

D R A F T

FOR DISCUSSION ONLY

UNIFORM BUSINESS TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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WITH REPORTER'S NOTES

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM BUSINESS TRUST ACT

TABLE OF CONTENTS

§101. SHORT TITLE	1
§102. DEFINITIONS	1
§103. KNOWLEDGE AND NOTICE	4
§104. DEFAULT AND MANDATORY RULES	4
§105. APPLICABILITY OF TRUST LAW	8
§106. RULES OF CONSTRUCTION	8
§107. TAX CLASSIFICATION	8
§108. NAME OF BUSINESS TRUST	9

ARTICLE 2

FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS

§201. CERTIFICATE OF TRUST	11
§202. AMENDMENT OR RESTATEMENT OF CERTIFICATE	12
§203. STATEMENT OF CANCELLATION	13
§204. SIGNING OF RECORDS	13
§205. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY OF STATE]; EFFECTIVE TIME AND DATE	14
§206. CORRECTING FILED RECORD	15
§207. LIABILITY FOR FALSE INFORMATION IN FILED RECORD	16
§208. CERTIFICATE OF EXISTENCE OR AUTHORIZATION	17
§209. RESERVATION OF NAME	18

ARTICLE 3

BUSINESS TRUSTS

§301. BUSINESS TRUSTS VALIDATED	21
§302. LAW OF INTERNAL AFFAIRS	21
§303. PURPOSES OF BUSINESS TRUSTS	22
§304. DURATION OF BUSINESS TRUST	22
§305. POWER TO SUE AND BE SUED	23
§306. OFFICE AND AGENT FOR SERVICE OF PROCESS	24
§307. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF PROCESS ..	24
§308. RESIGNATION OF AGENT FOR SERVICE OF PROCESS	25
§309. SERVICE OF PROCESS	25

ARTICLE 4

TRUSTEES AND TRUST MANAGEMENT

§401. MANAGEMENT OF BUSINESS TRUSTS	28
§402. RIGHTS OF TRUSTEES IN TRUST PROPERTY	29
§403. NONLIABILITY OF TRUSTEES	30
§404. NONLIABILITY OF OFFICERS, EMPLOYEES, MANAGERS, AND AGENTS	31
§405. NONLIABILITY FOR GOOD FAITH RELIANCE	31

§406. SELF-DEALING AUTHORIZED	32
§407. INDEMNIFICATION AND EXCULPATION	32

ARTICLE 5 BENEFICIARIES AND BENEFICIAL RIGHTS

§501. CONTRIBUTIONS BY BENEFICIAL OWNERS	35
§502. REDEMPTION OF BENEFICIAL INTERESTS	36
§503. RIGHTS OF BENEFICIAL OWNERS IN TRUST PROPERTY	36
§504. TRANSACTIONS WITH BENEFICIAL OWNERS	38
§505. LIMITED LIABILITY OF BENEFICIAL OWNERS	38
§506. VOTING BY BENEFICIAL OWNERS	39
§507. DERIVATIVE ACTIONS	40
§508. ACCESS TO, AND CONFIDENTIALITY OF, INFORMATION AND RECORDS ...	42

ARTICLE 6 MERGER, CONSOLIDATION, AND CONVERSION

§601. MERGER OR CONSOLIDATION	48
§602. CONVERSION FROM ANOTHER ENTITY	48
§603. CONVERSION TO ANOTHER ENTITY	48

ARTICLE 7 FOREIGN BUSINESS TRUSTS

§701. GOVERNING LAW	49
§702. APPLICATION FOR CERTIFICATE OF AUTHORITY	49
§703. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS	50
§704. FILING OF CERTIFICATE OF AUTHORITY	52
§705. NONCOMPLYING NAME OF FOREIGN BUSINESS TRUST	52
§706. REVOCATION OF CERTIFICATE OF AUTHORITY	53
§707. CANCELLATION OF CERTIFICATE OF AUTHORITY; EFFECT OF FAILURE TO HAVE CERTIFICATE	54
§708. ACTION BY [ATTORNEY GENERAL]	55

ARTICLE 8 MISCELLANEOUS PROVISIONS

§801. UNIFORMITY OF APPLICATION AND CONSTRUCTION	56
§802. SEVERABILITY CLAUSE	56
§803. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT	56
§804. EFFECTIVE DATE	57
§805. REPEALS	57
§806. APPLICATION TO EXISTING RELATIONSHIPS	57
§807. SAVING CLAUSE	57

1 **UNIFORM BUSINESS TRUST ACT**

2 **ARTICLE 1**

3 **GENERAL PROVISIONS AND DEFINITIONS**

4
5 **§101. SHORT TITLE.** This [act] may be cited as the Uniform Business Trust Act.

6 **Reporter's Note**

7
8 The precise name for this entity, and hence the name of the Act, was left open at the last
9 meeting. See 4/19/04 appendix D, comments re §101.
10

11 **§102. DEFINITIONS.**

12 (1) "Beneficial owner" means any owner of a beneficial interest in a business
13 trust. Beneficial ownership shall be determined and evidenced, whether by means of
14 registration, the issuance of certificates or otherwise, in accordance with the applicable
15 provisions of the governing instrument of the business trust.

16 (2) "Business trust" or "domestic business trust" means an unincorporated
17 association that:

18 (A) is created by a trust instrument under which property is or will be
19 held, managed, administered, controlled, invested, reinvested or operated, or business or
20 professional activities are carried on or will be carried on, by a trustee or trustees for the benefit
21 of such person or persons as are or may become entitled to a beneficial interest in the trust
22 property, including but not limited to a trust of the type known at common law as a "business
23 trust" or "Massachusetts trust" or "grantor trust", or a trust qualifying as a real estate investment
24 trust under Section 856 et seq., of the United States Internal Revenue Code of 1986, or any
25 subsequent corresponding internal revenue code of the United States, as from time to time

1 amended, or a trust qualifying as a real estate mortgage investment conduit under Section 860D
2 of the United States Internal Revenue Code of 1986, or any subsequent corresponding internal
3 revenue code of the United States, as from time to time amended; and

4 (B) files a certificate of trust pursuant to Section 201.

5 Any such association organized before or after [enactment date], shall be a
6 business trust and a separate legal entity.

7 (3) “Designated office” means:

8 (A) with respect to a business trust, the office that the business trust is
9 required to designate and maintain under Section 201(a)(2); and

10 (B) with respect to a foreign business trust, its principal office.

11 (4) “Foreign business trust” means any business trust, association or similar entity
12 which is not organized under the laws of this state.

13 (5) “Governing instrument” means a trust instrument which creates a business
14 trust and provides for the governance of the affairs of the business trust and the conduct of its
15 business. A governing instrument:

16 (A) may provide that a person shall become a beneficial owner and shall
17 become bound by the governing instrument if such person, or a representative authorized by
18 such person orally, in writing or by other action such as payment for a beneficial interest,
19 complies with the conditions for becoming a beneficial owner set forth in the governing
20 instrument or any other writing and acquires a beneficial interest;

21 (B) may consist of one or more agreements, instruments or other writings
22 and may refer to or incorporate bylaws containing provisions relating to the business of the
23 business trust, the conduct of its affairs and its rights or powers or the rights or powers of its

1 trustees, beneficial owners, agents or employees; and

2 (C) may contain any provision that is not inconsistent with Section 104(b)
3 or otherwise applicable law or with the information contained in the certificate of trust.

4 (6) “Independent trustee” means, solely with respect to a business trust that is
5 registered as an investment company under the Investment Company Act of 1940, as amended
6 (15 U.S.C. §§80a-1 et seq.), or any successor statute thereto (the “1940 Act”), any trustee who is
7 not an “interested person” (as such term is defined below) of the business trust; provided that the
8 receipt of compensation for service as an independent trustee of the business trust and also for
9 service as an independent trustee of 1 or more other investment companies managed by a single
10 investment adviser (or an “affiliated person” (as such term is defined below) of such investment
11 adviser) shall not affect the status of a trustee as an independent trustee under this chapter. An
12 independent trustee as defined hereunder shall be deemed to be independent and disinterested for
13 all purposes. For purposes of this definition, the terms “affiliated person” and “interested
14 person” have the meanings set forth in the 1940 Act or any rule adopted thereunder.

15 (7) “Other business entity” means a corporation, a limited liability company, a
16 general or business trust, a limited liability partnership, a common law trust, or any other
17 unincorporated business.

18 (8) “Person” means a natural person, partnership, business trust, limited liability
19 partnership, limited liability company, trust, estate, association, corporation, custodian, nominee
20 or any other individual or entity in its own or any representative capacity.

21 (9) “Trustee” means the person or persons appointed as a trustee in accordance
22 with the governing instrument of a business trust and may include one or more of the beneficial
23 owners of the business trust.

1 **Reporter's Note**

2
3 Based on Conn §34-501 and Del §3801, except for (3), which is based on ULPA §102
4 (2001), and which is included because much of the filing rules of Article 2 are based on ULPA
5 and make reference to a designated office.
6

7 **§103. KNOWLEDGE AND NOTICE.**

8 (a) A person knows a fact if the person has actual knowledge of it.

9 (b) A person has notice of a fact if the person:

10 (1) knows of it;

11 (2) has received a notification of it;

12 (3) has reason to know it exists from all of the facts known to the person at
13 the time in question.

14 **Reporter's Note**

15
16 Based on ULPA §103 and ULLCA §102. Observe, however, that those sections contain
17 additional knowledge and notice provisions for which there are no counterparts above.
18

19 **§104. DEFAULT AND MANDATORY RULES.**

20 (a) Except as otherwise provided in the governing instrument, this [act] governs
21 the duties and powers of a trustee, relations among trustees, and the rights and interests of a
22 beneficial owner.

23 (b) The terms of a governing instrument prevail over any provision of this [act]
24 except:

25 (1) the duty of a trustee to act in good faith;

26 (2) the tax classification under Section 107;

27 (3) the regulation of names under Section 108;

- 1 (4) the necessity of a certificate of trust under Section 201;
- 2 (5) the necessity of the signature of all trustees on the initial certificate of
- 3 trust under Section 204(a)(1);
- 4 (6) the law governing internal affairs under Sections 302 and 701;
- 5 (7) the requirement that self-dealing be in good faith and fair to the
- 6 business trust under Section 406;
- 7 (8) the effect indemnification term under Section 407(a);
- 8 (9) the effect of an exculpatory term under Section 407(c);
- 9 [(10) the rights of beneficial owners to information under Section 508;]

10 and

11 (11) **[Insert additional mandatory rules here.]**

12 (c) Subject to subsection (b), a governing instrument may contain any provision

13 relating to the management of the business and affairs of the business trust, and the rights, duties

14 and obligations of the trustees, beneficial owners and other persons. Subject to subsection (b),

15 without limitation a governing instrument:

16 (1) May provide for classes, groups or series of trustees or beneficial

17 owners, or classes, groups or series of beneficial interests, having such relative rights, powers

18 and duties as the governing instrument may provide, and may make provision for the future

19 creation in the manner provided in the governing instrument of additional classes, groups or

20 series of trustees, beneficial owners or beneficial interests, having such relative rights, powers

21 and duties as may from time to time be established, including rights, powers and duties senior or

22 subordinate to existing classes, groups or series of trustees, beneficial owners or beneficial

23 interests;

1 (2) May establish or provide for the establishment of designated series of
2 trustees, beneficial owners or beneficial interests having separate rights, powers or duties with
3 respect to specified property or obligations of the business trust or profits and losses associated
4 with specified property or obligations, and, to the extent provided in the governing instrument,
5 any such series may have a separate business purpose or investment objective;

6 (3) May provide for the taking of any action, including the amendment of
7 the governing instrument, the accomplishment of a merger or consolidation, the appointment of
8 one or more trustees, the sale, lease, exchange, transfer, pledge or other disposition of all or any
9 part of the assets of the business trust or the assets of any series, or the dissolution of the
10 business trust, or may provide for the taking of any action to create under the provisions of the
11 governing instrument a class, group or series of beneficial interests that was not previously
12 outstanding, in any such case without the vote or approval of any particular trustee or beneficial
13 owner, or class, group or series of trustees or beneficial owners;

14 (4) May grant to, or withhold from, all or certain trustees or beneficial
15 owners, or a specified class, group or series of trustees or beneficial owners, the right to vote,
16 separately or with any or all other classes, groups or series of the trustees or beneficial owners,
17 on any matter, such voting being on a per capita, number, financial interest, class group, series or
18 any other basis;

19 (5) May, if and to the extent that voting rights are granted under the
20 governing instrument, set forth provisions relating to notice of the time, place or purpose of any
21 meeting at which any matter is to be voted on, waiver of any such notice, action by consent
22 without a meeting, the establishment of record dates, quorum requirements, voting in person, by
23 proxy or in any other manner, or any other matter with respect to the exercise of any such right

1 to vote;

2 (6) May provide for the present or future creation of more than one
3 business trust, including the creation of a future business trust to which all or any part of the
4 assets, liabilities, profits or losses of any existing business trust will be transferred, and for the
5 conversion of beneficial interests in an existing business trust, or series thereof, into beneficial
6 interests in the separate business trust, or series thereof; or

7 (7) May provide for the appointment, election or engagement, either as
8 agents or independent contractors of the business trust or as delegates of the trustees, as
9 officers, employees, managers or other persons who may manage the business and affairs of the
10 business trust and may have such titles and such relative rights, powers and duties as the
11 governing instrument shall provide. Except to the extent otherwise provided in the governing
12 instrument of a business trust, the trustees shall choose and supervise such officers, managers,
13 employees and other persons.

14 (8) May provide rights to any person, including a person who is not a
15 party to the governing instrument, to the extent set forth therein; or

16 (9) May provide for the manner in which it may be amended, including by
17 requiring the approval of a person who is not a party to the governing instrument or the
18 satisfaction of conditions, and to the extent the governing instrument provides for the manner in
19 which it may be amended such governing instrument may be amended only in that manner or as
20 otherwise permitted by law, provided that the approval of any person may be waived by such
21 person and that any such conditions may be waived by all persons for whose benefit such
22 conditions were intended.

23 **Reporter's Note**

This idea for this section came from UTC §105 (2000) and ULPA §110. Subsection (c) is based on Del 3806, Conn 34-517, and is of import for mutual funds. The animating policy is that the demand of third parties to see language expressly authorizing specific matters justifies the laundry list of permissive authorizations.

§105. APPLICABILITY OF TRUST LAW. The laws of this State pertaining to trusts are applicable to business trusts.

Reporter's Note

Based on Del 3809, Conn 34-519, consistent also with the existing statutes in Maryland, Nevada, New Hampshire, South Dakota, and Wyoming—the bulk of the modern Acts. See 4/19/04 Appendix D re §104.

§106. RULES OF CONSTRUCTION.

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this [act].

(b) It is the policy of this [act] to give maximum effect to the principle of freedom of contract and to the enforceability of governing instruments.

Reporter's Note

Based on Del 3825, Conn 34-546, consistent also with Nevada, South Dakota, Virginia, Wyoming, and New Hampshire—the bulk of the modern Acts.

§107. TAX CLASSIFICATION. For purposes of any tax imposed by this State or any instrumentality, agency or political subdivision of this State, a business trust shall be classified as a corporation, an association, a partnership, a trust or otherwise, as shall be determined under the United States Internal Revenue Code of 1986 [26 U.S.C. §§1 et seq.], as amended, or under any successor provision.

Reporter's Note

1 Based on Del 3809, Conn 34-519, consistent also with Maryland, South Dakota, and
2 Virginia. See 4/19/04 Appendix D re §106.
3

4 **§108. NAME OF BUSINESS TRUST.**

5 (a) Unless authorized by subsection (c), the name of a business trust must be
6 distinguishable in the records of the [Secretary of State] from:

7 (1) the name of each person other than an individual incorporated,
8 organized, or authorized to transact business in this State; and

9 (2) each name reserved under subsection __ [or other state laws allowing
10 the reservation or registration of business names, including fictitious name statutes].

11 (b) The name of each business trust as set forth in its certificate of trust shall
12 contain one or more of the following words or abbreviations:

13 **[Drawn from Conn:]** “Business trust”, “Limited Liability Trust”,
14 “Limited”, “LLT”, “L.L.T.”, or “Ltd.”.

15 **[Drawn from Del:]** The name of each business trust, as set forth in its
16 certificate of trust, may contain the following words: “company,” “association,”
17 “club,” “foundation,” “fund,” “institute,” “society,” “union,” “syndicate,”
18 “limited” or “trust” (or abbreviations of like import).

19 **[Drawn from RMBCA 4.01:]** must contain the word “corporation,”
20 “incorporated,” “company,” or “limited,” or the abbreviation “corp.,” “inc.,”
21 “co.,” or “Ltd.,” or words or abbreviations of like import in another language; and

22 The name of each business trust as set forth in its certificate of trust may
23 contain the name of a beneficial owner, a trustee or any other person.

24 (c) A business trust may apply to the [Secretary of State] for authorization to use

1 a name that does not comply with subsection (a). The [Secretary of State] shall authorize use of
2 the name applied for if, as to each conflicting name:

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

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

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

12 (A) has merged into the applicant;

13 (B) has been converted into the applicant; or

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

16 (d) Subject to Section 705, this section applies to any foreign business trust
17 transacting business in this State, having a certificate of authority to transact business in this
18 State, or applying for a certificate of authority.

19 **Reporter's Note**

20
21 Based on ULPA §§108, Conn 34-506, Del 3814. It is located in Article 1, rather than in
22 Article 2 as originally proposed, for consistency with ULPA. Obviously we will need to sort out
23 section (b).
24

1 (1) the governing instrument prevails as to trustees, beneficial owners and
2 transferees; and

3 (2) the filed certificate of trust, statement of cancellation, or change or
4 articles of conversion or merger prevail as to persons, other than trustees, beneficial owners and
5 transferees, that reasonably rely on the filed record to their detriment.

6 **Reporter's Note**

7
8 Based on ULPA §201 in light of Del 3810 and Conn 34-503. Following ULPA,
9 effective date issues are addressed in §206.
10

11 **§202. AMENDMENT OR RESTATEMENT OF CERTIFICATE.**

12 (a) In order to amend its certificate of trust, a business trust must deliver to the
13 [Secretary of State] for filing an amendment or, pursuant to [Article] 6, articles of merger
14 stating:

15 (1) the name of the business trust;
16 (2) the date of filing of its initial certificate; and
17 (3) the changes the amendment makes to the certificate as most recently
18 amended or restated.

19 (c) A trustee that knows that any information in a filed certificate of trust was
20 false when the certificate was filed or has become false due to changed circumstances shall
21 promptly:

22 (1) cause the certificate to be amended; or
23 (2) if appropriate, deliver to the [Secretary of State] for filing a statement
24 of correction pursuant to Section 206.

25 (d) A certificate of trust may be amended at any time for any purpose as

1 determined by the trustees.

2 (e) A restated certificate of business trust may be delivered to the [Secretary of
3 State] for filing in the same manner as an amendment.

4 (f) Subject to Section 205(c), an amendment or restated certificate is effective
5 when filed by the [Secretary of State].

6 **Reporter's Note**

7
8 Based on ULPA §202 in light of Del 3810 and Conn 34-503.
9

10 **§203. STATEMENT OF CANCELLATION.**

11 (a) A terminated business trust that has completed winding up may deliver to the
12 [Secretary of State] for filing a statement of cancellation that states:

13 (1) the name of the business trust;

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

15 (3) any other information as determined by the trustees filing the
16 statement.

17 (b) Subject to Section 205(c), a statement of cancellation is effective when filed
18 by the [Secretary of State].

19 **Reporter's Note**

20
21 Based on ULPA §203 in light of Del 3810 and Conn 34-503.
22

23 **§204. SIGNING OF RECORDS.**

24 (a) Each record delivered to the [Secretary of State] for filing pursuant to this
25 [act] must be signed in the following manner:

26 (1) An initial certificate of trust must be signed by all trustees.

1 (2) A statement of cancellation must be signed by all of the trustees.

2 (3) Articles of conversion must be signed by all of the trustees **[to be**
3 **revised in light of Article 6].**

4 (4) Articles of merger must be signed as provided in Section **[to be**
5 **revised in light of Article 6].**

6 (5) Any other record delivered on behalf of a business trust to the
7 [Secretary of State] for filing must be signed by at least one of the trustees.

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

10 **Reporter's Note**

11 Based on ULPA §204 in light of Del 3811 and Conn 34-504.
12
13

14 **§205. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY OF**
15 **STATE]; EFFECTIVE TIME AND DATE.**

16 (a) A record authorized or required to be delivered to the [Secretary of State] for
17 filing under this [act] must be captioned to describe the record's purpose, be in a medium
18 permitted by the [Secretary of State], and be delivered to the [Secretary of State]. Unless the
19 [Secretary of State] determines that a record does not comply with the filing requirements of this
20 [act], and if all filing fees have been paid, the [Secretary of State] shall file the record and send a
21 copy of the filed record and a receipt for the fees to the person on whose behalf the record was
22 filed.

23 (b) Upon request and payment of a fee, the [Secretary of State] shall send to the
24 requester a certified copy of the requested record.

1 (c) Except as otherwise provided in Sections 206 and 307, a record delivered to
2 the [Secretary of State] for filing under this [act] may specify an effective time and a delayed
3 effective date. Except as otherwise provided in this [act], a record filed by the [Secretary of
4 State] is effective:

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

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

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

12 (A) the specified date; or

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

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

16 (A) the specified date; or

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

18 **Reporter's Note**

19
20 Based on ULPA §206 (2001) in light of Del 3812 and Conn 34-505. Perhaps the
21 comment will need to say something about there being filing fees, but not franchise fees?
22

23 **§206. CORRECTING FILED RECORD.**

24 (a) A business trust or foreign business trust may deliver to the [Secretary of
25 State] for filing a statement of correction to correct a record previously delivered by the business

1 trust or foreign business trust to the [Secretary of State] and filed by the [Secretary of State], if at
2 the time of filing the record contained false or erroneous information or was defectively signed.

3 (b) A statement of correction may not state a delayed effective date and must:

4 (1) describe the record to be corrected, including its filing date, or attach a
5 copy of the record as filed;

6 (2) specify the incorrect information and the reason it is incorrect or the
7 manner in which the signing was defective; and

8 (3) correct the incorrect information or defective signature.

9 (c) When filed by the [Secretary of State], a statement of correction is effective
10 retroactively as of the effective date of the record the statement corrects, but the statement is
11 effective when filed as to persons relying on the uncorrected record and adversely affected by
12 the correction.

13 **Reporter's Note**

14 Based on ULPA §207.
15
16

17 **§207. LIABILITY FOR FALSE INFORMATION IN FILED RECORD.**

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

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

23 (2) a trustee that has notice that the information was false when the record
24 was filed or has become false because of changed circumstances, if the trustee has notice for a

1 reasonably sufficient time before the information is relied upon to enable the trustee to effect an
2 amendment under Section 202 or deliver to the [Secretary of State] for filing a statement of
3 correction pursuant to Section 206.

4 (b) Signing a record authorized or required to be filed under this [act] constitutes
5 an affirmation under the penalties of perjury that the facts stated in the record are true.

6 **Reporter's Note**

7
8 Based on ULPA §208.
9

10 **§208. CERTIFICATE OF EXISTENCE OR AUTHORIZATION.**

11 (a) The [Secretary of State], upon request and payment of the requisite fee, shall
12 furnish a certificate of existence for a business trust if the records filed in the [office of the
13 Secretary of State] show that the [Secretary of State] has filed a certificate of trust and has not
14 filed a statement of cancellation. A certificate of existence must state:

15 (1) the business trust's name;

16 (2) that it was duly formed under the laws of this State and the date of
17 formation;

18 (3) whether all fees and penalties due to the [Secretary of State] under this
19 [act] or other law have been paid;

20 (4) that a statement of cancellation has not been filed by the [Secretary of
21 State]; and

22 (5) other facts of record in the [office of the Secretary of State] which may
23 be requested by the applicant.

24 (b) The [Secretary of State], upon request and payment of the requisite fee, shall

1 furnish a certificate of authorization for a foreign business trust if the records filed in the [office
2 of the Secretary of State] show that the [Secretary of State] has filed a certificate of authority,
3 has not revoked the certificate of authority, and has not filed a notice of cancellation. A
4 certificate of authorization must state:

5 (1) the foreign business trust's name and any alternate name adopted
6 under Section 705 for use in this State;

7 (2) that it is authorized to transact business in this State;

8 (3) whether all fees and penalties due to the [Secretary of State] under this
9 [act] or other law have been paid;

10 (4) that the [Secretary of State] has not revoked its certificate of authority
11 and has not filed a notice of cancellation; and

12 (5) other facts of record in the [office of the Secretary of State] which may
13 be requested by the applicant.

14 (c) Subject to any qualification stated in the certificate, a certificate of existence
15 or authorization issued by the [Secretary of State] may be relied upon as conclusive evidence
16 that the business trust or foreign business trust is in existence or is authorized to transact
17 business in this State.

18 **Reporter's Note**

19
20 Based on ULPA 209.
21

22 **§209. RESERVATION OF NAME.**

23 (a) The exclusive right to the use of a name that complies with Section 108 may
24 be reserved by:

1 (1) a person intending to organize a business trust under this [act] and to
2 adopt the name;

3 (2) a business trust or a foreign business trust authorized to transact
4 business in this State intending to adopt the name;

5 (3) a foreign business trust intending to obtain a certificate of authority to
6 transact business in this State and adopt the name;

7 (4) a person intending to organize a foreign business trust and intending to
8 have it obtain a certificate of authority to transact business in this State and adopt the name;

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

10 (6) a foreign business trust formed under a name that does not comply
11 with Section 108, but the name reserved under this paragraph may differ from the foreign
12 business trust's name only to the extent necessary to comply with Section 108.

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

18 (c) An applicant that has reserved a name pursuant to subsection (b) may reserve
19 the same name for additional 120-day periods. A person having a current reservation for a name
20 may not apply for another 120-day period for the same name until 90 days have elapsed in the
21 current reservation.

22 (d) A person that has reserved a name under this section may deliver to the
23 [Secretary of State] for filing a notice of transfer that states the reserved name, the name and

1 street and mailing address of some other person to which the reservation is to be transferred, and
2 the paragraph of subsection (a) which applies to the other person. Subject to Section 205(c), the
3 transfer is effective when the [Secretary of State] files the notice of transfer.

4 **Reporter's Note**
5

6 Based on ULPA §109 in light of Conn 34-506, Del 3814.

1 **ARTICLE 3**

2 **BUSINESS TRUSTS**

3
4 **§301. BUSINESS TRUSTS VALIDATED.**

5 (a) A business trust is hereby declared to be a permitted form of association for
6 the conduct of business in this state, provided the provisions of this [act] are complied with,
7 except that nothing contained in this [act] shall be construed to limit, prohibit or invalidate the
8 existence, acts or obligations of any common law business trust created or doing business in this
9 state before or after [effective date].

10 (b) Common law business trusts created before or after [effective date], may elect
11 to be governed by the provisions of this [act] upon the filing of a certificate of trust, provided,
12 however, that a common law business trust created before [effective date] shall not be governed
13 by the provisions of this [act] to the extent of any inconsistent provisions contained in its
14 governing instrument and not thereafter modified by amendment.

15 **Reporter's Note**

16
17 Based on Conn 34-502. Section (a) is designed expressly to overrule any old authority
18 holding that business trusts violate public policy or local corporate law. See 4/19/04 Appendix
19 D re §301. Query whether some or all of the text above belongs in Section 806.
20

21 **§302. LAW OF INTERNAL AFFAIRS.** The laws of this state shall govern the
22 organization and internal affairs of all domestic business trusts.

23 **Reporter's Note**

24
25 Based on Conn 34-502.

26
27 **See also Nev. Rev. Stat. 88A.150:**
28

The provisions of this chapter apply to commerce with foreign nations and among the several states. It is the intention of the legislature by enactment of this chapter that the legal existence of business trusts formed pursuant to this chapter be recognized beyond the limits of this state and that, subject to any reasonable requirement of registration, any such business trust transacting business outside this state be granted protection of full faith and credit pursuant to section 1 of article IV of the Constitution of the United States.”

§303. PURPOSES OF BUSINESS TRUSTS. A business trust may be organized to carry on any lawful business or activity, whether or not conducted for profit, and for any lawful purpose, including, without limitation, holding or otherwise taking title to property, whether in an active, passive or custodial capacity.

Reporter's Note

Based on Conn 34-502a. Query whether this section is necessary in view of §301. Observe further that this language might invite evasion of the Rule against Perpetuities and limitations on purpose trusts in ordinary trust law. Hence there are important policy considerations regarding this section that warrant ventilation at the meeting.

See also RMBCA §3.01:

(a) Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.

(b) A corporation engaging in a business that is subject to regulation under another statute of this state may incorporate under this Act only if permitted by, and subject to all limitations of, the other statute.

§304. DURATION OF BUSINESS TRUST.

(a) A business trust shall have perpetual existence, and a business trust may not be terminated or revoked by a beneficial owner or other person except in accordance with the terms of its governing instrument.

(b) The death, incapacity, dissolution, termination or bankruptcy of a beneficial owner shall not result in the termination or dissolution of a business trust.

1 **Reporter's Note**

2
3 Based on Del 3808, Conn 34-518. See 4/19/04 Appendix D re §304.
4

5 **§305. POWER TO SUE AND BE SUED.**

6 (a) A business trust shall have the power to sue and be sued in its own name.

7 (b) A business trust may be sued for debts and other obligations or liabilities
8 contracted or incurred by the trustees, or by the duly authorized agents of such trustees, in the
9 performance of their respective duties under the governing instrument of the business trust, and
10 for any damages to persons or property resulting from the negligence of such trustees or agents
11 acting in the performance of such respective duties.

12 (c) The property of a business trust shall be subject to attachment and execution
13 as if it were a domestic corporation.

14 (d) Notwithstanding the foregoing provisions of this section, in the event that the
15 governing instrument of a business trust, including a business trust which is a registered
16 investment company under the Investment Company Act of 1940, as amended, 15 USC Sections
17 80a-1 et seq., creates one or more series as provided in Section 104(c) and

18 (1) separate and distinct records are maintained for any such series and the
19 assets associated with any such series are held and accounted for separately from the assets of
20 the business trust, or any other series thereof,

21 (2) the governing instrument so provides, and

22 (3) notice of the limitation on liabilities of series as referenced in this
23 sentence is set forth in the certificate of trust of the business trust, then the debts, liabilities,
24 obligations and expenses incurred, contracted for or otherwise existing with respect to a

1 particular series shall be enforceable against the assets of such series only and not against the
2 assets of the business trust generally.

3 **Reporter's Note**

4
5 Based on Del 3804, Conn 34-518.
6

7 **§306. OFFICE AND AGENT FOR SERVICE OF PROCESS.**

8 (a) A business trust shall designate and continuously maintain in this State an
9 agent for service of process.

10 (b) An agent for service of process of a business trust or foreign business trust
11 must be an individual who is a resident of this State or other person authorized to do business in
12 this State.

13 (c) Subject to subsection (b), a business trust may designate one of its trustees as
14 its agent for service of process.

15 **Reporter's Note**

16
17 Based on ULPA §114, Conn 34-507, Del 3804.
18

19 **§307. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF**
20 **PROCESS.**

21 (a) In order to change its agent for service of process, or the address of its agent
22 for service of process, a business trust or a foreign business trust may deliver to the [Secretary of
23 State] for filing a statement of change containing:

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

25 (2) the street and mailing address of its current designated office;

26 (3) if the current designated office is to be changed, the street and mailing

1 address of the new designated office;

2 (4) the name and street and mailing address of its current agent for service
3 of process; and

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

6 (b) Subject to Section 205(c), a statement of change is effective when filed by the
7 [Secretary of State].

8 **Reporter's Note**

9
10 Based on ULPA §115.
11

12 **§308. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

13 (a) In order to resign as an agent for service of process of a business trust or
14 foreign business trust, the agent must deliver to the [Secretary of State] for filing a statement of
15 resignation containing the name of the business trust or foreign business trust.

16 (b) After receiving a statement of resignation, the [Secretary of State] shall file it
17 and mail a copy to the designated office of the business trust or foreign business trust and
18 another copy to the principal office if the address of the office appears in the records of the
19 [Secretary of State] and is different from the address of the designated office.

20 (c) An agency for service of process is terminated on the 31st day after the
21 [Secretary of State] files the statement of resignation.

22 **Reporter's Note**

23
24 Based on ULPA §116.
25

26 **§309. SERVICE OF PROCESS.**

1 (a) An agent for service of process appointed by a business trust or foreign
2 business trust is an agent of the business trust or foreign business trust for service of any process,
3 notice, or demand required or permitted by law to be served upon the business trust or foreign
4 business trust.

5 (b) If a business trust or foreign business trust does not appoint or maintain an
6 agent for service of process in this State or the agent for service of process cannot with
7 reasonable diligence be found at the agent's address, the [Secretary of State] is an agent of the
8 business trust or foreign business trust upon whom process, notice, or demand may be served.

9 (c) Service of any process, notice, or demand on the [Secretary of State] may be
10 made by delivering to and leaving with the [Secretary of State] duplicate copies of the process,
11 notice, or demand. If a process, notice, or demand is served on the [Secretary of State], the
12 [Secretary of State] shall forward one of the copies by registered or certified mail, return receipt
13 requested, to the business trust or foreign business trust at its designated office.

14 (d) Service is effected under subsection (c) at the earliest of:

15 (1) the date the business trust or foreign business trust receives the
16 process, notice, or demand;

17 (2) the date shown on the return receipt, if signed on behalf of the business
18 trust or foreign business trust; or

19 (3) five days after the process, notice, or demand is deposited in the mail,
20 if mailed postpaid and correctly addressed.

21 (e) The [Secretary of State] shall keep a record of each process, notice, and
22 demand served pursuant to this section and record the time of, and the action taken regarding,
23 the service.

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

Reporter's Note

Based on ULPA §117. Query whether we should provide that service on a trustee is sufficient.

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TRUSTEES AND TRUST MANAGEMENT

§401. MANAGEMENT OF BUSINESS TRUSTS.

(a) The business and affairs of a business trust shall be managed by or under the direction of its trustees. A business trust is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a trustee acting in the ordinary course of business of the business trust or with authority of the business trust.

(b) Any person, including a beneficial owner, shall be entitled by the terms of the governing instrument to direct the trustees or other persons in the management of the business trust. Neither the power to give direction to a trustee or other persons nor the exercise thereof by any person, including a beneficial owner, shall cause such person to be a trustee. Neither the power to give direction to a trustee or other persons nor the exercise thereof by any person, including a beneficial owner, shall cause such person to have duties, including fiduciary duties, or liabilities relating thereto to the business trust or to a beneficial owner thereof.

(c) On any matter that is to be voted on by the trustees:

(1) the trustees may take such action without a meeting, without a prior notice and without a vote if a consent or consents in writing, setting forth the action so taken, shall be signed by the trustees having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all trustees entitled to vote thereon were present and voted, and

(2) the trustee may vote in person or by proxy, and such proxy may be

1 granted in writing, by means of electronic transmission, or as otherwise permitted by applicable
2 law.

3 A consent transmitted by electronic transmission by a trustee or by a person or
4 persons authorized to act for a trustee shall be deemed to be written and signed for purposes of
5 this subsection. For purposes of this subsection, the term “electronic transmission” means any
6 form of communication not directly involving the physical transmission of paper that creates a
7 record that may be retained, retrieved and reviewed by a recipient thereof and that may be
8 directly reproduced in paper form by such a recipient through an automated process.

9 (d) A trustee of a business trust has the power and authority to delegate to 1 or
10 more other persons the trustee’s rights and powers to manage and control the business and affairs
11 of the business trust, including to delegate to agents, officers and employees of the trustee or the
12 business trust, and to delegate by management agreement or other agreement with, or otherwise
13 to, other persons. Such delegation by a trustee of a business trust shall not cause the trustee to
14 cease to be a trustee of the business trust or cause the person to whom any such rights and
15 powers have been delegated to be a trustee of the business trust.

16 **Reporter’s Note**

17
18 Based on Del 3806, Conn 34-517, ULLCA §302. Query whether the definition of
19 “electronic transmission” should be moved to Section 101.
20

21 **§402. RIGHTS OF TRUSTEES IN TRUST PROPERTY.**

22 (a) No creditor of a trustee shall have any right to obtain possession of, or
23 otherwise exercise legal or equitable remedies with respect to, the property of the business trust
24 with respect to any claim against, or obligation of, such trustee in its individual capacity and not
25 related to the business trust.

(b) Legal title to the property of the business trust or any part thereof may be held in the name of any trustee of the business trust, in its capacity as such, with the same effect as if such property were held in the name of the business trust.

Reporter's Note

Based on Del 3805, Conn 34-523.

§403. NONLIABILITY OF TRUSTEES. A trustee, when acting in such capacity, shall not be personally liable to any person other than the business trust or a beneficial owner for any act, omission or obligation of the business trust or any trustee thereof.

Reporter's Note

Based on Del 3803, Conn 34-523.

See also ULPA §303:

An obligation of a limited partnership, whether arising in contract, tort, or otherwise, is not the obligation of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership.

See also ULLCA §303:

(a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

(b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.

(c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:

1 (1) a provision to that effect is contained in the articles of organization; and

2
3 (2) a member so liable has consented in writing to the adoption of the provision or
4 to be bound by the provision.
5

6 **§404. NONLIABILITY OF OFFICERS, EMPLOYEES, MANAGERS, AND**
7 **AGENTS.** An officer, employee, manager or other person acting pursuant to Section 104(c)(7)
8 of this [act], when acting in such capacity, shall not be personally liable to any person other than
9 the business trust or a beneficial owner for any act, omission or obligation of the business trust
10 or any trustee thereof.

11 **Reporter's Note**

12 Based on Del 3803, Conn 34-523.
13
14

15 **§405. NONLIABILITY FOR GOOD FAITH RELIANCE.**

16 (a) To the extent that, at law or in equity, a trustee has duties, including fiduciary
17 duties, and liabilities relating thereto to a business trust or to a beneficial owner:

18 (1) Any such trustee acting under a governing instrument shall not be
19 liable to the business trust or to any such beneficial owner for the trustee's good faith reliance on
20 the provisions of such governing instrument; and

21 (2) The trustee's duties and liabilities may be expanded or restricted by
22 provisions in a governing instrument.

23 (b) To the extent that, at law or in equity, an officer, employee, manager or other
24 person designated pursuant to Section 104(c)(7) has duties, including fiduciary duties, and
25 liabilities relating thereto to a business trust, a beneficial owner or a trustee:

26 (1) Any such officer, employee, manager or other person acting under a

governing instrument shall not be liable to the business trust, any beneficial owner or any trustee for such person's good faith reliance on the provisions of such governing instrument; and

(2) The duties and liabilities of an officer, employee, manager or other person acting pursuant Section 104(c)(7) may be expanded or restricted by provisions in a governing instrument.

Reporter's Note

Based on Del 3806, Conn 34-517.

See also UTC §1006:

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

§406. SELF-DEALING AUTHORIZED. A trustee, officer, employee or manager may lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or assume 1 or more obligations of, provide collateral for, and transact other business with a business trust and, subject to other applicable law, has the same rights and obligations with respect to any such matter as a person who is not a beneficial owner, trustee, officer, employee or manager, provided that the trustee, officer, employee or manager deals with the business trust in good faith and that the transaction is fair.

Reporter's Note

Based on Del 3806(g), plus good faith and fairness language.

§407. INDEMNIFICATION AND EXCULPATION.

(a) A business trust shall have the power to indemnify and hold harmless any trustee or beneficial owner or other person from and against any and all claims and demands

whatsoever, provided that the claim does not arise from the bad faith or reckless indifference of the trustee or beneficial owner or other person seeking indemnification.

(b) The absence of a provision for indemnity in the governing instrument of a business trust shall not be construed to deprive any trustee or beneficial owner or other person of any right to indemnity which is otherwise available to such person under the laws of this State.

(c) A term in the governing instrument relieving any trustee from liability is unenforceable to the extent that it relieves the trustee from liability for breach of trust committed in bad faith or with reckless indifference.

Reporter's Note

Based on Del 3817, Conn 34-524, plus the limitation to good faith of UTC §§105 & 1008. See 4/19/04 Appendix D re §406. In *Nakahara v. The NS 1991 American Trust*, 739 A.2d 770 (Del. Ch. 1998), the court denied the trustees' claim for indemnification on the ground of unclean hands.

This issue will require ventilation at the meeting.

See also Jesse Dukeminier, Stanley M. Johanson, James Lindgren, & Robert H. Sitkoff, *Wills, Trusts, and Estates* ch. 8 (7th ed. forthcoming 2005):

Suppose an exculpatory clause that was not inserted as a result of abuse by the trustee. Should the law impose an outer limit on the permissible scope of such a clause? In *McNeil v. McNeil*, 798 A.2d 503, 509 (Del. 2002), the trust at issue provided that the trustees' decisions were "not subject to review by any court." Observing that courts "flatly refuse to enforce provisions relieving a trustee of all liability," the court nonetheless reviewed the trustees' actions despite the clause that purported to insulate the trustees from judicial review. The reason: "A trust in which there is no legally binding obligation on a trustee is a trust in name only and more in the nature of an absolute estate or fee simple grant of property." *Id.* See also George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §542, at 188-89 (rev. 2d ed. 1993). Generally speaking, the line is usually drawn at bad faith, reckless indifference, and intentional or willful neglect. An exculpatory clause that purports to immunize the trustee for any such conduct will not be enforced. See *id.*, at 208; Austin W. Scott, *Trusts*, §222.3, at 391-92 (William F. Fratcher 4th ed. 1987). Both Uniform Trust Code §1008(a)(1) (2000) and Restatement (Second) of Trusts §222(2) (1959) are in accord. See also UTC §105(b)(2) (establishing a mandatory duty of good faith). For recent commentary on the policies that underpin this limitation, see David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 *Mo. L. Rev.* 143, 206-07 (2002); John H. Langbein,

- 1 Mandatory Rules in the Law of Trusts, 98 Nw. U. L. Rev. 1105, 1123-25 (2004); Robert H.
- 2 Sitkoff, An Agency Costs Theory of Trust Law, 89 Cornell L. Rev. 621, 642-46 (2004).

1 **ARTICLE 5**

2 **BENEFICIARIES AND BENEFICIAL RIGHTS**

3
4 **§501. CONTRIBUTIONS BY BENEFICIAL OWNERS.**

5 (a) A contribution of a beneficial owner to the business trust may be in cash,
6 property or services rendered or a promissory note or other obligation to contribute cash or
7 property or to perform services; provided, a person may become a beneficial owner of a business
8 trust and may receive a beneficial interest in a business trust without making a contribution or
9 being obligated to make a contribution to the business trust.

10 (b) A beneficial owner is obligated to the business trust to perform any promise to
11 contribute cash or property or to perform services, even if the beneficial owner is unable to
12 perform because of death, disability or any other reason. If a beneficial owner does not make the
13 required contribution of property or services, the beneficial owner is obligated at the option of
14 the business trust to contribute cash equal to that portion of the agreed value, as stated in the
15 records of the business trust, of the contribution that has not been made. Such option shall be in
16 addition to, and not in lieu of, any other rights, including the right to specific performance, that
17 the business trust may have against such beneficial owner under the governing instrument or
18 applicable law.

19 (c) A governing instrument may provide that the interest of any beneficial owner
20 who fails to make any contribution that such beneficial owner is obligated to make shall be
21 subject to specific penalties for, or set forth the specified consequences of, such failure. Such
22 penalty or consequence may take the form of:

23 (1) reducing or eliminating the defaulting beneficial owner's proportionate

1 interest in the business trust;

2 (2) subordinating the defaulting beneficial owner's beneficial interest to
3 that of nondefaulting beneficial owners;

4 (3) a forced sale of the defaulting beneficial owner's beneficial interest;

5 (4) forfeiture of the defaulting beneficial owner's beneficial interest;

6 (5) the lending by other beneficial owners of the amount necessary to meet
7 the defaulting beneficial owner's commitment;

8 (6) fixing the value of the defaulting beneficial owner's beneficial interest
9 by appraisal or by formula and redemption or sale of the defaulting beneficial owner's beneficial
10 interest at such value; or

11 (7) any other penalty or consequence.

12 **Reporter's Note**

13
14 Based on Del 3802, Conn 34-515.
15

16 **§502. REDEMPTION OF BENEFICIAL INTERESTS.** A business trust may
17 acquire, by purchase, redemption or otherwise, any beneficial interest in the business trust held
18 by a beneficial owner of the business trust. Any such interest so acquired by a business trust
19 shall be deemed canceled.

20 **Reporter's Note**

21
22 Based on Del 3818. We have been told that this is an important provision for mutual
23 funds.
24

25 **§503. RIGHTS OF BENEFICIAL OWNERS IN TRUST PROPERTY.**

26 (a) A beneficial owner shall have an undivided beneficial interest in the property

1 of the business trust and shall share in the profits and losses of the business trust in the
2 proportion, expressed as a percentage, of the entire undivided beneficial interest in the business
3 trust owned by such beneficial owner. The governing instrument of a business trust may provide
4 that the business trust or the trustees, acting for and on behalf of the business trust, shall be
5 deemed to hold beneficial ownership of any income earned on securities of the business trust
6 issued by any business entities formed, organized, or existing under the laws of any jurisdiction,
7 including the laws of any foreign country.

8 (b) No creditor of the beneficial owner shall have any right to obtain possession
9 of, or otherwise exercise legal or equitable remedies with respect to, the property of the business
10 trust.

11 (c) A beneficial owner's beneficial interest in the business trust is personal
12 property notwithstanding the nature of the property of the trust. A beneficial owner has no
13 interest in specific business trust property.

14 (d) A beneficial owner's beneficial interest in the business trust is freely
15 transferable.

16 (e) At the time a beneficial owner becomes entitled to receive a distribution, the
17 beneficial owner has the status of, and is entitled to all remedies available to, a creditor of the
18 business trust with respect to the distribution. A governing instrument may provide for the
19 establishment of record dates with respect to allocations and distributions by a business trust.

20 (f) Where the business trust is a registered investment company under the
21 Investment Company Act of 1940, as amended (15 U.S.C. § 80a-1 et seq.), any class, group or
22 series of beneficial interests established by the governing instrument with respect to such
23 business trust shall be a class, group or series preferred as to distribution of assets or payment of

1 dividends over all other classes, groups or series in respect to assets specifically allocated to the
2 class, group or series as contemplated by §18 (or any amendment or successor provision) of the
3 Investment Company Act of 1940 [15 U.S.C. § 80a-18], as amended, and any regulations issued
4 thereunder, provided that this section is not intended to affect in any respect the provisions of
5 Section 305(d).

6 (g) A beneficial owner shall have no preemptive right to subscribe to any
7 additional issue of beneficial interests or another interest in a business trust.

8 **Reporter's Note**

9
10 Based on Del 3805, Conn 34-516.
11

12 **§504. TRANSACTIONS WITH BENEFICIAL OWNERS.** A beneficial owner may
13 lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or
14 assume 1 or more obligations of, provide collateral for, and transact other business with a
15 statutory trust and, subject to other applicable law, has the same rights and obligations with
16 respect to any such matter as a person who is not a beneficial owner.

17 **Reporter's Note**

18
19 Based on Del 3806(g). But note the lack of good faith and fairness, as in Section 406, the
20 parallel section for trustees and managers.
21

22 **§505. LIMITED LIABILITY OF BENEFICIAL OWNERS.**

23 (a) The beneficial owners of a business trust shall be entitled to the same
24 limitation of personal liability extended to shareholders of domestic corporations.

25 **Reporter's Note**

26
27 Based on Del 3803, Conn 34-523. Query whether to say anything in the comment about
28 veil-piercing.

1 **See also ULPA §303:**
2

3 An obligation of a limited partnership, whether arising in contract, tort, or otherwise, is
4 not the obligation of a limited partner. A limited partner is not personally liable, directly or
5 indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely
6 by reason of being a limited partner, even if the limited partner participates in the management
7 and control of the limited partnership.
8

9 **See also ULLCA §303:**
10

11 (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities
12 of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts,
13 obligations, and liabilities of the company. A member or manager is not personally liable for a
14 debt, obligation, or liability of the company solely by reason of being or acting as a member or
15 manager.
16

17 (b) The failure of a limited liability company to observe the usual company formalities or
18 requirements relating to the exercise of its company powers or management of its business is not
19 a ground for imposing personal liability on the members or managers for liabilities of the
20 company.
21

22 (c) All or specified members of a limited liability company are liable in their capacity as
23 members for all or specified debts, obligations, or liabilities of the company if:
24

25 (1) a provision to that effect is contained in the articles of organization; and
26

27 (2) a member so liable has consented in writing to the adoption of the provision or
28 to be bound by the provision.
29

30 **See also RMBCA §6.22:**
31

32 (a) A purchaser from a corporation of its own shares is not liable to the corporation or its
33 creditors with respect to the shares except to pay the consideration for which the shares were
34 authorized to be issued (section 6.21) or specified in the subscription agreement (section 6.20).
35

36 (b) Unless otherwise provided in the articles of incorporation, a shareholder of a
37 corporation is not personally liable for the acts or debts of the corporation except that he may
38 become personally liable by reason of his own acts or conduct.
39

40 **§506. VOTING BY BENEFICIAL OWNERS.** On any matter that is to be voted on by
41 the beneficial owners:

42 (1) the beneficial owners may take such action without a meeting, without a prior

1 notice and without a vote if a consent or consents in writing, setting forth the action so taken,
2 shall be signed by the beneficial owners having not less than the minimum number of votes that
3 would be necessary to authorize or take such action at a meeting at which all interests in the
4 business trust entitled to vote thereon were present and voted, and

5 (2) the beneficial owners may vote in person or by proxy, and such proxy may be
6 granted in writing, by means of electronic transmission; or as otherwise permitted by applicable
7 law.

8 A consent transmitted by electronic transmission by a beneficial owner or by a
9 person or persons authorized to act for a beneficial owner shall be deemed to be written and
10 signed for purposes of this subsection. For purposes of this subsection, the term “electronic
11 transmission” means any form of communication not directly involving the physical
12 transmission of paper that creates a record that may be retained, retrieved and reviewed by a
13 recipient thereof and that may be directly reproduced in paper form by such a recipient through
14 an automated process.

15 **Reporter’s Note**

16
17 Based on Del 3806(e). As with Section 401, query whether the definition of “electronic
18 transmission” should be moved to Section 101.
19

20 **§507. DERIVATIVE ACTIONS.**

21 (a) A beneficial owner may bring an action in the [court of general jurisdiction] in
22 the right of a business trust to recover a judgment in its favor if trustees with authority to do so
23 have refused to bring the action or if an effort to cause those trustees to bring the action is not
24 likely to succeed.

25 (b) A beneficial owner may not commence or maintain a derivative action unless

1 the beneficial owner is a beneficial owner at the time of bringing the action and the beneficial
2 owner:

3 (1) was a beneficial owner at the time of the transaction of which the
4 beneficial owner complains or became a beneficial owner through transfer by operation of law or
5 pursuant to the terms of the governing instrument of the business trust from a person who was a
6 beneficial owner at the time of the transaction, and

7 (2) fairly and adequately represents the interests of the business trust in
8 enforcing the right of the business trust.

9 (c) In a derivative action, the complaint shall set forth with particularity the effort,
10 if any, of the plaintiff to secure initiation of the action by the trustees, or the reasons for not
11 making the effort.

12 (d) If a derivative action is successful, in whole or in part, or if anything is
13 received by a business trust as a result of a judgment, compromise or settlement of any such
14 action, the Court may award the plaintiff reasonable expenses, including reasonable attorney's
15 fees. If anything is so received by the plaintiff, the Court shall make such award of plaintiff's
16 expenses payable out of those proceeds and direct plaintiff to remit to the business trust the
17 remainder thereof, and if those proceeds are insufficient to reimburse plaintiff's reasonable
18 expenses, the Court may direct that any such award of plaintiff's expenses or a portion thereof be
19 paid by the business trust.

20 (e) A beneficial owner's right to bring a derivative action may be subject to such
21 additional standards and restrictions, if any, as are set forth in the governing instrument of the
22 business trust, including, without limitation, the requirement that beneficial owners owning a
23 specified beneficial interest in the business trust join in the bringing of the derivative action.

1 (f) A derivative action may not be discontinued or settled without the court's
2 approval.

3 **Reporter's Note**

4
5 Based Del 3816, Conn 34-522.
6

7 **§508. ACCESS TO, AND CONFIDENTIALITY OF, INFORMATION AND**
8 **RECORDS.**

9 (a) Each beneficial owner of a business trust has the right, subject to such
10 reasonable standards (including standards governing what information and documents are to be
11 furnished at what time and location and at whose expense) as may be established by the trustees,
12 to obtain from the business trust from time to time upon reasonable demand for any purpose
13 reasonably related to the beneficial owner's interest as a beneficial owner of the business trust:

14 (1) a copy of the governing instrument and certificate of trust and all
15 amendments thereto, together with copies of any written powers of attorney pursuant to which
16 the governing instrument and any certificate and any amendments thereto have been executed;

17 (2) a current list of the name and last known business, residence or
18 mailing address of each beneficial owner and trustee;

19 (3) information regarding the business and financial condition of the
20 business trust; and

21 (4) other information regarding the affairs of the business trust as is just
22 and reasonable.

23 (b) Each trustee shall have the right to examine all the information described in
24 subsection (a) of this section for any purpose reasonably related to the trustee's position as a

1 trustee.

2 (c) The trustees of a business trust shall have the right to keep confidential from
3 the beneficial owners, for such period of time as the trustees deem reasonable, any information
4 that the trustees reasonably believe to be in the nature of trade secrets or other information, the
5 disclosure of which the trustees in good faith believe is not in the best interest of the business
6 trust or could damage the business trust or its business or which the business trust is required by
7 law or by agreement with a third party to keep confidential.

8 (d) A business trust may maintain its records in other than a written form if such
9 form is capable of conversion into a written form within a reasonable time.

10 (e) Any demand by a beneficial owner or trustee under this section shall be in
11 writing and shall state the purpose of such demand.

12 **Reporter's Note**

13
14 Based on Del 3819.

15 16 **See also ULLCA §408:**

17
18 (a) A limited liability company shall provide members and their agents and attorneys
19 access to its records, if any, at the company's principal office or other reasonable locations
20 specified in the operating agreement. The company shall provide former members and their
21 agents and attorneys access for proper purposes to records pertaining to the period during which
22 they were members. The right of access provides the opportunity to inspect and copy records
23 during ordinary business hours. The company may impose a reasonable charge, limited to the
24 costs of labor and material, for copies of records furnished.

25
26 (b) A limited liability company shall furnish to a member, and to the legal representative
27 of a deceased member or member under legal disability:

28
29 (1) without demand, information concerning the company's business or affairs
30 reasonably required for the proper exercise of the member's rights and performance of the
31 member's duties under the operating agreement or this [act]; and

32
33 (2) on demand, other information concerning the company's business or affairs,
34 except to the extent the demand or the information demanded is unreasonable or otherwise

1 improper under the circumstances.

2
3 (c) A member has the right upon written demand given to the limited liability company to
4 obtain at the company's expense a copy of any written operating agreement.

5
6 **See also DGCL §220:**

7
8 . . . (b) Any stockholder, in person or by attorney or other agent, shall, upon written
9 demand under oath stating the purpose thereof, have the right during the usual hours for business
10 to inspect for any proper purpose, and to make copies and extracts from:

11
12 (1) The corporation's stock ledger, a list of its stockholders, and its other books
13 and records; and

14
15 (2) A subsidiary's books and records, to the extent that:

16
17 a. The corporation has actual possession and control of such records of
18 such subsidiary; or

19
20 b. The corporation could obtain such records through the exercise of
21 control over such subsidiary, provided that as of the date of the making of the demand:

22
23 1. The stockholder inspection of such books and records of the
24 subsidiary would not constitute a breach of an agreement between the corporation or the
25 subsidiary and a person or persons not affiliated with the corporation; and

26
27 2. The subsidiary would not have the right under the law
28 applicable to it to deny the corporation access to such books and records upon demand by the
29 corporation.

30
31 In every instance where the stockholder is other than a record holder of stock in a stock
32 corporation or a member of a nonstock corporation, the demand under oath shall state the
33 person's status as a stockholder, be accompanied by documentary evidence of beneficial
34 ownership of the stock, and state that such documentary evidence is a true and correct copy of
35 what it purports to be. A proper purpose shall mean a purpose reasonably related to such
36 person's interest as a stockholder. In every instance where an attorney or other agent shall be the
37 person who seeks the right to inspection, the demand under oath shall be accompanied by a
38 power of attorney or such other writing which authorizes the attorney or other agent to so act on
39 behalf of the stockholder. The demand under oath shall be directed to the corporation at its
40 registered office in this State or at its principal place of business.

41
42 (c) If the corporation, or an officer or agent thereof, refuses to permit an inspection
43 sought by a stockholder or attorney or other agent acting for the stockholder pursuant to
44 subsection (b) of this section or does not reply to the demand within 5 business days after the
45 demand has been made, the stockholder may apply to the Court of Chancery for an order to

1 compel such inspection. The Court of Chancery is hereby vested with exclusive jurisdiction to
2 determine whether or not the person seeking inspection is entitled to the inspection sought. The
3 Court may summarily order the corporation to permit the stockholder to inspect the corporation's
4 stock ledger, an existing list of stockholders, and its other books and records, and to make copies
5 or extracts therefrom; or the Court may order the corporation to furnish to the stockholder a list
6 of its stockholders as of a specific date on condition that the stockholder first pay to the
7 corporation the reasonable cost of obtaining and furnishing such list and on such other
8 conditions as the Court deems appropriate. Where the stockholder seeks to inspect the
9 corporation's books and records, other than its stock ledger or list of stockholders, such
10 stockholder shall first establish that:

11
12 (1) Such stockholder is a stockholder;

13
14 (2) Such stockholder has complied with this section respecting the form and
15 manner of making demand for inspection of such documents; and

16
17 (3) The inspection such stockholder seeks is for a proper purpose.
18

19 Where the stockholder seeks to inspect the corporation's stock ledger or list of
20 stockholders and establishes that such stockholder is a stockholder and has complied with this
21 section respecting the form and manner of making demand for inspection of such documents, the
22 burden of proof shall be upon the corporation to establish that the inspection such stockholder
23 seeks is for an improper purpose. The Court may, in its discretion, prescribe any limitations or
24 conditions with reference to the inspection, or award such other or further relief as the Court may
25 deem just and proper. The Court may order books, documents and records, pertinent extracts
26 therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this
27 State upon such terms and conditions as the order may prescribe.
28

29 (d) Any director (including a member of the governing body of a nonstock corporation)
30 shall have the right to examine the corporation's stock ledger, a list of its stockholders and its
31 other books and records for a purpose reasonably related to the director's position as a director.
32 The Court of Chancery is hereby vested with the exclusive jurisdiction to determine whether a
33 director is entitled to the inspection sought. The Court may summarily order the corporation to
34 permit the director to inspect any and all books and records, the stock ledger and the list of
35 stockholder's and to make copies or extracts therefrom. The burden of proof shall be upon the
36 corporation to establish that the inspection such director seeks is for an improper purpose. The
37 Court may, in its discretion, prescribe any limitations or conditions with reference to the
38 inspection, or award such other and further relief as the Court may deem just and proper.
39

40 **See also RMBCA §16.02:**
41

42 (a) A shareholder of a corporation is entitled to inspect and copy, during regular business
43 hours at the corporation's principal office, any of the records of the corporation described in
44 section 16.01(e) if he gives the corporation written notice of his demand at least five business
45 days before the date on which he wishes to inspect and copy.

1 (b) A shareholder of a corporation is entitled to inspect and copy, during regular business
2 hours at a reasonable location specified by the corporation, any of the following records of the
3 corporation if the shareholder meets the requirements of subsection (c) and gives the corporation
4 written notice of his demand at least five business days before the date on which he wishes to
5 inspect and copy:
6

7 (1) excerpts from minutes of any meeting of the board of directors, records of any
8 action of a committee of the board of directors while acting in place of the board of directors on
9 behalf of the corporation, minutes of any meeting of the shareholders, and records of action
10 taken by the shareholders or board of directors without a meeting, to the extent not subject to
11 inspection under section 16.02(a);
12

13 (2) accounting records of the corporation; and
14

15 (3) the record of shareholders.
16

17 (c) A shareholder may inspect and copy the records described in subsection (b) only if:
18

19 (1) his demand is made in good faith and for a proper purpose;
20

21 (2) he describes with reasonable particularity his purpose and the records he
22 desires to inspect; and
23

24 (3) the records are directly connected with his purpose.
25

26 (d) The right of inspection granted by this section may not be abolished or limited by a
27 corporation's articles of incorporation or bylaws.
28

29 (e) This section does not affect:
30

31 (1) the right of a shareholder to inspect records under section 7.20 or, if the
32 shareholder is in litigation with the corporation, to the same extent as any other litigant;
33

34 (2) the power of a court, independently of this Act, to compel the production of
35 corporate records for examination.
36

37 (f) For purposes of this section, "shareholder" includes a beneficial owner whose shares
38 are held in a voting trust or by a nominee on his behalf.
39

40 **See also RMBCA §16.03:**
41

42 (a) A shareholder's agent or attorney has the same inspection and copying rights as the
43 shareholder represented.
44

45 (b) The right to copy records under section 16.02 includes, if reasonable, the right to

1 receive copies by xerographic or other means, including copies through an electronic
2 transmission if available and so requested by the shareholder.
3

4 (c) The corporation may comply at its expense with a shareholder's demand to inspect
5 the record of shareholders under section 16.02(b)(3) by providing the shareholder with a list of
6 shareholders that was compiled no earlier than the date of the shareholder's demand.
7

8 (d) The corporation may impose a reasonable charge, covering the costs of labor and
9 material, for copies of any documents provided to the shareholder. The charge may not exceed
10 the estimated cost of production, reproduction or transmission of the records.

1 **ARTICLE 6**

2 **MERGER, CONSOLIDATION, AND CONVERSION**

3
4 The content of this article will have to be linked with the recent NCCUSL project on the
5 merger, consolidation, and conversion of different business entities; all that will be left for this
6 section is the merger and consolidation between business trusts that are subject to this [act].
7

8 **§601. MERGER OR CONSOLIDATION.** See Del 3815, Conn 34-521.

9 **§602. CONVERSION FROM ANOTHER ENTITY.** See Del 3820.

10 **§603. CONVERSION TO ANOTHER ENTITY.** See Del 3821.

1 comply with Section 108, an alternate name adopted pursuant to Section 705(a).

2 (2) the name of the State or other jurisdiction under whose law the foreign
3 business trust is organized;

4 (3) the street and mailing address of the foreign business trust's principal
5 office and, if the laws of the jurisdiction under which the foreign business trust is organized
6 require the foreign business trust to maintain an office in that jurisdiction, the street and mailing
7 address of the required office; and

8 (4) the name and street and mailing address of the foreign business trust's
9 initial agent for service of process in this State;

10 (b) A foreign business trust shall deliver with the completed application a
11 certificate of existence or a record of similar import signed by the [Secretary of State] or other
12 official having custody of the foreign business trust's publicly filed records in the State or other
13 jurisdiction under whose law the foreign business trust is organized.

14 **Reporter's Note**

15
16 Based on ULPA §902. See also Del 3852, 3855, 3859, Conn 34-531, 34-536, 34-538.
17

18 **§703. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS.**

19 (a) Activities of a foreign business trust which do not constitute transacting
20 business in this State within the meaning of this [article] include:

- 21 (1) maintaining, defending, and settling an action or proceeding;
- 22 (2) holding meetings of its trustees or carrying on any other activity
23 concerning its internal affairs;
- 24 (3) maintaining accounts in financial institutions;

1 (4) maintaining offices or agencies for the transfer, exchange, and
2 registration of the foreign business trust's own securities or maintaining trustees or depositories
3 with respect to those securities;

4 (5) selling through independent contractors;

5 (6) soliciting or obtaining orders, whether by mail or electronic means or
6 through employees or agents or otherwise, if the orders require acceptance outside this State
7 before they become contracts;

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

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

13 (9) conducting an isolated transaction that is completed within 30 days
14 and is not one in the course of similar transactions of a like manner; and

15 (10) transacting business in interstate commerce.

16 (b) For purposes of this [article], the ownership in this State of income-producing
17 real property or tangible personal property, other than property excluded under subsection (a),
18 constitutes transacting business in this State.

19 (c) This section does not apply in determining the contacts or activities that may
20 subject a foreign business trust to service of process, taxation, or regulation under any other law
21 of this State.

22 (d) A person shall not be deemed to be doing business in the State solely by
23 reason of being a trustee or a beneficial owner of a foreign business trust.

1 **Reporter's Note**

2
3 Based on ULPA 903, Del 3852.
4

5 **§704. FILING OF CERTIFICATE OF AUTHORITY.** Unless the [Secretary of
6 State] determines that an application for a certificate of authority does not comply with the filing
7 requirements of this [act], the [Secretary of State], upon payment of all filing fees, shall file the
8 application, prepare, sign and file a certificate of authority to transact business in this State, and
9 send a copy of the filed certificate, together with a receipt for the fees, to the foreign business
10 trust or its representative.

11 **Reporter's Note**

12
13 Based on ULPA 904. See also Del 3853, Conn 34-533.
14

15 **§705. NONCOMPLYING NAME OF FOREIGN BUSINESS TRUST.**

16 (a) A foreign business trust whose name does not comply with Section 108 may
17 not obtain a certificate of authority until it adopts, for the purpose of transacting business in this
18 State, an alternate name that complies with Section 108. A foreign business trust that adopts an
19 alternate name under this subsection and then obtains a certificate of authority with the name
20 need not comply with [fictitious name statute]. After obtaining a certificate of authority with an
21 alternate name, a foreign business trust shall transact business in this State under the name unless
22 the foreign business trust is authorized under [fictitious name statute] to transact business in this
23 State under another name.

24 (b) If a foreign business trust authorized to transact business in this State changes
25 its name to one that does not comply with Section 108, it may not thereafter transact business in
26 this State until it complies with subsection (a) and obtains an amended certificate of authority.

1 **Reporter's Note**

2
3 Based on ULPA 905. See also Del 3854, Conn 34-535.
4

5 **§706. REVOCATION OF CERTIFICATE OF AUTHORITY.**

6 (a) A certificate of authority of a foreign business trust to transact business in this
7 State may be revoked by the [Secretary of State] in the manner provided in subsections (b) and
8 (c) if the foreign business trust does not:

9 (1) pay, within 60 days after the due date, any fee, tax or penalty due to
10 the [Secretary of State] under this [act] or other law;

11 (2) appoint and maintain an agent for service of process as required by
12 Section 306; or

13 (3) deliver for filing a statement of a change under Section 307 within 30
14 days after a change has occurred in the name or address of the agent.

15 (b) In order to revoke a certificate of authority, the [Secretary of State] must
16 prepare, sign, and file a notice of revocation and send a copy to the foreign business trust's agent
17 for service of process in this State, or if the foreign business trust does not appoint and maintain
18 a proper agent in this State, to the foreign business trust's designated office. The notice must
19 state:

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

22 (2) the foreign business trust's failures to comply with subsection (a)
23 which are the reason for the revocation.

24 (c) The authority of the foreign business trust to transact business in this State

1 ceases on the effective date of the notice of revocation unless before that date the foreign
2 business trust cures each failure to comply with subsection (a) stated in the notice. If the foreign
3 business trust cures the failures, the [Secretary of State] shall so indicate on the filed notice.

4 **Reporter's Note**

5 Based on ULPA 906. See also Del 3856, Conn 34-537.
6
7

8 **§707. CANCELLATION OF CERTIFICATE OF AUTHORITY; EFFECT OF**
9 **FAILURE TO HAVE CERTIFICATE.**

10 (a) In order to cancel its certificate of authority to transact business in this State, a
11 foreign business trust must deliver to the [Secretary of State] for filing a notice of cancellation.

12 The certificate is canceled when the notice becomes effective under Section 206.

13 (b) A foreign business trust transacting business in this State may not maintain an
14 action or proceeding in this State unless it has a certificate of authority to transact business in
15 this State.

16 (c) The failure of a foreign business trust to have a certificate of authority to
17 transact business in this State does not impair the validity of a contract or act of the foreign
18 business trust or prevent the foreign business trust from defending an action or proceeding in this
19 State.

20 (d) A partner of a foreign business trust is not liable for the obligations of the
21 foreign business trust solely by reason of the foreign business trust's having transacted business
22 in this State without a certificate of authority.

23 (e) If a foreign business trust transacts business in this State without a certificate
24 of authority or cancels its certificate of authority, it appoints the [Secretary of State] as its agent

1 for service of process for rights of action arising out of the transaction of business in this State.

2 **Reporter's Note**

3
4 Based on ULPA 907. See also Del 3857, Conn 34-539, 34-540.
5

6 **§708. ACTION BY [ATTORNEY GENERAL].** The [Attorney General] may
7 maintain an action to restrain a foreign business trust from transacting business in this State in
8 violation of this [article].

9 **Reporter's Note**

10
11 Based on ULPA 908 See also Del 3854, Conn 34-532.

1 **ARTICLE 8**

2 **MISCELLANEOUS PROVISIONS**

3
4 **§801. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying
5 and construing this Uniform Act, consideration must be given to the need to promote uniformity
6 of the law with respect to its subject matter among States that enact it.

7 **Reporter's Note**

8
9 Based on ULPA 1201.
10

11 **§802. SEVERABILITY CLAUSE.** If any provision of this [act] or its application to
12 any person or circumstance is held invalid, the invalidity does not affect other provisions or
13 applications of this [act] which can be given effect without the invalid provision or application,
14 and to this end the provisions of this [act] are severable.

15 **Reporter's Note**

16
17 Based on ULPA 1202. See also Conn 34-547.
18

19 **§803. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
20 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the federal
21 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.,
22 but this [act] does not modify, limit, or supersede Section 101(c) of that Act or authorize
23 electronic delivery of any of the notices described in Section 103(b) of that Act.

24 **Reporter's Note**

25
26 Based on ULPA 1203.
27

§804. EFFECTIVE DATE. This [act] takes effect [effective date].

Reporter's Note

Based on ULP A 1204.

§805. REPEALS.

(a) Effective [all-inclusive date], the following acts and parts of acts are repealed:
[the State Business Trust Act as amended and in effect immediately before the effective date of
this [act]].

(b) All provisions of this [act] may be altered from time to time or repealed and all rights of business trusts, trustees, beneficial owners and other persons are subject to this reservation.

Reporter's Note

Based on ULPa 1205, Conn 34-545.

§806. APPLICATION TO EXISTING RELATIONSHIPS. [Reserved]

Reporter's Note

Query whether an existing relationships section is necessary in light of Section 301. Compare §301, *supra*, with ULPA §1206.

§807. SAVING CLAUSE. This [act] does not affect an action commenced, proceeding brought, or right accrued before this [act] takes effect.

Reporter's Note

Based on ULP A 1206.