a "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 Sections 105 of the Uniform Limited Liability Company Act (2006) (Last Amended 2013), Uniform Partnership Act (1997) (Last Amended 2013), and Uniform Limited Partnership Act (2001) (Last Amended 2013), and intended a similar meaning here. *See also* 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, 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. (2014), 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 213 (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, the governing instrument may supersede or modify application to the statutory trust of any law of this state pertaining to common-law trusts.

Comment

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, 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) (Last Amended 2010) — 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) (Last Amended 2010); Restatement (Third) of Trusts §§99-102 (2012); Austin W. Scott, William F. Fratcher & Mark L. Ascher, 4 Scott and Ascher on Trusts §24.9 (5th ed. 2007). However, if 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, as a statutory trust is itself an entity. Sections 609 through 614 govern actions by a beneficial owner.

SECTION 106. RULE OF CONSTRUCTION. The presumption that a civil statute in derogation of the common law is construed strictly does not apply to this [act].

Comment

This Section directs 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.

SECTION 107. CONSTRUCTIVE NOTICE. A person that is not a beneficial owner is deemed to have notice of a statutory trust's merger, interest exchange, conversion, or domestication 90 days after articles of merger, interest exchange, conversion, or domestication under [Article] 9 become effective.

Comment

Unlike the other unincorporated business entity acts, this act does not include a section defining the terms "knowledge" and "notice." This section provides for constructive notice of an Article 9 transaction (merger, interest exchange, conversion, and domestication). These are the only transactions for which constructive notice by third parties is an issue in this act. *Cf*. Uniform Limited Liability Company Act §103(d)(2)(C) (2006) (Last Amended 2013).

SECTION 108. 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 this [act]]. The law of this state other than this [act] pertaining to trusts applies 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]] which does not have a predominantly donative purpose may elect to become a statutory trust under 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 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]].]

Comment

This act governs all domestic statutory trusts formed on or after the act's effective date (see Section 1006). 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.

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 a foreign statutory trust. Thus, once this act is effective (see Section 1006), it applies immediately to all foreign statutory trusts, whether formed before or after the act's effective date.

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

SECTION 109. RESERVATION OF POWER TO AMEND OR REPEAL. The [legislature of this state] 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

Provisions similar to this section, which under Section 104(1)(C) cannot be varied, have their genesis in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1819), which held that the U.S. Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to this section. This section is a generalized form of the type of provision found in many entity organic laws, the purpose of which is to avoid any possible argument that an entity has contractual or vested rights in any specific statutory provision of its organic law and to ensure that the state may in the future modify its entity statutes as it deems appropriate and require existing entities to comply with the statutes as modified.

This section applies to changes in mandatory provisions of this act (see Section 104). It does not pertain to changes in default rules. It is substantively identical to Uniform Limited Partnership Act §123 (2001) (Last Amended 2013) and Uniform Limited Liability Company Act §121 (2006) (Last Amended 2013).

[ARTICLE] 2

FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS

SECTION 201. FORMATION OF STATUTORY TRUST; 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 213;

(2) the street and mailing addresses of the trust's principal office;

(3) the name and street and mailing addresses in this state of the trust's registered agent; 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), but may not vary or otherwise affect the provisions specified in Section 104 in a manner inconsistent with that section.

(d) A statutory trust is formed when the certificate of trust becomes effective.

(e) A filed certificate of trust, a filed statement of cancellation or change, or filed articles under [Article] 9 prevail over inconsistent terms of a trust instrument.

Comment

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 211). 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.

(a) A certificate of trust may be amended or restated at any time.

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

(1) the name of the trust;

(2) the date of filing of its initial certificate; and

(3) the text of the amendment.

(c) To restate its certificate of trust, a statutory trust must deliver to the [Secretary of State] for filing a restatement designated as such in its heading.

(d) If a trustee knows that any information in a filed certificate of trust was inaccurate when the certificate was filed or has become inaccurate due to changed circumstances, the trustee shall promptly:

(1) cause the certificate to be amended; or

(2) if appropriate, deliver to the [Secretary of State] for filing a statement of change under Section 217 or a statement of correction under Section 210.

Comment

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 221. Subsection (d) 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 TO BE DELIVERED FOR FILING TO [SECRETARY OF STATE].

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

(b) A record delivered for filing under this [act] may be signed by an agent. Whenever this [act] requires a particular individual to sign a record and the individual is deceased or incompetent, the record may be signed by a legal representative of the individual.

(c) A person that signs a record as an agent or legal representative affirms as a fact that the person is authorized to sign the record.

Comment

Subsection (a) – As provided in Section 102(18), "sign" includes any manual, facsimile, conformed, or electronic signature.

Subsection (b) – This subsection 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, following Uniform Trust Code §807 (2000) (Last Amended 2010) and Restatement of Trusts §80 (2007).

The filing office will not check the bona fides of a person purporting to have signed a record in a representative capacity.

Subsection (c) – As a matter of agency law, a person who signs in a representative capacity gives a "warranty of authority." Restatement (Third) of Agency §6.10 (2006). Under Section 204(b), "[a]n individual who signs a record authorized or required to be filed under this [act] affirms under penalty of perjury that the information stated in the record is accurate."

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

SECTION 204. LIABILITY FOR INACCURATE INFORMATION IN FILED RECORD.

(a) If a record delivered to the [Secretary of State] for filing under this [act] and filed by the [Secretary of State] contains inaccurate information, a person that suffers loss by reliance on the information may recover damages for the loss from:

(1) a person that signed the record, or caused another to sign it on the person's behalf, and knew the information to be inaccurate at the time the record was signed; and

(2) a trustee of a statutory trust, if:

(A) the record was delivered for filing on behalf of the trust; and

(B) the trustee knew or had notice of the inaccuracy for a reasonably sufficient time before the information was relied upon so that, before the reliance, the trustee reasonably could have:

(i) effected an amendment under Section 202;

(ii) filed a petition under Section 204; or

(iii) delivered to the [Secretary of State] for filing a statement of change under Section 217 or a statement of correction under Section 210.

(b) An individual who signs a record authorized or required to be filed under this [act] affirms under penalty of perjury that the information stated in the record is accurate.

Comment

Subsection (a) – This subsection relates to liability to third parties for inaccurate information in a filed record.

Subsection (b) – This subsection provides for criminal liability. The elements of perjury are a matter for the criminal law of the jurisdiction.

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

SECTION 205. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.

(a) If a person required by this [act] to sign a record or deliver a record to the [Secretary of State] for filing under this [act] does not do so, any other person that is aggrieved may petition [the appropriate court] to order:

(1) the person to sign the record;

(2) the person to deliver the record to the [Secretary of State] for filing; or

(3) the [Secretary of State] to file the record unsigned.

(b) If the petitioner under subsection (a) is not the statutory trust or foreign statutory trust to which the record pertains, the petitioner shall make the trust or foreign trust a party to the action.

(c) A record filed under subsection (a)(3) is effective without being signed.

Comment

This section gives the court the flexibility to order either that a record be signed or that the record be filed by the filing office unsigned. The latter circumstance may arise, for example, in a situation in which the person who should sign the record is not subject to the jurisdiction of the court. This section also makes clear that the court may order a person with control over a record that has been signed to deliver the record to the filing office for filing.

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

SECTION 206. DELIVERY OF RECORD.

(a) Except as otherwise provided in this [act], permissible means of delivery of a record include delivery by hand, the mail, conventional commercial practice, and electronic transmission.

(b) Delivery to the [Secretary of State] is effective only when a record is received by the [Secretary of State].

Comment

Subsection (a) – Permissible means of delivery are not limited to those listed in this subsection, because this subsection by its terms is a non-exclusive list. Conventional commercial practice includes the use of private delivery or courier services. What constitutes conventional commercial practice may change over time. This section lists permissible means of delivery but, except for delivery to the filing office, does not determine when delivery occurs.

Subsection (b) – Delivery to the filing office is effective only upon actual receipt.

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

SECTION 207. FILING REQUIREMENTS.

(a) To be filed by the [Secretary of State] pursuant to this [act], a record must be received by the [Secretary of State], comply with this [act], and satisfy the following:

(1) The filing of the record must be required or permitted by this [act].

(2) The record must be physically delivered in written form unless and to the

extent the [Secretary of State] permits electronic delivery of records.

(3) The words in the record must be in English, and numbers must be in Arabic or Roman numerals, but the name of an entity need not be in English if written in English letters or Arabic or Roman numerals.

(4) The record must be signed by a person authorized or required under this [act] to sign the record.

(5) The record must state the name and capacity, if any, of each individual who signed it, either on behalf of the individual or the person authorized or required to sign the record, but need not contain a seal, attestation, acknowledgment, or verification.

(b) If law other than this [act] prohibits the disclosure by the [Secretary of State] of information contained in a record delivered to the [Secretary of State] for filing, the [Secretary of State] shall file the record if the record otherwise complies with this [act] but may redact the information.

(c) When a record is delivered to the [Secretary of State] for filing, any fee required under this [act] and any fee, tax, interest, or penalty required to be paid under this [act] or law other than this [act] must be paid in a manner permitted by the [Secretary of State] or by that law.

(d) The [Secretary of State] may require that a record delivered in written form be accompanied by an identical or conformed copy.

(e) The [Secretary of State] may provide forms for filings required or permitted to be made by this [act], but, except as otherwise provided in subsection (f), their use is not required.

(f) The [Secretary of State] may require that a cover sheet for a filing be on a form prescribed by the [Secretary of State].

Comment

The filing office's duty under this section is ministerial (see Section 211(a)). The office's assessment of a record delivered for filing is limited to conformity with this section. The filing office *must* file a record delivered for filing if the record contains the information required by this act and is accompanied by the required filing fee. The filing office is authorized to provide forms but not to require their use, and, as a result, may not reject records delivered for filing on the basis of form (except to the limited extent permitted by subsections (d) and (f)).

In view of the limited discretion granted to the filing office under this section and Section 210(a), under Section 211(e)(2), "[t]he filing of … a record does not … create a presumption that the information contained in the record is correct."

Subsection (a) – The first requisite for having a record filed is to cause the record actually to be received by the filing office. Section 206(b) reiterates this point.

Subsection (a)(2) – A record delivered for filing must be in typewritten or printed form unless the filing office permits delivery by electronic transmission. The types of electronic transmission that may be used will be determined by the filing office and is intended to include evolving methods of electronic delivery, including facsimile transmissions, electronic transmissions between computers, and filings through delivery of storage media.

Subsection (a)(3) – The text of an entity filing must be in the English language, except to the limited extent permitted by this paragraph.

Subsection (a)(4) – To be filed a record must be signed by the appropriate person. See the definition of "sign" in Section 102 for a description of the manner in which a record may be "signed." Who is an appropriate person is determined under Section 203, but the filing office will not check to determine whether a person purportedly authorized to sign is in fact authorized (see the Comment to Section 203(a)-(c)).

The requirement in some state statutes that records delivered for filing on behalf of an entity must be acknowledged or verified as a condition for filing has been rejected. These requirements serve little purpose in connection with entity filings. On the other hand, many organizations, like lenders or title companies, may desire that specific records include acknowledgements, verifications, or seals. Subsection (a)(4) does not prohibit the addition of these forms of execution and their use does not affect the eligibility of the record for filing.

Subsection (b) – Under this subsection, a confidentiality obligation does not affect the filing office's duty to file, and the filing office is authorized but not required to redact. This act does not affect any confidentiality-related obligations the filing office may have under other law.

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

SECTION 208. EFFECTIVE DATE AND TIME. Except as otherwise provided in Section 209 and subject to Section 210(d), a record filed under this [act] is effective:

(1) on the date and at the time of its filing by the [Secretary of State] as provided in Section 211;

(2) on the date of filing and at the time specified in the record as its effective time, if later than the time under paragraph (1);

(3) at a specified delayed effective time and date, which may not be more than 90 days after the date of filing; or

(4) if a delayed effective date is specified, but no time is specified, at 12:01 a.m. on the date specified, which may not be more than 90 days after the date of filing.

Comment

Records accepted for filing become effective at the date and time of filing as recorded by the filing office, or at another specified time on that date, unless a permissible delayed effective date is stated in the record.

Section 211(b) requires the filing office to maintain some means of recording the date and time of delivery of a record and requires that office to record that date and time as the date and time of filing. That provision gives express statutory authority to the common practice of most filing offices of ignoring processing time and treating a record as filed as of the date and time it is delivered for filing even though it may not be reviewed and accepted for filing until several days after delivery. That section contemplates that time of delivery, as well as the date, will be routinely recorded.

Paragraph (1) – In the absence of provision for a delayed effective date, a record delivered for filing becomes effective on the date and time of filing by the filing office. Since under 211(b) the date and time of filing is the recorded date and time of delivery of the record to the filing office (which under Section 211(b) is the date and time of actual receipt), together these provisions eliminate any doubt about situations involving same-day transactions in which a record, for example, a statement of merger, is delivered for filing on the morning of the day the merger is to become effective.

Paragraph (3) – This paragraph does not authorize or contemplate the retroactive establishment of an effective date before the date of filing.

Paragraphs (3) and (4) – A record that states an effective date beyond the 90-day limit is not a record that “satisfies this [act]” (Section 211(a)), and will properly be rejected by the filing office.

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

SECTION 209. WITHDRAWAL OF FILED RECORD BEFORE EFFECTIVENESS.

(a) Except as otherwise provided in Sections 924, 934, 944, and 954, a record delivered to the [Secretary of State] for filing may be withdrawn before it takes effect by delivering to the [Secretary of State] for filing a statement of withdrawal.

(b) A statement of withdrawal must:

(1) be signed by each person that signed the record being withdrawn, except as otherwise agreed by those persons;

(2) identify the record to be withdrawn; and

(3) if signed by fewer than all the persons that signed the record being withdrawn, state that the record is withdrawn in accordance with the agreement of all the persons that signed the record.

(c) On filing by the [Secretary of State] of a statement of withdrawal, the action or transaction evidenced by the original record does not take effect.

Comment

Only records that have not yet taken effect may be withdrawn under this section. If a record has taken effect, it may be corrected under Section 210 if the requirements of that section are satisfied. Otherwise, the record must be amended in accordance with this act or, if the record is a certificate of trust, the resulting statutory trust may be dissolved and terminated in accordance with Article 7.

Subsection (b)(1) – If a signatory has died or is incompetent, Section 203(b) provides for a substitute signatory.

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

SECTION 210. CORRECTING FILED RECORD.

(a) A person on whose behalf a filed record was delivered to the [Secretary of State] for filing may correct the record if:

(1) the record at the time of filing was inaccurate;

(2) the record was defectively signed; or

(3) the electronic transmission of the record to the [Secretary of State] was defective.

(b) To correct a filed record, a person on whose behalf the record was delivered to the [Secretary of State] must deliver to the [Secretary of State] for filing a statement of correction.

(c) A statement of correction:

(1) may not state a delayed effective date;

(2) must be signed by the person correcting the filed record;

(3) must identify the filed record to be corrected;

(4) must specify the inaccuracy or defect to be corrected; and

(5) must correct the inaccuracy or defect.

(d) A statement of correction is effective as of the effective date of the filed record that it corrects except for purposes of Section 107 and as to persons relying on the uncorrected filed record and adversely affected by the correction. For those purposes and as to those persons, the statement of correction is effective when filed.

Comment

This section permits making corrections in filed records without re-submitting the entire record.

Subsection (a)(1) and (2) – A filed record may be corrected because it contains an inaccuracy or because it was defectively executed (including defects in optional forms of execution that do not affect the eligibility of the original record for filing).

Subsection (a)(3) – In addition, a filed record may be corrected if its electronic transmission was defective – i.e., where an electronic delivery is made but, due to a defect in transmission, the filed record is later discovered to be inconsistent with the record intended to be filed. If no delivery is made because of a defect in transmission, a statement of correction may not be used to effect a retroactive filing. Therefore, a statutory trust making an electronic delivery should take steps to confirm that the transmission was received by the filing office.

Subsection (c) – A provision in a filed record setting an effective date may be corrected under this section, but the corrected effective date must comply with Section 208, which limits delayed effective dates to within 90 days after filing. A corrected effective date is thus measured from the date of the original filing of the record being corrected, i.e., it cannot be before the date of filing of the record or more than 90 days thereafter.

Subsection (d) – The correction relates back to the original effective date of the record being corrected, except as to persons relying on the original entity filing and adversely affected by the correction. As to these persons, the effective date of the statement of correction is the date the statement is filed.

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

SECTION 211. DUTY OF [SECRETARY OF STATE] TO FILE; REVIEW OF REFUSAL TO FILE; DELIVERY OF RECORD BY [SECRETARY OF STATE].

(a) The [Secretary of State] shall file a record delivered to the [Secretary of State] for filing which satisfies this [act]. The duty of the [Secretary of State] under this section is ministerial.

(b) When the [Secretary of State] files a record, the [Secretary of State] shall record it as filed on the date and at the time of its delivery to the [Secretary of State]. After filing a record, the [Secretary of State] shall deliver to the person that submitted the record a copy of the record with an acknowledgment of the date and time of filing.

(c) If the [Secretary of State] refuses to file a record, the [Secretary of State] shall, not later than [15] business days after the record is delivered:

(1) return the record or notify the person that submitted the record of the refusal; and

(2) provide a brief explanation in a record of the reason for the refusal.

(d) If the [Secretary of State] refuses to file a record, the person that submitted the record may petition the [appropriate court] to compel filing of the record. The record and the explanation of the [Secretary of State] of the refusal to file shall be attached to the petition. The court may decide the matter in a summary proceeding.

(e) The filing of or refusal to file a record does not:

(1) affect the validity or invalidity of the record in whole or in part; or

(2) create a presumption that the information contained in the record is correct or incorrect.

(f) Except as provided by Section 220 or by law other than this [act], the [Secretary of State] may deliver any record to a person by delivering it:

(1) in person to the person that submitted it;

(2) to the address of the person's registered agent;

(3) to the principal office of the person; or

(4) to another address the person provides to the [Secretary of State] for delivery.

Comment

Subsection (a) – Under this subsection the filing office is required to file a record if it "satisfies this [act]." The purpose of this language is to limit the discretion of the filing office to a ministerial role in reviewing the contents of records. If the record submitted is in the form prescribed, the record contains the information required by this act, and the appropriate filing fee is tendered, the filing office must file the record. Consistent with this approach, this subsection states explicitly that the filing duty of the filing office is ministerial (see also subsection (e)).

Subsection (b) – This subsection provides that when the filing office files a record, the filing office records it as filed on the date and time of delivery to the filing office, retains the original record for the office's records, and delivers a copy of the record to the person who delivered the record for filing with an acknowledgement of the date and time of filing.

In the case of a record transmitted electronically to the filing office, that office may make delivery by electronic transmission. The copy returned will be the exact or conformed copy if one has been required by the filing office, or will be a copy made by the filing office if an exact or conformed copy was not required.

Under this subsection the acceptance of a filing is evidenced merely by the filing office's delivery of a copy of the record with an acknowledgment of the date and time of filing. The act does not provide for the filing office to issue a formal certificate of filing. A copy of the filed record together with an acknowledgment of the date and time of filing should sufficiently indicate that the filing has been accepted for filing and been filed.

Subsection (c) – Because of the simplification of formal filing requirements and the limited discretion granted to the filing office by this act, it is probable that rejection of records delivered to the filing office for filing will occur only rarely. This subsection provides that if the filing office does reject a record delivered for filing, the filing office must return the record to the person that submitted it within 15 days together with a brief written explanation of the reason for rejection. In the case of a record delivered by electronic transmission, rejection of the record may be made electronically by the filing office or by a mailing to the person that submitted the record.

Subsection (e) – This subsection provides that the filing of a record by the filing office does not affect the validity or invalidity of any provision contained in the record and does not create any presumption with respect to any information in the record. Likewise, the refusal of the filing office to file a record creates no presumption that any of the information in the record is incorrect. Persons adversely affected by a statement in a filed record may contest the statement in a proceeding appropriate for that purpose, including an action for damages under Section 204.

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

SECTION 212. CERTIFICATE OF GOOD STANDING OR REGISTRATION.

(a) On request of any person, the [Secretary of State] shall issue a certificate of good standing for a statutory trust or a certificate of registration for a registered foreign statutory trust.

(b) A certificate under subsection (a) must state:

(1) the statutory trust's name or the registered foreign statutory trust's name used in this state;

(2) in the case of a statutory trust:

(A) that a certificate of trust has been filed and has taken effect;

(B) the date the certificate became effective;

(C) the period of the trust's duration if the records of the [Secretary of

State] reflect that its period of duration is less than perpetual; and

(D) that:

(i) no articles of dissolution or statement of administrative dissolution have been filed;

(ii) the records of the [Secretary to State] do not otherwise reflect that the trust has been dissolved or terminated; and

(iii) a proceeding is not pending under Section 707;

(3) in the case of a registered foreign statutory trust, that it is registered to do business in this state;

(4) that all fees, taxes, interest, and penalties owed to this state by the statutory trust or foreign statutory trust and collected through the [Secretary of State] have been paid, if:

(A) payment is reflected in the records of the [Secretary of State]; and

(B) nonpayment affects the good standing or registration of the trust or foreign trust;

(5) that the most recent [annual] [biennial] report required by Section 221 has been delivered to the [Secretary of State] for filing; and

(6) other facts reflected in the records of the [Secretary of State] pertaining to the statutory trust or foreign statutory trust which the person requesting the certificate reasonably requests.

(c) Subject to any qualification stated in the certificate, a certificate issued by the [Secretary of State] under subsection (a) may be relied on as conclusive evidence of the facts stated in the certificate.

Comment

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.

Subsection (b)(4)(B) – This provision refers only to fees, taxes, interest, and penalties collected by the filing office. In some states other agencies may report to the filing office that franchise or other taxes have been paid; in those states, this information may be included in the certificate. In states where this procedure does not unduly delay the issuance of certificates, this section may be revised appropriately. Subsection (b)(4)(B) limits the scope of the statement in the certificate that all fees, taxes, interest, and penalties have been paid to those where nonpayment affects the existence or authorization to do business of the entity.

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

SECTION 213. PERMITTED NAMES.

(a) The name of a statutory trust may contain the phrase “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 any beneficial owner, trustee, or any other person.

(b) Except as otherwise provided in subsection (e), the name of a statutory trust, and the name under which a foreign statutory trust may register to do business in this state, must be distinguishable on the records of the [Secretary of State] from any:

(1) name of an existing person whose formation required the filing of a record by the [Secretary of State] and which is not at the time administratively dissolved;

(2) name of a limited liability partnership whose statement of qualification is in effect;

(3) name under which a person is registered to do business in this state by the filing of a record by the [Secretary of State];

(4) a name reserved under Section 214 or other law of this state providing for the

reservation of a name by the filing of a record by the [Secretary of State];

(5) a name registered under Section 215 or law of this state other than this [act] providing for the registration of a name by the filing of a record by the [Secretary of State]; and

(6) a name registered under [this state's assumed or fictitious name statute].

(c) If a person consents in a record to the use of its name and submits an undertaking in a form satisfactory to the [Secretary of State] to change its name to a name that is distinguishable on the records of the [Secretary of State] from any name in any category of names in subsection (b), the name of the consenting person may be used by the person to which the consent was given.

(d) Except as otherwise provided in subsection (e), in determining whether a name is the same as or not distinguishable on the records of the [Secretary of State] from the name of another person, words, phrases, or abbreviations indicating a type of person, such as "corporation", "corp.", "incorporated", "Inc.", "professional corporation", "P.C.", "PC", "professional association", "P.A.", "PA", "Limited", "Ltd.", "limited partnership", "L.P.", "LP", "limited liability partnership", "L.L.P.", "LLP", "registered limited liability partnership", "R.L.L.P.", "RLLP", "limited liability limited partnership", "L.L.L.P.", "LLLP", "registered limited liability limited partnership", "R.L.L.L.P.", "RLLLP", "limited liability company", "L.L.C." "LLC", or "limited cooperative association", limited cooperative", "L.C.A.", or "LCA" may not be taken into account.

(e) A person may consent in a record to the use of a name that is not distinguishable on the records of the [Secretary of State] from its name except for the addition of a word, phrase, or abbreviation indicating the type of person as provided in subsection (d). In such a case, the person need not change its name pursuant to subsection (b).

(f) The name of a statutory trust or foreign statutory trust may not contain the words [insert prohibited word or words that may be used only with approval by the appropriate state agency].

(g) A statutory trust or foreign statutory trust may use a name that is not distinguishable from a name described in subsection (b)(1) through (6) if the trust delivers to the [Secretary of State] a certified copy of a final judgment of a court of competent jurisdiction establishing the right of the trust to use the name in this state.

Comment

This section adopts the “distinguishable on the records” test for name availability and rejects the “deceptively similar” test widely used in the past.

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) (2014); *see also* Rule 35d-1, 17 C.F.R. §270.35d-1 (2014) (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 214. RESERVATION OF NAME.

(a) A person may reserve the exclusive use of the name that complies with Section 213 by delivering an application to the [Secretary of State] for filing. The application must state the name and address of the applicant and the name to be reserved. If the [Secretary of State] finds that the name is available, the [Secretary of State] shall reserve the name for the applicant’s exclusive use for [120] days.

(b) The owner of a reserved name may transfer the reservation to another person by delivering to the [Secretary of State] a signed notice in a record of the transfer which states the name and address of the person to which the reservation is being transferred.

Comment

This section does not provide for the renewal of a name reservation for successive 120-day periods. A new reservation may be filed upon the expiration of a reservation, but by requiring a new filing this section creates the possibility that another party may timely submit a reservation for the same name. It was considered appropriate to allow for that possibility so that the procedure in this section cannot be used to block a name indefinitely. Compare Section 215(d), which authorizes a renewable registration of certain names.

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

SECTION 215. REGISTRATION OF NAME.

(a) A foreign statutory trust not registered to do business in this state under [Article] 8 may register its name, or an alternate name adopted pursuant to Section 806, if the name is distinguishable on the records of the [Secretary of State] from the names that are not available under Section 213.

(b) To register its name or an alternate name adopted pursuant to Section 806, a foreign statutory trust must deliver to the [Secretary of State] for filing an application stating the trust's name, the jurisdiction and date of its formation, and any alternate name adopted pursuant to Section 806. If the [Secretary of State] finds that the name applied for is available, the [Secretary of State] shall register the name for the applicant's exclusive use.

(c) The registration of a name under this section is effective for [one year] after the date of registration.

(d) A foreign statutory trust whose name registration is effective may renew the registration for successive [one-year] periods by delivering, not earlier than [three months] before the expiration of the registration, to the [Secretary of State] for filing a renewal application that complies with this section. When filed, the renewal application renews the registration for a succeeding [one-year] period.

(e) A foreign statutory trust whose name registration is effective may register as a foreign statutory trust under the registered name or consent in a signed record to the use of that name by another person that is not an individual.

Comment

Unlike the reservation of a name under Section 214, a registration of a name under this section may be renewed for successive periods thus permitting a name to be protected for a period longer than the initial registration period. Use of the procedure in this section is limited, however, to the names of foreign statutory trusts that are not registered to do business in the state. The purpose of this section is to permit a foreign entity to make sure its name will be available in the event it should choose to register in the state at some time in the future.

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

SECTION 216. REGISTERED AGENT.

(a) Each statutory trust and each registered foreign statutory trust shall designate and maintain a registered agent in this state. The designation of a registered agent is an affirmation of fact by the statutory trust or registered foreign statutory trust that the agent has consented to serve.

(b) A registered agent for a statutory trust or registered foreign statutory trust must have a place of business in this state.

(c) The only duties under this [act] of a registered agent that has complied with this [act] are:

(1) to forward to the statutory trust or registered foreign statutory trust at the address most recently supplied to the agent by the trust or foreign trust any process, notice, or demand pertaining to the trust or foreign trust which is served on or received by the agent;

(2) if the registered agent resigns, to provide the notice required by Section 218(c)

to the trust or foreign trust at the address most recently supplied to the agent by the trust or foreign trust; and

(3) to keep current the information with respect to the agent in the certificate of trust or foreign registration statement.

Comment

This section is limited to prescribing the duties of a registered agent under this act. An agent may undertake other responsibilities to a represented entity, such as by contract or course of dealing, but those duties will be determined under other law.

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

SECTION 217. CHANGE OF REGISTERED AGENT OR ADDRESS FOR REGISTERED AGENT BY STATUTORY TRUST.

(a) A statutory trust or registered foreign statutory trust may change its registered agent or the address of its registered agent by delivering to the [Secretary of State] for filing a statement of change that states:

(1) the name of the trust or foreign trust; and

(2) the information that is to be in effect as a result of the filing of the statement of change.

(b) The beneficial owners or trustees of a statutory trust need not approve the filing of:

(1) a statement of change under this section; or

(2) a similar filing changing the registered agent or registered office, if any, of the trust in any other jurisdiction.

(c) A statement of change under this section designating a new registered agent is an affirmation of fact by the statutory trust or registered foreign statutory trust that the agent has consented to serve.

(d) As an alternative to using the procedure in this section, a statutory trust may amend its certificate of trust.

Comment

A change in the identity of the registered agent of a statutory trust or foreign statutory trust or a change of the office address of a trust's registered agent are usually routine matters that do not affect the rights of the beneficial owners of the represented trust. This section permits those changes to be made without: (i) amendment of the trust's certificate of trust; (ii) formal trustee approval; and (iii) any approval by the beneficial owners. For the registered agent's power to resign, see Section 218. For the registered agent's power to change its name, address, or both, see Section 219.

Subsection (c) avoids the need to file with a statement of change consent of the new registered agent being designated.

Subsection (d) makes clear that the procedures in this section are not exclusive. A common way in which a statutory trust changes its registered agent is to include the change in an amendment of its certificate of trust or in its annual/biennial report (see Section 221(e)).

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

SECTION 218. RESIGNATION OF REGISTERED AGENT.

(a) A registered agent may resign as agent for a statutory trust or registered foreign statutory trust by delivering to the [Secretary of State] for filing a statement of resignation that states:

(1) the name of the trust or foreign trust;

(2) the name of the agent;

(3) that the agent resigns from serving as registered agent for the trust or foreign trust; and

(4) the address of the trust or foreign trust to which the agent will send the notice required by subsection (c).

(b) A statement of resignation takes effect on the earlier of:

(1) the 31st day after the day on which it is filed by the [Secretary of State]; or

(2) the designation of a new registered agent for the statutory trust or registered foreign statutory trust.

(c) A registered agent promptly shall furnish to the statutory trust or registered foreign statutory trust notice in a record of the date on which a statement of resignation was filed.

(d) When a statement of resignation takes effect, the registered agent ceases to have responsibility under this [act] for any matter thereafter tendered to it as agent for the statutory trust or registered foreign statutory trust. The resignation does not affect any contractual rights the trust or foreign trust has against the agent or that the agent has against the trust or foreign trust.

(e) A registered agent may resign with respect to a statutory trust or registered foreign statutory trust whether or not the trust or foreign trust is in good standing.

Comment

Resignation under this section may be accomplished solely by action of the registered agent and does not require the cooperation or consent of the represented statutory trust or foreign statutory trust. Whether a resignation violates a contract between the registered agent and the trust is beyond the scope of this act, and subsection (d) preserves whatever claims a represented trust may have against its registered agent for a wrongful termination. Even if a resignation were to violate such a contract, the resignation would still be effective if the provisions of this section were followed.

Subsection (b) – This subsection delays the effectiveness of a statement of resignation for 31 days to allow the notice of the resignation that must be sent under subsection (c) to reach the represented statutory trust and to allow the represented statutory trust or foreign statutory trust to arrange for a substitute registered agent.

Subsection (e) – This subsection makes clear that a registered agent may resign with respect to a statutory trust or foreign statutory trust that is not in good standing and supersedes the contrary administrative practice in some states of refusing to accept any filings with respect to an entity that is not in good standing until the problem with the entity's standing is cured.

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

SECTION 219. CHANGE OF NAME OR ADDRESS BY REGISTERED AGENT.

(a) If a registered agent changes its name or address, the agent may deliver to the [Secretary of State] for filing a statement of change that states:

(1) the name of the statutory trust or registered foreign statutory trust represented by the registered agent;

(2) the name of the agent as currently shown in the records of the [Secretary of State] for the trust or foreign trust;

(3) if the name of the agent has changed, its new name; and

(4) if the address of the agent has changed, its new address.

(b) A registered agent promptly shall furnish notice to the represented statutory trust or registered foreign statutory trust of the filing by the [Secretary of State] of the statement of change and the changes made by the statement.

Legislative Note: *Many registered agents act in that capacity for many entities, and the Model Registered Agents Act (2006) (Last Amended 2013) provides a streamlined method through which a commercial registered agent can make a single filing to change its information for all represented entities. The single filing does not prevent an enacting state from assessing filing fees on the basis of the number of entity records affected.*

Comment

This section permits a registered agent to change the name and address of the agent that appears in the registered agent filing of a statutory trust or foreign statutory trust represented by the agent. This act does not provide for commercial registered agents. *Compare* Uniform Business Organizations Code (2011) (Last Amended 2013), §§1-405, 1-406, and 1-409. As a result, a registered agent will need to make a separate filing under this section for each statutory trust represented by the agent.

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

SECTION 220. SERVICE OF PROCESS, NOTICE, OR DEMAND.

(a) A statutory trust or registered foreign statutory trust may be served with any process, notice, or demand required or permitted by law by serving its registered agent.

(b) If a statutory trust or registered foreign statutory trust ceases to have a registered agent, or if its registered agent cannot with reasonable diligence be served, the trust or foreign trust may be served by registered or certified mail, return receipt requested, or by similar commercial delivery service, addressed to the trust or foreign trust at its principal office. The address of the principal office must be as shown in the trust's or foreign trust's most recent [annual] [biennial] report filed by the [Secretary of State]. Service is effected under this subsection on the earliest of:

(1) the date the trust or foreign trust receives the mail or delivery by the commercial delivery service;

(2) the date shown on the return receipt, if signed by the trust or foreign trust; or

(3) five days after its deposit with the United States Postal Service or with the commercial delivery service, if correctly addressed and with sufficient postage or payment.

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

(d) Service of process, notice, or demand on a registered agent must be in a written record.

(e) Service of process, notice, or demand may be made by other means under law other than this [act].

Comment

Subsection (b) – This subsection offers three alternative methods for establishing the date service is effected, a date important for determining the time frame in which an statutory trust or foreign statutory trust must respond to the process, notice, or demand served. Under subsection (b)(1), service is effected on the date or receipt by the trust of the mail or commercial delivery. Under subsection (b)(2), service is effected on the date shown on the return receipt, if signed on behalf of the trust. Under subsection (b)(3), service is effected five days after it is deposited with the Postal Service or with a similar commercial delivery service, if correctly addressed and with correct postage or payment. Service is effective at the earliest of the three listed circumstances.

However, for the party effecting service there are difficulties of proof under the first two circumstances. Under subsection (b)(1) the exact date of the receipt by the statutory trust or foreign statutory trust of mail or commercial delivery is peculiarly within the knowledge of the trust. Under subsection (b)(2) the return receipt must be signed on behalf of the trust. That requirement is designed to assure that the service is actually received by the trust, but the signature on the return receipt may not always show unambiguously that the signer was acting for the trust and was authorized to do so. As a practical matter, therefore, parties effecting service under subsection (b) may find it most convenient to rely on subsection (3) and to maintain their own records so that the date of deposit in the mails or with a commercial delivery service can easily be established.

Subsection (c) – This subsection provides a means for serving process on a statutory trust or foreign statutory trust that cannot be served under subsection (a) or (b). Some statutory trust statutes require or permit that service of process in that circumstance be made on the filing office. Compare Fed. R. Civ. P. 4(h)(1), which permits service to be made on an officer or managing or general agent of an entity.

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

SECTION 221. [ANNUAL] [BIENNIAL] REPORT FOR [SECRETARY OF STATE].

(a) A statutory trust or registered foreign statutory trust shall deliver to the [Secretary of State] for filing [an annual] [a biennial] report that states:

(1) the name of the trust or foreign trust;

(2) the name and street and mailing addresses of its registered agent in this state;

(3) the street and mailing addresses of its principal office;

(4) the name of at least one trustee; and

(5) in the case of a foreign statutory trust, its jurisdiction of formation and any alternate name adopted under Section 806.

(b) Information in the [annual] [biennial] report must be current as of the date the report is signed by the statutory trust or registered foreign statutory trust.

(c) The first [annual] [biennial] report must be delivered to the [Secretary of State] for filing after [January 1] and before [April 1] of the year following the calendar year in which the statutory trust's certificate of trust became effective or the registered foreign statutory trust registered to do business in this state. Subsequent [annual] [biennial] reports must be delivered to the [Secretary of State] for filing after [January 1] and before [April 1] of each [second] calendar year thereafter.

(d) If [an annual] [a biennial] report does not contain the information required by this section, the [Secretary of State] promptly shall notify the reporting statutory trust or registered foreign statutory trust in a record and return the report for correction.

(e) If [an annual] [a biennial] report contains the name or address of a registered agent which differs from the information shown in the records of the [Secretary of State] immediately before the report becomes effective, the differing information in the report is considered a statement of change under Section 217.

Comment

A statutory trust or qualified foreign statutory trust that fails to comply with this section is subject to administrative dissolution under Section 707. 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, a trustee as trustee, and a

person designated under Section 103(e)(8) or (9) as a person in the designated capacity, for a debt, obligation, or other liability of a statutory trust or a series thereof; and

(3) the extent to which:

(A) a debt, obligation, or other liability of a series trust is enforceable against the property of any series thereof; and

(B) a debt, obligation, or other liability of a series of a series trust is enforceable against the property of the trust or any other series thereof.

Comment

Paragraph (1) provides that 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), because some authorities differentiate liability shield issues from internal affairs for purposes of choice of law. *See, e.g.*, Restatement (Second) of Conflict of Laws §307 (1971) (treating shareholders' liability separately from the internal affairs doctrine).

Section 801 states parallel rules for 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 distinct from its trustees and beneficial owners.

Comment

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) (Last Amended 2010); 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, regardless of whether for profit.

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

Comment

Under this section, a statutory trust may be formed for any lawful purpose other than a predominantly donative purpose. Section 401(c) states a similar rule for the series of a statutory trust. The inclusion of the phrase "regardless of whether for profit" in subsection (a) confirms that a statutory trust's activities are not limited solely to profit making or business purposes. This is consistent with Uniform Limited Liability Act §108(b) (2006) (Last Amended 2013) and Uniform Limited Partnership Act §110(b) (2001) (Last Amended 2013).

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).

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) (Last Amended 2010); 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) (Last Amended 2010), 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.

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.

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

SECTION 304. LIABILITY OF TRUSTEES AND BENEFICIAL OWNERS.

(a) A debt, obligation, or other liability of a statutory trust or series thereof is solely the debt, obligation, or other liability of the trust or series thereof. A beneficial owner, trustee, or person designated pursuant to Section 103(e)(8) or (9) 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 beneficial owner, trustee, or person designated pursuant to Section 103(e)(8) or (9). This subsection applies regardless of the dissolution of the trust.

(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

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) (Last Amended 2010) (eliminating the personal liability of the trustee for a debt, obligation, or liability arising in the trustee's fiduciary capacity), *and* Restatement (Third) of Trusts §106 (2012) (same). 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 a 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.).

The last sentence of subsection (a) was added as part of the harmonization project. It refers specifically to dissolution, providing that the rule of that subsection applies regardless of the dissolution of the trust. In clarifying this point by express provision, the harmonization committee did not intend to suggest a negative inference that the rule would not apply after termination of the trust. To the contrary, that the rule of this subsection applies also regardless of the termination of the trust follows ineluctably from the structure of this provision. In other words, the rule of this section continues to apply as to any debt, obligation, or other liability of the trust incurred before termination of the trust. For further discussion, see the comment to Uniform Limited Liability Company Act §304 (2006) (Last Amended 2013).

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

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

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) (Last Amended 2010); 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 over which a trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. *See* 11 U.S.C. §541(d) (2014).

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) Except as otherwise provided in its certificate of trust, a statutory trust:

(1) has perpetual duration; and

(2) may not be terminated or revoked except in accordance with this [act] or the terms of the trust's certificate of trust.

(b) A series of a statutory trust 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, or person designated under Section 103(e)(8) or (9) 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

The principal source used by the drafting committee in fashioning this section was Delaware Statutory Trust Act §3808 (2009).

Subsection (a) provides a default rule of perpetual duration for a statutory trust. Under Section 104(4), this default rule can be modified only by the certificate of 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, which under Section 303(b) may not have a predominantly donative purpose.

Subsection (b) confirms that a statutory trust may be terminated only in accordance with the terms of this act or the governing instrument (see Sections 701 and 707). 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 apt to the circumstances.

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); 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

This section implements the concept that a statutory trust is an entity separate from its trustees and beneficial owners by providing that a statutory trust may transact and hold property in its own name. The property of a common-law trust, by contrast, is normally 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 ordinarily 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) (Last Amended 2010); Restatement (Third) of Trusts §106 (2012); 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) (Last Amended 2010); 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 has the capacity to sue and be sued in its own name.

Comment

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

Under Section 104(5), the trust instrument may not override this section.

[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 purpose, regardless of whether for profit, separate from the trust or any other series thereof if the purpose of the series is lawful and not a predominantly donative purpose.

(d) Subject to Section 404, the governing instrument may provide for the creation of one or more classes of trustees, beneficial owners, or beneficial interests having separate rights, powers, or duties with respect to the statutory trust or any series thereof.

Comment

The principal sources used by the drafting committee in fashioning this section were Delaware Statutory Trust Act §3806 (2009) and 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(17). Under this act, a series is a segregation or partitioning of property within a statutory trust. If a statutory trust has organized as a series trust under this section, then under Section 402 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, and only in accordance with the procedures prescribed by Section 403.

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 403), 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, which are not entities under state trust law, but are commonly taxed as separate entities 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, regardless of whether for profit, 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 (2014); *see also* Delaware Statutory Trust Act §3805(h) (2009).

Subsection (d) clarifies the distinction between governance classes, meaning an internal grouping of trustees, beneficial owners, or beneficial interests for governance purposes, as is authorized by Section 103(e)(5), and the series concept, which under this act is a segregation or partitioning of property within a single statutory trust. Subsection (d) confirms that governance classes may be implemented in parallel to property series, so that different trustees, beneficial owners, or beneficial interests may pertain to different property series, subject to the rule of Section 404, which requires that there be a trustee whose duties run to the trust and all series thereof.

Under Section 104(6), 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 rules pertaining to distributions under Sections 615 and 616 apply to a distribution from a series trust and from the property of any series thereof, except for a distribution under Section 405.

(c) 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 a transaction under [Article] 9, is deemed to be a transfer between separate persons under [Uniform Voidable Transaction Act or other state fraudulent transfer statute] and a distribution under Section 615.

Comment

Subsection (a) provides that if a statutory trust creates one or more series in accordance with 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 rules of this subsection are implemented by the procedures prescribed by Section 403.

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 interim distributions made from the property of a series. Liquidating distributions by a series are governed by Section 405.

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

Under Section 104(6), the governing instrument may not override subsections (b) or (c).

SECTION 403. CLAIMS PERTAINING TO A SERIES TRUST.

(a) A series of a statutory trust may not sue or be sued in its own name.

(b) If a series trust has a claim against a person which pertains to the property of a series thereof, the trust may assert the claim under Section 308 and shall allocate the proceeds of the claim under Sections 401 and 402.

(c) If a person has a claim against a series trust which pertains to the property of a series thereof, to assert the claim the person must bring the claim against the trust, stating that the claim pertains to the property of a series thereof and specifying the series if known. To the extent the claim succeeds and is reduced to judgment:

(1) the judgment must state that it is collectable only against the property of the specified series; and

(2) the judgment creditor may levy on the judgment only by serving the series trust, which shall satisfy the judgment using only the property of the specified series.

Comment

This section prescribes implementing procedures for claims pertaining to a series trust.

Subsection (a) confirms that a series of a statutory trust may not sue or be sued in its own name. In accordance with Section 401(b), which provides that a series of a statutory trust is not an entity separate from the trust, in litigation involving a series trust the proper party is the trust itself (see Section 308). This is true even if the matter pertains exclusively to property associated with a series of the trust.

Subsection (b) addresses claims held by a series trust that pertain to the property of a series of the trust. Under this subsection, the trust may assert the claim in accordance with its capacity to sue under Section 308, but the trust will then allocate the proceeds of the claim internally in accordance with its series structure under Sections 401 and 402.

Subsection (c) addresses claims held by others that pertain to the property of a series of a series trust. Under this subsection, to enforce such a claim the claimant must assert it against the trust (see Section 308). Moreover, the claimant must state that the claim pertains to the property of a series of the trust and must specify which series if the claimant has that information. If the claimant lacks that information, the failure to name the series in the complaint is not grounds for dismissal on the pleadings. Instead, pre-trial discovery can be used to obtain the information, and once the complainant has the information, the court should normally grant leave to amend the complaint to incorporate the information.

If the claim succeeds and is reduced to judgment, subparagraph (1) requires that the judgment state that it is collectable only against the property of the specified series. Subparagraph (2) provides that as judgment creditor the claimant may levy on the judgment only by serving the series trust, which in accordance with Section 402 will satisfy the judgment using only the property of the specified series.

Under Section 104(6), the governing instrument may not override this section.

SECTION 404. 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 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(6), the governing instrument may not override this section.

SECTION 405. 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 703 and shall take actions with respect to the claims and obligations of the series as provided in Sections 703 through 706.

(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 solely because the person acts in that capacity.

Comment

Although a series is not an entity separate 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 may 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 703 through 706, 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(6), the governing instrument may not override subsection (c).

[ARTICLE 5]

TRUSTEES AND TRUST MANAGEMENT

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

Comment

The principal sources used by the drafting committee in fashioning this section were Delaware Statutory Trust Act §3806 (2009), Delaware General Corporation Law §141 (2009), and Model Business Corporation Act §8.01.

Section 102(24) 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 itself state any default rules for trustee appointment, if the governing instrument does not address the issue, 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) (Last Amended 2010), and Restatement (Third) of Trusts §§31-37 (2003).

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 activities and affairs of the statutory trust; and

(3) other powers conferred by this [act].

Comment

The principal source used by the drafting committee in fashioning this section was Uniform Trust Code §815 (2000) (Last Amended 2010).

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. In accordance with modern trust law, *see* Uniform Trust Code §815 (2000) (Last Amended 2010); Restatement (Third) of Trusts §85, cmt. a (2007), this section grants the trustees of a statutory trust the broadest possible powers in the administration of the trust.

However, in exercising or not exercising the broad powers conferred by this section, a trustee must comply with the standards of conduct stated in Section 505. That all powers held by a trustee are subject to the trustee's fiduciary duties is familiar trust law. The Restatement characterizes this point as "a basic principle of trust administration," namely, "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); *see also id.* §86 cmt. b ("All powers of trusteeship are held in the trustee's fiduciary capacity and must be exercised in good faith and to serve the interests of the beneficiaries.").

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

The principal sources used by the drafting committee in fashioning this section were Delaware Statutory Trust Act §3806 (2009), Delaware General Corporation Law §228 (2009), and Uniform Trust Code §703 (2000) (Last Amended 2010).

In accord with Uniform Trust Code §703(a) (2000) (Last Amended 2010) and Restatement (Third) of Trusts §39 (2003), paragraph (1) rejects the common-law rule requiring unanimity among the trustees of a private trust, replacing 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) (2014); 17 C.F.R. §270.17g-1 (2014). 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) (2014).

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

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 who deals with a trustee in good faith 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 a person acts in good faith, the 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 a 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.

Subsection (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) (Last Amended 2010), 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 404, 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

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 corporate fiduciary law rather than the more restrictive fiduciary duties of trust law 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 as its model. 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 corporate fiduciary law 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, 1110-18 (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 of trust fiduciary law 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) (Last Amended 2010); Delaware Statutory Trust Act §3806(c), (e) (2009); Model Business Corporation Act §8.30.

Series Trusts. Subsection (a) is subject to Section 404, 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 404.

Mandatory and Default Fiduciary Law. Under Section 104(7), 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 law. *See* Restatement (Third) of Trust §86, cmt. b (2007) ("A trustee's duties, like trustee powers, may be modified by the terms of the trust, but the duties of trusteeship are subject to certain minimum standards that are fundamental to the trust relationship and normally essential to it."); Restatement (Third) of Trusts §96, cmt. c (2012) ("Notwithstanding the breadth of language in a trust provision relieving a trustee from liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability."); *see also* Uniform Trust Code §105(b)(2) (2000) (Last Amended 2010); 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).

SECTION 506. REASONABLE RELIANCE. A trustee, officer, employee, manager, or committee of a statutory trust, or other person designated pursuant to Section 103(e)(8) or (9), 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 reasonable 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) or (9).

Comment

The principal sources used by the drafting committee in fashioning this section were Uniform Trust Code §1006 (2000) (Last Amended 2010) and 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 reasonable. This section does not foreclose injunctive or other such equitable relief. Under traditional trust law, a trustee "may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions." Restatement (Third) of Trusts §71 (2007).

The drafting committee intended the standard of "reasonable reliance" to have an objective component. *Cf.* Restatement (Third) of Trusts §77, cmt. b(2) (2007) ("Taking the advice of legal counsel on such matters 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 reasonable 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(8), the governing instrument may not vary the obligation of a person to act in reasonable reliance 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 reasonable 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) or (9).

(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

The principal sources used by the drafting committee in fashioning this section were 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). 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) (2014).

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(9), 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 404. 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.

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

SECTION 509. REIMBURSEMENT, INDEMNIFICATION, ADVANCEMENT, EXONERATION, AND INSURANCE.

(a) A statutory trust shall reimburse a trustee for any payment made by the trustee in the course of the trustee's activities on behalf of the statutory trust, if the trustee complied with Sections 505 and 615 in making the payment.

(b) A statutory trust may indemnify and hold harmless a trustee, beneficial owner, or person designated pursuant to Section 103(e)(8) or (9) 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 conduct involving bad faith, willful or intentional misconduct, or knowing violation of law.

(c) Expenses, including reasonable attorney's fees and costs, incurred by a trustee, beneficial owner, or person designated pursuant to Section 103(e)(8) or (9) 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 (b).

(d) A term in the governing instrument relieving or exonerating a trustee or person designated under Section 103(e)(8) or (9) from liability is unenforceable to the extent it relieves or exonerates the trustee or person from liability for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law.

(e) A statutory trust may purchase and maintain insurance on behalf of a trustee, person designated under Section 103(e)(8) or (9), or beneficial owner of the trust against liability asserted against or incurred by the trustee, person, or beneficial owner in that capacity or arising from that status even if, under Section 104(10), the trust instrument could not eliminate or limit the person's liability to the trust for the conduct giving rise to the liability.

Comment

Under this section the governing instrument may provide for indemnification, advancement of expenses, or exoneration, but not for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law. Section 104(10) makes this limitation mandatory. This section does not affect the power of a court to issue injunctive or other equitable relief for breach of trust.

Prohibiting indemnification and exoneration for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law is consistent with familiar trust law. *See* Uniform Trust Code §1008(a) (2000) (Last Amended 2010) ("A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries."); Restatement (Third) of Trusts §96, cmt. c (2012) ("Notwithstanding the breadth of language in a trust provision relieving a trustee from liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability. Hence, an exculpatory clause cannot excuse a trustee for a breach of trust committed in bad faith. Nor can the trustee be excused for a breach committed with indifference to the interests of the beneficiaries or to the terms and purposes of the trust—that is, committed without reasonable effort to understand and conform to applicable fiduciary duties.").

The Delaware Statutory Trust Act is in accord. 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).

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) (2014).

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 Release No. 24083, 70 SEC Docket 2017 (Oct. 14, 1999). 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

The principal sources used by the drafting committee in fashioning this section were Delaware Statutory Trust Act §3806 (2009) and Uniform Trust Code §808 (2000) (Last Amended 2010).

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) (Last Amended 2010); Restatement (Third) of Trusts §75, cmts. c, e, and f (2007).

Following Uniform Trust Code §808(b) (2000) (Last Amended 2010), 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 (2007).

The reference in subsection (c) to a “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, such as trustee removal, trust law distinguishes between “serious” and other breaches of trust. *See, e.g.,* Uniform Trust Code §706(b)(1) (2000) (Last Amended 2010); 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 instructions in cases of reasonable doubt about whether a direction falls within the exclusion of subsection (c). *See* Restatement (Third) of Trusts §71 (2007).

Under Section 104(11), 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

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), this section is intended to facilitate delegation to specialists. 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) (Last Amended 2010); 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 (2000) (Last Amended 2010), which is derived from Uniform Prudent Investor Act §9. However, this section deviates from those Acts on 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 trust law disfavors delegation by one co-trustee to another. *See* Uniform Trust Code §703(e); Restatement (Third) of Trusts §81, cmt. c(1) (2007). 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 (2014).

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

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 advisor 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 advisor. *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 Ann., Corps. & Ass'ns §2-405.3 (West 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) (2014).

[ARTICLE] 6

BENEFICIAL OWNERS

SECTION 601. BENEFICIAL INTEREST.

(a) A beneficial interest in a statutory trust is personal property.

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

(c) 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

Subsections (a) and (b) follow from the principle that a statutory trust is an entity separate from its beneficial owners (see Section 302). They are based on Delaware Statutory Trust Act §3805 (2009).

Subsection (c) is derived from the Model Business Corporation Act §6.30.

SECTION 602. TRANSFER OF BENEFICIAL INTEREST.

(a) In this section, "covered creditor" means a judgment creditor of a beneficial owner or a person to which a beneficial interest in a statutory trust has been transferred by operation of law.

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

(c) The governing instrument may not limit the transferability of a beneficial interest if the same person is the sole trustee and sole beneficial owner.

(d) If a beneficial interest in a statutory trust is not freely transferable by a beneficial owner under a provision of the governing instrument such that a transferee may become a beneficial owner without further requirement except notice to the statutory trust, the following rules apply:

(1) On petition by a covered creditor, [the appropriate court] may authorize the petitioner to reach the beneficial owner's interest by attachment of present or future distributions to or for the benefit of the beneficial owner or by other means. The court may limit the award to relief that is appropriate under the circumstances.

(2) On petition by a covered creditor, to the extent a trustee has not complied with a standard of distribution provided in the governing instrument or has abused the trustee's discretion to make a distribution, [the appropriate court]:

(A) may order a distribution to the benefit of the petitioner; and

(B) if a distribution is ordered, shall direct the trustee to pay to the petitioner an equitable amount but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficial owner if the trustee had complied with the standard or had not abused the discretion.

Comment

This section addresses the transferability of a beneficial interest in a statutory trust and the rights of a creditor of a beneficial owner to levy on the owner's interest in the trust.

Subsection (a) defines the term "covered creditor" within this section as "a judgment creditor of a beneficial owner or a person to which a beneficial interest in a statutory trust has been transferred by operation of law."

Subsection (b) provides as a default rule that a beneficial interest in a 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, Multistate Guide to Trusts and Trust Administration tbl. 5, pt. 1 (2012) (identifying such states). However, because this subsection is not scheduled in Section 104, the governing instrument may limit the transferability of a beneficial interest as is confirmed by Section 103(e)(2). Subsections (c) and (d) impose safeguards against limits on transferability that are abusive toward creditors.

Subsection (c) provides that the transferability of a beneficial interest may not be limited if the same person is the sole trustee and sole beneficial owner. Under the merger doctrine of the common law of trusts, in such circumstances the legal and equitable title in the trust property would merge, and the trust would terminate, so that no person could be both the sole trustee and sole beneficiary of property protected from the person's creditors. This subsection is necessary to reach the same result, because Section 306(d) overrides the application to a statutory trust of the common-law merger doctrine. The drafting committee concluded that the same person could be the sole trustee and sole beneficiary of a statutory trust, but for reasons of policy in such circumstances the beneficial interest must be freely transferable and so reachable by the person's creditors.

Subsection (d) addresses the rights of a creditor of a beneficial owner whose beneficial interest in a statutory trust is not freely transferable. Drawing in part on the language of Uniform Trust Code §504 (2000) (Last Amended 2010), subsection (d) authorizes the "attachment of present or future distributions to or for the benefit of a beneficial owner." Subsection (d) also authorizes a creditor to stand in the shoes of a beneficial owner for the purpose of compelling a distribution by a trustee who has "not complied with a standard of distribution … or has abused the trustee's discretion to make a distribution."

Subsection (d) thus rejects the possibility of a spendthrift statutory trust, that is, the creation of beneficial interests over which creditors of the beneficiary have no recourse. "In the American tradition, … the trust is regarded as a conditional gift, and a beneficiary takes his interest in the trust subject to any restrictions imposed by the settlor. Within American law, freedom of disposition includes the right to impose conditions on the beneficiary's enjoyment if the trust property, including a disabling restraint on voluntary and involuntary alienation of the beneficial interest." Jesse Dukeminier & Robert H. Sitkoff, Wills, Trusts, and Estates 696 (9th ed. 2013). The drafting committee reasoned that this policy basis for allowing a spendthrift trust, implementing the donor's right to freedom of disposition, does not pertain to a business trust that is a creature of freedom of contract. Under Section 303(b), a statutory trust may not have a predominantly donative purpose.

Under Section 104(12), the governing instrument may not vary the provisions of subsections (a), (c), and (d).

SECTION 603. 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

Except for merger, interest exchange, conversion, and domestication transactions under Article 9, dissolution under Article 7, 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(h) (1997) (Last Amended 2013) (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) (2014). 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 (2014). 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 604. FORM OF AND LIABILITY FOR CONTRIBUTIONS.

(a) A contribution may consist of property transferred to, services performed for, or another benefit provided to the statutory trust or an agreement to transfer property to, perform services for, or provide another benefit to the trust.

(b) 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.

(c) A person's obligation to make a contribution to a statutory trust is not excused by the person's death, disability, termination, or other inability to perform personally.

(d) If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the trustee to contribute money equal to the value of the part of the contribution which has not been made.

(e) 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 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 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

Subsection (a) deals with the form of a contribution (defined in Section 102(4)). Comparable language exists in most corporate and unincorporated business entity statutes.

Subsection (b) acknowledges that a beneficial owner may obtain a beneficial interest without an exchange of consideration, a possibility that is not uncommon in existing commercial practice. However, a statutory trust may not be used to effect a donative transfer, as Section 303(b) prohibits a statutory trust from having a "predominantly donative purpose."

Subsection (c) overrides any common law principle of impracticability or otherwise, such as under Restatement (Second) of Contracts §§261-262 (1981), that might discharge a duty to perform on account of death or incapacity. The reference to "perform personally" is not limited to individuals but rather may refer to any person, including an entity, that has a non-delegable duty.

Subsections (d) and (e) authorize specified penalties for a beneficial owner's failure to comply with an obligation in the governing instrument to make a contribution. *Cf.* Delaware Statutory Trust Entity Act §3802(c) (2009); 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 605. SHARING OF AND RIGHT TO DISTRIBUTIONS BEFORE DISSOLUTION.

(a) Any distribution made by a statutory trust before its dissolution and winding up must be in proportion to the beneficial interests.

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

(c) A beneficial owner has a right to a distribution before the dissolution and winding up of a statutory trust only if the trustee decides to make an interim distribution. A beneficial owner does not have a right to demand or receive a distribution from the trust in any form other than money.

(d) Except as otherwise provided in Section 703(b), the trust may distribute an asset in kind only 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 distributions.

Comment

The principal sources used by the drafting committee in fashioning this section, which deals with interim distributions, were Delaware Statutory Trust Act §3805 (2009) and Revised Uniform Limited Liability Company Act §404 (2006) (Last Amended 2013). Section 703 deals with liquidating distributions. Section 615 sets forth limitations on distributions.

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) (2014). 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 (2014). 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 606. 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

The principal source used by the drafting committee in fashioning this section was Delaware Statutory Trust Act §3806 (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 (2014); 17 CFR §270.22c-1 (2014). In narrowly defined circumstances, this redemption right and obligation may be postponed. *See* 15 U.S.C. §80a-22(e) (2014). 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 (2014).

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

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. Delaware Statutory Trust Act §3806(h) (2009) is to similar effect.

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

Under Section 104(13), 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(13), 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 apt right to information, because the beneficiary could 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.

Section 508 addresses a trustee's right to information.

SECTION 609. DIRECT ACTION BY BENEFICIAL OWNER. 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 only if the owner can plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the statutory trust.

Comment

A beneficial owner does not have a direct claim against a trustee merely because the trustee has breached the trustee's standard of conduct or the terms of the trust's governing instrument. To have standing to bring a direct claim, the beneficial owner must be able to show a direct harm or injury—*i.e.*, a harm or injury that is independent of the harm or injury caused or threatened to be caused to the statutory trust.

The reference to "threatened injury" allows for claims for preventive relief, such as a temporary restraining order or preliminary injunction.

Under Section 104(14), the governing instrument may not eliminate the right of a beneficial owner to bring a direct action under this section or a derivative action under Section 610. However, Section 104(14) permits the governing instrument to subject the right to bring an action 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.

SECTION 610. DERIVATIVE ACTION. A beneficial owner may maintain a derivative action to enforce a right of 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 under paragraph (1) would be futile.

Comment

Paragraph (1) – The demand requirement recognizes that, presumptively at least, the decision to cause a statutory trust to bring suit is a business decision, to be made by those who manage the business. Deborah A. DeMott, Shareholder Derivative Actions: Law and Practice §5.9 (2012).

Paragraph (2) – Although some jurisdictions have a universal demand requirement, the futility rule adopted in this paragraph is the majority approach. *Id.* §5.12.

Under Section 104(14), the governing instrument may not eliminate the right of a beneficial owner to bring a direct action under this section or a derivative action under Section 609. However, Section 104(14) permits the governing instrument to subject the right to bring an action 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.

SECTION 611. PROPER PLAINTIFF. A derivative action to enforce a right 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) whose status as a beneficial owner devolved on the person 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.

Comment

The standing rule stated in this section is conventional in the law of unincorporated entities and in corporate law. A transferee of a beneficial owner has no standing to bring a derivative action.

SECTION 612. PLEADING. In a derivative action, the complaint must state with particularity:

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

(2) why demand should be excused as futile.

Comment

This pleading requirements of this section implement Section 610 and are traceable to Uniform Limited Partnership Act §1003 (1976/1985).

SECTION 613. SPECIAL LITIGATION COMMITTEE.

(a) If a statutory trust is named as or made a party in a derivative proceeding, the trust may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the trust. If the trust appoints a special litigation committee, on motion by the committee made in the name of the trust, except for good cause shown, the court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation. This subsection does not prevent the court from:

(1) enforcing a person's right to information under Section 508 or 608; or

(2) granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

(b) A special litigation committee must be composed of one or more disinterested and independent individuals, who may be trustees.

(c) A special litigation committee may be appointed:

(1) by a majority of the trustees not named as parties in the proceeding; or

(2) if all trustees are named as parties in the proceeding, by a majority of the trustees named as defendants.

(d) After appropriate investigation, a special litigation committee may determine that it is in the best interests of the statutory trust that the proceeding:

(1) continue under the control of the plaintiff;

(2) continue under the control of the committee;

(3) be settled on terms approved by the committee; or

(4) be dismissed.

(e) After making a determination under subsection (d), a special litigation committee shall file with the court a statement of its determination and its report supporting its determination and shall serve each party with a copy of the determination and report. The court shall determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof. If the court finds that the members of the committee were disinterested and independent and that the committee acted in good faith, independently, and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall dissolve the stay of discovery entered under subsection (a) and allow the action to continue under the control of the plaintiff.

Comment

This section is substantially identical to the comparable provisions in the other unincorporated filing entity acts. *See, e.g.*, Uniform Limited Liability Company Act §805 (2006) (Last Amended 2013). This section is consistent with established law in most jurisdictions, modified to fit the context of a statutory trust. Under Section 104(15), a governing instrument can preclude the use of special litigation committee, rendering this section inapplicable, but it cannot otherwise vary this section.

The standard of review in subsection (e) follows Auerbach v. Bennett, 393 N.E.2d 994 (N.Y. 1979) rather than Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981), because the latter's reference to a court's business judgment has generally not been followed in other states.

SECTION 614. PROCEEDS AND EXPENSES.

(a) Except as otherwise provided in subsection (b):

(1) any proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, belong to the statutory trust and not to the plaintiff; and

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

(b) If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including attorney's fees and costs, from the recovery by the trust.

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

Comment

Subsection (a) deals with the allocation of any proceeds of a derivative action.

Subsection (b) deals with reimbursement of expenses, including attorney's fees and costs.

Subsection (c) imposes a requirement of court approval for a voluntary dismissal or settlement of a derivative action. The requirement is intended to prevent abuse by way of a collusive settlement.

SECTION 615. LIMITATIONS ON DISTRIBUTIONS.

(a) A statutory trust may not make a distribution, including a distribution under Section 703(b)(2), if after the distribution:

(1) the trust would not be able to pay its debts as they become due in the ordinary course of the trust's activities and affairs; or

(2) the trust's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the trust were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of beneficial

owners and transferees whose preferential rights are superior to the rights of persons receiving the distribution.

(b) A trustee may base a determination that a distribution is not prohibited under subsection (a) on:

(1) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; or

(2) a fair valuation or other method that is reasonable under the circumstances.

(c) Except as otherwise provided in subsection (e), the effect of a distribution under subsection (a) is measured:

(1) in the case of a distribution by purchase, redemption, or other acquisition of a beneficial interest, as of the earlier of:

(A) the date money or other property is transferred or debt incurred by the statutory trust; or

(B) the date the person entitled to the distribution ceases to own the interest or rights being acquired by the trust in return for the distribution;

(2) in the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(3) in all other cases, as of the date:

(A) the distribution is authorized, if the payment occurs not later than 120 days after that date; or

(B) the payment is made, if the payment occurs more than 120 days after the distribution is authorized.

(d) A statutory trust's indebtedness to a beneficial owner or transferee incurred by reason of a distribution made in accordance with this section is at parity with the trust's indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement.

(e) A statutory trust's indebtedness, including indebtedness issued as a distribution, is not a liability for purposes of subsection (a) if the terms of the indebtedness provide that payment of principal and interest are made only if and to the extent that payment of a distribution could then be made under this section. If indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is made.

(f) In measuring the effect of a distribution under Section 703(b)(2), the liabilities of a dissolved statutory trust do not include any claim that has been disposed of under Section 704, 705, or 706.

Comment

Both this section and Section 616 were derived from Model Business Corporation Act §6.40. The other uniform acts on unincorporated entities contain similar provisions. For further discussion, see the comments to Uniform Limited Liability Company Act §§405, 406 (2006) (Last Amended 2013).

SECTION 616. LIABILITY FOR IMPROPER DISTRIBUTIONS.

(a) If a trustee consents to a distribution made in violation of Section 615 and in consenting to the distribution fails to comply with Section 505, the trustee is personally liable to the trust or the series thereof for the amount of the distribution which exceeds the amount that could have been distributed without the violation of Section 505.

(b) A person that receives a distribution knowing that the distribution violated Section 615 is personally liable to the statutory trust or series thereof but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under Section 615.

(c) A trustee against which an action is commenced because the trustee is liable under subsection (a) may:

(1) implead any other trustee that is liable under subsection (a) and seek to enforce a right of contribution from the trustee; and

(2) implead any person that received a distribution in violation of subsection (b) and seek to enforce a right of contribution from the person in the amount the person received in violation of subsection (b).

(d) An action under this section is barred unless commenced not later than two years after the distribution.

Comment

Both this section and Section 615 were derived from Model Business Corporation Act §6.40. The other uniform acts on unincorporated entities contain similar provisions. For further discussion, see the comments to Uniform Limited Liability Company Act §§405, 406 (2006) (Last Amended 2013).

[ARTICLE] 7

DISSOLUTION AND WINDING UP

SECTION 701. EVENTS CAUSING DISSOLUTION. A statutory trust is dissolved only by:

(1) an administrative dissolution under Section 707; or

(2) the filing of articles of dissolution under Section 702:

(A) with the approval of all the beneficial owners; or

(B) as provided in the certificate of trust.

Comment

This section provides that a statutory trust may be dissolved only by delivering articles of dissolution under Section 702 or by administrative dissolution under Section 707. 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)(A) of this section prevails over the general rule of majority vote stated in Section 603(1). However, under Section 104(18), the governing instrument cannot override any of the provisions in this article.

SECTION 702. ARTICLES OF DISSOLUTION.

(a) If dissolution of a statutory trust is authorized under Section 701, 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 208, a statutory trust is dissolved when articles of dissolution that comply with subsection (a) are filed by the [Secretary of State].

Comment

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 703. Subsection (b) governs the effective date of the dissolution.

Under Section 104(18), the governing instrument may not override this section.

SECTION 703. WINDING UP.

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

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

(1) discharge the trust's debts, obligations, and other liabilities, settle and close the trust's activities and affairs, 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 704 or 705 are not liable for breach of duty with respect to claims against the trust that are barred or satisfied under Section 704 or 705.

(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

Upon the effective date of the articles of dissolution under Section 702, 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(18), the governing instrument may not override this section.

SECTION 704. KNOWN CLAIMS AGAINST DISSOLVED STATUTORY TRUST.

(a) Except as otherwise provided in subsection (d), a dissolved statutory trust may give notice of a known claim under subsection (b), which has the effect provided in subsection (c).

(b) A dissolved statutory trust may in a record notify its known claimants of the dissolution. The notice must:

(1) specify the information required to be included in a claim;

(2) state that a claim must be in writing and provide a mailing address to which the claim is to be sent;

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

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

(c) A claim against a dissolved statutory trust is barred if the requirements of subsection (b) 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 causes the claimant to receive a notice in a record stating that the claim is rejected and will be barred unless the claimant commences an action against the trust to enforce the claim not later than 90 days after the claimant receives the notice; and

(B) the claimant does not commence the required action not later than 90 days after the claimant receives the notice.

(d) This section does not apply to a claim based on an event occurring after the date of dissolution or a liability that on that date is contingent.

Comment

Sections 704 through 706 provide rules under which a dissolved statutory trust may achieve finality with regards to claims. These sections are derived almost verbatim from Model Business Corporation Act §§14.06 through 14.08.

Under Section 104(18), the governing instrument may not override this section.

SECTION 705. OTHER CLAIMS AGAINST DISSOLVED STATUTORY TRUST.

(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 the principal office is not located in this state, in the [county] in which the office of the trust's registered agent is or was last located;

(2) describe the information required to be contained in a claim, state that the claim must be in writing, and provide a mailing address to which the claim is to be sent; and

(3) 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), the claim of each of the following claimants is barred 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:

(1) a claimant that did not receive notice in a record under Section 704;

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

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

(d) A claim not barred under this section or Section 704 may be enforced:

(1) against a dissolved statutory trust, to the extent of its undistributed assets; and

(2) except as provided in Section 706, if assets of the trust have been distributed after dissolution, against a beneficial owner to the extent of that person's proportionate share of the claim or of the trust's assets distributed to the beneficial owner after dissolution, whichever is less, but a person's total liability for all claims under this paragraph may not exceed the total amount of assets distributed to the person after dissolution.

Comment

This section, which is derived almost verbatim from Model Business Corporation §14.07, 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.

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.

Under Section 104(18), the governing instrument may not override this section.

SECTION 706. COURT PROCEEDINGS.

(a) A dissolved statutory trust that has published a notice under Section 705 may file an application with [the appropriate court] in the [county] where the trust's principal office is located or, if the principal office is not located in this state, where the office of its registered agent is or was last located, for a determination of the amount and form of security to be provided for payment of claims that are reasonably expected to arise after the date of dissolution based on facts known to the trust and:

(1) at the time of the application:

(A) are contingent; or

(B) have not been made known to the dissolved trust or

(2) are based on an event occurring after the date of dissolution.

(b) Security is not required for a claim that is or is reasonably anticipated to be barred under Section 705(c).

(c) Not later than 10 days after the filing of an application under subsection (a), the dissolved trust shall give notice of the proceeding to each claimant holding a contingent claim known to the trust.

(d) In a proceeding under this section, the court may appoint a guardian ad litem to represent all claimants whose identities are unknown. The reasonable fees and expenses of the guardian, including reasonable expert witness fees, must be paid by the dissolved statutory trust.

(e) A dissolved statutory trust that provides security in the amount and form ordered by the court under subsection (a) satisfies the trust's obligations with respect to claims that are contingent, have not been made known to the trust, or are based on an event occurring after the date of dissolution, and such claims may not be enforced against a beneficial owner on account of assets received in liquidation

Comment

This section is derived almost verbatim from Model Business Corporation Act §14.08. Under Section 104(18), the governing instrument may not override this section.

SECTION 707. ADMINISTRATIVE DISSOLUTION.

(a) The [Secretary of State] may commence a proceeding under subsections (b) to dissolve a statutory trust administratively if the trust does not:

(1) pay any fee, tax, interest, or penalty required to be paid to the [Secretary of State] not later than [six months] after it is due;

(2) deliver [an annual] [a biennial] report to the [Secretary of State] not later than [six months] after it is due; or

(3) have a registered agent in this state for [60] consecutive days.

(b) If the [Secretary of State] determines that one or more grounds exist for administratively dissolving a statutory trust, the [Secretary of State] shall serve the trust with notice in a record of the [Secretary of State's] determination.

(c) If a statutory trust, not later than [60] days after service of the notice under subsection (b), does not cure or demonstrate to the satisfaction of the [Secretary of State] the nonexistence of each ground determined by the [Secretary of State], the [Secretary of State] shall administratively dissolve the trust by signing a statement of administrative dissolution that recites the grounds for dissolution and the effective date of dissolution. The [Secretary of State] shall file the statement and serve a copy on the trust pursuant to Section 220.

(d) A statutory trust that is administratively dissolved continues in existence as an entity but may not carry on any activities except as necessary to wind up its activities and affairs and liquidate its assets under Sections 703, 704 and 705, or to apply for reinstatement under Section 708.

(e) The administrative dissolution of a statutory trust does not terminate the authority of its registered agent.

Comment

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 filing office, avoids further wasteful attempts to compel compliance by an abandoned statutory trust, and returns the trust's name to the pool of available names.

Many failures to comply with statutory requirements that may give rise to administrative dissolution occur because of oversight or inadvertence and are usually corrected promptly when brought to the attention of the statutory trust. Subsections (b) and (c) therefore provide a mandatory notice by the filing office to a statutory trust subject to administrative dissolution and a 60-day grace period following the notice before the statement of administrative dissolution may be filed.

In most instances, the issue whether a statutory trust is subject to administrative dissolution will not be controverted. If a statutory trust is administratively dissolved, it may petition the filing office for reinstatement under Section 708 and, if reinstatement is denied, the company may appeal to the courts under Section 709.

Under Section 104(18), the governing instrument may not override this section.

SECTION 708. REINSTATEMENT.

(a) A statutory trust that is administratively dissolved under Section 707 may apply to the [Secretary of State] for reinstatement [not later than [two] years after the effective date of dissolution]. The application must state:

(1) the name of the trust at the time of its administrative dissolution and, if needed, a different name that satisfies Section 213;

(2) the address of the principal office of the trust and the name and street and mailing addresses of its registered agent;

(3) the effective date of the trust's administrative dissolution; and

(4) that the grounds for dissolution did not exist or have been cured.

(b) To be reinstated, a statutory trust must pay all fees, taxes, interests, and penalties that were due to the [Secretary of State] at the time of the trust's administrative dissolution and all fees, taxes, interests, and penalties that would have been due to the [Secretary of State] while the trust was administratively dissolved.

(c) If the [Secretary of State] determines that an application under subsection (a) contains the required information, is satisfied that the information is correct, and determines that all payments required to be made to the [Secretary of State] by subsection (b) have been made, the [Secretary of State] shall:

(1) cancel the statement of administrative dissolution and prepare a statement of reinstatement that states the [Secretary of State's] determination and the effective date of reinstatement; and

(2) file the statement of reinstatement and serve a copy on the statutory trust.

(d) When reinstatement under this section is effective, the following rules apply:

(1) The reinstatement relates back to and takes effect as of the effective date of the administrative dissolution.

(2) The statutory trust resumes carrying on its activities and affairs as if the administrative dissolution had not occurred.

(3) The rights of a person arising out of an act or omission in reliance on the dissolution before the person knew or had notice of the reinstatement are not effective.

Comment

Some states require that reinstatement be sought within two years of administrative dissolution. Other states provide a longer time, or do not impose any time limit. Imposing no limit risks abuse by unscrupulous people seeking to reinstate and appropriate for improper ends a dormant statutory trust that has been abandoned by its members. On the other hand, reinstatement is intended as a safety net for the inattentive—*i.e.*, for a trustee of a statutory trust who has neglected to file an annual report or otherwise subjected the trust to administrative dissolution. If the deadline comes too soon, the opportunity to correct may be lost before the oversight is discovered.

Subsection (a)(1) applies if, before a statutory trust is reinstated, another entity has taken the trust's name (see Section 213(b)(1)).

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(18), the governing instrument may not override this section.

SECTION 709. JUDICIAL REVIEW OF DENIAL OF REINSTATEMENT.

(a) If the [Secretary of State] denies a statutory trust's application for reinstatement following administrative dissolution, the [Secretary of State] shall serve the trust with a notice in a record that explains the reasons for the denial.

(b) A statutory trust may seek judicial review of denial of reinstatement in [the appropriate court] not later than [30] days after service of the notice of denial.

Comment

Because the grounds for administrative dissolution under Section 707 are limited and straightforward, a dispute about whether a statutory trust has corrected the reasons for its administrative dissolution is unlikely. However, in the event a dissolved statutory trust disagrees with a determination by the filing office to deny the trust's application for reinstatement, this section gives the trust a limited right to seek judicial review of the denial of reinstatement.

Under Section 104(18), the governing instrument may not override this section.

[ARTICLE] 8

FOREIGN STATUTORY TRUSTS

SECTION 801. 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 extent to which:

(A) a debt, obligation, or other liability of the foreign statutory trust is enforceable against the property of any series thereof; and

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

(b) A foreign statutory trust is not precluded from registering to do business in this state because of any difference between the law of its jurisdiction of formation and the law of this state.

(c) Registration of a foreign statutory trust to do business in this state does not authorize a the foreign trust to engage in any activities and affairs or exercise any power that a statutory trust may not engage in or exercise in this state.

Comment

Subsection (a) provides that the laws of the jurisdiction of formation of a foreign statutory trust, rather than the laws of this state, govern both the internal affairs of the entity and the liability of its trustees and beneficial owners for the obligations of the trust. This subdivision parallels Section 301 on the governing law for domestic statutory trusts.

The statutory trust legislation of several states, as well as Article 4 of this act, authorize a statutory trust to have one or more series. Under those statutes and Article 4, if a series is properly created, a debt, obligation, or other liability associated with the property of that series is enforceable only against property of that series, and not against the property of the statutory trust generally or any other series thereof. Subsection (a)(3) respects that type of internal shield in a foreign statutory trust that is organized under a statute permitting series.

Subsections (b) and (c) together make clear that, although a foreign statutory trust may not be denied registration merely because of a difference between the laws of its jurisdiction of formation and the laws of this state, the foreign statutory trust may not engage in any activity or exercise any power in this state that a domestic statutory trust of the same type could not engage in or exercise.

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

SECTION 802. REGISTRATION TO DO BUSINESS IN THIS STATE.

(a) A foreign statutory trust may not do business in this state until it registers with the [Secretary of State] under this [article].

(b) A foreign statutory trust doing business in this state may not maintain an action or proceeding in this state unless it is registered to do business in this state.

(c) The failure of a foreign statutory trust to register to do business in this state does not impair the validity of a contract or act of the trust or preclude it from defending an action or proceeding in this state.

(d) A limitation on the liability of a beneficial owner or trustee of a foreign statutory trust is not waived solely because the trust does business in this state without registering to do business in this state.

(e) Section 801(a) and (b) applies even if a foreign statutory trust fails to register under this [article].

Comment

Subsection (b) is meant to induce foreign statutory trusts to register under Section 803 but without imposing harsh or erratic sanctions. Often a failure to register is a result of inadvertence or bona fide disagreement as to the scope of Section 805, which is necessarily imprecise. The imposition of harsh sanctions in those situations is inappropriate. Closing the courts of the state to suits brought by foreign entities that should have registered is not punitive. If a court dismisses a case under this subsection rather than staying the proceedings pending the foreign LLC's registration, a statute of limitations problem may occur. If a foreign trust should have registered and failed to do so, it may still enforce its contracts by registering.

This subsection does not prevent a foreign statutory trust that has failed to register from "defending" an action or proceeding. The distinction between "maintaining" and "defending" an action or proceeding is determined on the basis of whether affirmative relief is sought. A nonregistered foreign statutory trust may interpose any defense or permissive or mandatory counterclaim to defeat a claim, but the trust may not obtain an affirmative judgment based on the counterclaim without first registering.

Subsection (c) makes clear that a failure to register does not impair the validity of a foreign statutory trust's acts.

Subsection (d) preserves the effectiveness of a foreign statutory trust's liability shield applicable under the foreign statutory trust's governing law.

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

SECTION 803. FOREIGN REGISTRATION STATEMENT. To register to do business in this state, a foreign statutory trust must deliver a foreign registration statement to the

[Secretary of State] for filing. The statement must state:

(1) the name of the trust and, if the name does not comply with Section 213, an alternate name adopted pursuant to Section 806(a);

(2) that the trust is a foreign statutory trust;

(3) the trust's jurisdiction of formation;

(4) the street and mailing addresses of the trust's principal office and, if the law of the trust's jurisdiction of formation requires the trust to maintain an office in that jurisdiction, the street and mailing addresses of the required office; and

(5) the name and street and mailing addresses of the trust's registered agent in this state.

Comment

A foreign registration statement provides certain basic information about the foreign statutory trust to ensure that citizens of the state have access to that information in their dealings with the foreign trust. Once registered, a foreign statutory trust must file an annual/biennial report under Section 221.

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

SECTION 804. AMENDMENT OF FOREIGN REGISTRATION STATEMENT. A registered foreign statutory trust shall deliver to the [Secretary of State] for filing an amendment to its foreign registration statement if there is a change in:

(1) the name of the trust;

(2) the trust's jurisdiction of formation;

(3) an address required by Section 803(4); or

(4) the information required by Section 803(5).

Comment

This section works in tandem with the annual or biennial report requirement of Section 221 to keep up to date the information of record in the filing office.

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

SECTION 805. ACTIVITIES NOT CONSTITUTING DOING BUSINESS.

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

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

(2) carrying on any activity concerning its internal affairs, including holding meetings of its beneficial owners or trustees;

(3) maintaining accounts in financial institutions;

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

(5) selling through independent contractors;

(6) soliciting or obtaining orders by any means if the orders require acceptance outside this state before they become contracts;

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

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

(9) conducting an isolated transaction that is not in the course of similar transactions;

(10) owning, without more, property; and

(11) doing business in interstate commerce.

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

(c) 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].

Comment

This act does not attempt to provide an inclusive definition of what constitutes doing business in a state. Rather, the concept is defined in a negative manner by subsections (a) and (b), which state that certain activities do not constitute doing business.

In general terms, any conduct that is more regular, systematic, or extensive than that which is described in subsection (a) constitutes doing business and requires the foreign statutory trust to register to do business. Typical conduct requiring registration includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general purposes. But the passive owning of real estate for investment purposes does not constitute doing business (see subsection (a)(10)).

The test of "doing business" defined in a negative way in subsections (a) and (b) applies only to the question of whether the foreign statutory trust's contacts with the state are such that it must register under this section. The test is not applicable to other questions, such as whether the foreign trust is amenable to service of process under state long-arm statutes or liable for state or local taxes. A foreign statutory trust that has registered or is required to register will generally be subject to suit and taxation in the state, while a foreign trust that is subject to service of process or state taxation in a state will not necessarily be required to register.

Subsection (a) – The list of activities set forth in this subsection is not exhaustive.

Subsection (a)(1) – A foreign statutory trust is not "doing business" solely because it resorts to the courts of the state to recover an indebtedness, enforce an obligation, recover possession of personal property, obtain the appointment of a receiver, intervene in a pending proceeding, bring a petition to compel arbitration, file an appeal bond, or pursue appellate remedies. Similarly, a foreign statutory trust is not required to register merely because it files a complaint with a governmental agency or participates in an administrative proceeding within the state.

Subsection (a)(2) – A foreign statutory trust does not "do business" within a state under this section merely because some of its internal affairs occur within a state. Thus, a foreign statutory trust may hold meetings of its trustees or beneficial owners within a state without first registering. A foreign statutory trust also may maintain offices or agencies within a state relating solely to the transfer, exchange, or registration of its interests without registering. Other activities relating to the internal affairs of the foreign trust that do not constitute doing business under this section include having officers or representatives who reside within or are physically present in the state; while there, the officers or representatives may make executive decisions relating to the internal affairs of the foreign trust without imposing on the foreign trust the requirement that it register, if these activities are not so regular and systematic as to cause the residence to be viewed as a business office.

Subsection (a)(5) – Under this paragraph, a foreign statutory trust need not register if it sells goods in the state through independent contractors. These transactions are viewed as transactions by the independent contractors, not by the foreign trust itself even though the foreign trust sets some limits or ground rules for its contractors. If these controls are sufficiently pervasive, however, the foreign statutory trust may be deemed to be selling for itself in intrastate commerce, and not through the independent contractors and therefore engaged in doing business in the state.

Subsection (a)(7) and (8) – The mere act of making a loan by a foreign statutory trust that is not in the business of making loans does not constitute doing business in the state in which the loan is made. On the same theory, a foreign statutory trust may obtain security for the repayment of a loan, and foreclose or enforce the lien or security interest to collect the loan, without being deemed to be doing business. Similarly, a refunding or "roll over" of a loan or its adjustment or compromise does not involve doing business.

Subsection (a)(9) – The concept of "doing business" involves regular, repeated, and continuing business contacts of a local nature. A single agreement or isolated transaction within a state does not constitute doing business if there is no intention to repeat the transaction or engage in similar transactions. This act does not impose the limitation found in some statutes, such as Section 15.01(b)(10) of the Model Business Corporation Act, that the isolated transaction be completed within 30 days. A foreign statutory trust should not be required to register simply because it engages in an isolated transaction that takes longer than 30 days to complete.

Subsection (a)(11) – A foreign statutory trust is not "doing business" within the meaning of this section if it is transacting business in interstate commerce (see also subsection (a)(6) (stating that soliciting or obtaining orders that must be accepted outside the state before they become contracts is not "doing business" within the meaning of this section)).

These exclusions reflect the provisions of the United States Constitution that grant to the United States Congress exclusive power over interstate commerce, and preclude states from imposing restrictions or conditions upon this commerce. This subsection should be construed in a manner consistent with judicial decisions under the United States Constitution. Under these decisions, a foreign statutory trust is not required to register even though it sells goods within the state if they are shipped to the purchasers in interstate commerce. Thus a foreign statutory trust need not register even if it also does work and performs acts within the state incidental to the interstate business—for example, if it takes or enforces a security interest incidental to these transactions. Nor is it required to register merely because it sends traveling salespeople or solicitors into a state so long as contracts are not made within the state. Similarly, an office may be maintained by a foreign statutory trust in this state without registering if the office's functions relate solely to interstate commerce. Purchases of goods may of course be in interstate commerce as readily as sales. Thus, the purchase of personal property in this state by a foreign statutory trust for shipment in interstate commerce out of the state does not require the entity to register.

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

SECTION 806. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.

(a) A foreign statutory trust whose name does not comply with Section 213 may not register to do business in this state until it adopts, for the purpose of doing business in this state, an alternate name that complies with Section 213. A trust that registers under an alternate name under this subsection need not comply with [this state's assumed or fictitious name statute]. After registering to do business in this state with an alternate name, a trust shall do business in this state under:

(1) the alternate name;

(2) the trust's name, with the addition of its jurisdiction of formation; or

(3) a name the trust is authorized to use under [this state's assumed or fictitious name statute].

(b) If a registered foreign statutory trust changes its name to one that does not comply with Section 213, it may not do business in this state until it complies with subsection (a) by amending its registration to adopt an alternate name that complies with Section 213.

Comment

A foreign statutory trust must register under its true name if that name satisfies the requirements of Section 213. If the true name is unavailable because it is not distinguishable upon the records of the filing office from a name already in use or reserved or registered, the foreign statutory trust may use an alternate name.

A foreign statutory trust that registers to do business in the state may do business under a fictitious name to the same extent as a domestic entity.

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

SECTION 807. WITHDRAWAL OF REGISTRATION OF REGISTERED FOREIGN STATUTORY TRUST.

(a) A registered foreign statutory trust may withdraw its registration by delivering a statement of withdrawal to the [Secretary of State] for filing. The statement of withdrawal must state:

(1) the name of the trust and its jurisdiction of formation;

(2) that the trust is not doing business in this state and that it withdraws its registration to do business in this state;

(3) that the trust revokes the authority of its registered agent to accept service on its behalf in this state; and

(4) an address to which service of process may be made under subsection (b).

(b) After the withdrawal of the registration of a foreign statutory trust, service of process in any action or proceeding based on a cause of action arising during the time the trust was registered to do business in this state may be made pursuant to Section 220.

Comment

A statement of withdrawal under this section must set forth an address where service of process may be made on the entity pursuant to Section 220. There is no limit on how long the withdrawn entity must keep that address up to date.

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

SECTION 808. WITHDRAWAL DEEMED ON CONVERSION TO DOMESTIC FILING ENTITY OR DOMESTIC LIMITED LIABILITY PARTNERSHIP. A registered foreign statutory trust that converts to a domestic limited liability partnership or to a domestic entity whose formation requires delivery of a record to the [Secretary of State] for filing is deemed to have withdrawn its registration on the effective date of the conversion.

Comment

When a registered foreign statutory trust has converted to a domestic "filing entity" or domestic limited liability partnership, information about the entity in its new capacity as a domestic entity will be of record in the filing office. Therefore, this section treats its prior registration as withdrawn.

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

SECTION 809. WITHDRAWAL ON DISSOLUTION OR CONVERSION TO NONFILING ENTITY OTHER THAN LIMITED LIABILITY PARTNERSHIP.

(a) A registered foreign statutory trust that has dissolved and completed winding up or has converted to a domestic or foreign entity whose formation does not require the public filing of a record, other than a limited liability partnership, shall deliver a statement of withdrawal to the [Secretary of State] for filing. The statement must state:

(1) in the case of a trust that has completed winding up:

(A) its name and jurisdiction of formation;

(B) that the trust surrenders its registration to do business in this state; and

(2) in the case of a trust that has converted:

(A) the name of the converting trust and its jurisdiction of formation;

(B) the type of entity to which the trust has converted and its jurisdiction of formation;

(C) that the converted entity surrenders the converting trust's registration to do business in this state and revokes the authority of the converting trust's registered agent to act as registered agent in this state on the behalf of the trust or the converted entity; and

(D) a mailing address to which service of process may be made under subsection (b).

(b) After a withdrawal under this section is effective, service of process in any action or proceeding based on a cause of action arising during the time the foreign statutory trust was registered to do business in this state may be made pursuant to Section 220.

Comment

If a registered foreign statutory trust has dissolved and completed winding up, or has converted to a "nonfiling entity" other than a limited liability partnership, there is no further reason for information about the entity to appear in the records of the filing office. This section thus requires delivery of a statement of withdrawal for the purpose of removing the foreign statutory trust from the rolls of registered foreign entities.

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

SECTION 810. TRANSFER OF REGISTRATION.

(a) When a registered foreign statutory trust has merged into a foreign entity that is not registered to do business in this state or has converted to a foreign entity required to register with the [Secretary of State] to do business in this state, the foreign entity shall deliver to the [Secretary of State] for filing an application for transfer of registration. The application must state:

(1) the name of the registered foreign statutory trust before the merger or conversion;

(2) that before the merger or conversion the registration pertained to a foreign statutory trust;

(3) the name of the applicant foreign entity into which the foreign statutory trust has merged or to which it has been converted, and, if the name does not comply with Section 213, an alternate name adopted pursuant to Section 806(a);

(4) the type of entity of the applicant foreign entity and its jurisdiction of formation;

(5) the street and mailing addresses of the principal office of the applicant foreign

entity and, if the law of that entity's jurisdiction of formation requires the entity to maintain an office in that jurisdiction, the street and mailing addresses of that office; and

(6) the name and street and mailing addresses of the applicant foreign entity's registered agent in this state.

(b) When an application for transfer of registration takes effect, the registration of the foreign statutory trust to do business in this state is transferred without interruption to the entity into which the trust has merged or to which it has been converted.

Comment

A filing under this section has the two-fold effect of canceling the authority of the foreign statutory trust to do business in the state while at the same time reregistering the former foreign trust as the new type of foreign entity. If the reregistered foreign entity subsequently wishes to cancel its registration to do business in the state, it may do so under Section 811.

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

SECTION 811. TERMINATION OF REGISTRATION.

(a) The [Secretary of State] may terminate the registration of a registered foreign statutory trust in the manner provided in subsections (b) and (c) if the trust does not:

(1) pay, not later than [60] days after the due date, any fee, tax, interest, or penalty required to be paid to the [Secretary of State] under this [act] or law other than this [act];

(2) deliver to the [Secretary of State] for filing, not later than [60] days after the due date, [an annual] [a biennial] report required under Section 221;

(3) have a registered agent as required by Section 216; or

(4) deliver to the [Secretary of State] for filing a statement of change under Section 217 not later than [30] days after a change has occurred in the name or address of the registered agent.

(b) The [Secretary of State] may terminate the registration of a registered foreign statutory trust by:

(1) filing a notice of termination or noting the termination in the records of the [Secretary of State]; and

(2) delivering a copy of the notice or the information in the notation to the trust's registered agent or, if the trust does not have a registered agent, to the trust's principal office.

(c) The notice must state or the information in the notation must include:

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

(2) the grounds for termination under subsection (a).

(d) The authority of a registered foreign statutory trust to do business in this state ceases on the effective date of the notice of termination or notation under subsection (b), unless before that date the trust cures each ground for termination stated in the notice or notation. If the trust cures each ground, the [Secretary of State] shall file a record so stating.

Comment

This section is analogous to the procedures for administrative dissolution under Section 707.

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

[SECTION 812. 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

The authority of the state attorney general or other named officer to bring an action to enjoin a foreign entity from doing in the state has been part of corporate law for more than a century and has been carried over into the law of unincorporated business entities. In contemporary practice, this authority is rarely if ever invoked in either context.

[ARTICLE] 9

MERGER, INTEREST EXCHANGE,

CONVERSION, AND DOMESTICATION

[PART] 1

GENERAL PROVISIONS

Introductory Comment to Article 9

This article deals comprehensively with both same-type and cross-type mergers and interest exchanges and with conversions and domestications.

For this article to apply, at least one participant organization must be a domestic statutory trust. For a foreign entity to be involved, its organic law must permit the entity's participation.

Part 1 contains definitions specific to this article as well as provisions applicable to all transactions authorized by this article.

Part 2 governs mergers and is an amalgamation of existing entity law, both unincorporated and incorporated.

Part 3 governs interest exchanges, previously a feature only of corporate law. Part 3 is derived from the share exchange provisions in Chapter 11 of the Model Business Corporation Act.

Part 4 governs conversions, a one-step procedure by which an entity changes from one type of entity to another type while nonetheless continuing in existence as the same legal entity.

Part 5 governs domestications, a procedure by which a domestic statutory trust can become a foreign statutory trust or vice versa, in each instance with the statutory trust remaining the same legal entity.

Part 2 sets the paradigm for Parts 3, 4, and 5, because mergers are long established and merger rules and concepts are familiar to business lawyers. Moreover, conversions and domestications could formerly be accomplished via mergers (with a new entity), and an interest exchange produces the same result as a triangular merger. The comments to Part 2 are thus relevant to understanding Parts 3, 4, and 5.

SECTION 901. DEFINITIONS. In this [article]:

(1) "Acquired entity" means the entity, all of one or more classes or series of interests of which are acquired in an interest exchange.

(2) “Acquiring entity” means the entity that acquires all of one or more classes or series of interests of the acquired entity in an interest exchange.

(3) “Conversion” means a transaction authorized by [Part] 4.

(4) “Converted entity” means the converting entity as it continues in existence after a conversion.

(5) “Converting entity” means the domestic entity that approves a plan of conversion pursuant to Section 943 or the foreign entity that approves a conversion pursuant to the law of its jurisdiction of formation.

(6) “Distributional interest” means the right under an unincorporated entity’s organic law and organic rules to receive distributions from the entity.

(7) “Domestic”, with respect to an entity, means governed as to its internal affairs by the law of this state.

(8) “Domesticated statutory trust” means the domesticating statutory trust as it continues in existence after a domestication.

(9) “Domesticating statutory trust” means the domestic statutory trust that approves a plan of domestication pursuant to Section 953 or the foreign statutory trust that approves a domestication pursuant to the law of its jurisdiction of formation.

(10) “Domestication” means a transaction authorized by [Part] 5.

(11) “Entity”:

(A) means:

(i) a business corporation;

(ii) a nonprofit corporation;

(iii) a general partnership, including a limited liability partnership;

(iv) a limited partnership, including a limited liability limited partnership;

(v) a limited liability company;

[(vi) a general cooperative association;]

(vii) a limited cooperative association;

(viii) an unincorporated nonprofit association;

(ix) a statutory trust, business trust, or common-law business trust; or

(x) any other person that has:

(I) a legal existence separate from any interest holder of that person; or

(II) the power to acquire an interest in real property in its own name; and

(B) does not include:

(i) an individual;

(ii) a trust with a predominantly donative purpose or a charitable trust;

(iii) an association or relationship that is not an entity listed in subparagraph (A) and is not a partnership under the rules stated in [Section 202(c) of the Uniform Partnership Act (1997) (Last Amended 2011)] [Section 7 of the Uniform Partnership Act (1914)] or a similar provision of the law of another jurisdiction;

(iv) a decedent's estate; or

(v) a government or a governmental subdivision, agency, or instrumentality.

(12) "Filing entity" means an entity whose formation requires the filing of a public organic record. The term does not include a limited liability partnership.

(13) “Foreign”, with respect to an entity, means an entity governed as to its internal affairs by the law of a jurisdiction other than this state.

(14) “Governance interest” means a right under the organic law or organic rules of an unincorporated entity, other than as a governor, agent, assignee, or proxy, to:

(A) receive or demand access to information concerning, or the books and records of, the entity;

(B) vote for or consent to the election of the governors of the entity; or

(C) receive notice of or vote on or consent to an issue involving the internal affairs of the entity.

(15) “Governor” means:

(A) a director of a business corporation;

(B) a director or trustee of a nonprofit corporation;

(C) a general partner of a general partnership;

(D) a general partner of a limited partnership;

(E) a manager of a manager-managed limited liability company;

(F) a member of a member-managed limited liability company;

[(G) a director of a general cooperative association;]

(H) a director of a limited cooperative association;

(I) a manager of an unincorporated nonprofit association;

(J) a trustee of a statutory trust, business trust, or common-law business trust; or

(K) any other person under whose authority the powers of an entity are exercised and under whose direction the activities and affairs of the entity are managed pursuant to the organic law and organic rules of the entity.

(16) “Interest” means:

(A) a share in a business corporation;

(B) a membership in a nonprofit corporation;

(C) a partnership interest in a general partnership;

(D) a partnership interest in a limited partnership;

(E) a membership interest in a limited liability company;

[(F) a share in a general cooperative association;]

(G) a member’s interest in a limited cooperative association;

(H) a membership in an unincorporated nonprofit association;

(I) a beneficial interest in a statutory trust, business trust, or common-law business trust; or

(J) a governance interest or distributional interest in any other type of unincorporated entity.

(17) “Interest exchange” means a transaction authorized by [Part] 3.

(18) “Interest holder” means:

(A) a shareholder of a business corporation;

(B) a member of a nonprofit corporation;

(C) a general partner of a general partnership;

(D) a general partner of a limited partnership;

(E) a limited partner of a limited partnership;

(F) a member of a limited liability company;

[(G) a shareholder of a general cooperative association;]

(H) a member of a limited cooperative association;

(I) a member of an unincorporated nonprofit association;

(J) a beneficiary or beneficial owner of a statutory trust, business trust, or common-law business trust; or

(K) any other direct holder of an interest.

(19) "Interest holder liability" means:

(A) personal liability for a liability of an entity which is imposed on a person:

(i) solely by reason of the status of the person as an interest holder; or

(ii) by the organic rules of the entity which make one or more specified interest holders or categories of interest holders liable in their capacity as interest holders for all or specified liabilities of the entity; or

(B) an obligation of an interest holder under the organic rules of an entity to contribute to the entity.

(20) "Merger" means a transaction authorized by [Part] 2.

(21) "Merging entity" means an entity that is a party to a merger and exists immediately before the merger becomes effective.

(22) "Organic law" means the law of an entity's jurisdiction of formation governing the internal affairs of the entity.

(23) "Organic rules" means the public organic record and private organic rules of an entity.

(24) "Plan" means a plan of merger, plan of interest exchange, plan of conversion, or plan of domestication.

(25) "Plan of conversion" means a plan under Section 942.

(26) "Plan of domestication" means a plan under Section 952.

(27) “Plan of interest exchange” means a plan under Section 932.

(28) “Plan of merger” means a plan under Section 922.

(29) “Private organic rules” means the rules, whether or not in a record, that govern the internal affairs of an entity, are binding on all its interest holders, and are not part of its public organic record, if any. The term includes:

(A) the bylaws of a business corporation;

(B) the bylaws of a nonprofit corporation;

(C) the partnership agreement of a general partnership;

(D) the partnership agreement of a limited partnership;

(E) the operating agreement of a limited liability company;

[(F) the bylaws of a general cooperative association;]

(G) the bylaws of a limited cooperative association;

(H) the governing principles of an unincorporated nonprofit association; and

(I) the trust instrument of a statutory trust or similar rules of a business trust or common-law business trust.

(30) “Protected agreement” means:

(A) a record evidencing indebtedness and any related agreement in effect on [the effective date of this [act]];

(B) an agreement that is binding on an entity on [the effective date of this [act]];

(C) the organic rules of an entity in effect on [the effective date of this [act]]; or

(D) an agreement that is binding on any of the governors or interest holders of an entity on [the effective date of this [act]].

(31) “Public organic record” means the record the filing of which by the [Secretary of

State] is required to form an entity and any amendment to or restatement of that record. The term includes:

(A) the articles of incorporation of a business corporation;

(B) the articles of incorporation of a nonprofit corporation;

(C) the certificate of limited partnership of a limited partnership;

(D) the certificate of organization of a limited liability company;

[(E) the articles of incorporation of a general cooperative association;]

(F) the articles of organization of a limited cooperative association; and

(G) the certificate of trust of a statutory trust or similar record of a business trust.

(32) “Registered foreign entity” means a foreign entity that is registered to do business in this state pursuant to a record filed by the [Secretary of State].

(33) “Statement of conversion” means a statement under Section 945.

(34) “Statement of domestication” means a statement under Section 955.

(35) “Statement of interest exchange” means a statement under Section 935.

(36) “Statement of merger” means a statement under Section 925.

(37) “Surviving entity” means the entity that continues in existence after or is created by a merger.

(38) “Type of entity” means a generic form of entity:

(A) recognized at common law; or

(B) formed under an organic law, whether or not some entities formed under that organic law are subject to provisions of that law that create different categories of the form of entity.

Comment

This section defines the terms that are used in this article. Many of the definitions describe attributes that are significant in some forms of entity and not in others. For example, the concept of separate "distributional" and "governance" interests are inherent in unincorporated entities but have no counterpart in corporations. In addition, because some statutes use different terms to describe the same transaction, the definitions are intended to be broad enough to encompass those similar transactions, regardless of how described. See, for example, "domestication" below.

"Acquired entity" [(1)] – This definition recognizes that an interest exchange may involve only the acquisition of a particular "class" or "series" of interests in an entity. Model Business Corporation Act §6.01 does not expressly define "classes" or "series." Because the interests of owners of an unincorporated business organization often tend to be distinctive, it may be that each owner's interest will comprise a separate class or series. For an explanation of a new and different meaning of the word "series," see the comment to Section 931. The term "acquired entity" does not encompass series under that new meaning.

"Acquiring entity" [(2)] – An "acquiring entity" is an entity that acquires the interests of the acquired entity in an interest exchange governed by Part 3 of this article.

"Conversion" [(3)] – The term "conversion" means a transaction authorized by Part 4 pursuant to which an entity of one type is converted into an entity of another type. As used in this act, the term "conversion" does not include a transaction in which an entity changes the jurisdiction in which it is organized but does not change to a different form of entity; that type of transaction is referred to in this act as a "domestication" and is governed by Article 5.

"Converted entity" [(4)] – This term is used in Part 4 to refer to the entity that results from a conversion.

"Converting entity" [(5)] – A converting entity is the entity that becomes the converted entity under Part 4.

"Distributional interest" [(6)] – This term is similar to the concept of a "transferable interest" found in the organic laws of several types of unincorporated entities, but has a broader meaning because the scope of this act includes entities in addition to those whose organic law uses the term "transferable interest."

"Domestic" [(7)] – The term "domestic", when used in this article with respect to an entity, refers to an entity whose internal affairs are governed by the organic laws of this state

"Domesticated limited liability company" [(8)] – This term is used in Part 5 and means the entity that is domesticated pursuant to Part 5. By the nature of the transaction, the domesticated entity will be of the same type as the domesticating entity.

"Domesticating limited liability company" [(9)] – This term is used in Part 5 and means the entity that is domesticated pursuant to Part 5.

"Domestication" [(10)] – The term "domestication" means a transaction of the kind authorized by Part 5 pursuant to which an entity may change its *jurisdiction* of formation *but not its type* so long as the laws of the foreign jurisdiction permit the domestication. The legal effect of the domestication of an entity out of this state will be governed by the laws of both this state and the foreign jurisdiction. Some statutes include what is described in this act as "domestication" in their definition of a "conversion." *See, e.g.*, Colo. Rev. Stat §7-90-201. It is intended that the domestication provisions of this article will apply to a transaction that may be characterized under another act as a "conversion" if the transaction meets the definition of "domestication" under this article.

"Entity" [(11)] – This definition determines the overall scope of the article because only an "entity" may participate in the transactions authorized by Parts 2 (mergers), 3 (interest exchanges), 4 (conversions), and 5 (domestications) (see Sections 921 (authorization of mergers), 931(authorization of interest exchanges), 941(authorization of conversions), and 951(authorization of domestications)).

Paragraph (A)(x) is a "catch-all" provision that includes within the definition of "entity" any type of organization recognized under the law of this state that is not listed specifically in the preceding paragraphs of this definition. Paragraph (A)(x) is intended to include all forms of private organizations, regardless of whether organized for profit, and artificial legal persons other than those excluded by Paragraph (B). This definition does not exclude regulated entities such as public utilities, banks, and insurance companies. Should a state desire to exclude certain types of regulated entities or any of the entities listed in Paragraph (A)(i)-(x) from participating in transactions permitted by this article for policy reasons, that may be done by listing those types of entities in Section 908(a), or by permitting those type of entities to engage in transactions under this article generally but prohibiting certain types of transactions by listing those transactions in Section 908(b).

Unincorporated nonprofit associations are treated as a type of entity in Paragraph (A)(viii) because Section 5 of the Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013) specifically states that an unincorporated nonprofit association is an entity. In many states, the status of a nonprofit association may not be clear. Nevertheless, in most states a nonprofit association has the power to acquire an interest in real property in its own name and therefore would qualify as an "entity" under Paragraph (A)(x). See Section 6 of the UUNAA, which gives an unincorporated nonprofit association the power to acquire in its own name an interest in real property.

Paragraph (B)(i) of this definition excludes a sole proprietorship from the concept of an "entity."

Trusts with a predominately donative purpose, such as inter vivos and testamentary trusts and charitable trusts, are treated in many states as having a separate legal existence, but they have been excluded from the definition of "entity" (and thus are not within the scope of this article) under Paragraph (B)(ii) because they should not be able to engage in transactions under this article as a matter of public policy. Trusts that carry on a business, however, such as business and statutory entity trusts, are "entities" (see Paragraph (A)(ix)).

Paragraph (B)(iii) of this definition excludes from the concept of an "entity" any form of co-ownership of property or sharing of returns from property that is not listed in paragraph (A) and is not a partnership under the 1997 UPA. In that connection, Section 202(c) of the 1997 UPA provides in part:

> In determining whether a partnership is formed, the following rules apply:
> (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.
> (2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

Limited liability partnerships and limited liability limited partnerships are "entities" because they are general partnerships and limited partnerships respectively that have made the additional required election claiming LLP or LLLP status. A limited liability partnership is not, therefore, a separate type of entity from the underlying general or limited partnership that has elected limited liability partnership status. Thus, for example, the election of a general partnership to become a limited liability partnership is not a conversion subject to Part 4.

Under Paragraph (B)(iv), decedent's estates are excluded from the definition of an entity for the same policy reason as trusts with a predominately donative purpose and charitable trusts.

This same public policy rationale is the justification for the exclusion of governmental subdivisions, agencies, or instrumentalities in Paragraph (B)(v).

"Filing entity" [(12)] – Whether an entity is a filing entity is determined by reference to whether its legal existence requires the filing of a document with the state filing officer. To fit within this definition, the filing must be necessary but need not be sufficient to form the entity.

While the statute refers to the "formation" of an entity, the term is intended to encompass corporations which are "incorporated," as well as other filing entities whose statutes refer to them as being "organized." Business trusts present a special problem. In some states, a business trust could be a filing entity or a common law relationship, while in other states business trusts are only recognized at common law. Under section 201(a) of this act, a statutory trust entity is formed by delivery of a certificate of trust to the appropriate filing officer, and is a filing entity.

The term "filing entity" does not include a limited liability partnership because an election filed by a general partnership claiming that status (*e.g.*, a statement of qualification under Uniform Partnership Act §901 (1997) (Last Amended 2013)) does not form the entity. A limited liability limited partnership, on the other hand, is a filing entity because the underlying limited partnership is formed by filing a certificate of limited partnership.

“Foreign” [(13)] – The term “foreign entity” includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing. A nonfiling foreign entity is governed by the laws governing its internal affairs. It is a factual question whether a general partnership whose internal affairs are governed by the Uniform Partnership Act (1914) (“1914 UPA”) is a domestic or foreign partnership. A 1914 UPA partnership will likely be deemed to be a domestic entity where the greatest nexus of contacts are found. The domestic or foreign characterization of partnerships under the Uniform Partnership Act (1997) (Last Amended 2013) that have not registered as limited liability partnerships will be governed by Section 104(2) (“the law of the jurisdiction in which the partnership has its principal office”).

“Governance interest” [(14)] – A governance interest is typically only part of the interest that a person will hold in an unincorporated entity and is usually coupled with a distributional interest (or economic rights). Memberships in some nonprofit corporations and unincorporated nonprofit associations consist solely of governance interests and memberships in other nonprofit entities may not include either governance interests or distributional interests. In some unincorporated business entities, including limited liability companies, there is a more limited right to transfer governance interests than there is to transfer distributional interests. An interest holder in such an unincorporated business entity who transfers only a distributional interest and retains the governance interest will also retain the status of an interest holder. Whether a transferee who acquires only a distributional interest will acquire the status of an interest holder is determined by the definition of “interest holder.”

Governors of an entity have the kinds of rights listed in the definition of “governance interest” by reason of their position with the entity. For a governor to have a “governance interest,” however, requires that the governor also have those rights for a reason other than the governor’s status as such. A manager who is not a member in a limited liability company, for example, will not have a governance interest, but a manager who is a member will have a governance interest arising from the ownership of a membership interest.

“Governor” [(15)] – This term has been chosen to provide a way of referring to a person who has the authority under an entity’s organic law to make management decisions regarding the entity that is different from any of the existing terms used in connection with particular types of entities. Depending on the type of entity or its organic rules, the governors of an entity may have the power to act on their own authority, or they may be organized as a board or similar group and only have the power to act collectively, and then only through a designated agent. In other words, a person having only the power to bind the organization pursuant to the instruction of the governors is not a governor. Under the organic rules, particularly those of unincorporated entities, most or all of the management decisions may be reserved to the members or partners. Thus, if a manager of a limited liability company were limited to having authority to execute management decisions made by the members and did not have any authority to make independent management decisions, the manager would not be a governor under this definition.

“Interest” [(16)] – In the usual case, the interest held by an interest holder will include both a governance interest and a distributional interest. Members in nonprofit corporations or unincorporated nonprofit associations generally do not have any distributional interest because they do not receive distributions, but they nonetheless may hold a governance interest in which case they would have the status of interest holders under this article.

"Interest exchange" [(17)] – The term "interest exchange" means a transaction authorized by Part 3 pursuant to which an entity may acquire interests in another entity. The consideration that may be provided to the interest holders whose interests are being acquired in an exchange may consist in whole or part of interests in a third party that is not one of the two parties to the exchange itself (see Section 931(a)).

"Interest holder" [(18)] – This act does not refer to "equity" interests or "equity" owners or holders because the term "equity" could be confusing in the case of a nonprofit entity whose members do not have an interest in the assets or results of operations of the entity but only have a right to vote on its internal affairs.

"Interest holder liability" [(19)] – This term is used to describe the vicarious liability of an interest holder, by virtue of being an interest holder, for liabilities of the entity. The term includes only personal liability of an interest holder for a debt of the entity imposed on the interest holder either by statute or by the organic rules to the extent authorized pursuant to the organic law. Liabilities that an interest holder incurs in any other fashion are not interest holder liabilities for purposes of this article. Thus, for example, if a state's business corporation law makes shareholders personally liable for unpaid wages because of their status as shareholders, that liability would be an "interest holder liability." If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an "interest holder liability" because it is a direct liability and not based on the status of being a shareholder. Similarly, the liability to return an improper distribution is not an interest holder liability because it is a direct liability of the interest holder based on receipt of the distribution.

"Merger" [(20)] – The term means a transaction in which two or more entities are combined into a single entity pursuant to a filing with the filing office. The term "merger" in this article includes the transaction known as a consolidation in which a new entity results from the combination of two or more pre-existing entities.

"Merging entity" [(21)] – The term "merging entity" refers to each entity that is in existence immediately before a merger and is a party to the merger. It will include the surviving entity if the surviving entity exists before the merger becomes effective. It does not include an entity that provides consideration to be received by interest holders if that entity is not a party to the merger.

"Organic law" [(22)] – Organic law means statutes that govern the internal affairs of an entity. For example, this act is the organic law of a statutory trust formed under this act.

Entity laws in a few states purport to require that some of their internal governance rules applicable to a domestic entity also apply to a foreign entity with significant ties to the state. *See, e.g.*, Cal. Corp. Code §2115 (Foreign Corporations); N.Y. Not-For-Profit-Corp. §§1318-1321 (Liabilities of Directors and Officers of Foreign Corporations); 15 Pa. Const. Stat. §6145 (Applicability of Certain Safeguards to Foreign Corporations). Such a "sticky fingers" law is not included within the definition of "organic law" for purposes of this article because those laws are not part of the law of the entity's jurisdiction of formation.

"Organic rules" [(23)] – The term "organic rules" means an entity's public organic record and the private organic rules. The organic rules, the organic law, and the common law, provide the rules governing the internal affairs of the entity. For example, this act and the governing instrument comprise the organic rules of a statutory trust formed under this act.

"Plan" [(24)] – The term "plan" is a short-hand way of referring to the plan of merger, interest exchange, conversion, or domestication, as the case may be, depending on which form of transaction is taking place (see Sections 922 (plan of merger), 932 (plan of interest exchange), 942 (plan of conversion), and 952 (plan of domestication)).

"Private organic rules" [(29)] – The term private "organic rules" is intended to include all governing rules of an entity that are binding on all of its interest holders, whether or not in record form, except for the provisions of the entity's public organic record, if any. The term is intended to include agreements in "record" form such as corporate bylaws as well as oral partnership agreements and oral operating agreements among LLC members.

"Protected agreement" [(30)] – The term "protected agreement" refers to evidences of indebtedness and agreements binding on the entity or any of its governors or interest holders that are unpaid or executory in whole or in part on the effective date of the article. Thus a revolving line of credit from a bank to a statutory trust would constitute a protected agreement even if advances were not made until after the effective date of the article. Likewise, a governing instrument in effect under this act or a predecessor to this act is a "protected agreement."

If a protected agreement has provisions that apply if an entity merges, those provisions will apply if the entity enters into an interest exchange, conversion, or domestication even though the agreement does not mention those other types of transactions (see Sections 931(c) (interest exchange), 941(c) (conversion), and 951(c) (domestication)).

"Public organic record" [(31)] – A "public organic record" is a record that is filed publicly to form, organize, incorporate, or otherwise create an entity. The term does not include a statement of authority filed under 1997 UPA §303 (Last Amended 2013) or any of the other statements that may be filed under that act since those statements do not create a new entity.

For the same reason, a statement of qualification filed under 1997 UPA §1001 is not a "public organic record." The limited liability partnership that results from the filing is the same entity as the partnership that delivered the statement to the filing office. Similarly, the term does not include a statement of authority filed under Section 7 of the Revised Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013) or a statement appointing a registered agent filed under Section 31 of that act.

In those states where a deed of trust or other instrument is publicly filed to create a business trust, that filing will constitute a public organic record. But in those states where a business trust is not created by a public filing, the deed of trust or similar record will be part of the private organic rules of the business trust.

Where a public organic document has been amended or restated, the term means the public organic document as last amended or restated.

“Registered foreign entity” [(32)] – This term refers to a foreign entity that is registered to transact business in this state pursuant to a public filing.

“Surviving entity” [(37)] – The term “surviving entity” refers to either a merging entity that survives the merger or the new entity created by the merger.

“Type of entity” [(38)] – The term “type of entity” has been developed in an attempt to distinguish different legal forms of entities. It is sometimes difficult to decide whether one is dealing with a different form of entity or a variation of the same form. For example, a limited partnership, although it has been defined as a partnership, is a different type of entity from a general partnership, while a limited liability partnership is not a different type of entity from a general partnership. In some states cooperatives are categories of business corporations or nonprofit corporations, while in other states cooperatives are a separate type of entity.

SECTION 902. RELATIONSHIP OF [ARTICLE] TO OTHER LAWS.

(a) This [article] does not authorize an act prohibited by, and does not affect the application or requirements of, law other than this [article].

(b) A transaction effected under this [article] may not create or impair a right, duty, or obligation of a person under the statutory law of this state relating to a change in control, takeover, business combination, control-share acquisition, or similar transaction involving a domestic merging, acquired, converting, or domesticating business corporation unless:

(1) if the corporation does not survive the transaction, the transaction satisfies any requirements of the law; or

(2) if the corporation survives the transaction, the approval of the plan is by a vote of the shareholders or directors which would be sufficient to create or impair the right, duty, or obligation directly under the law.

Comment

This section preserves existing regulatory law in an adopting state in general terms.

Adopting states should consider more carefully integrating this article with their various regulatory laws. For example, in some states certain professions are limited in their use of limited liability entities (see also Section 903).

Laws other than this article that will apply to transactions under the article include, for example, the various uniform fraudulent transfer and fraudulent conveyance acts; state insolvency statutes; federal bankruptcy law; and Articles 8 and 9 of the UCC.

Subsection (b) – Many states have enacted "antitakeover" statutes intended to make it more difficult to acquire control of a publicly-traded corporation. Those statutes often provide that their application to a particular corporation cannot be changed unless the corporation obtains certain specified approvals, such as a vote of disinterested directors or a supermajority vote by the shareholders. The purpose of the special requirements in this subsection on varying the application of an antitakeover statute is to protect against a hostile acquirer or group of shareholders seeking to use the article to avoid the application of the antitakeover statute.

This subsection protects the application of antitakeover statutes from being affected by a transaction under this article by requiring that the transaction be approved in a manner that would be sufficient to approve changing the application of the antitakeover statute. If a transaction is approved in that manner, there is no policy reason to prohibit the application of the antitakeover statute from being varied by a transaction under this article. If the application of an antitakeover statute cannot be varied by action of an entity subject to it, then a transaction under this article will be permissible only if the antitakeover provision continues to apply after the transaction or the transaction itself is permissible under the antitakeover statute.

SECTION 903. REQUIRED NOTICE OR APPROVAL.

(a) A domestic or foreign entity that is required to give notice to, or obtain the approval of, a governmental agency or officer of this state to be a party to a merger must give the notice or obtain the approval to be a party to an interest exchange, conversion, or domestication.

(b) Property held for a charitable purpose under the law of this state by a domestic or foreign entity immediately before a transaction under this [article] becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted, devised, or otherwise transferred unless, to the extent required by or pursuant to the law of this state concerning cy pres or other law dealing with nondiversion of charitable assets, the entity obtains an appropriate order of [the appropriate court] [the Attorney General] specifying the disposition of the property.

(c) A bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance which:

(1) is made to a merging entity that is not the surviving entity; and

(2) takes effect or remains payable after the merger inures to the surviving entity.

(d) A trust obligation that would govern property if transferred to the nonsurviving entity applies to property that is transferred to the surviving entity under this section.

Legislative Note: *As an alternative to enacting subsection (a), a state may identify each of its regulatory laws that require prior approval for a merger of a regulated entity, decide whether regulatory approval should be required for an interest exchange, conversion, or domestication, and make amendments as appropriate to those laws.*

As with subsection (a), an adopting state may choose to amend its various laws with respect to the nondiversion of chartable property to cover the various transactions authorized by this article as an alternative to enacting subsection (b).

Comment

Subsection (a) – Because at least some of the provisions of this article will be new in most states, it is likely that existing state laws that require regulatory approval of transactions by businesses such as banks, insurance companies, or public utilities may not be worded in a fashion that will include at least some of the transactions authorized by this article. The purpose of this subsection is to ensure that transactions under this article will be subject to the same regulatory approval as mergers. This subsection is based on whether a merger by a regulated entity requires prior approval because the transactions authorized by this article may be effectuated indirectly in many cases under existing law by establishing a wholly-owned subsidiary of the desired type and then merging into it.

The consequence of violating this subsection should be the same as in the case of a merger consummated without the required approval.

Subsection (b) – This article applies generally to nonprofit corporations and unincorporated nonprofit associations. As in the case of laws regulating particular industries, a state's laws governing the nondiversion of charitable property to other uses may not cover some of the transactions authorized by this article. To prevent the procedures in this article from being used to avoid restrictions on the use of such charitable property, this subsection requires approval of the effect of transactions under this article by the appropriate arm of government having supervision of nonprofit entities.

An approval or order obtained under this section may impose conditions or specify the disposition of assets or liabilities in a manner different than would otherwise be the case. In such an instance, the approval or order will control over the provisions of this article specifying the effects of a transaction (see Sections 926 (effect of merger), 936 (effect of interest exchange), 946 (effect of conversion), and 956 (effect of domestication)).

Subsection (c) – This subsection clarifies the legal effect of a merger on bequests, etc. that were originally made to an entity that does not survive the merger. This issue does not arise in an interest exchange, conversion, or domestication transaction because the entity to which the bequest, etc. was made survives in some form after the transaction.

SECTION 904. NONEXCLUSIVITY. The fact that a transaction under this [article] produces a certain result does not preclude the same result from being accomplished in any other manner permitted by law other than this [article].

Comment

This section allows a transaction that has the same end result as one of the transactions governed by this article, but that is accomplished in a manner not within the scope of this article, to be exempt from this act. For example, a sale of assets and transfer of liabilities by two entities to a third entity followed by the liquidation of the two transferring entities can be accomplished pursuant to sale of assets statutory provisions rather than under Part 2 of this article, even though the end result of the transaction is essentially the same as if the two entities had merged into a third entity.

SECTION 905. REFERENCE TO EXTERNAL FACTS. A plan may refer to facts ascertainable outside the plan if the manner in which the facts will operate upon the plan is specified in the plan. The facts may include the occurrence of an event or a determination or action by a person, whether or not the event, determination, or action is within the control of a party to the transaction.

Comment

This section is based on, but more concise than, Section 1.20(k) of the Model Business Corporation Act.

SECTION 906. APPRAISAL RIGHTS. An interest holder of a domestic merging, acquired, converting, or domesticating statutory trust is entitled to contractual appraisal rights in connection with a transaction under this [article] to the extent provided in:

(1) the trust instrument; or

(2) the plan.

Comment

In corporate law, appraisal rights developed when corporate statutes were amended to permit mergers with less than unanimous consent of the shareholders. This article provides no appraisal rights, because as a default rule transactions under this article require the consent or affirmative vote of all the beneficial owners. To the extent the governing instrument changes this default rule, parties may wish to consider contractual appraisal rights.

This subsection validates the grant of such contractual appraisal rights. *Cf.* 6 Del. Code §§15-120 (general partnerships), 17-212 (limited partnerships), and 18-210 (limited liability companies), which validate "contractual appraisal rights"; and Model Business Corporation Act §13.02(5) which permits the articles of incorporation, bylaws, or a resolution of the board of directors to confer appraisal rights in contexts in which they would otherwise not be available. Legislative authorization in this section of the grant of contractual appraisal rights removes any question as to whether a court would have jurisdiction to hear a case in which the parties were attempting to create jurisdiction in the court by private agreement.

In this section, the term "appraisal rights" refers to any arrangement, either in the governing instrument or the plan, providing for the buy-out of beneficial owners that object to a transaction under this article.

[SECTION 907. EXCLUDED ENTITIES AND TRANSACTIONS.

(a) The following entities may not participate in a transaction under this [article]:

(1)

(2).

(b) This [article] may not be used to effect a transaction that:

(1)

(2).]

Legislative Note: *Subsection (a) may be used by states that have special statutes restricted to the organization of certain types of entities. A common example is banking statutes that prohibit banks from engaging in transactions other than pursuant to those statutes.*

Nonprofit entities may participate in transactions under this article with for-profit entities, subject to compliance with Section 903(b). If a state desires, however, to exclude entities with a charitable purpose or to exclude other types of entities from the scope of the article, that *may be done by referring to those entities in subsection (a).*

Subsection (b) maybe used to exclude certain types of transactions governed by more specific statutes. A common example is the conversion of an insurance company from mutual to stock form. There may be other types of transactions that vary greatly among the states.

[PART] 2

MERGER

SECTION 921. MERGER AUTHORIZED.

(a) By complying with this [part]:

(1) one or more domestic statutory trusts may merge with one or more domestic or foreign entities into a domestic or foreign surviving entity; and

(2) two or more foreign entities may merge into a domestic statutory trust.

(b) By complying with the provisions of this [part] applicable to foreign entities, a foreign entity may be a party to a merger under this [part] or may be the surviving entity in such a merger if the merger is authorized by the law of the foreign entity's jurisdiction of formation.

Comment

The merger transaction authorized by this part involves the combination of one or more domestic statutory trusts with or into one or more other domestic or foreign entities. It also contemplates the consolidation of two or more foreign entities into a single domestic statutory trust. Upon the effective date of the merger, all the assets and liabilities of the constituent entities vest in the surviving entity as a matter of law. As such, mergers require the existence of at least two separate entities before the transaction and only one entity may survive the merger. If independent existence of the constituent entities is desired following the conclusion of the transaction, a restructuring transaction other than a merger must be used to accomplish the transfer of assets and liabilities.

This part authorizes a merger for state entity law purposes. Federal law and other state law will independently determine how a merger transaction will be taxed.

Although a statutory trust can engage in a merger or other Article 9 transaction, a series of a statutory trust is not itself an entity (see Section 401(b)) and therefore cannot itself engage in an Article 9 transaction. If a statutory trust with a series merges, converts, or domesticates: (a) if the transaction is a merger and the statutory trust is the resulting entity, the series may remain (although the plan of merger might provide otherwise), and (b) in the other situations, either: (i) the resulting entity must provide for arrangements substantially like a series, or (ii) as part of the transaction the series must be dissolved and its affairs wound up.

Subsection (a)(1) – This paragraph states the general rule that subject to subsection (b) one or more domestic statutory trusts may merge with or into a domestic or foreign surviving entity.

Subsection (a)(2) – This paragraph provides that two or more foreign entities may merge into a domestic surviving statutory trust so long as the requirements of subsection (b) are met.

Section (b) – This subsection provides that a foreign entity may be a party to a merger or may be the surviving entity in a merger only if the merger is authorized by the laws of the foreign entity's jurisdiction of formation.

SECTION 922. PLAN OF MERGER.

(a) A domestic statutory trust may become a party to a merger under this [part] by approving a plan of merger. The plan must be in a record and contain:

(1) as to each merging entity, its name, jurisdiction of formation, and type of entity;

(2) if the surviving entity is to be created in the merger, a statement to that effect and the entity's name, jurisdiction of formation, and type of entity;

(3) the manner of converting the interests in each party to the merger into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) if the surviving entity exists before the merger, any proposed amendments to:

(A) its public organic record, if any; and

(B) its private organic rules that are, or are proposed to be, in a record;

(5) if the surviving entity is to be created in the merger:

(A) its proposed public organic record, if any; and

(B) the full text of its private organic rules that are proposed to be in a record;

(6) the other terms and conditions of the merger; and

(7) any other provision required by the law of a merging entity's jurisdiction of formation or the organic rules of a merging entity.

(b) In addition to the requirements of subsection (a), a plan of merger may contain any other provision not prohibited by law.

Comment

Subsection (a) – This subsection states the requirements for the plan of merger. They are similar to plan of merger provisions in corporation statutes. *See* Model Business Corporation Act §11.02(c). The requirements stated in this subsection are mandatory and cannot be varied under Section 104(17).

Subsection (a)(1) – This paragraph requires that the plan of merger identify the parties to the merger. The name of a merging entity as it appears in the plan of merger will be its name in its jurisdiction of formation.

Subsection (a)(3) – The language of this paragraph is similar to Model Business Corporation Act §11.02(c)(3), and similar provisions in the uniform unincorporated entity acts. *See, e.g.*, Uniform Partnership Act §1122(a)(3) (1997) (Last Amended 2013). Although this paragraph and these other provisions are all phrased in similar language, what may be done under this paragraph with respect to providing for continuing interests in the surviving entity for some holders of interests of a class or series of a party to the merger while paying some other form of consideration to other holders of the same class or series of interests in that entity will vary depending on the type of entity involved and the extent to which its organic rules provide for non-uniform treatment of interest holders in a manner that is permissible under its organic law. Similarly the ability to use a merger to reorganize the capital structure of the surviving entity will vary depending on the type of entity involved and whether the entity has appropriately adopted relevant provisions in its organic rules.

If the organic law and organic rules of an unincorporated entity permit a non-uniform "equity shuffle" to be accomplished in a merger involving the unincorporated entity, the minority owners of the unincorporated entity will not necessarily be entitled to the statutory appraisal rights currently afforded to minority stockholders in merging corporate entities. Any perceived unfairness in the shuffle would be addressed either (i) under principles of fiduciary duties and the contractual obligations of good faith and fair dealing, assuming, of course, that such duties and obligations have not been contractually modified or eliminated to the extent permitted by the applicable organic law, or (ii) by the exercise of whatever rights the minority owners may have to veto the transaction or to withdraw or to dissociate and be paid the value of their interests.

The Model Business Corporation Act generally requires that shares of the same class or series be treated in the same manner in a merger unless the corporation has adopted an applicable provision of its articles of incorporation pursuant to Section 6.01(e) of that act providing for variations in the treatment of holders of the same class or series of shares. Thus a determination of what may be done by way of an equity shuffle in the case of a corporation will require reference to its organic law and organic rules.

The consideration paid to the interest holders of the merging parties may be supplied in whole or part by a person who is not a party to the merger.

Subsection (b) – This subsection provides the statutory authority for a merging party to include a provision in a plan of merger that is not specifically listed in subsection (a). One such possibility is contractual appraisal rights as provided in Section 906(b).

SECTION 923. APPROVAL OF MERGER.

(a) A plan of merger is not effective unless it has been approved:

(1) by a domestic merging statutory trust, by all the beneficial owners of the trust entitled to vote on or consent to any matter; and

(2) in a record, by each beneficial owner of a domestic merging statutory trust which will have interest holder liability for debts, obligations, and other liabilities that arise after the merger becomes effective, unless:

(A) the trust instrument of the trust provides in a record for the approval of a merger in which some or all its beneficial owners become subject to interest holder liability by the affirmative vote or consent of fewer than all the beneficial owners; and

(B) the beneficial owner consented in a record to or voted for that provision of the trust instrument or became a beneficial owner after the adoption of that provision.

(b) A merger involving a domestic merging entity that is not a statutory trust is not effective unless the merger is approved by that entity in accordance with its organic law.

(c) A merger involving a foreign merging entity is not effective unless the merger is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

Comment

Subsection (a) – In the uniform acts pertaining to unincorporated business organizations, unanimity is the default rule for approving a merger. The governing instrument can change this rule (see Section 103), but care should be taken in doing so. For example, a merger can revise the governing instrument (see Section 922(a)(4)). Thus, if a merger requires less-than-unanimous consent, the governing instrument is subject to amendment by the same quantum of consent. "Exit rights" also require consideration. This act does not provide appraisal rights, because such rights are inapposite when unanimous consent is required (see the Comment to Section 906).

Subsection (a)(2) – Under Section 104(16), the rights of beneficial owners in this provision, which deals with the situation in which a beneficial owner of an statutory trust that is a party to a merger will have vicarious liability for the liabilities of the surviving entity that arise after the merger is effective, cannot be varied. The special approval requirement in subsection (a)(2) will be applicable, for example, to beneficial owners of a statutory trust that merges into a general partnership that is not a limited liability partnership if the beneficial owners become general partners of the surviving general partnership.

The consent of a beneficial owner required by subsection (a)(2)(B) may be given either by (i) signing or agreeing generally to the terms of an governing instrument that includes the required provision permitting less than unanimous approval of a merger in which beneficial owners become subject to "interest holder liability," or (ii) voting for or consenting to an amendment to the governing instrument to add such a provision.

Subsection (b) – Where a domestic entity other than a statutory trust is a party to a merger under this part, this subsection defers to that entity's organic law for the requirements for approval of the merger by that entity.

Subsection (c) – Where a foreign entity is a party to a merger under this part, this subsection defers to the laws of the foreign jurisdiction for the requirements for approval of the merger by the foreign entity. Those laws will include the organic law of the foreign entity and other applicable laws. The laws of the foreign jurisdiction will also control the application of any special approval requirements found in the organic rules of the foreign entity.

SECTION 924. AMENDMENT OR ABANDONMENT OF PLAN OF MERGER.

(a) A plan of merger may be amended only with the consent of each party to the plan, except as otherwise provided in the plan.

(b) A domestic merging statutory trust may approve an amendment of a plan of merger:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its trustees or beneficial owners of the trust in the manner provided in the plan, but a beneficial owner that was entitled to vote on or consent to approval of the merger is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by the interest holders of any party to the plan;

(B) the public organic record, if any, or private organic rules of the surviving entity that will be in effect immediately after the merger becomes effective, except for changes that do not require approval of the interest holders of the surviving entity under its organic law or organic rules; or

(C) any other terms or conditions of the plan, if the change would adversely affect the beneficial owner in any material respect.

(c) After a plan of merger has been approved and before a statement of merger becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic merging statutory trust may abandon the plan in the same manner as the plan was approved.

(d) If a plan of merger is abandoned after a statement of merger has been delivered to the [Secretary of State] for filing and before the statement becomes effective, a statement of abandonment, signed by a party to the plan, must be delivered to the [Secretary of State] for filing before the statement of merger becomes effective. The statement of abandonment takes effect on filing, and the merger is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of each party to the plan of merger;

(2) the date on which the statement of merger was filed by the [Secretary of State]; and

(3) a statement that the merger has been abandoned in accordance with this section.

Comment

This section sets out the requirements for amending or abandoning the plan of merger. They are similar to provisions for amending or abandoning mergers found in existing corporation merger statutes. *See* Model Business Corporation Act §§11.02(e), 11.08.

Under Section 104(1)(B), the provisions of this section cannot be varied.

SECTION 925. STATEMENT OF MERGER; EFFECTIVE DATE OF MERGER.

(a) A statement of merger must be signed by each merging entity and delivered to the [Secretary of State] for filing.

(b) A statement of merger must contain:

(1) the name, jurisdiction of formation, and type of entity of each merging entity that is not the surviving entity;

(2) the name, jurisdiction of formation, and type of entity of the surviving entity;

(3) a statement that the merger was approved by each domestic merging entity, if any, in accordance with this [part] and by each foreign merging entity, if any, in accordance with the law of its jurisdiction of formation;

(4) if the surviving entity exists before the merger and is a domestic filing entity, any amendment to its public organic record approved as part of the plan of merger;

(5) if the surviving entity is created by the merger and is a domestic filing entity,

its public organic record, as an attachment;

(6) if the surviving entity is created by the merger and is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(7) if the surviving entity is a foreign entity that is not a registered foreign entity, a mailing address to which the [Secretary of State] may send any process served on the [Secretary of State] pursuant to Section 926(e).

(c) In addition to the requirements of subsection (b), a statement of merger may contain any other provision not prohibited by law.

(d) If the surviving entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed.

(e) A plan of merger that is signed by all the merging entities and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of merger and on filing has the same effect. If a plan of merger is filed as provided in this subsection, references in this [article] to a statement of merger refer to the plan of merger filed under this subsection.

(f) If the surviving entity is a domestic statutory trust, the merger becomes effective when the statement of merger is effective. In all other cases, the merger becomes effective on the later of:

(1) the date and time provided in the organic law of the surviving entity; or

(2) when the statement is effective.

Comment

The filing of a statement of merger makes the transaction a matter of public record.

Subsection (a) – This subsection pertains to all merging entities involved in a merger, not merely any merging domestic statutory trust. Other filings may be required by the organic law of other entities participating in the merger.

Subsection (b)(1) and (2) – The names of foreign entities set forth in the statement of merger will generally be their names in their jurisdiction of formation, except that if a foreign entity has been required to adopt a different name in order to register to do business in this state, the foreign qualification statute will likely require that, when the entity does business in this state, the entity must use the name adopted for the purposes of registering to do business. Engaging in a merger under this part will be part of the business done by the entity in this state and the name of the entity set forth in the statement of merger will thus need to be the name under which the entity has registered to do business. Use of the name under which the entity has registered to do business will allow the records in the filing office to associate the registration of the entity to do business with the statement of merger.

Subsection (b)(3) – See the comment to subsection (f).

Subsection (b)(4) – The statement in this paragraph that the plan of merger was approved by each entity in accordance with this article necessarily presupposes that the plan was approved in accordance with any valid, special requirements in the organic rules of each merging entity.

Subsection (b)(5) and (6) – The public organic record of a domestic surviving entity created by the merger that is attached to the statement of merger becomes the original, officially filed text of the public organic record of the surviving entity when the statement of merger takes effect. It is not necessary, or appropriate, to make any other filing to create the surviving entity.

Similarly, a statement of qualification for a domestic limited liability partnership created by the merger that is attached to the statement of merger does not need to be filed separately.

Subsection (d) – Organic laws typically require that an initial filing that creates an entity be signed by the person serving as the incorporator or other organizer. This subsection, however, provides that the public organic record of the surviving entity does not need to be signed since that record is attached to a signed record.

This subsection also permits the public organic record of the surviving entity to omit any provision that is not required to be included in a restatement of the public organic record. Pursuant to this provision, for example, the public organic record of a business corporation created as the surviving entity in the merger would not need to state the name and address of each incorporator even though that information would be required by Section 2.02(a)(4) of the Model Business Corporation Act if the corporation were being incorporated outside the context of the merger.

Subsection (e) – A plan of merger that contains all the information required in the statement of merger may be filed instead of the statement of merger. The plan must be in a record and signed by each merging party.

Subsection (f) – A merger in which the surviving entity is a domestic statutory trust takes effect when the statement of merger takes effect. A merger in which the surviving entity is a foreign entity will usually also take effect when the statement of merger takes effect because the practice is to coordinate the filings that need to be made when a merger involves both a domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the same time. Because of the possibility, however, that the filing in the foreign jurisdiction will take effect at a different time, subsection (g) provides that the merger transaction itself will take effect at the later of (i) when the statement of merger takes effect, and (ii) when the merger takes effect under the law of the foreign jurisdiction. That rule avoids the possibility that the merger will take effect in the domestic jurisdiction before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the domestic entity would cease to exist before it has been merged into the foreign entity.

It is only necessary for the filing office to record the effective date of the statement of merger and the filing office does not need to be concerned with the effective date of the merger itself. Persons wishing to determine the effective date of a merger involving both a domestic and a foreign entity will be able to do so by consulting the records of the filing offices in each jurisdiction.

Under Section 104(1)(B), the provisions of this section cannot be varied.

SECTION 926. EFFECT OF MERGER.

(a) When a merger becomes effective:

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

(2) each merging entity that is not the surviving entity ceases to exist;

(3) all property of each merging entity vests in the surviving entity without transfer, reversion, or impairment;

(4) all debts, obligations, and other liabilities of each merging entity are debts, obligations, and other liabilities of the surviving entity;

(5) except as otherwise provided by law or the plan of merger, all the rights, privileges, immunities, powers, and purposes of each merging entity vest in the surviving entity;

(6) if the surviving entity exists before the merger:

(A) all its property continues to be vested in it without transfer, reversion, or impairment;

(B) it remains subject to all its debts, obligations, and other liabilities; and

(C) all its rights, privileges, immunities, powers, and purposes continue to be vested in it;

(7) the name of the surviving entity may be substituted for the name of any merging entity that is a party to any pending action or proceeding;

(8) if the surviving entity exists before the merger:

(A) its public organic record, if any, is amended to the extent provided in the statement of merger; and

(B) its private organic rules that are to be in a record, if any, are amended to the extent provided in the plan of merger;

(9) if the surviving entity is created by the merger, plaintiff's private organic rules are effective and:

(A) If it is a filing entity, its public organic record is effective; and

(B) If it is a limited liability partnership, its statement of qualification is effective; and

(10) the interests in each merging entity which are to be converted in the merger are converted, and the interest holders of those interests are entitled only to the rights provided to them under the plan of merger and to any appraisal rights they have under Section 908 and the merging entity's organic law.

(b) Except as otherwise provided in the organic law or organic rules of a merging entity, the merger does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the merging entity.

(c) When a merger becomes effective, a person that did not have interest holder liability with respect to any of the merging entities and becomes subject to interest holder liability with respect to a domestic entity as a result of the merger has interest holder liability only to the extent provided by the organic law of that entity and only for those debts, obligations, and other liabilities that arise after the merger becomes effective.

(d) When a merger becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic merging statutory trust with respect to which the person had interest holder liability is subject to the following rules:

(1) The merger does not discharge any interest holder liability under this [act] to the extent the interest holder liability arose before the merger became effective.

(2) The person does not have interest holder liability under this [act] for any debt, obligation, or other liability that arises after the merger becomes effective.

(3) This [act] continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the merger had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by this [act], law other than this [act], or the governing instrument of the domestic merging statutory trust with respect to any interest holder liability preserved under paragraph (1) as if the merger had not occurred.

(e) When a merger becomes effective, a foreign entity that is the surviving entity may be served with process in this state for the collection and enforcement of any debts, obligations, or other liabilities of a domestic merging statutory trust as provided in Section 220.

(f) When a merger becomes effective, the registration to do business in this state of any foreign merging entity that is not the surviving entity is canceled.

Comment

With the exception of subsections (c) and (d), this section is similar to statutory provisions on the effect of a merger of a corporation with a corporation. *See* Model Business Corporation Act §11.07.

Subsection (a) – This subsection states the general understanding that in a merger the assets and liabilities of the merging entities automatically vest in the surviving entity. The surviving entity becomes the owner of all real and personal property of the merged entities and is subject to all debts, obligations, and liabilities of the merging entities. A merger does not constitute a transfer, assignment, or conveyance of any property held by the merging entities prior to the merger. A merger also does not give rise to a claim that a contract with a merging entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a merger. The contract rights that are vested in the surviving entity include the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the merger. Section 903(c) deals with the surviving entity's rights in trust obligations of a nonsurviving party in a merger and transactions such as bequests made to a nonsurviving party to a merger that takes effect after the merger.

After a merger becomes effective, the law of the surviving entity's jurisdiction of formation governs the surviving entity.

See Sections 903(a) and (b), which modify the provisions of this section with respect to the effects of a merger to the extent a regulatory law provides otherwise or any of the parties holds property committed to charitable purposes.

Subsection (a)(2) – A merger cannot have the effect of making an interest holder of a domestic merging entity subject to interest holder liability for the debts, obligations, or other liabilities of any other person or entity unless the interest holder has executed a separate written consent to become subject to such liability or previously agreed to the effectuation of a transaction having that effect without the interest holder's consent. The governing instrument cannot change this provision (see Section 104(16)).

Subsection (a)(7) – All pending proceedings involving either the survivor or a party whose separate existence ceased as a result of the merger are continued. Under this paragraph, the name of the survivor may be, but need not be, substituted in any pending proceeding for the name of a party to the merger whose separate existence ceased as a result of the merger. The substitution may be made whether the survivor is a complainant or a respondent, and may be made at the instance of either the survivor or an opposing party. Such a substitution has no substantive effect because, whether or not the survivor's name is substituted, the survivor succeeds to the claims, and is subject to the liabilities, of any party to the merger whose separate existence ceased as a result of the merger.

Subsection (a)(8)(B) – The private organic rules of an unincorporated entity typically may be either oral or written. The plan of merger is not required to set forth amendments to oral provisions of the private organic rules of the surviving entity, and thus this provision is limited in scope just to amendments to the private organic rules that are to be in a record, if any.

Subsection (a)(10) – See the comments to Section 906.

Subsections (c) and (d) – These subsections set forth rules for two circumstances that typically do not exist in a merger where all the entities involved are corporations. Subsection (c) deals with the situation where an interest holder that does not have vicarious liability for the obligations of a merging entity before the merger has interest holder liability after the merger. An example would be a beneficial owner who agrees to be the general partner in a limited partnership that is the surviving entity in a merger between a statutory trust and a limited partnership that is not a limited liability limited partnership. Subsection (d) deals with the situation where an interest holder has vicarious liability for the obligations of one of the merging parties before the merger but ceases to have any interest holder liability for the obligations of the surviving entity after the merger is effective. An example would be a general partner in a general partnership that merges into a statutory trust.

The effects of subsections (c) and (d) will depend on when a liability arises, which is determined by other law. When a contractual liability arises may depend on how the contractual obligation is worded. For example, a lease that provides that the entire rent is due when the lease is signed, but provides that rent may be paid in future installments, will be treated differently from a lease that does not provide that the entire rent is earned upon signing.

These subsections apply not only to merging domestic statutory trusts but also to any other domestic entity involved in the merger.

Subsection (c) – This subsection sets forth the general rule that an interest holder that was not liable for the liabilities of a merging entity before the merger but will have personal liability for the obligations of the surviving entity after the merger will be personally liable only for the liabilities of a domestic surviving entity that arise after the effective date of a merger. When a liability arises will be determined by other applicable law.

Subsection (d) – This subsection provides four rules with respect to a person who ceases to have interest holder liability after the effective date of the merger:

(1) the interest holder remains personally liable for any obligations that were incurred before the effective date of the merger;

(2) the interest holder does not have any personal liability for obligations of the surviving entity;

(3) the pre-existing personal liability of the interest holder is enforced against the interest holder on the same basis as if the merger had not taken place; and

(4) the interest holder has the same rights of contribution from other interest holders of the merging entity as the interest holder would have had if the merger had not occurred.

For further discussion, see the comment to Section 946(d).

Subsection (e) – When a merger becomes effective, this subsection provides that a foreign entity that is the surviving entity may be served with process in this state. The proceedings covered by this subsection include a proceeding to enforce the rights of any interest holders of each domestic merging entity who are entitled to and exercise appraisal rights. One of the liabilities that a foreign surviving entity succeeds to is the obligation of a merging entity to pay the amount, if any, to which its interest holders who assert appraisal rights are entitled.

[PART] 3

INTEREST EXCHANGE

SECTION 931. INTEREST EXCHANGE AUTHORIZED.

(a) By complying with this [part]:

(1) a domestic statutory trust may acquire all of one or more classes or series of interests of another domestic entity or a foreign entity in exchange for interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing; or

(2) all of one or more classes or series of interests of a domestic statutory trust may be acquired by another domestic entity or a foreign entity in exchange for interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing.

(b) By complying with the provisions of this [part] applicable to foreign entities, a foreign entity may be the acquiring or acquired entity in an interest exchange under this [part] if the interest exchange is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic statutory trust but does not refer to an interest exchange, the provision applies to an interest exchange in which the domestic statutory trust is the acquired entity as if the interest exchange were a merger until the provision is amended after [the effective date of this [act]].

Comment

An interest exchange is the same type of transaction as the share exchange provided for in Section 11.03 of the Model Business Corporation Act. The effect of an interest exchange is that: (1) the separate existence of the acquired entity is not affected; and (2) the acquiring entity acquires all of the interests of one or more classes of the acquired entity. An interest exchange also allows an indirect acquisition through the use of consideration in the exchange that is not provided by the acquiring entity (*e.g.*, consideration from another or related entity).

Neither share exchanges nor interest exchanges are universally recognized in either corporation or unincorporated entity laws. The effect of an interest exchange can be achieved through a triangular merger in which the acquiring entity forms a new subsidiary and the acquired entity is then merged into the new subsidiary. Part 3 allows the interest exchange to be accomplished directly in a single step, rather than indirectly through the triangular merger route.

The "series" referenced in subsection (a) are not the series contemplated by Article 4 and some LLC statutes. *See, e.g.*, 805 ILCS 180/37-40 (2012); Del. Code Ann. tit. 6, §18-215 (2012). Because a series of a domestic statutory trust is not an entity separate from the statutory trust (see Section 410(b)), a series by itself cannot engage in an interest exchange or any other type of Article 9 transaction. Instead, in this context "series" refers to a subset of a class, which is a meaning commonly found in corporation law. *See, e.g.*, Model Business Corporation Act §6.02. Specific provisions authorizing classes and series are less common in unincorporated entity law but do exist. *See, e.g.*, Minn. Stat. §322B.155 (2012). In any event, a governing instrument certainly has the power to create classes and series as contemplated by this section.

Subsection (a) – For this section to apply, a domestic statutory trust must be either the acquiring or acquired entity.

The acquiring entity is not required to acquire all of the interests in the acquired entity. For example, assume that a statutory trust with three classes of beneficial interests enters into an interest exchange with an acquiring entity. The acquiring entity need only acquire all of the beneficial owners' interests of one or more classes of the trust's beneficial interests.

Subsection (b) – This subsection allows a foreign entity to effectuate an interest exchange with a domestic statutory trust if the interest exchange is authorized by the organic law of the foreign entity.

Subsection (c) – This subsection deals with rights of parties to protected agreements (defined in Section 901(30)) when an interest exchange takes place. Because the concept of an interest exchange is relatively new, a person contracting with a domestic statutory trust or loaning it money who drafted and negotiated special rights relating to the transaction before the enactment of this article should not be charged with the consequences of not having dealt with the concept of an interest exchange in the context of those special rights. Similarly, when the governance structure of an entity has been negotiated before the enactment of this act, the concept of an interest exchange may not have been reflected in any special governance arrangements; for example, special approval rights may have been provided for fundamental transactions, but those rights fail to include language that would make them applicable to an interest exchange. Subsection (c) accordingly provides a transitional rule that is intended to protect such special rights. If, for example, an entity is a party to a contract that provides that the entity cannot participate in a merger without the consent of the other party to the contract, the requirement to obtain the consent of the other party will also apply to an interest exchange in which the entity is the acquired entity. If the entity fails to obtain the consent, the result will be that the other party will have the same rights it would have had if the entity were to participate in a merger without the required consent.

The transitional rule in this subsection ceases to make sense at such time as the provision of the governing instrument giving rise to the special rights is first amended after the effective date of this article because at that time the provision may be amended to address expressly an interest exchange. The transitional rule will continue to apply, however, if a provision other than the specific provision giving rise to the special rights is amended.

SECTION 932. PLAN OF INTEREST EXCHANGE.

(a) A domestic statutory trust may be the acquired entity in an interest exchange under this [part] by approving a plan of interest exchange. The plan must be in a record and contain:

(1) the name of the acquired entity;

(2) the name, jurisdiction of formation, and type of entity of the acquiring entity;

(3) the manner of converting the interests in the acquired entity into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) any proposed amendments to:

(A) the certificate of trust; and

(B) the trust instrument of the acquired entity that are, or are proposed to be, in a record;

(5) the other terms and conditions of the interest exchange; and

(6) any other provision required by the law of this state or the governing instrument of the acquired entity.

(b) In addition to the requirements of subsection (a), a plan of interest exchange may contain any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of interest exchange, which must be approved by the acquired entity in accordance with Section 933. The content of the plan of interest exchange is similar to the content of a plan of merger. *See* Section 922.

The plan of interest exchange may, but need not, be filed instead of the statement of interest exchange (see Section 935) so long as the plan contains all the information required to be in the statement and is delivered to the filing office for filing after the plan has been adopted and approved (see Section 935(d)).

Subsection (a) – The requirements stated in this subsection are mandatory and cannot be varied under Section 104(17).

Subsection (a)(3) – Under this paragraph, interest holders in the acquired entity may receive interests or securities of the acquiring entity or of a party other than the acquiring entity, obligations, rights to acquire interests or securities, cash, or other property (see also the comment to Section 922(a)(3)).

Subsection (b) – This subsection authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

SECTION 933. APPROVAL OF INTEREST EXCHANGE.

(a) A plan of interest exchange is not effective unless it has been approved:

(1) by all the beneficial owners of a domestic acquired statutory trust entitled to vote on or consent to any matter; and

(2) in a record, by each beneficial owner of the domestic acquired statutory trust that will have interest holder liability for debts, obligations, and other liabilities that arise after the interest exchange becomes effective, unless:

(A) the governing instrument of the trust in a record provides for the approval of an interest exchange or a merger in which some or all of its beneficial owners become subject to interest holder liability by the affirmative vote or consent of fewer than all the beneficial owners; and

(B) the beneficial owner consented in a record to or voted for that provision of the governing instrument or became a beneficial owner after the adoption of that provision.

(b) An interest exchange involving a domestic acquired entity that is not a statutory trust is not effective unless it is approved by the domestic entity in accordance with its organic law.

(c) An interest exchange involving a foreign acquired entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

(d) Except as otherwise provided in its organic law or organic rules, the interest holders of the acquiring entity are not required to approve the interest exchange.

Comment

This section sets forth the required approval of an interest exchange. An interest exchange transaction governed by this article only requires approval by the acquired entity, unless the applicable organic law or the organic rules of the acquiring entity otherwise provide, (subsection (d)), a condition that rarely exists.

Subsection (a)(2) – See the comment to Section 923(a)(2) for an explanation of this interest holder liability provision.

SECTION 934. AMENDMENT OR ABANDONMENT OF PLAN OF INTEREST EXCHANGE.

(a) A plan of interest exchange may be amended only with the consent of each party to the plan, except as otherwise provided in the plan.

(b) A domestic acquired statutory trust may approve an amendment of a plan of interest exchange:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its trustees or beneficial owners in the manner provided in the plan, but a beneficial owner that was entitled to vote on or consent to approval of the interest exchange is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the beneficial owners of the acquired trust under the plan;

(B) the governing instrument of the acquired trust that will be in effect immediately after the interest exchange becomes effective, except for changes that do not require approval of the beneficial owners of the acquired trust under this [act] or the governing instrument; or

(C) any other terms or conditions of the plan, if the change would adversely affect the beneficial owner in any material respect.

(c) After a plan of interest exchange has been approved and before a statement of interest exchange becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic acquired statutory trust may abandon the plan in the same manner as the plan was approved.

(d) If a plan of interest exchange is abandoned after a statement of interest exchange has been delivered to the [Secretary of State] for filing and before the statement becomes effective, a statement of abandonment, signed by the acquired statutory trust, must be delivered to the [Secretary of State] for filing before the statement of interest exchange becomes effective. The statement of abandonment takes effect on filing, and the interest exchange is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the acquired trust;

(2) the date on which the statement of interest exchange was filed by the [Secretary of State]; and

(3) a statement that the interest exchange has been abandoned in accordance with this section.

Comment

This section parallels analogous provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications) (see Sections 924 (mergers), 944 (conversions), and 194 (domestications)).

Under Section 104(1)(B), the provisions of this section may not be varied.

SECTION 935. STATEMENT OF INTEREST EXCHANGE; EFFECTIVE DATE OF INTEREST EXCHANGE.

(a) A statement of interest exchange must be signed by a domestic acquired statutory trust and delivered to the [Secretary of State] for filing.

(b) A statement of interest exchange must contain:

(1) the name of the acquired statutory trust;

(2) the name, jurisdiction of formation, and type of entity of the acquiring entity;

(3) a statement that the plan of interest exchange was approved by the acquired trust in accordance with this [part]; and

(4) any amendments to the acquired trust's certificate of trust approved as part of the plan of interest exchange.

(c) In addition to the requirements of subsection (b), a statement of interest exchange may contain any other provision not prohibited by law.

(d) A plan of interest exchange that is signed by a domestic acquired statutory trust and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of interest exchange and on filing has the same effect. If a plan of interest exchange is filed as provided in this subsection, references in this [article] to a statement of interest exchange refer to the plan of interest exchange filed under this subsection.

(e) An interest exchange under this section becomes effective when the statement of interest exchange is effective.

Comment

This section applies only when the acquired entity is a domestic statutory trust. The filing makes the transaction a matter of public record.

This part has no filing requirement when the only domestic statutory trust involved is the acquired entity. For that situation, the organic law of the acquiring entity must be consulted.

Subsection (b) – This subsection states the requirements for a statement of interest exchange, which are essentially the same as the requirements for a statement of merger under Section 925(b).

Subsection (d) – A plan of interest exchange can be used as a substitute for the statement of interest exchange so long as the plan satisfies the requirements in subsection (b).

Subsection (e) – This subsection applies when the acquiring entity is a domestic statutory trust, and Section 208 determines when a record delivered for filing under this act is effective. A statement of interest exchange may specify a delayed effective time and date, subject to the 90-day limit stated in subsection Section 208(3) and (4).

If the acquired entity is not a domestic statutory trust, the effectiveness of the interest exchange will occur when provided by the law of the jurisdiction of formation of the acquired entity.

Under Section 104(1)(B), the provisions of this section may not be varied.

SECTION 936. EFFECT OF INTEREST EXCHANGE.

(a) When an interest exchange in which the acquired entity is a domestic statutory trust becomes effective:

(1) the interests in the acquired trust which are the subject of the interest exchange are converted and the beneficial owners holding those interests are entitled only to the rights provided to them under the plan of interest exchange and to any appraisal rights they have under

Section 906;

(2) the acquiring entity becomes the interest holder of the interests in the acquired trust stated in the plan of interest exchange to be acquired by the acquiring entity; and

(3) the governing instrument of the acquired trust is amended to the extent provided in the statement of interest exchange.

(b) Except as otherwise provided in the governing instrument of a domestic acquired statutory trust, the interest exchange does not give rise to any rights that a beneficial owner, trustee, or third party would have upon a dissolution, liquidation, or winding up of the acquired trust.

(c) When an interest exchange becomes effective, a person that did not have interest holder liability with respect to a domestic acquired statutory trust and becomes subject to interest holder liability with respect to a domestic entity as a result of the interest exchange has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that arise after the interest exchange becomes effective.

(d) When an interest exchange becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic acquired statutory trust with respect to which the person had interest holder liability is subject to the following rules:

(1) The interest exchange does not discharge any interest holder liability under this [act] to the extent the interest holder liability arose before the interest exchange became effective.

(2) The person does not have interest holder liability under this [act] for any debt, obligation, or other liability that arises after the interest exchange becomes effective.

(3) This [act] continues to apply to the release, collection, or discharge of any

interest holder liability preserved under paragraph (1) as if the interest exchange had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by this [act], law other than this [act], or the governing instrument of the acquired trust with respect to any interest holder liability preserved under paragraph (1) as if the interest exchange had not occurred.

Comment

This section applies only when the *acquired* entity is a domestic statutory trust, and this part states no rule for the effect of an interest exchange when the only domestic statutory trust involved is the *acquiring* entity. For that situation, the organic law of the acquired entity must be consulted.

Subsection (a) – In contrast to a merger, an interest exchange does not in and of itself affect the separate existence of the parties, vest in the acquiring entity the assets of the acquired entity, or render the acquiring entity liable for the liabilities of the acquired entity. Thus, subsection (a) is significantly simpler than Section 926(a) with respect to the effects of a merger.

When an interest exchange becomes effective: (1) the interests of the acquired domestic statutory trust are exchanged, converted or canceled as provided in the plan; (2) the only rights of the former beneficial owners of the acquired statutory trust whose interests are affected by the interest exchange are those rights related to the exchange, conversion or cancellation; (3) the acquiring entity becomes the owner of the acquired trust's interests as provided in the plan; (4) the certificate of organization of the acquired trust is amended as provided in the statement of interest exchange, thus obviating the need for repetitive filings (*i.e.*, a filing as to the entity interest exchange and another filing to reflect amendments to certificate); and (5) the provisions of the governing instrument of the acquired trust that are to be in a record, if any, are amended to the extent provided in the plan of interest exchange.

Subsection (c) – This subsection provides the rule for future interest holder liability pertaining to domestic entities and parallels analogous provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications) (see the comment to Section 926).

Subsection (d) – This subsection provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications) (see the comments to Sections 926(d) and 946(d)).

[PART] 4

CONVERSION

SECTION 941. CONVERSION AUTHORIZED.

(a) By complying with this [part], a domestic statutory trust may become:

(1) a domestic entity that is a different type of entity; or

(2) a foreign entity that is a different type of entity, if the conversion is authorized by the law of the foreign entity's jurisdiction of formation.

(b) By complying with the provisions of this [part] applicable to foreign entities, a foreign entity that is not a foreign statutory trust may become a domestic statutory trust if the conversion is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic statutory trust but does not refer to a conversion, the provision applies to a conversion of the entity as if the conversion were a merger until the provision is amended after [the effective date of this [act]].

Comment

This part of Article 9 permits an entity to change to a different type of entity in its jurisdiction of formation or in a foreign jurisdiction. A transaction in which an entity changes its jurisdiction of organization but does not change its type is a domestication and is the subject of Part 5.

Although a statutory trust can engage in a conversion or other Article 9 transaction, because a series of a statutory trust having series is not an entity separate from the trust (see Section 401(b)), a series cannot engage in a conversion or other type of Article 9 transaction.

Subsection (a)(2) – For this provision to apply, this type of conversion must be authorized by the law of the foreign jurisdiction. If this is not the case, it may be possible to achieve the same result by forming an entity of the type desired in the foreign jurisdiction and then merging the domestic entity into the new foreign entity under Part 2 of Article 9.

Subsection (b) – This subsection allows a foreign entity to effectuate a conversion into a domestic statutory trust, but only if the conversion is permitted by the laws of the foreign entity's jurisdiction of formation. When a foreign entity becomes a domestic statutory trust pursuant to this part of Article 9, the effect of the conversion will be as provided in Section 946. The procedures by which the conversion is approved, however, will be determined by the laws of the foreign entity's jurisdiction of formation. See Section 102(9) for the definition of "jurisdiction of formation."

Subsection (c) – See the comment to Section 931(c).

SECTION 942. PLAN OF CONVERSION.

(a) A domestic statutory trust may convert to a different type of entity under this [part] by approving a plan of conversion. The plan must be in a record and contain:

(1) the name of the converting statutory trust;

(2) the name, jurisdiction of formation, and type of entity of the converted entity;

(3) the manner of converting the interests in the converting statutory trust into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) the proposed public organic record of the converted entity if it will be a filing entity;

(5) the full text of the private organic rules of the converted entity which are proposed to be in a record;

(6) the other terms and conditions of the conversion; and

(7) any other provision required by the law of this state or the governing instrument of the converting statutory trust.

(b) In addition to the requirements of subsection (a), a plan of conversion may contain any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of conversion, which must be approved by the converting entity in accordance with Section 943. The content of a plan of conversion is similar to the content of a plan of merger (see Section 922).

Subsection (a) – The requirements stated in this subsection are mandatory and cannot be varied under Section 104(17).

Subsection (a)(3) – Interest holders in the converting entity may receive interests or other securities of the converted entity or of any other person, obligations, rights to acquire interests or other securities, cash, or other property (see also Sections 922(a)(3) (mergers), 932(a)(3) (interest exchanges), and 952(a)(3) (domestications)).

Subsection (b) – This subsection authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

SECTION 943. APPROVAL OF CONVERSION.

(a) A plan of conversion is not effective unless it has been approved:

(1) by a domestic converting statutory trust, by all the beneficial owners of the trust entitled to vote on or consent to any matter; and

(2) in a record, by each beneficial owner of a domestic converting statutory trust which will have interest holder liability for debts, obligations, and other liabilities that arise after the conversion becomes effective, unless:

(A) the governing instrument of the trust provides in a record for the approval of a conversion or a merger in which some or all of its beneficial owners become subject to interest holder liability by the affirmative vote or consent of fewer than all the beneficial owners; and

(B) the beneficial owner voted for or consented in a record to that provision of the governing instrument or became a beneficial owner after the adoption of that provision.

(b) A conversion involving a domestic converting entity that is not a statutory trust is not effective unless it is approved by the domestic converting entity in accordance with its organic law.

(c) A conversion of a foreign converting entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

Comment

Subsection (a)(1) – This provision is a default rule, subject to change in the governing instrument (see Section 103).

Subsection (a)(2) – This provision is not a default rule and cannot be varied (section 104(17)). For an explanation of this interest holder liability provision, see the comment to Section 923(a)(2).

SECTION 944. AMENDMENT OR ABANDONMENT OF PLAN OF CONVERSION.

(a) A plan of conversion of a domestic converting statutory trust may be amended:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its beneficial owners of the trust in the manner provided in the plan, but a beneficial owner that was entitled to vote on or consent to approval of the conversion is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the beneficial owners of the converting trust under the plan;

(B) the public organic record, if any, or private organic rules of the converted entity which will be in effect immediately after the conversion becomes effective, except for changes that do not require approval of the interest holders of the converted entity under its organic law or organic rules; or

(C) any other terms or conditions of the plan, if the change would adversely affect the beneficial owner in any material respect.

(b) After a plan of conversion has been approved by a domestic converting statutory trust and before a statement of conversion becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic converting statutory trust may abandon the plan in the same manner as the plan was approved.

(c) If a plan of conversion is abandoned after a statement of conversion has been delivered to the [Secretary of State] for filing and before the statement becomes effective, a statement of abandonment, signed by the converting entity, must be delivered to the [Secretary of State] for filing before the statement of conversion becomes effective. The statement of abandonment takes effect on filing, and the conversion is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the converting statutory trust;

(2) the date on which the statement of conversion was filed by the [Secretary of State]; and

(3) a statement that the conversion has been abandoned in accordance with this section.

Comment

This section parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications) (see Sections 924 (mergers), 934 (interest exchanges), and 954 (domestications)).

Under Section 104(1)(B), the provisions of this section cannot be varied.

SECTION 945. STATEMENT OF CONVERSION; EFFECTIVE DATE OF CONVERSION.

(a) A statement of conversion must be signed by the converting entity and delivered to the [Secretary of State] for filing.

(b) A statement of conversion must contain:

(1) the name, jurisdiction of formation, and type of entity of the converting entity;

(2) the name, jurisdiction of formation, and type of entity of the converted entity;

(3) if the converting entity is a domestic statutory trust, a statement that the plan of conversion was approved in accordance with this [part] or, if the converting entity is a foreign entity, a statement that the conversion was approved by the foreign entity in accordance with the law of its jurisdiction of formation;

(4) if the converted entity is a domestic filing entity, its public organic record, as an attachment;

(5) if the converted entity is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(6) if the converted entity is a foreign entity, a mailing address to which the [Secretary of State] may send any process served on the [Secretary of State] pursuant to Section 946(e).

(c) In addition to the requirements of subsection (b), a statement of conversion may contain any other provision not prohibited by law.

(d) If the converted entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed.

(e) A plan of conversion that is signed by a domestic converting entity and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of conversion and on filing has the same effect. If a plan of conversion is filed as provided in this subsection, references in this [article] to a statement of conversion refer to the plan of conversion filed under this subsection.

(f) If the converted entity is a domestic statutory trust, the conversion becomes effective when the statement of conversion is effective. In all other cases, the conversion becomes effective on the later of:

(1) the date and time provided by the organic law of the converted entity; or

(2) when the statement is effective.

Comment

This section applies regardless of whether a domestic statutory trust is the converting or converted entity. A foreign entity seeking to convert to a domestic statutory trust must therefore comply with this section.

If either the converting or converted entity is a foreign entity, the organic law of the foreign entity's jurisdiction must also be consulted.

The filing of a statement of conversion makes the transaction a matter of public record.

Subsection (b) – This subsection sets forth the requirements for a statement of conversion. They are essentially the same as the requirements for a statement of merger in Section 925.

Subsection (e) – A plan of conversion can be used as a substitute for the statement of conversion so long as the plan satisfies the requirements in subsection (b).

Subsection (f) – Section 208 determines when a record delivered for filing under this act is effective. A statement of conversion may specify a delayed effective time and date, subject to the 90-day limit stated in Section 208(3) and (4).

When the statement of conversion becomes effective under this subsection, the conversion transaction occurs if the converted entity is a domestic statutory trust. A conversion in which the converted entity is a foreign entity will usually also take effect when the statement of conversion takes effect because the best practice will be to coordinate the filings that need to be made when a conversion involves both a domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the same time. Because of the possibility, however, that the filing in the foreign jurisdiction will take effect at a different time, this subsection provides that the conversion transaction itself will take effect at the later of (i) when the statement of conversion takes effect, and (ii) when the conversion takes effect under the law of the foreign jurisdiction. That rule avoids the possibility that the conversion will take effect in the domestic jurisdiction before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the converting domestic entity would cease to exist before it has been converted into the foreign entity.

It is only necessary for the filing office to record the effective date of the statement of conversion and the filing office does not need to be concerned with the effective date of the conversion itself. Persons wishing to determine the effective date of a conversion involving both a domestic limited liability company and a foreign entity will be able to do so by consulting the records of the filing offices in each jurisdiction.

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

SECTION 946. EFFECT OF CONVERSION.

(a) When a conversion becomes effective:

(1) the converted entity is:

(A) organized under and subject to the organic law of the converted entity; and

(B) the same entity without interruption as the converting entity;

(2) all property of the converting entity continues to be vested in the converted entity without transfer, reversion, or impairment;

(3) all debts, obligations, and other liabilities of the converting entity continue as debts, obligations, and other liabilities of the converted entity;

(4) except as otherwise provided by law or the plan of conversion, all the rights, privileges, immunities, powers, and purposes of the converting entity remain in the converted entity;

(5) the name of the converted entity may be substituted for the name of the converting entity in any pending action or proceeding;

(6) the governing instrument of the converted entity is effective; and

(7) the interests in the converting entity are converted, and the interest holders of the converting entity are entitled only to the rights provided to them under the plan of conversion

and to any appraisal rights they have under Section 906 and the converting entity's organic law.

(b) Except as otherwise provided in the governing instrument of a domestic converting statutory trust, the conversion does not give rise to any rights that a beneficial owner or third party would have upon a dissolution, liquidation, or winding up of the converting entity.

(c) When a conversion becomes effective, a person that did not have interest holder liability with respect to the converting entity and that becomes subject to interest holder liability with respect to a domestic entity as a result of the conversion has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that arise after the conversion becomes effective.

(d) When a conversion becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic converting statutory trust with respect to which the person had interest holder liability is subject to the following rules:

(1) The conversion does not discharge any interest holder liability under this [act] to the extent the interest holder liability arose before the conversion became effective.

(2) The person does not have interest holder liability under this [act] for any debt, obligation, or other liability that arises after the conversion becomes effective;

(3) This [act] continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the conversion had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by this [act], law other than this [act], or the organic rules of the converting entity with respect to any interest holder liability preserved under paragraph (1) as if the conversion had not occurred.

(e) When a conversion becomes effective, a foreign entity that is the converted entity may be served with process in this state for the collection and enforcement of any of its debts, obligations, and other liabilities as provided in Section 220.

(f) If the converting entity is a registered foreign entity, its registration to do business or other foreign qualification is canceled when the conversion becomes effective.

(g) A conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

Comment

A converted entity is the same entity as it was before the conversion; the entity just has a different legal form

Subsection (a) – This subsection states the principal legal effects of a conversion. The converted entity remains the owner of all real and personal property and remains subject to all the liabilities, actual or contingent, of the converting entity. A conversion is not a conveyance, transfer, or assignment. A conversion does not give rise to: (i) claims of reverter or impairment of title based on a prohibited conveyance or transfer; or (ii) to a claim that a contract with the converting entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a conversion. The contract rights that remain in the converted entity include, without limitation, the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the conversion.

When a conversion becomes effective, the internal affairs of the converting entity are no longer governed by its former organic law but instead by the organic law of the converted entity. As a result, filings that may have been made under the organic law of the converting entity, such as the following, will no longer be effective: a statement of qualification as a limited liability partnership under Section 901 of the Uniform Partnership Act (1997) (Last Amended 2013), a statement of partnership authority under Section 303 of that act, a statement of authority under Section 302 of the Uniform Limited Liability Company Act (2006) (Last Amended 2013), or under Section 7 of the Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013).

Subsection (a)(5) – All pending proceedings involving the converting entity are continued. The name of the converted entity may be, but need not be, substituted in any pending proceeding for the name of the converting entity.

Subsection (c) – This subsection provides the rule for future interest holder liability and parallels provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications) (see the Comment to Section 926(c)).

Subsection (d) – Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications) (see the comment to Section 926(d)).

At first glance, this subsection might seem to apply to the null set; beneficial owners of a statutory trust typically do not have interest holder liability. However, the definition of interest holder liability also includes "personal liability for a liability of an entity which is imposed on a person … by the organic rules of the entity which make one or more specified interest holders or categories of interest holders liable in their capacity as interest holders for all or specified liabilities of the entity" (Section 901(19)(A)(ii)).

Subsection (e) – For this provision to apply, the converting entity must have been a domestic statutory trust. When a domestic statutory trust becomes a foreign entity as a result of a conversion, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the converting trust. This subsection, which parallels analogous provisions in Parts 2 (mergers) and 5 (domestications), authorizes service of process for all such claims in this state.

Subsection (g) – When a conversion takes effect, the entity continues to exist – simply in a different form. This subsection thus makes clear that the conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

[PART] 5

DOMESTICATION

SECTION 951. DOMESTICATION AUTHORIZED.

(a) By complying with this [part], a domestic statutory trust may become a foreign statutory trust if the domestication is authorized by the law of the foreign jurisdiction.

(b) By complying with the provisions of this [part] applicable to foreign statutory trusts, a foreign statutory trust may become a domestic statutory trust if the domestication is authorized by the law of the foreign statutory trust's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic statutory trust but does not refer to a domestication, the provision applies to a domestication of the statutory trust as if the domestication were a merger until the provision is amended after [the effective date of this [act]].

Comment

A domestication authorized by Part 5 of Article 9 differs from a conversion in that a domestication requires that the domesticating entity be the same type of entity as the domesticated entity. In a conversion, by contrast, the converting entity changes its type.

As with a conversion, all rights and privileges, debts, obligations, and other liabilities, and actions or proceedings of a domesticating entity vest unimpaired in the domesticated entity. A domestication is not a sale, transfer, assignment, or conveyance and does not give rise to a claim of reverter or impairment of title.

Part 5 of Article 9 governs the legal effect of a foreign statutory trust domesticating in this state. On the other hand, the organic laws of the foreign jurisdiction, and not Part 5, will govern the legal effect of most aspects of a domestication of a domestic statutory trust in another jurisdiction. In the latter scenario, Part 5 authorizes the domestication of the domestic entity in the foreign jurisdiction, but Part 5 does not create a right in the domestic entity to be received in the foreign jurisdiction. Similarly, this section does not provide a right on the part of a foreign statutory trust to become a domestic statutory trust if the domestication is not authorized by the laws of the foreign jurisdiction. If the foreign jurisdiction does not authorize a domestication transaction, the same results can be accomplished by forming a new statutory trust in this state and merging the existing foreign limited liability company into the new domestic trust.

Although a statutory trust can engage in a domestication or other type of Article 9 transaction, because a series of a statutory trust having series is not an entity separate from the trust (see Section 401(b)), a series itself cannot engage in an Article 9 transaction.

Subsection (c) – For discussion see the comment to Section 931(c).

SECTION 952. PLAN OF DOMESTICATION.

(a) A domestic statutory trust may become a foreign statutory trust in a domestication by approving a plan of domestication. The plan must be in a record and contain:

(1) the name of the domesticating statutory trust;

(2) the name and jurisdiction of formation of the domesticated statutory trust;

(3) the manner of converting the interests in the domesticating statutory trust into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) the proposed governing instrument of the domesticated statutory trust;

(5) the other terms and conditions of the domestication; and

(6) any other provision required by the law of this state or the governing instrument of the domesticating statutory trust.

(b) In addition to the requirements of subsection (a), a plan of domestication may contain any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of domestication for a domestic statutory trust seeking to become a statutory trust existing under the law of another jurisdiction. For a foreign statutory trust seeking to become a domestic statutory trust, the organic law of the foreign trust governs the requirements for a plan of domestication. The content of a plan of domestication is similar to the content of a plan of merger (see Section 922).

Subsection (a) – The requirements stated in this subsection are mandatory and cannot be varied by the governing instrument (see Section 104(17)).

Subsection (a)(3) – Beneficial owners in the domesticating statutory trust may receive interests or other securities of the domesticated statutory trust or any other entity, obligations, rights to acquire interests or other securities, cash, or other property. For further discussion, see the comment to Section 922(a)(3).

Subsection (b) – This subsection authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

SECTION 953. APPROVAL OF DOMESTICATION.

(a) A plan of domestication of a domestic domesticating statutory trust is not effective unless it has been approved:

(1) by all the beneficial owners entitled to vote on or consent to any matter; and

(2) in a record, by each beneficial owner that will have interest holder liability for debts, obligations and other liabilities that arise after the domestication becomes effective, unless:

(A) the governing instrument of the trust provides for the approval of a domestication or merger in which some or all of its beneficial owners become subject to interest holder liability by the affirmative vote or consent of fewer than all the beneficial owners; and

(B) the beneficial owner voted for or consented in a record to that provision of the governing instrument or became a beneficial owner after the adoption of that provision.

(b) A domestication of a foreign domesticating statutory trust is not effective unless it is approved in accordance with the law of the foreign statutory trust's jurisdiction of formation.

Comment

Subsection (a)(1) – This provision is a default rule, subject to change in the governing instrument (see Section 103).

Subsection (a)(2) – This provision is mandatory and cannot be varied by the governing instrument (Section 104(17)). For an explanation of the provision, see the comment to Section 923(a)(2).

Subsection (b) – In the case of a foreign statutory trust that is domesticating in this state, this subsection provides that the required approval is determined by the laws of the foreign statutory's jurisdiction of formation.

SECTION 954. AMENDMENT OR ABANDONMENT OF PLAN OF DOMESTICATION.

(a) A plan of domestication of a domestic domesticating statutory trust may be amended:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by the beneficial owners in the manner provided in the plan, but a beneficial owner that was entitled to vote on or consent to approval of the domestication is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the beneficial owners of the domesticating statutory trust under the plan;

(B) the governing instrument of the domesticated statutory trust that will be in effect immediately after the domestication becomes effective, except for changes that do not require approval of the beneficial owners of the domesticated statutory trust under its governing instrument; or

(C) any other terms or conditions of the plan, if the change would adversely affect the beneficial owners in any material respect.

(b) After a plan of domestication has been approved by a domestic domesticating statutory trust and before a statement of domestication becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic domesticating statutory trust may abandon the plan in the same manner as the plan was approved.

(c) If a plan of domestication is abandoned after a statement of domestication has been delivered to the [Secretary of State] for filing and before the statement becomes effective, a statement of abandonment, signed by the domesticating statutory trust, must be delivered to the [Secretary of State] for filing before the statement of domestication becomes effective. The statement of abandonment takes effect on filing, and the domestication is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the domesticating statutory trust;

(2) the date on which the statement of domestication was filed by the [Secretary of State]; and

(3) a statement that the domestication has been abandoned in accordance with this section.

Comment

This section parallels provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions) (see Sections 924 (mergers), 934 (interest exchanges), and 944 (conversions)).

Under Section 104(1)(B), the provisions of this section may not be varied.

SECTION 955. STATEMENT OF DOMESTICATION; EFFECTIVE DATE OF DOMESTICATION.

(a) A statement of domestication must be signed by the domesticating statutory trust and delivered to the [Secretary of State] for filing.

(b) A statement of domestication must contain:

(1) the name and jurisdiction of formation of the domesticating statutory trust;

(2) the name and jurisdiction of formation of the domesticated statutory trust;

(3) if the domesticating statutory trust is a domestic statutory trust, a statement that the plan of domestication was approved in accordance with this [part] or, if the domesticating statutory trust is a foreign statutory trust, a statement that the domestication was approved in accordance with the law of its jurisdiction of formation;

(4) the certificate of trust of the domesticated statutory trust, as an attachment; and

(5) if the domesticated entity is a foreign statutory trust, a mailing address to which the [Secretary of State] may send any process served on the [Secretary of State] pursuant to Section 956(e).

(c) In addition to the requirements of subsection (b), a statement of domestication may contain any other provision not prohibited by law.

(d) The certificate of trust of a domestic domesticated statutory trust must satisfy the requirements of this [act], but the certificate does not need to be signed.

(e) A plan of domestication that is signed by a domestic domesticating statutory trust and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of domestication and on filing has the same effect. If a plan of domestication is filed as provided in this subsection, references in this [article] to a statement of domestication refer to the plan of domestication filed under this subsection.

(f) If the domestic entity is a domestic statutory trust, the domestication becomes effective when the statement of domestication is effective. If the domesticated entity is a foreign statutory trust, the domestication becomes effective on the later of:

(1) the date and time provided in the organic law of the domesticated entity; or

(2) when the statement is effective.

Comment

Regardless of whether a domestic statutory trust is the domesticating or domesticated entity:

- This section applies and, therefore, a foreign statutory trust seeking to domesticate and thereby become a domestic statutory trust must comply with this section.
- The organic law of the foreign entity's jurisdiction must also be consulted.

The filing of a statement of domestication makes the transaction a matter of public record.

Subsection (b) – This subsection sets forth the requirements for a statement of domestication. They are essentially the same as the requirements for a statement of merger in Section 925.

Subsection (e) – A plan of domestication can be used as a substitute for the statement of domestication so long as the plan satisfies the requirements in subsection (b).

Subsection (f) – Section 208 determines when a record delivered for filing under this act is effective. A statement of domestication may specify a delayed effective time and date, subject to the 90-day limit stated in Section 208(3) and (4).

When the statement of domestication becomes effective under this subsection, the domestication transaction occurs if the domesticated entity is a domestic statutory trust. A domestication in which the domesticated entity is a foreign statutory trust will usually also take effect when the statement of domestication takes effect because the best practice will be to coordinate the filings that need to be made in each jurisdiction so that they take effect at the same time. Because of the possibility, however, that the filing in the foreign jurisdiction will take effect at a different time, this subsection provides that the domestication transaction itself will take effect at the later of (i) when the statement of domestication takes effect, and (ii) when the domestication takes effect under the law of the foreign jurisdiction. This rule avoids the possibility that the domestication will take effect in the domestic jurisdiction before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the domesticating domestic statutory trust would cease to appear as an active entity on the records of this state before it appears as its active domesticated self on the records of the foreign jurisdiction.

It is only necessary for the filing office to record the effective date of the statement of domestication and the filing office does not need to be concerned with the effective date of the domestication itself. Persons wishing to determine the effective date of a domestication will be able to do so by consulting the records of the filing offices in each jurisdiction.

Under Section 104(1)(B), the provisions of this section may not be varied by the governing instrument.

SECTION 956. EFFECT OF DOMESTICATION.

(a) When a domestication becomes effective:

(1) the domesticated entity is:

(A) organized under and subject to the organic law of the domesticated entity; and

(B) the same entity without interruption as the domesticating trust;

(2) all property of the domesticating entity continues to be vested in the domesticated entity without transfer, reversion, or impairment;

(3) all debts, obligations, and other liabilities of the domesticating entity continue as debts, obligations, and other liabilities of the domesticated entity;

(4) except as otherwise provided by law or the plan of domestication, all the rights, privileges, immunities, powers, and purposes of the domesticating entity remain in the domesticated entity;

(5) the name of the domesticated trust may be substituted for the name of the domesticating entity in any pending action or proceeding;

(6) the governing instrument of the domesticated entity is effective; and

(7) the interests in the domesticating entity are converted to the extent and as

approved in connection with the domestication, and the beneficial owners of the domesticating entity are entitled only to the rights provided to them under the plan of domestication and to any appraisal rights they have under Section 906.

(b) Except as otherwise provided in the governing instrument of the domesticating statutory trust, the domestication does not give rise to any rights that an interest holder or third party would have upon a dissolution, liquidation, or winding up of the domesticating trust.

(c) When a domestication becomes effective, a person that did not have interest holder liability with respect to the domesticating statutory trust and becomes subject to interest holder liability with respect to a domestic trust as a result of the domestication has interest holder liability only to the extent provided by this [act] and only for those debts, obligations, and other liabilities that arise after the domestication becomes effective.

(d) When a domestication becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic domesticating statutory trust with respect to which the person had interest holder ability is subject to the following rules:

(1) The domestication does not discharge any interest holder liability under this [act] to the extent the interest holder liability arose before the domestication became effective.

(2) A person does not have interest holder liability under this [act] for any debt, obligation, or other liability that arises after the domestication becomes effective.

(3) This [act] continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the domestication had not occurred.

(4) A person has whatever rights of contribution from any other person as are provided by this [act], or law other than this [act], or the partnership agreement of a domestic domesticating statutory trust with respect to any interest holder liability preserved under

paragraph (1) as if the domestication had not occurred.

(e) When a domestication becomes effective, a foreign statutory trust that is the domesticated trust may be served with process in this state for the collection and enforcement of any of its debts, obligations, and other liabilities as provided in Section 220.

(f) If the domesticating statutory trust is a registered foreign entity, the registration of the entity is canceled when the domestication becomes effective.

(g) A domestication does not require the statutory trust to wind up its affairs and does not constitute or cause the dissolution of the trust.

Comment

Subsection (a)(1) – The domesticated entity is the same entity as the domesticating entity; it has merely changed its jurisdiction of formation.

Subsection (a)(2) – A domestication is not a sale, conveyance, transfer, or assignment and does not give rise to claims of reverter or impairment of title that may be based on a prohibition on transfer, assignment, or conveyance.

Subsection (a)(5) – All pending proceedings involving the domesticating entity are continued. The name of the domesticated entity may be, but need not be, substituted in any pending proceeding for the name of the domesticating entity.

Subsection (a)(7) – The interests of the domesticating statutory trust are reclassified into whatever rights were negotiated in the domestication and the beneficial owners of the domesticating trust are only entitled to those rights. Paragraph 7, on its face, allows for certain beneficial owners of the domesticating trust to be entitled to a continuing equity interest in the domesticated trust whereas other beneficial owners of the domesticating trust may be cashed out as a result of the transaction.

Subsection (c) – This subsection provides the rule for future interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions) (see the Comment to Section 926(c)).

Subsection (d) – This subsection provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions) (see the Comments to Sections 926(d) and 946(d)).

Subsection (e) – When a domestic domesticating statutory trust becomes a foreign statutory trust as a result of a domestication, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the domesticating trust. This subsection, which parallels analogous provisions in Parts 2 (mergers) and 4 (conversions), authorizes service of process for all such claims in this state.

Subsection (g) – When a domestication takes effect, the entity continues to exist – simply as a domestic entity under the laws of a different state. This subsection thus makes clear that the domestication does not require the statutory trust to wind up its affairs and does not constitute or cause the dissolution of the statutory trust.

[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

Under Section 104(19), 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 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).

SECTION 1003. SAVINGS CLAUSE. This [act] does not affect an action commenced, proceeding brought, or right accrued before [the effective date of this [act]].

[SECTION 1004. SEVERABILITY CLAUSE. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or decision by the highest court of this state stating a general rule of severability.*

SECTION 1005. REPEALS. The following are repealed:

(1) [the state Statutory Trust Act, as [amended, and as] in effect immediately before [the effective date of this [act]]];

(2) [the state Business Trust Act, as [amended, and as] in effect immediately before [the effective date of this [act]]]; and

(3) [the state Real Estate Investment Trust Act, as [amended, and as] in effect immediately before [the effective date of this [act]]].

Comment

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. (2014), or that qualifies as a real estate mortgage investment conduit under 26 U.S.C. §860D (2014). Although the Internal Revenue Code (IRC) 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 IRC, several states enacted REIT statutes that authorize the creation of a trust entity designed to qualify as a REIT under the IRC. 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(19), the governing instrument may not override this section.

SECTION 1006. EFFECTIVE DATE. This [act] takes effect . . . .

Comment

Under Section 104(19), the governing instrument may not override this section.