

D R A F T

FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

FOR FALL 2007 MEETING
CHANGES SINCE SUMMER 2007 READING TRACKED

UNIFORM STATUTORY TRUST ENTITY ACT

WITH PREFATORY NOTE AND COMMENTS

Copyright ©2007

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

DRAFTING COMMITTEE ON UNIFORM STATUTORY TRUST ENTITY ACT

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

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

THOMAS J. BUITEWEG, 200 Renaissance Ct., Mail Code 482-B09-B11, P.O. Box 200,
Detroit, MI 48265-2000

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

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

DIMITRI G. KARCAZES, 55 E. Monroe St., Suite 3700, Chicago, IL 60603

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

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

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

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

EX OFFICIO

HOWARD J. SWIBEL, 120 S. Riverside Plaza, Suite 1200, Chicago, IL 60606, *President*

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

AMERICAN BAR ASSOCIATION ADVISOR

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

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

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

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 211 E. Ontario St., Suite 1300, Chicago, IL 60611, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

UNIFORM STATUTORY TRUST ENTITY ACT

TABLE OF CONTENTS

| **[OMITTED; SEE UNTRACKED VERSION FOR TOC]**

UNIFORM STATUTORY TRUST ENTITY ACT

Prefatory Note

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

To address the legal uncertainty over the common law business trust, at least thirty states have enacted legislation that validates the trust as a permissible form of business organization. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [citation] (collecting state statutes). 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. See the Comment to Section 101.

Since the 1980s, statutory trust entities have thrived in a variety of niches, particularly in the organization of mutual funds and the practice of asset securitization. See Sitkoff, *supra*; 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 various tax-advantaged real estate transactions. See, e.g., *Rev. Rul. 2004-86*, 2004-33 *IRB* 191.

A statutory trust differs from a common law trust in several important respects. A common law trust, whether its purpose is donative or commercial, arises from private action without the involvement of a public official. See *Uniform Trust Code* §401 (2000); *Restatement (Third) of Trusts* §10 (2003). Because a common law trust is not a juridical entity, it must sue, be sued, and transact over property in the name of the trustee in the trustee’s capacity as such. By contrast, a statutory trust is ~~created~~formed by delivering a certificate of trust to a public official, typically the Secretary of State, for filing in the public record. See Section 201. Moreover, a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue, be sued, and transact over property in its own name. See Sections 301, 307-08.

Most existing state business trust statutes do not prohibit use of the common law trust for a commercial purpose. Instead, the modern statutes offer transactional planners an additional option, a statutory trust, which is governed by the state’s statutory trust act. Common law trusts, whether donative or commercial, remain subject to the principles of law and equity applicable to private and charitable trusts.

The primary stimulus for the drafting of the Uniform Statutory Trust Entity Act is the increasing popularity of statutory trust entities, chiefly in the structured finance and mutual fund industries. Increasing use of statutory trusts 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. Practitioners, entrepreneurs, and scholars struggle to understand the law governing statutory trusts. The case law on statutory trusts is surprisingly sparse.

The Uniform Statutory Trust Entity Act validates the statutory trust as a permissible form of business organization and brings the disparate and often inadequate existing approaches 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 regimes exist in several states. Notable examples include Connecticut, Delaware, Maryland, New Hampshire, Nevada, South Dakota, Wyoming, and Virginia, all of which were referred to in the drafting process. However, 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 follow Delaware, the drafting committee relied on a recent study that presents state-level data on the aggregate number of statutory trusts formed and the number of new statutory trust formations in each state over the last several years. See Sitkoff, *supra*, at _____. ~~According to this study, the number of statutory trusts formed under the Delaware Act vastly exceeds the number formed in all other states, surpassing second-place Connecticut by a factor of almost ten to one. Id. at _____. The study also presents data on new trust formations. These data indicate that the Delaware Act dominates the field. The new formation data show that the Delaware statutory trust has come also to dominate the Massachusetts business trust for the organization of business trusts more generally.~~ Id. at _____. A further reason for following the Delaware model was to ensure that a statutory trust under this act would receive treatment under applicable regulatory law similar to that of a Delaware statutory trust. For a general discussion of the Delaware Statutory Trust Act, see Wendell Fenton & Eric A. Mazie, *Delaware Statutory Trusts*, in 2 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* ch. 19 (3d ed. 2005 Supp.).

Although under Section 105 ordinary trust law supplements this Act, several substantive provisions of this Act were drawn from corporate law, not from trust law. See, e.g., 401 (management by or under the authority of the trustees); 404 (standards of conduct of trustees); 408 (interested transactions). Looking to the corporate law model on these issues is consistent with the hybrid approach of the Delaware Act and reflects the nature of a statutory trust as a juridical entity. The Uniform Statutory Trust Entity Act is an unincorporated entity statute.

In drafting the public filing and other provisions not unique to the statutory trust form, the drafting committee took the Uniform Limited Partnership Act (2001) and the Revised Uniform Limited Liability Company Act (2006) as its starting points. For guidance on the common law of trusts, the drafting committee took the Uniform Trust Code (2000) as its starting point.

Innovative Provisions. Although much of the Uniform Statutory Trust Entity Act

reflects a reorganization and refinement of provisions found in the Delaware Statutory Trust Act, the Uniform Act contains several innovations including: (1) specification of rules that are not subject to override in the statutory trust's governing instrument (§103(c)); (2) exclusion of trusts with a prevaillingly donative purpose (§302); (3) clearer guidance on the relationship applicability of ordinary trust law to statutory trust entities (§105); (4) clearer guidance on the relationship between the common law trust and statutory trust entities (§905); and (5) systematic treatment of conversion and merger (Article 6), and of dissolution (Article 7).

Default and Mandatory Rules. Most of the Uniform Statutory Trust Entity Act consists of default rules that apply only if the governing instrument fails to address or insufficiently covers a particular issue. Pursuant to Section 103(a)-(b), the governing instrument may override a substantial majority of the Act's provisions. The exceptions are scheduled in Section 103(c). Section 104 collects various permissive rules regarding the scope of the governing instrument.

Relationship to Common Law Trusts and the Uniform Trust Code. In the culture of American law the common law trust is usually regarded as a vehicle for effecting donative transfers. Indeed, leading compilations of the common law of trusts tend to exclude business trusts from their coverage. See e.g., Restatement (Third) of Trusts §1 cmt. b (2003); Austin Wakeman Scott, William F. Fratcher, & Mark L. Ascher, 1 Scott and Ascher on Trusts §2.1.2 (5th ed. 2006); Restatement (Second) of Trusts §1 cmt. b (1959). The justification stated in the Restatement (Third) of Trusts is representative: "[T]he business trust is a business arrangement that is best dealt with in connection with business associations." Restatement (Third) of Trusts, supra.

There is, however, no separate body of general business law that rivals ordinary trust law for application to a common law trust that has a business purpose. The common law of trusts applies to all trusts arising under the common law, even those that have a business purpose, to the extent that the common law is not displaced by the trust instrument or specialized legislation. For this reason, although the Uniform Trust Code "is directed primarily at trusts that arise in an estate planning or other donative context," the Code applies to trusts that have a business or commercial purpose to the extent that the trust instrument or other legislation do not displace the Code's provisions. UTC §102 cmt.

Accordingly, the Uniform Statutory Trust Entity Act is not a codification of general business law principles applicable to common law business trusts. Nothing in this Act displaces the common law of trusts, or the Uniform Trust Code, with respect to such trusts. On the contrary, Section 905(a) expressly confirms the continued applicability of the state's laws pertaining to trusts to a common law business trust.

The Uniform Statutory Trust Entity Act more closely resembles a generic corporate code or unincorporated entity law than 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 conduct transactions in its own name separate from that of its fiduciary and its beneficial owners. See Sections 301, 307-08. Like those entities, but unlike a common law trust, a statutory trust is formed by delivering a certificate of trust to a public official for filing. Compare Section 201 with Uniform Trust Code §401 (2000) and Restatement (Third) of Trusts

§10 (2003). Further, Section 105 provides that ordinary trust law supplements this Act ~~in governing statutory trusts~~, but only to the extent not modified or displaced by this Act or the governing instrument—and this Act modifies or displaces a host of ordinary trust law principles including those concerning fiduciary standards of conduct (Section 404) and termination of trusts (Section 306). Section 905(b) allows an existing common law trust that does not have a prevailingly donative purpose to convert into a statutory trust by delivering a certificate of trust for filing under Section 201.

Although the drafting committee contemplated that a statutory trust under this Act will be used primarily as a mode of business organization, Section 501(a) confirms that a person may become a beneficial owner of a statutory trust without an exchange of consideration. It is therefore possible that a statutory trust could be used as a substitute for the common law trust in ~~a variety of commercial and noncommercial contexts~~. However, to ensure that a statutory trust is not used to evade mandatory rules applicable to common law trusts that enforce public policy limitations on donative transfers, Section 302 provides that a statutory trust may not have a prevailingly donative purpose. For discussion of the nonapplicability to a statutory trust of the mandatory rules applicable to common law trusts (including Uniform Trust Code §105), see the comment to Section 103 under the heading “Relationship to Mandatory Rules Under the Uniform Trust Code” and the comments to Sections 105 and 302.

Citation Convention. [To come: A statement here about citation conventions, for example, that state statutory cites are current as of Lexis or Westlaw on X date.]

1 **UNIFORM STATUTORY TRUST ENTITY ACT**

2
3 **[ARTICLE] 1**

4 **GENERAL PROVISIONS**

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

7 **Comment**

8
9 Because this Act provides for the creation and use of a statutory trust as a form of
10 business organization, it might seem that “Uniform Business Trust Act,” “Uniform Statutory
11 Business Trust Act,” or “Uniform Statutory Trust Act” would be a better title. However, after
12 ~~deliberation informed by~~ consultation with experts in the structured finance, bankruptcy, mutual
13 fund, and estate planning industries, the drafting committee rejected those and other such titles in
14 favor of “Uniform Statutory Trust Entity Act.”
15

16 The drafting committee included the word “entity” in the title for two reasons. First, the
17 creature of this act is indeed a trust entity. It has the power to sue, be sued, and transact over
18 property in its own name. A common law trust, by contrast, is not a juridical entity. Second, the
19 word “entity” in the title differentiates this act from the Uniform Trust Code, which is a
20 codification of the common law of trusts. However, to conform with prevailing usage under the
21 Delaware Statutory Trust Act, the entity that arises under this Act is called a “statutory trust,”
22 not a “statutory trust entity.” See Section 102(14). Further, because the drafting committee
23 wanted a statutory trust under this act to receive treatment under applicable regulatory law
24 similar to that of a Delaware statutory trust, the entity features of a statutory trust under this act
25 closely resemble those of a Delaware statutory trust.
26

27 The drafting committee had three reasons for eschewing the phrase “business trust.”
28 First, under this act a statutory trust need not have a business or commercial purpose. On the
29 contrary, Section 302 confirms that a statutory trust may have any lawful purpose other than a
30 prevailingly donative purpose.
31

32 Second, the drafting committee endeavored to avoid any implication whether a statutory
33 trust would qualify as a “business trust” under the bankruptcy code. Under the bankruptcy code,
34 the definition of a “debtor” eligible for bankruptcy includes a “person,” 11 U.S.C. §101(13), the
35 definition of “person” includes a “corporation,” id. §101(41), and the definition of “corporation”
36 includes a “business trust.” Id. §101(9). Hence, a “business trust” might qualify as an eligible
37 “debtor.” Bankruptcy eligibility is a significant issue for trusts used as special purpose entities
38 in structured finance transactions, a principal use of the modern statutory trust in practice. Such
39 trusts are often designed to be “bankruptcy remote.” Thus, as in the leading case of *In re*

1 Secured Equipment Trust of Eastern Airlines, Inc., 38 F.3d 86 (2d Cir. 1994), in certain
2 configurations trusts used in securitization transactions have indeed been held not to be
3 “business trusts” under the bankruptcy code.
4

5 Third, the drafting committee was influenced by the revealed preference for “statutory
6 trust” over “business trust” among existing users of statutory business trusts as evidenced by the
7 dominant position of the Delaware Statutory Trust Act relative to the statutory or business trust
8 acts of the other states. See Robert H. Sitkoff, The Rise of the Statutory Business Trust [in
9 progress]. In 2002 Delaware recast the “Delaware Business Trust Act” as the “Delaware
10 Statutory Trust Act,” replacing nearly every reference to “business trust” with “statutory trust.”
11 | See 73 Del. Laws 329 (2002). The Connecticut statute, which is the second most popular, is
12 likewise cast as a Statutory Trust Act. See Connecticut Statutory Trust Act §§34-500, 34-
13 501(2).
14

15 SECTION 102. DEFINITIONS.

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

18 (2) “Certificate of trust” means the record that is delivered to the [Secretary of State] for
19 filing under Section 201 and the record as amended or restated.

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

26 (4) “Designated office” means:

27 (A) with respect to a statutory trust, the mailing address that it is required to
28 designate under Section 201(a)(2); or

29 (B) with respect to a foreign statutory trust, its principal office.

30 (5) “Foreign statutory trust” means a trust entity that is formed under the laws of a

jurisdiction other than this state and is required by those laws to file a record with a public official in that jurisdiction.

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

(7) “Jurisdiction” means a state or a foreign country **[For Discussion: Question from style about whether we do indeed mean to include “a foreign country.”]**.

(8) “Person” means an individual, corporation, estate, trust, partnership, limited partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(9) “Qualified foreign statutory trust” means a foreign statutory trust that is authorized to transact business in this state.

(10) “Record” 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.

(11) “Related person”, with respect to a trustee, officer, employee, manager, or beneficial owner, means:

(A) the spouse of the person;

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

(C) an individual having the same home as the person;

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

(E) a trust, estate, incompetent, conservatee, or minor for which the person is a fiduciary; or

(F) a person that is directly or indirectly controlled by, or is under common

1 control of, the person.

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

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

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

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

9 (14) “Statutory trust” means an unincorporated entity formed under this [act].

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

11 (16) “Trust instrument” means an instrument other than the certificate of trust, whether
12 referred to as a trust agreement, trust instrument, declaration of trust, bylaws, or otherwise, that
13 provides for the governance of the affairs of the statutory trust and the conduct of its business.

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

16 Comment

17
18 **Principal Sources** – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
19 Act §34-501; Uniform Limited Partnership Act §102 (2001); SEC Rule 144(a)(1), 17 C.F.R.
20 §230.144(a)(1).

21
22 ~~Paragraph (2) defines “common-law trust” consistently with Restatement (Third) of~~
23 ~~Trusts §2 (2003), except that as defined herein the term expressly includes a common-law~~
24 ~~business trust. See also Uniform Trust Code §102 cmt. (2000).~~

25
26 Paragraphs (2), (6), and (16) define “certificate of trust,” “governing instrument,” and
27 “trust instrument” respectively. The certificate of trust is the record that must be filed with a
28 public official under Section 201 to form a statutory trust. The trust instrument is the transaction
29 document that provides for the governance of the affairs of the statutory trust and that need not
30 be made part of the public record. Together, the certificate of trust and the trust instrument
31 compose the governing instrument. The term “governing instrument” is in the singular to

1 conform with standard commercial usage. Conflicts between the certificate of trust and the
2 governing instrument are resolved pursuant to Section 201(d). Although ~~Paragraph (15)~~ the term
3 “trust instrument” is phrased in the singular, consistent with current commercial practice the
4 drafting committee contemplated that there would often be more than one “trust instrument.”
5 Section 104(be) makes the authorization of multiple instruments explicit.

6
7 Paragraph (3) defines “common law trust” consistently with Restatement (Third) of
8 Trusts §2 (2003), except that as defined herein the term expressly includes a common law
9 business trust. See also Uniform Trust Code §102 cmt. (2000).

10
11 Paragraph (11) defines the term “related person,” which is used in Sections 408 and 505
12 concerning the legality of certain interested transactions. In using but not defining the term
13 “substantial” in Paragraph (11)(D), the drafting committee contemplated that a totality of the
14 circumstances test would apply. Section 406 defines the term “independent trustee” with respect
15 to a statutory trust that is an investment company under the Investment Company Act of 1940.

16
17 Paragraph (17) defines “trustee” as a person designated as such in accordance with the
18 governing instrument or applicable law. For discussion of trustee appointment, see the Comment
19 to Section 401.

21 **SECTION 103. DEFAULT AND MANDATORY RULES.**

22 ~~(a) Except Subject to subsection (c) and the terms of as otherwise provided in the~~
23 governing instrument, this [act] governs the management and affairs of the statutory trust and the
24 rights, interests, duties, obligations, and powers of, and the relations among, the trustees,
25 beneficial owners, and other persons.

26 (b) Subject to subsection (c), a governing instrument may contain:

- 27 (1) any provision relating to the management and affairs of the statutory trust;
28 (2) any provision relating to the rights, interests, duties, obligations, and powers
29 of the trustees, beneficial owners, and other persons; and
30 (3) any other provision that is not inconsistent with this [act].

31 (c) The terms of the governing instrument prevail over any provision of this [act] except:

- 32 (1) [Articles] 2, 7, 8 and 9;
33 (2) the exclusion of a prevailingly donative purpose under Section 302;

1 (3) the choice of governing law as provided in Section 303;

2 (4) the standards of conduct for trustees under Section 404, but the governing
3 instrument may prescribe the standards by which good faith, best interests of the statutory trust,
4 and care that a person in a like position would reasonably believe appropriate under similar
5 circumstances are determined, if the standards are not manifestly unreasonable;

6 (5) the limitations provided in Section 405(b) on direction of trustees that are
7 manifestly contrary to the terms of the governing instrument or would constitute a serious breach
8 of trust;

9 (6) the right of a trustee to information under Section 407, but the governing
10 instrument may prescribe the standards for assessing whether information is reasonably related
11 to the trustee's discharge of the trustee's duties as trustee if the standards are not manifestly
12 unreasonable;

13 (7) the prohibition under Section 410 of indemnification, advancement, or
14 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference;

15 (8) the right of a beneficial owner to information under Section 503, but the
16 governing instrument may prescribe the standards for assessing whether information is
17 reasonably related to the beneficial owner's ability to enforce its rights as a beneficial owner if
18 the standards are not manifestly unreasonable;

19 (9) the right of a beneficial owner to bring a derivative action under Section
20 ~~508~~507, but the governing instrument may modify the terms of Section ~~508~~507 to subject the
21 right to additional standards and restrictions including the requirement that beneficial owners
22 owning a specified amount or type of beneficial interest join in bringing the derivative action, if
23 the additional standards and restrictions are not manifestly unreasonable; and

(10) Sections 601, 604, 605, 608, and 609. [For Discussion: Excluded sections of Article 6].

Comment

Principal Sources – Uniform Trust Code §105 (2000); Revised Uniform Limited Liability Company Act §110 (2006); Uniform Limited Partnership Act §110 (2001); Uniform Limited Liability Company Act §103 (1996); Revised Uniform Partnership Act §103 (1997); Uniform Commercial Code §§1-302, 9-603 (2000); Delaware Statutory Trust Act §3806.

Default Rules. Paragraphs (a) and (b) emphasizes that the Uniform Statutory Trust Entity Act is primarily a default statute. Most of the Act’s provisions may be overridden by the terms of the governing instrument.

Mandatory Rules. Paragraph (c) ~~lists~~ schedules the provisions of this act that are not subject to override in the governing instrument of a statutory trust. Most concern the rights of nonparties or public filing and notice requirements. By contrast, with two exceptions all the provisions of this Act concerning the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficial owner may be overridden or at least altered by the terms of the governing instrument. The first exception is the mandatory prohibition of indemnification, advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless indifference in paragraph (c)(7). This exception is familiar trust law. See Restatement (Second) of Trusts §222 (1959); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees §542 (rev. 2d ed. 1993); Uniform Trust Code §1008 (2000). See also John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1121-25 (2004). The Delaware Statutory Trust Act likewise limits the permissible scope of exoneration. See Delaware Statutory Trust Act §3806(e), which provides that the “governing instrument may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing instrument may not eliminate the implied contractual covenant of good faith and fair dealing.” Limitations on permissible exoneration are also familiar ~~business-corporate and alternative~~ entity law. See, e.g., Delaware General Corporation Law §102(b)(7); Delaware Limited Liability Company Act §18-1101.

The second exception is contained in paragraph (c)(5), which makes mandatory the invalidity under Section 405(b) of a direction to a trustee or other person that is manifestly contrary to the terms of the governing instrument or would constitute a serious breach of fiduciary duty. The reference to serious breach of fiduciary duty is designed to exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial owner. For some purposes, trust law distinguishes between serious and not serious breaches of trust. See, e.g., Uniform Trust Code §706(b)(1) (2000); Austin W. Scott, William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed. 2006); Restatement (Second) of Trusts §107 cmt. b (1959). However, the effect of paragraph (c)(5) is limited by paragraph (c)(4), which allows the trustee’s fiduciary duty to be altered by the governing instrument if the alteration is not manifestly unreasonable.

Paragraphs (c)(4), (c)(6), (c)(8), and (c)(9) allow the governing instrument to alter the nature of the trustee's fiduciary obligation, the right of a trustee to information, the right of a beneficial owner to information, and the right of a beneficial owner to bring a derivative action, but only if the alteration is not "manifestly unreasonable." In opting for ~~a~~ the "manifestly unreasonable" standard instead of Delaware's "good faith and fair dealing" formulation, see Delaware Statutory Trust Act §3806(c) and (e), the drafting committee took notice of the use of the term "manifestly unreasonable" in Revised Uniform Limited Liability Company Act §110(d) (2006); Uniform Limited Partnership Act §110(b) (2001), Revised Uniform Partnership Act §103(b) (1997), Uniform Limited Liability Company Act §103(b) (1996), 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).

Because paragraph (c) refers specifically to other sections of the Act, enacting jurisdictions that modify those other sections may also need to modify paragraph (c).

Relationship to Mandatory Rules Under the Uniform Trust Code. Under Section 105 of this act, the law pertaining to common law trusts supplements this act to the extent ~~it that~~ such law is not displaced by this act or the governing instrument. Hence, in an enacting jurisdiction that has also enacted the Uniform Trust Code (UTC), the ~~Code~~ UTC will apply to a statutory trust to the extent that the Code's provisions are not displaced by this act or the governing instrument. However, b-Because paragraph (c) of this section does not include-make Section 105 of this act mandatory, the rules stated in UTC §105 that are mandatory with respect to a common law trust are not mandatory with respect to a statutory trust. The governing instrument of a statutory trust may override or alter any rule other than those scheduled in §103(c) of this act.

_____ To prevent evasion of the UTC's mandatory rules, which enforce public policy limitations on donative transfers, Section 302 of this Act provides that a statutory trust may not have "a prevailingly 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 302.

Registered Investment Companies. The Investment Company Act of 1940 (the "1940 Act") trumps this Act with respect to a statutory trust that registers as an investment company. For such a statutory trust the 1940 Act imposes additional mandatory rules. See, e.g., the Comments to Sections 207 (name of statutory trust), 408 (interested transactions), 410 (indemnification, advancement, and exoneration), 411 (delegation by trustee), and 412 (action by trustees).

SECTION 104. SCOPE OF GOVERNING INSTRUMENT.

(a) Subject to Section 103(c), a 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 ~~Section 309~~[To be updated after series provisions are set];

(4) if and to the extent that voting rights are granted under the governing instrument, include provisions relating to:

- (A) notice of the 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, quorum requirements, or voting in person, by proxy, any form of communication that creates a record, telephone, or video conference, or in any other manner; or
- (E) any other matter with respect to the exercise of the right to vote;

(5) provide for any action to be taken without the vote or approval of any particular trustee or beneficial owner, or any class, group, or series of trustees or beneficial owners, including:

- (A) amendment of the governing instrument;
- (B) accomplishment of a merger, conversion, or reorganization;
- (C) appointment of one or more trustees;
- (D) sale, lease, exchange, transfer, pledge or other disposition of all or any part of the assets of the statutory trust or the assets of any series[To be updated after series

1 | provisions are set]; and

2 | (E) dissolution of the statutory trust;

3 | (6) provide for the present or future creation of more than one statutory trust,
4 | including the creation of a future statutory trust to which all or any part of the assets, liabilities,
5 | profits, or losses of any existing statutory trust may be transferred or exchanged, and for the
6 | conversion of beneficial interests in an existing statutory trust, or series thereof [To be updated
7 | after series provisions are set], into beneficial interests in the separate statutory trust, or series
8 | thereof [To be updated after series provisions are set];

9 | (7) provide for the appointment, election, or engagement of agents or independent
10 | contractors of the statutory trust or delegates of the trustees, or agents, officers, employees,
11 | managers, committees, or other persons that may manage the business and affairs of the statutory
12 | trust, which may have such titles and such relative rights, powers, and duties as the governing
13 | instrument provides;

14 | (8) provide rights to any person, including a person that is not a party to the
15 | governing instrument;

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

22 | (10) provide that a person becomes a beneficial owner, acquires a beneficial
23 | interest, and is bound by the governing instrument if the person complies with the conditions for

1 becoming a beneficial owner set forth in the governing instrument such as payment to the
2 statutory trust or to a previous beneficial owner;

3 | (11) provide that a person may comply under paragraph (910) by a representative
4 authorized by the person orally, in a record, or by conduct;

5 (12) provide that the statutory trust or the trustees, acting for and on behalf of the
6 statutory trust, are deemed to hold beneficial ownership of any income earned on securities held
7 by the statutory trust that are issued by any business entity formed, organized, or existing under
8 the laws of any jurisdiction; and

9 (13) provide for the establishment of record dates for distributions.

10 (b) The governing instrument may include one or more instruments, agreements,
11 declarations, bylaws, or other records and refer to or incorporate any record containing
12 provisions relating to the governance of the affairs of the statutory trust and the conduct of its
13 business.

14 **Comment**

15 **Principal Sources** – Scattered sections of the Delaware and Connecticut Statutory Trust
16 Acts.

17
18 The unusual principal sources citation reflects the drafting committee’s decision to
19 collect in a single section various permissive rules regarding the scope of the governing
20 instrument that are scattered throughout the Delaware and Connecticut Statutory Trust Acts. The
21 main exceptions concern the statement of permissive rules regarding the creation of one or more
22 | series of a statutory trust in Section 309[**To be updated after series provisions are set**], and the
23 permissive rules regarding the allowable remedies for a beneficial owner’s breach in Section
24 501(c).

25
26 By scheduling a nonexhaustive list of provisions that may validly be included in a
27 statutory trust’s governing instrument, this section is the permissive rule analogue to Section
28 103(c), which schedules the mandatory rules that cannot be overridden in the governing
29 instrument. The drafting committee concluded that the demand of third parties and transactional
30 planners to see language that expressly authorizes specific terms justified inclusion of a detailed
31 list in addition to the broad statement of freedom of contract in Sections 103(a)-(b) and 106.

32 | ~~Prior to statutory confirmation, doubts sometimes arose in transactional~~ Statutory confirmation

reduces transaction costs by resolving doubts in practice about ~~about~~ over the permissibility of such provisions. Similar reasoning underlies the provision of a detailed schedule of powers in Uniform Trust Code §816 (2000) in addition to the broad general statement in Uniform Trust Code §815.

SECTION 105. APPLICABILITY OF TRUST LAW. The law of this state pertaining to common-law trusts supplements this [act] except to the extent modified or displaced by this [act] or, subject only to section 103(c), the governing instrument. **[For Discussion: (1)**

Whether this edit is sufficient to address the question from the floor about the nonapplicability of the UTC/common law mandatory rules. (2) Question from the floor about “supplements.”]

Comment

Principal Sources – Uniform Trust Code §106 (2000); Delaware Statutory Trust Act §3809; Connecticut Statutory Trust Act §34-519.

Consistent with the Delaware Statutory Trust Act, the Uniform Statutory Trust Entity Act provides that state trust law, not corporate law, supplements this Act and the terms of the governing instrument. Thus, in an enacting jurisdiction that has also enacted the Uniform Trust Code, the Code will apply to a statutory trust to the extent that the Code’s provisions—including the mandatory rules scheduled in UTC §105—are not displaced by this act or the governing instrument. Under this act, the governing instrument of a statutory trust may override any otherwise applicable rule except for those scheduled in §103(c). For further discussion of why the rules under the UTC that are mandatory with respect to a common law trust are not mandatory with respect to a statutory trust, see the comment to Section 103 under the heading “Relationship to Mandatory Rules Under the Uniform Trust Code.”

In looking to trust law to supply defaults to fill gaps in this act and the governing instrument, the drafting committee was strongly influenced by the revealed preference for trust law among existing users of statutory trusts as evidenced by the popularity of the Delaware Act as compared to the business trust acts (such as those in Arizona, Indiana, Kansas, Mississippi, Montana, Oregon, Tennessee, Washington, and West Virginia) that look to corporate law. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [in progress].

[For Discussion: We received a suggestion from the floor to the effect that in this comment or elsewhere we should schedule important trust law rules that are absorbed by this section—for example, election of remedies. An alternative suggestion was that we draft explicitly on some of those issues, particularly election of remedies and release of liability for trustees. Election of remedies may indeed warrant a section, as it is complicated by the entitization of the trust. Routine breaches of trust by the trustee will

likely cause damage to the trust rather than to an individual beneficiary, hence a suit for redress would be derivative. But a derivative suit is a procedural mechanism unknown in the common law of trusts, and the derivative nature of the suite bears on the available remedies.]

SECTION 106. RULES OF CONSTRUCTION.

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

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

Comment

Principal Sources – Delaware Statutory Trust Act §3825; Connecticut Statutory Trust Act §34-546; Uniform Statute and Rule Construction Act §18 (1995).

Paragraph (a) emphasizes the freedom of contract afforded to transactional planners by the Uniform Statutory Trust Entity Act, which is primarily a default statute.

Paragraph (b) admonishes the courts not to apply to this Act the canon of construction that statutes in derogation of the common law are to be strictly construed. ~~Although Revised Uniform Partnership Act §104 (1997) does not include a similar admonition on the ground that the “principle is now so well established that it is not necessary to so state in the Act,” id. emt., ¶The drafting committee for the Uniform Statutory Trust Entity Act included this admonition because several of this Act’s provisions are designed specifically to reject the application to a statutory trust of one or more common law trust principles. See, e.g., Sections [citations]. Those provisions, which deliberately derogate the common law, should be interpreted in accord with that purpose. Put differently, several provisions of this Act derogate the common law. Those provisions should be interpreted in accord with their purpose.~~

1 [ARTICLE] 2

2 FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

3 SECTION 201. CERTIFICATE OF TRUST.

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

6 (b) A certificate of trust must contain:

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

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

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

11 (4) notice if the trust might have one or more series [To be updated after series
12 provisions are set].

13 [Placeholder Note: This schedule of requirements for the certificate of trust might
14 require revision depending on the outcome of our discussion of the self-settled asset
15 protection trust problem.]
16

17 (c) A certificate of trust may contain any information in addition to that required by
18 subsection (b) which is not inconsistent with this [act].

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

21 (e) If a provision of a trust instrument is inconsistent with the filed certificate of trust, a
22 filed statement of cancellation or change, or filed articles of conversion, reorganization, or
23 merger:

24 (1) the inconsistent provision of the trust instrument prevails as to trustees and
25 beneficial owners; and

(2) the certificate of trust, statement of cancellation, or change or articles of conversion or merger prevails as to a person, other than a trustee or a beneficial owner, which reasonably relies to its detriment on the filed record.

Comment

Principal Sources – Uniform Limited Partnership Act §201 (2001); Delaware Statutory Trust Act §3810; Connecticut Statutory Trust Act §34-503.

Unlike a common law trust, a statutory trust is a creature of statute that requires a filing with the state to come into existence. Filing rules are typical of limited liability entities. Such filing rules serve a notice function, alerting interested parties to creation and existence of a new limited liability juridical entity. See Section 204(b), which entitles any person to a certified copy of a filing made pursuant to this act.

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. (For more on the meaning of “filing,” see Section 204 and the comment thereto.) The certificate of trust provides notice to interested third parties of the existence of the statutory trust and the identification of the statutory trust’s initial agent for service of process. Pursuant to Section 309(b)(2), the certificate of trust also puts third parties on notice if the statutory trust further segregates its assets and liabilities by creating one or more series [To be updated after series provisions are set].

Although formed by making 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. Paragraph (d) provides the rule for determining which prevails in such circumstances. Under paragraph (d)(1), the inconsistent provision of the trust instrument prevails as to with respect to trustees and beneficial owners. Under paragraph (d)(2), the terms of the public filings trust prevail as to with respect to all other parties that reasonably rely on the filing. The public filing controls for a party other than a trustee or beneficial owner because such a party ~~different rule is justified on the theory that a party other than a beneficial owner or trustee is entitled to rely on the public record.~~

Under Section 103(c)(1), this Section is not subject to override by the governing instrument.

SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF TRUST.

(a) To amend its certificate of trust, a statutory trust must deliver to the [Secretary of

State] for filing an amendment, articles of conversion, or articles of merger stating:

(1) the name of the trust;

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

(3) the changes that any amendment makes to the certificate.

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

(1) cause the certificate to be amended; or

(2) if appropriate, deliver to the [Secretary of State] for filing a statement of correction.

(c) A certificate of trust may be amended at any time for any purpose as determined by the trustees.

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

(e) Subject to Section 204(c), an amended or restated certificate is effective when filed by the [Secretary of State].

Comment

Principal Sources – Uniform Limited Partnership Act §202 (2001); Delaware Statutory Trust Act §3810; Connecticut Statutory Trust Act §34-503.

Paragraph (a) provides a mechanism for updating a statutory trust's filed certificate of trust. Paragraph (b) imposes an obligation directly on the trustee rather than on the statutory trust. **[For Discussion: That the obligation is on the trustee, not the trust.]**

Under Section 103(c)(1), this Section is not subject to override by the governing instrument.

SECTION 203. SIGNING OF RECORDS.

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

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

Comment

Principal Sources – Uniform Limited Partnership Act §204 (2001); Delaware Statutory Trust Act §3811; Connecticut Statutory Trust Act §34-504.

Paragraph (b) confirms that the signing of a public record by a trustee is a delegable act.

Under Section 103(c)(1), this Section is not subject to override by the governing instrument.

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

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

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

(c) Except as otherwise provided in Sections 205 and 212, a record delivered to the [Secretary of State] for filing under this [act] may specify an effective time and a delayed effective date. Except as otherwise provided in this [act], a record filed by the [Secretary of State] is effective:

(1) if the record does not specify an effective time or delayed effective date, on

1 the date and at the time the record is filed as evidenced by the [Secretary of State's] endorsement
2 of the date and time on the record;

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

5 (3) if the record specifies a delayed effective date but not an effective time, at
6 12:01 a.m. on the earlier of:

7 (A) the specified date; or

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

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

11 (A) the specified date; or

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

13 **Comment**

14
15 **Principal Sources** – Uniform Limited Partnership Act §206 (2001); Delaware Statutory
16 Trust Act §3812; Connecticut Statutory Trust Act §34-505.

17
18 For a record prepared by a private person to become part of the public record under this
19 Act, (1) someone must put a properly prepared version of the record into the possession of the
20 public official specified in the Act as the appropriate filing officer, and (2) the filing officer must
21 determine that the record complies with the filing requirements of this Act and then officially
22 make the record part of the public record. This Act refers to the first step as “delivery to the
23 [Secretary of State] for filing” and refers to the second step as “filing.” Thus, under this Act
24 “filing” is an official act.

25
26 Under paragraph (a), the caption need only indicate the title of the record—for example,
27 | “Certificate of Trust” or “Statement of Change for Statutory Trust.” Filing officers typically
28 note on a filed record the fact, date, and time of filing. Copies provided by the filing officer
29 under paragraph (a) should contain that notation. This Act does not provide a remedy if the
30 filing officer wrongfully fails or refuses to file a record.

31
32 Paragraph (c) allows most records to have a delayed effective date, up to 90 days after
33 the date the record is filed by the filing officer. A record specifying a longer delay will not be
34 rejected. Instead, under paragraph (c)(3) and (4), the delayed effective date is adjusted by

1 operation of law to the “90th day after the record is filed.” This Act does not require the filing
2 officer to notify anyone of the adjustment.

3
4 Consistent with the existing statutory trust acts, but inconsistent with most corporate
5 codes, this Act makes no provision for collecting a franchise tax. See generally Marcel Kahan &
6 Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205,
7 1218-33 (2001).

8
9 Under Section 103(c)(1), this Section is not subject to override by the governing
10 instrument.

11 12 **SECTION 205. CORRECTING FILED RECORD.**

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

16 (b) A statement of correction under subsection (a) may not state a delayed effective date
17 and must:

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

20 (2) specify the incorrect information and the reason it is incorrect or the manner in
21 which the signing was defective or erroneous; and

22 (3) correct the incorrect information or defective or erroneous signature.

23 (c) When filed by the [Secretary of State], a statement of correction under subsection (a)
24 is effective:

25 (1) except as otherwise provided in paragraph (2), retroactively as of the effective
26 date of the record the statement corrects; or

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

1 **Comment**

2
3 **Principal Source** – Uniform Limited Partnership Act §207 (2001).
4

5 A statement of correction is appropriate only to correct inaccuracies that existed or
6 signatures that were defective “at the time of filing.” A statement of correction may not be used
7 to amend or revise a record that was accurate when filed but has become inaccurate as a result of
8 subsequent events. **[For Discussion: An equivalent provision for article 8.]**
9

10 Under paragraph (c), a statement of correction “relates back” by way of retroactive
11 application except against persons that have relied on the uncorrected record and would be
12 adversely affected if the correction related back.
13

14 Under Section 103(c)(1), this Section is not subject to override by the governing
15 instrument.
16

17 **SECTION 206. CERTIFICATE OF EXISTENCE-OR-REGISTRATION.**

18 (a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish
19 to the person making the request a certificate of existence for a statutory trust if the records filed
20 in the [office of the Secretary of State] show that the [Secretary of State] has filed a certificate of
21 trust and has not filed a statement of cancellation. A certificate of existence must state:

22 (1) the name of the trust;

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

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

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

27 and

28 (5) whether the most recent annual report of the trust required by Section 215 has
29 been filed by the [Secretary of State].

30 (b) Subject to any qualification stated in the certificate, a certificate of existence ~~or~~
31 ~~registration~~ issued by the [Secretary of State] may be relied upon as conclusive evidence that the

1 statutory trust is in existence.

2 **Comment**

3
4 **Principal Source** – Uniform Limited Partnership Act §209 (2001).

5
6 A certificate of existence can reveal only information present in the public record. Under
7 this Act significant information bearing on the status of a statutory trust may be outside the
8 public record. Section 806 provides for the issuance of a certificate of registration for a qualified
9 foreign statutory trust.

10
11 ~~Section 204(b) provides a mechanism for obtaining a certified copy of a certificate of~~
12 ~~trust even if the trust has been terminated.~~

13
14 Under Section 103(c)(1), this Section is not subject to override by the governing
15 instrument.

16
17 **SECTION 207. NAME OF STATUTORY TRUST.**

18 (a) Unless authorized by the [Secretary of State] under subsection (c), the name of a
19 statutory trust must be distinguishable in the records of the [Secretary of State] from:

20 (1) the name of any person, other than an individual, that is already incorporated,
21 organized, or authorized to transact business in this state; and

22 (2) any name reserved under Section 210 [or other state laws allowing the
23 reservation or registration of business names, including fictitious or assumed name statutes].

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

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

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

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

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

(A) has merged with the applicant;

(B) has been converted into the applicant; or

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

(d) Subject to Section 807, this section applies to any foreign statutory trust transacting business in this state, having a certificate of qualification to transact business in this state, or applying for a certificate of qualification.

Comment

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

The drafting committee opted not to require that the name of a statutory trust contain a traditional limited liability appellation. Such a requirement would be inconsistent with current practice under the Delaware Act, though the drafting committee contemplated that enacting jurisdictions with a strong policy regarding names of limited liability entities might modify this Section accordingly. Moreover, 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). See also

1 Rule 35d-1, 17 C.F.R. §270.35d-1 (listing types of names that have been deemed “materially
2 deceptive or misleading”).

3
4 Under Section 103(c)(1), this Section is not subject to override by the governing
5 instrument.
6

7 **SECTION 208. RESERVATION OF NAME.**

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

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

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

14 (3) a foreign statutory trust intending to obtain a certificate of qualification to
15 transact business in this state and adopt the name;

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

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

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

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

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

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

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

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

11 (e) Subject to Section 204(c), a transfer or termination under subsection (d) is effective
12 when the [Secretary of State] files the notice of transfer.

13 **Comment**

14 **Principal source** – Uniform Limited Partnership Act §109 (2001).

15
16 Under Section 103(c)(1), this Section is not subject to override by the governing
17 instrument.

18 19 **SECTION 209. AGENT FOR SERVICE OF PROCESS.**

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

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

25 **Comment**

26

1 **Principal Sources** – Uniform Limited Partnership Act §114 (2001); Delaware Statutory
2 Trust Act §3804; Connecticut Statutory Trust Act §34-507.

3
4 Under Section 201(a)(3), the initial designation of a statutory trust’s agent for service of
5 process is made in the original certificate of trust. Under Section ~~702~~802(a)(3), the initial
6 designation of a foreign statutory trust’s agent for service of process is made in the original
7 application for a certificate of qualification. The initial designation may be changed pursuant to
8 a statement of change under Section ~~214~~210, by an amendment to the certificate of trust under
9 Section 202, or by an annual report under Section ~~214~~213(e). [Placeholder: Cross-reference to
10 article 7?]

11
12 Under Section 103(c)(1), this Section is not subject to override by the governing
13 instrument.

14
15 **SECTION 210. CHANGE OF DESIGNATED OFFICE OR AGENT FOR**
16 **SERVICE OF PROCESS.**

17 (a) A statutory trust or qualified foreign statutory trust may change its agent for service of
18 process, the address of its agent for service of process, or its designated office by delivering to
19 the [Secretary of State] for filing a statement of change containing:

- 20 (1) the name of the trust;
- 21 (2) the street and mailing addresses of the current designated office of the trust;
- 22 (3) if the designated office is to be changed, the street and mailing addresses of
23 the new designated office;
- 24 (4) the name and street and mailing addresses of the current agent of the trust for
25 service of process; and
- 26 (5) if the current agent for service of process or an address of the agent is to be
27 changed, the new information.

28 (b) A statement of change is effective as provided in Section 204(c).

29 **Comment**

30
31 **Principal Source** – Uniform Limited Partnership Act §115 (2001).

1
2 Paragraph (a) uses “may” rather than “must” because a statutory trust may also change
3 the information by an amendment to its certificate of trust under Section 202 and a qualified
4 foreign statutory trust may also change the information by an amendment to its certificate of
5 qualification under Section 805. Further, if the information currently in the public record is not
6 inaccurate, a statutory trust or qualified foreign statutory trust may change the information in an
7 annual report under Section 213(e).

8
9 Under Section 103(c)(1), this Section is not subject to override by the governing
10 instrument.
11

12 **SECTION 211. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

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

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

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

23 **Comment**

24
25 **Principal Source** – Uniform Limited Partnership Act §116 (2001).
26

27 This section provides the exclusive means for an agent to resign without cooperation
28 from the statutory trust or qualified foreign statutory trust and the only way the agent, rather than
29 the statutory trust or foreign statutory trust, can effect a change in the public record. Unlike most
30 records authorized or required to be delivered to the filing officer for filing under this Act, a
31 statement of resignation may not provide for a delayed effective date. Paragraph (c) mandates
32 the effective date. An effective date included in a statement of resignation is disregarded. To
33 satisfy Section 212(a), the statutory trust or qualified foreign statutory trust must designate a new
34 agent for service of process before the effective date. If the statutory trust or foreign statutory

1 | trust fails to do so, under Section ~~214~~212 service on the statutory trust or foreign statutory trust
2 may be made on the Secretary of State.
3

4 Under Section 103(c)(1), this Section is not subject to override by the governing
5 instrument.
6

7 **SECTION 212. SERVICE OF PROCESS.**

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

11 (b) If a statutory trust or qualified foreign statutory trust does not appoint or maintain an
12 agent for service of process in this state or the agent for service of process cannot with
13 reasonable diligence be found at the agent's address on file with the [Secretary of State], the
14 [Secretary of State] is an agent of the trust for service of process.

15 (c) Service of any process, notice, or demand on the [Secretary of State] under subsection
16 (b) may be made by delivering to and leaving with the [Secretary of State] two copies of the
17 process, notice, or demand. If a process, notice, or demand is served on the [Secretary of State],
18 the [Secretary of State] shall forward one of the copies by registered or certified mail, return
19 receipt requested, to the statutory trust or qualified foreign statutory trust at its designated office.

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

21 (1) the date the agent for the statutory trust or qualified foreign statutory trust
22 receives the process, notice, or demand;

23 (2) the date shown on the return receipt, if signed on behalf of the trust; or

24 (3) five days after the process, notice, or demand is deposited with the United
25 States Postal Service by the [Secretary of State], if correctly addressed and with sufficient
26 postage.

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

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

5 **Comment**

6
7 **Principal Source** – Uniform Limited Partnership Act §117 (2001).

8
9 Paragraph (f) confirms that the authority of the Secretary of State to accept process under
10 a state long-arm statute exists independently of paragraphs (b) through (e) of this Section.

11
12 Under Section 103(c)(1), this Section is not subject to override by the governing
13 instrument.
14

15 **SECTION 213. ANNUAL REPORT FOR [SECRETARY OF STATE].**

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

18 (1) in the case of a statutory trust:

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

20 (B) the name and street and mailing addresses of its agent for service of
21 process; or

22 (2) in the case of a qualified foreign statutory trust:

23 (A) any alternate name adopted under Section 706(a);

24 (B) the name of the state or other jurisdiction under whose law the trust is
25 formed; and

26 (C) the street and mailing addresses of its principal office and, if the laws
27 of the jurisdiction under which the trust is formed require it to maintain an office in that
28 jurisdiction, the street and mailing addresses of that office; and

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

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

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

(d) If an annual report does not contain the information required in subsection (a), the [Secretary of State] shall promptly notify the reporting trust and return the report to it for correction. If the report is corrected to contain the information required in subsection (a) and delivered to the [Secretary of State] within 30 days after the date of the notice, it is timely delivered.

(e) If an annual report under this section contains an address of a designated office or the name or address of an agent for service of process which differs from the information shown in the records of the [Secretary of State] immediately before the filing, the differing information in the annual report is considered a statement of change under Section ~~242~~210.

Comment

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

A statutory trust that fails to comply with this section is subject to administrative dissolution. See Section 701.

Under Section 103(c)(1), this Section ~~would not be~~ is not subject to override by the governing instrument.

1 [ARTICLE] 3

2 AUTHORIZATION; GOVERNING LAW; DURATION; POWERS

3 SECTION 301. STATUTORY TRUST AUTHORIZED. A statutory trust is an entity
4 separate from its trustees and beneficial owners.

5 Comment

6
7 Principal Sources – Delaware Statutory Trust Act §§3810; Connecticut Statutory Trust
8 Act §§34-502.

9
10 Because this Section implements an entity conception of the statutory trust, it confirms
11 that any prior judicial decision that holds that a common law business trust violates the state’s
12 corporate law, trust law, or public policy is not applicable to a statutory trust created under this
13 Act. Examples of such decisions, which reflect the now outmoded concern that a business trust
14 could be used to evade regulatory limitations on the corporate form, are collected in Robert H.
15 Sitkoff, The Rise of the Statutory Business Trust [in progress].
16

17 SECTION 302. PERMISSIBLE PURPOSES. A statutory trust may have any lawful
18 purpose except a prevailingly donative purpose.

19 Comment

20
21 Principal Sources – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
22 Act §34-502a.

23
24 ~~This Section provides that~~ Under this Section, a statutory trust may be formed for “any
25 lawful purpose except for a prevailingly donative purpose.” Thus, in addition to use in a
26 commercial transaction, a statutory trust may be used in a custodial or other context that need
27 might not be for profit. See Section 307. The limitation to “lawful” activity addresses the
28 concern that some states limit the type of organizations that may be used in regulated industries
29 such as banking and insurance.
30

31 The exclusion of “a prevailingly donative purpose” addresses the concern that a statutory
32 trust might be used in an estate planning or other donative context to evade public policy
33 limitations on donative transfers and common law trusts. See, e.g., Uniform Trust Code §105
34 (2000); John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105
35 (2004). The word “prevailingly” was included to account for the possibility that a donative
36 transfer might be structured to look otherwise in form but still be a donative transfer in
37 substance.
38

39 By prohibiting a statutory trust from having “a prevailingly donative purpose,” the

1 drafting committee avoided the necessity of designing a comprehensive schedule of mandatory
2 rules applicable only to statutory trusts with such a purpose, a task made more difficult by the
3 increasing differentiation among the states on these matters, particularly with respect to the
4 rights of the settlor's creditors in a self-settled trust and the continued application of the Rule
5 Against Perpetuities to interests held in trust. See Robert H. Sitkoff & Max M. Schanzenbach,
6 Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes,
7 115 Yale L.J. 356 (2005).

8
9 Examples of mandatory rules applicable to common law trusts that drafters might
10 otherwise try to avoid by using a statutory trust include the following:

- 11 • the duty of a trustee to act in good faith and in accordance with the terms and
12 purposes of the trust and the interests of the beneficiaries;
- 13 • the requirement that a trust and its terms be for the benefit of one or more
14 ascertainable beneficiaries, and that the trust have a purpose that is lawful, not
15 contrary to public policy, and possible to achieve;
- 16 • the power of the court to modify or terminate a trust;
- 17 • the effect of a spendthrift provision and the rights of the settlor's and the
18 beneficiary's creditors and assignees to reach the assets of a trust;
- 19 • the power of the court to adjust a trustee's compensation specified in the terms of
20 the trust which is unreasonably low or high;
- 21 • the power of the court to remove a trustee for a serious breach of trust;
- 22 • the duty of the trustee to give information and make reports concerning the
23 administration of the trust to the beneficiary;
- 24 • the effect of an exoneration clause that purports to limit or eliminate the duties or
25 liabilities of a trustee to a beneficiary;
- 26 • the rights of a party, other than a trustee or beneficiary, that transacts with the
27 trustee in the trustee's capacity as such;
- 28 • the rules against perpetuities, accumulations of income, and suspension of the
29 power of alienation; and
- 30 • the power of the court to take such action and exercise such jurisdiction as may be
31 necessary in the interests of justice.

32
33 Most of the foregoing rules are ~~scheduled~~ referenced in Uniform Trust Code §105 (2000), the
34 Code's schedule of mandatory rules. For discussion of why the rules that under the UTC that are
35 mandatory with respect to a common law trust are not mandatory with respect to a statutory
36 trust, see the comments to Sections 103 and 105, ~~under the heading "Relationship to Mandatory~~
37 ~~Rules Under the Uniform Trust Code."~~

38
39 The drafting committee declined the suggestion to exclude statutory trusts from having a
40 charitable purpose on the ground that a statutory trust with a charitable purpose would be
41 covered by existing regulatory law applicable to charitable entities. See Marion R. Fremont-
42 Smith, Governing Nonprofit Organizations: Federal and State Law and Regulation 187-427
43 (2004).

44
45 Under Section 103(c)(2), this Section is not subject to override by the governing

statutory trust. Accordingly, this section 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 beneficial owner of a common law business trust had a say in the administration of the trust or the right to remove and replace the trustees, the beneficial owner 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. For discussion of a beneficial owner’s limited liability under the Delaware Statutory Trust Act, see Wendell Fenton & Eric A. Mazie, *Delaware Statutory Trusts*, in 2 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* §19.3 (3d ed. 2005 Supp.).

SECTION 304. RIGHTS OF BENEFICIAL OWNER AND TRUSTEE IN TRUST PROPERTY.

(a) A beneficial owner's beneficial interest in the statutory trust is personal property regardless of the nature of the property of the trust. A beneficial owner has no interest in specific property of the trust.

(b) A creditor of a beneficial owner or of a trustee does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the statutory trust.

Comment

Principal Sources - Delaware Statutory Trust Act §3805; Connecticut Statutory Trust Act §34-516; Uniform Trust Code §507 (2000); Revised Uniform Partnership Act §203 (1994); Uniform Limited Liability Company Act §501 (1996); Uniform Limited Partnership Act §701 (2001).

Paragraph (b) implements the concept that a statutory trust is an entity separate from its trustee and beneficial owners by confirming that a creditor of a trustee or a beneficial owner has no recourse against the property of the statutory trust. With respect to trustees, the rule of this paragraph is familiar from the operation of common law trusts. See Uniform Trust Code ~~Restatement~~ §507 (2000); Restatement (Third) of Trusts §42 cmt. c (2003); Restatement (Second) of Trusts §308 (1959). The protection afforded by this section is also consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. See 11 U.S.C. §541(d). With respect to beneficial owners, for discussion of the parallel provision in the Delaware Statutory Trust Act, see Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A.

Finkelstein, *The Delaware Law of Corporations & Business Organizations* §19.4, at 19-9 – 19-10 (3d ed. 2005 Supp.). For a general discussion of asset partitioning rules in organizational law, see Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *Yale L.J.* 387 (2000); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 *N.Y.U. L. Rev.* 434 (1998). See also Henry Hansmann, Reinier Kraakman, & Richard Squire, *Law and the Rise of the Firm*, 119 *Harv. L. Rev.* 1333 (2006).

SECTION 305. GOVERNING LAW. The law of this state governs:

(1) the internal affairs of a statutory trust;

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

(3) the liability of a series of a statutory trust with respect to the statutory trust and other series thereof [To be updated after series provisions are set].

Comment

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

Under paragraph (1) the internal affairs of a statutory trust formed under this act are governed by the laws of this state no matter in which state the statutory trust operates. Although the term “internal affairs” may be indeterminate at its edges, the concept certainly includes interpretation and enforcement of the governing instrument and relations among the trustees, beneficial owners, and the statutory trust. See generally Restatement (Second) of Conflict of Laws §302 cmt. a₁ (1971) (defining “internal affairs” with reference to corporate law as “the relations inter se of the corporation, its shareholders, directors, officers or agents”).

Paragraph (2) supports Sections 303- and 304 by confirming that the liability of a beneficial owner or a trustee for the debts, obligations, or other liabilities of the statutory trust is governed by the law of this state. This paragraph is stated separately from Paragraph (1) because the liabilities of a beneficial owner or trustee to third parties is arguably not an internal affair. See, e.g., Restatement (Second) of Conflict of Laws §307 (1971) (treating shareholders' liability separately from the internal affairs doctrine).

Section 801(a) states rules for qualified foreign statutory trusts that parallel and are analogous in scope to those of this section.

Under Section 103(c)(3), this Section is not subject to override by the governing instrument.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11

3

4
5
6

7
8
9

10
1112
134
5

17
18
19
20
21
22
23
24
25
26
27
28

30
31
32
33
34
35

1 | ~~inasmuch as~~because a statutory trust under this Act may not have a prevaillingly donative purpose.
2 | Instead, the drafting committee contemplated that pursuant to Section 104(b)(9) the governing
3 | instrument would provide for termination of the statutory trust or modification of the governing
4 | instrument if such provisions are desirable.

5 |
6 | Paragraph (c) confirms that the rule of partnership law under which a partnership is
7 | dissolved upon the death or incapacity of one of the partners does not apply to a statutory trust or
8 | any series thereof [To be updated after series provisions are set].

9 |
10 | Paragraph (d) overrides the application to a statutory trust under Section 105 of the
11 | common law rule of merger whereby the legal and equitable title to the trust property merge and
12 | the trust terminates if the same person is the sole trustee and sole beneficiary. See Restatement
13 | (Third) of Trusts §69 (2003); Restatement (Second) of Trusts §341 (1959); Comment, The
14 | Doctrine of Merger as Applied to Commercial Trusts, 29 Yale L.J. 97 (1919).
15 |

16 | **SECTION 307. POWER TO SUE AND BE SUED.**

17 | (a) A statutory trust has the power to sue and be sued in its own name.

18 | (b) Except as otherwise provided in ~~Section 309~~[article] 3A [To be updated after the
19 | series provisions are set], the property of a statutory trust is subject to attachment and execution
20 | for a debt, obligation, or other liability of the trust.

21 | **Comment**

22 |
23 | **Principal Sources** – Delaware Statutory Trust Act §§3803-3805; Connecticut Statutory
24 | Trust Act §§34-518, 34-523; Uniform Limited Partnership Act §303 (2001).
25 |

26 | Paragraph (a) implements the concept that a statutory trust is an ~~separate juridical~~ entity
27 | separate from the trustee and beneficial owner by confirming that a statutory trust has the power
28 | to sue and be sued in its own name.
29 |

30 | Paragraph (b) addresses the attachment and execution of a statutory trust's property
31 | ~~unless the~~subject to the possibility that the statutory trust has formed one or more series under
32 | Section 309 [To be updated after series provisions are set].
33 |

34 | **SECTION 308. POWER TO HOLD PROPERTY; TITLE TO TRUST**

35 | **PROPERTY.** A statutory trust has the power to hold or take title to property its own name, or
36 | in the name of a trustee in the trustee's capacity as trustee, whether in an active, passive, or

custodial capacity.

Comment

Principal Source – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust Act §34-502a.

This Section implements the concept that a statutory trust is an entity separate from its trustee and beneficial owners by confirming that a statutory trust may transact over property in its own name. The property of a common law trust, by contrast, must be held in the name of the trustee as such.

However, this section also permits the statutory trust to take title to property in the name of the trustee in the trustee's capacity as such even though the statutory trust is an unjuridical entity separate from the trustee and beneficial owner that can hold property in its the name of the trustown name. The drafting committee reasoned that this provision would be useful for a statutory trust that has dealings in a state that has not provided for a statutory trust entity, because pProperty ownership by a trustee in the trustee's capacity as such is familiar from the use of common law trusts. To police the boundary of the trustee's personal assets and the assets of the trust, the common law imposes on the trustee duties to earmark trust property and not to commingle it with the trustee's own. See Uniform Trust Code §810 (2000); Restatement (Third) of Trusts §84 (T.D. No. 4, 20052007); Restatement (Second) of Trusts §179 (1959). The drafting committee contemplated that under appropriate circumstances Section 404(b) would be read to require similar conduct by a trustee of a statutory trust that takes title to property of the statutory trust in the name of the trustee in the trustee's capacity as such.

1 [Article] 3A

2 SERIES TRUSTS

3
4
5
6 INITIAL ISSUES FOR DISCUSSION

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

21
22 TENTATIVE OUTLINE OF SECTIONS WITH SUGGESTED CONTENT
23

24
25 **SECTION ~~309~~301A. SERIES OF STATUTORY TRUST.**

26 (a) The governing instrument may:

27 (1) provide for classes, groups, or series of trustees, beneficial owners, or
28 beneficial interests, having such relative rights, powers, and duties as the governing instrument
29 may provide, and provide for the creation of additional classes, groups, or series of trustees,
30 beneficial owners, or beneficial interests, having such relative rights, powers, and duties as may
31 be established, including rights, powers, and duties senior or subordinate to existing classes,
32 groups or series of trustees, beneficial owners, or beneficial interests;

33 (2) provide for designated series of trustees, beneficial owners, or beneficial
34 interests having separate rights, powers, or duties with respect to profits and losses associated
35 with specified property or obligations, and permit the series to have a separate business purpose

1 or investment objective; and

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

5 **Comment**

6
7 **Principal Sources** – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust
8 Act §34-518.

9
10 This section confirms that a statutory trust may be organized with one or more series.
11 The organization of a master statutory trust with several series is particularly common among
12 statutory trusts that are registered investment companies under the Investment Company Act of
13 1940, as amended, 15 U.S.C. Sections 80a-1 et seq. (the “1940 Act”). Rule 18f-2 under the
14 1940 Act permits an investment company to have multiple series, provided that any matter
15 required by the 1940 Act or other applicable law to be submitted to the holders of the
16 outstanding voting securities of a series company shall not be deemed to have been effectively
17 acted upon unless approved by the holders of a majority of the outstanding voting securities of
18 each series of stock affected by such matter. Rule 18f-2 also specifies certain instances where
19 the vote is required by all of the security holders of the investment company and other instances
20 where only the security holders of a series are required to vote.

21
22
23 **SECTION 302A. SERIES NOT SEPARATE ENTITY.**

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

29 [The alternative, which is common in LLC statutes with series provisions, is separate
30 entity treatment. See, for example, the Illinois LLC Act (805 ILCS 180/37-40(b)): “A series
31 with limited liability shall be treated as a separate entity to the extent set forth in the articles of
32 organization. Each series with limited liability may, in its own name, contract, hold title to

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

8 Comment

9 Principal Source –

10 [Assuming a series is not a separate entity, the next question is whether to make this
11 section mandatory. Allowing a separate entity series—that is, making this section
12 default—would require considerable additional statutory infrastructure.]

13 SECTION 303A. NAME OF SERIES.

14 The name of each series must contain the entire name of the statutory trust and must be
15 distinguishable from the names of the other series of the trust. [For discussion: Should we
16 have a reservation of name procedure for series on the model of Section 208 for statutory
17 trusts? And how does this section relate to the (probable) lack of entity status for each
18 series?]

19 Comment

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

21 [Commentary here.]

22 SECTION 304A. APPORTIONMENT AMONG SERIES.

23 [(a) Default rule to the effect that each series is charged fully for the expenses (including
24 25
26 27
28 29
30 31

1 taxes?) traceable to each series.]

2 [(b) Default rule to the effect that each series shares pro rata (how is that computed?) in
3 the general expenses of the trust (e.g., trustee commissions, filing fees, etc.).]

4 **Comment**

5
6 **Principal Source –**

7
8 **[Commentary here.]**
9

10 **SECTION 305A. LIABILITY OF SERIES. [For Discussion: Should this section**
11 **appear earlier?]**

12 (b) If the governing instrument of a statutory trust creates one or more series as provided
13 in ~~subsection (a)~~ section 301A, a debt, obligation, or other liability incurred, contracted for, or
14 otherwise existing with respect to a particular series is enforceable against the assets of the series
15 only, and not against the assets of the trust generally or any other series thereof, and none of the
16 debts, obligations, or other liabilities incurred, contracted for, or otherwise existing with respect
17 to the trust generally or any other series thereof is enforceable against the assets of the series if:

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

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

Comment

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

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

SECTION 306A. [CAPTION] [For Discussion: What would be an appropriate caption?].

(e) If a statutory trust is a registered investment company under the Investment Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [and any regulations issued thereunder,] any class, group, or series of beneficial interests established by the governing instrument of the trust is a class, group, or series preferred as to distribution of assets or payment of dividends over all other classes, groups, or series in respect to assets specifically allocated to the class, group, or series under Section 18, or any amendment or successor provision, of the Investment Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [and any regulations issued thereunder,].

Comment

Principal Sources – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust

1 Act §34-518.

2
3 ~~Paragraph (e)~~ The section addresses Section 18 of the 1940 Act, which governs the capital
4 structure of an investment company. The 1940 Act was intended to prevent inequitable or
5 discriminatory provisions that fail to protect the preferences and privileges of the holders of
6 shares and excessive borrowing or issuance of senior securities (where there are preferences of
7 rights among classes) that expose the fund and its shareholders to additional risk. Accordingly,
8 Section 18 defines and places restrictions on “senior securities” while at the same time allowing
9 segregated pools of assets (i.e., separate funds or series) to be created under a single trust, and
10 separate classes of shares representing interests in the same pool of assets with certain limited
11 instances where there are different voting rights or dividend preferences.
12

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

14 **[For Discussion: Should series dissolution follow the template of Article 7? And**
15 **should Article 7 be modified given the validation of series trusts? Our prior attempt at a**
16 **Delaware Act-based series dissolution provision follows.]**

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

20 (1) The dissolution, winding up, liquidation, or termination of any series does not
21 affect the limitation of liability with respect to a series established in accordance with Section
22 304(d)[requires updating].

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

26 (3) Upon dissolution of a series of a statutory trust, the persons that under the
27 governing instrument of the statutory trust are responsible for winding up the series’s affairs, in
28 the name of the statutory trust and for and on behalf of the statutory trust and the series, may take
29 all actions with respect to the series as are permitted under Section 604(a)[now]Article] 7] and

1 shall provide for the claims and obligations of the series and distribute the assets of the series as
2 provided Section 604(b) [now]Article] 7].

3 (b) Any person, including a trustee, that under the governing instrument is responsible for
4 winding up the affairs of a series under subsection (a) which has complied with this section is
5 not liable to the claimants of the dissolved series by reason of the person's actions in winding up
6 the series.

7 Comment

8 Principal Source – Delaware Statutory Trust Act §3808.

9
10 [Commentary here.]
11

12 SECTION 308A. FOREIGN SERIES TRUSTS.

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

20
21 [Here is the foreign series provision in the Illinois LLC Act (805 ILCS 180/37-40(o)):

22 If a foreign limited liability company, as permitted in the jurisdiction of its organization, has
23 established a series having separate rights, powers or duties and has limited the liabilities of such
24 series so that the debts, liabilities and obligations incurred, contracted for or otherwise existing
25 with respect to a particular series are enforceable against the assets of such series only, and not
26 against the assets of the limited liability company generally or any other series thereof, or so that
27 the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with
28 respect to the limited liability company generally or any other series thereof are not enforceable
29 against the assets of such series, then the limited liability company, on behalf of itself or any of
30 its series, or any of its series on their own behalf may register to do business in the State in
31 accordance with Section 45-5 of this Act. The limitation of liability shall be so stated on the
32 application for admission as a foreign limited liability company and a certificate of designation
33 shall be filed for each series being registered to do business in the State by the limited liability
34 company. Unless otherwise provided in the operating agreement, the debts, liabilities and
35 obligations incurred, contracted for or otherwise existing with respect to a particular series of
36 such a foreign limited liability company shall be enforceable against the assets of such series

1 only, and not against the assets of the foreign limited liability company generally or any other
2 series thereof and none of the debts, liabilities, obligations and expenses incurred, contracted for
3 or otherwise existing with respect to such a foreign limited liability company generally or any
4 other series thereof shall be enforceable against the assets of such series.]

5
6 **Comment**

7 **Principal Source – ???.**

8
9 **[Commentary here.]**
10

11 **SECTION 309A. [CATCH-ALL].**

12 Subject to the provisions of this [article], the provisions of this act that are generally
13 applicable to a statutory trust, trustee, or beneficial owner are applicable to each series with
14 respect to the operation of such series. [For discussion: If the series is not a separate entity,
15 does the rule stated in this section give the right outcome? Might this section lead to entity-
16 like outcomes such as requiring separate votes of the shareholders of each series? If so,
17 should we retain this section but add to this article additional provisions overriding
18 generally applicable sections elsewhere in the act.]

19 **Comment**
20

21 **Principal Source – 805 ILCS 180/37-40(j)**
22

1 [ARTICLE 4]

2 TRUSTEES AND TRUST MANAGEMENT

3 [For Discussion: Article 4 was heavily revised after the Spring 2007 Salt Lake City
4 meeting, before the summer reading. The question thus arises, do these revisions call for a
5 reordering of the sections of article 4?]
6

7 **SECTION 401. MANAGEMENT OF STATUTORY TRUST.** The business and
8 affairs of a statutory trust must be managed by or under the authority of its trustees.

9 **Comment**

10 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
11 Act §34-517; Uniform Limited Partnership Act §105 (2001); Delaware General Corporation Law
12 §141; Revised Model Business Corporation Act §8.01 (2002).
13

14 Section 102(1716) defines trustee as a person designated as such in accordance with the
15 governing instrument or applicable law. Section 104(b)(5)(C) confirms that the governing
16 instrument may provide for trustee appointment. However, because no provision in this Act
17 provides default rules for trustee appointment, if the governing instrument does not provide for
18 trustee appointment, then under Section 105 the applicable law is the state's law pertaining to
19 trustee appointment in common law trusts. For treatment of the default rules of trustee
20 appointment, removal, and succession in common law trusts, see Restatement (Third) of Trusts
21 §§31-37 (2003); Uniform Trust Code §§701-02, 704-06 (2000); Restatement (Second) of Trusts
22 §§101, 106-08 (1959).
23

24 **SECTION 402. TRUSTEE POWERS.** A trustee may exercise:

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

29 **Comment**

30 **Principal Source** –Uniform Trust Code §815 (2000).
31

32 This section is intended to grant trustees the broadest possible powers, ~~but to be exercised~~
33 ~~always in accordance with the duties of the trustee and any limitations stated in the terms of the~~
34 ~~trust.~~ Hence, paragraph (a) overrides the application to a statutory trust under Section 105 of the

1 outmoded common law rule that a trustee has only those powers granted by the trust instrument.
2 See Uniform Trust Code §815 (2000); Restatement (Third) of Trusts §85 cmt. a (~~T.D. No. 4,~~
3 ~~2005~~2007).
4

5 However, the existence of a power, regardless of its source, -does not speak to the
6 question whether ~~in a particular case~~ the exercise of that power in a particular case is consistent
7 with the trustee's fiduciary obligation ~~to exercise that power~~. The trustee's exercise of the broad
8 powers conferred by this section is always subject to the trustee's fiduciary obligations.— See
9 Uniform Trust Code §815 cmt. (2000); Restatement (Third) of Trusts §§70, 86 (~~T.D. No. 4,~~
10 ~~2005~~2007); John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale L.J. 625,
11 640-43 (1995).
12

13 **SECTION 403. PROTECTION OF PERSON DEALING WITH TRUSTEE.**

14 (a) A person, other than a beneficial owner, that in good faith assists a trustee, or that in
15 good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or
16 improperly exercising the trustee's power is protected from liability as if the trustee properly
17 exercised the power.

18 (b) A person, other than a beneficial owner, that in good faith deals with a trustee is not
19 required to inquire into the extent of a trustee's power or the propriety of its exercise.

20 (c) A person that in good faith delivers assets to a trustee need not ensure their proper
21 application.

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

26 **Comment**

27 **Principal Source** – Uniform Trust Code §1012 (2000).
28

29 Paragraph (a) protects two different classes of persons: (1) a person other than a
30 beneficial owner that assists a trustee with a transaction, and (2) a person other than a beneficial
31 owner that deals with the trustee for value. As long as the assistance was provided or the

1 transaction was entered into in good faith and without knowledge that the trustee was exceeding
2 or improperly exercising the trustee's powers, a third person in either category is protected in the
3 transaction ~~even if the trustee was exceeding or improperly exercising the power.~~
4

5 Paragraph (b) confirms that a third party that is acting in good faith is not charged with a
6 duty to inquire into the extent of a trustee's power or the propriety of its exercise. The third
7 party may assume that the trustee has the necessary power. ~~Thus, p~~Paragraph (b) therefore
8 overrides the application to a statutory trust under Section 105 of the common law rule that a
9 third party is charged with constructive notice of the trust instrument and its contents. See
10 George G. Bogert & George T. Bogert, The Law of Trusts and Trustees §897 (Rev. 2d ed. 1995);
11 4 Austin W. Scott & William F. Fratcher, The Law of Trusts Section §297 (4th ed. 1989).
12

13 Paragraph (c) protects any person, including a beneficial owner, that in good faith
14 delivers property to a trustee. The standard of protection in Restatement (Second) of Trusts §321
15 (1959) is phrased differently, but the result is similar. Under the Restatement (Second) of Trusts,
16 the person delivering property to a trustee is liable if at the time of the delivery the person had
17 notice that the trustee was misapplying or intending to misapply the property.
18

19 Paragraph (d) extends the protections afforded by this section to assistance provided to or
20 dealings for value with a former trustee. The third party is protected as if the former trustee still
21 held the office if the third party acted in good faith.
22

23 [For Discussion: Whether to indicate that “good faith” in this section is a trust law
24 term of art, and that in interpretation we contemplated resort to trust law precedent
25 (including the UTC section from which this section derives). Contrast the next section,
26 which uses “good faith” in a corporate formulation, and for that reason should probably be
27 interpreted in view of corporate precedents.]
28
29

30 **SECTION 404. STANDARDS OF CONDUCT FOR TRUSTEES.**

31 (a) In discharging the duties of trusteeship, a trustee shall act in good faith and in a
32 manner that the trustee reasonably believes to be in the best interests of the statutory trust.

33 (b) A trustee shall discharge its duties with the care that a person similarly situated would
34 reasonably believe appropriate under similar circumstances.

35 **Comment**

36 **Principal Source** – Revised Model Business Corporation Act §8.30 (2002).

37 To police the exercise of the trustee's broad powers under Section 402, this section
38 subjects the trustee to fiduciary duties of loyalty (paragraph (a)) and care (paragraph (b)) akin to
39 those of a corporate director.

1
2 Under Section 103(c), the trustee's standards of conduct under this section are mandatory
3 rules that are not subject to override by the governing instrument. However, the governing
4 instrument may prescribe the standards by which "good faith," "best interests of the statutory
5 trust," and "care that a person in a like position would reasonable believe appropriate under
6 similar circumstances" are determined provided that the standards are not "manifestly
7 unreasonable." ~~See also~~ Compare Delaware Statutory Trust Act §3806(c), which provides that a
8 trustee's fiduciary duties "may be expanded or restricted or eliminated by provisions in the
9 governing instrument; provided, that the governing instrument may not eliminate the implied
10 contractual covenant of good faith and fair dealing," and §3806(e), which provides that a
11 "governing instrument may provide for the limitation or elimination of any and all liabilities for .
12 . . breach of duties (including fiduciary duties) . . .; provided, that a governing instrument may
13 not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the
14 implied contractual covenant of good faith and fair dealing."
15

16 The drafting committee opted to model the trustee's duties on the corporate fiduciary
17 obligation as stated in Revised Model Business Corporation Act §8.30 (2002) rather than the
18 more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a
19 mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the
20 context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of
21 commercial actors. For a statement of the duties of loyalty and prudence in trust law, see
22 Restatement (Third) of Trusts §§77-78 (~~T.D. No. 4, 2005~~2007). For a comparison, see Robert H.
23 Sitkoff, Trust Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82
24 (2003). See also the sources cited in the Comment to Section 408.
25

26 SECTION 405. DIRECTION OF TRUSTEES.

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

29 (b) If the ~~terms of a statutory trust~~governing instrument confers upon a person a power to
30 direct certain actions of a trustee or other person, the trustee or other person shall act in
31 accordance with an exercise of the power unless the direction is manifestly contrary to the terms
32 of the governing instrument or the trustee knows or has reason to know that following the
33 direction would constitute a serious breach of fiduciary duty by the trustee.

34 (c) Neither the power to direct a trustee or other person nor the exercise of the power by
35 any person, including a beneficial owner, causes the person to be a trustee or imposes on the

1 person duties, including fiduciary duties, or liabilities relating thereto, to a statutory trust or to a
2 beneficial owner thereof.

3 **Comment**

4 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
5 Act §34-517; Uniform Trust Code §808 (2000).
6

7 Paragraph (a) ratifies the use of a directed trustee, meaning a trustee that must act in
8 accordance with the directions of another person. Under paragraph (b), however, the trustee
9 must not follow a direction that is manifestly contrary to the terms of the governing instrument
10 or that the trustee knows or has reason to know would constitute a serious breach of fiduciary
11 duty. Cf. Restatement (Third) of Trusts §75 (~~T.D. No. 4, 2005~~2007); Restatement (Second) of
12 Trusts §185 (1959). **[For Discussion: Increasing divergence in state trust laws respecting**
13 **direction of trustees.]**
14

15 The reference in paragraph (b) to “serious” breach of fiduciary duty is designed to
16 exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial
17 owner. For some purposes, such as trustee removal, trust law distinguishes between “serious”
18 and not serious breaches of trust. See, ~~e.g.~~, Uniform Trust Code §706(b)(1) (2000); Austin
19 Wakeman Scott, William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10,
20 p. 661 (5th ed. 2006); Restatement (Second) of Trusts §107 cmt. b (1959).
21

22 The trustee’s determination whether a direction is “manifestly contrary to the terms of the
23 governing instrument” or “would constitute a serious breach of fiduciary duty by the trustee” is
24 subject to the trustee’s fiduciary obligations. The drafting committee contemplated that, in
25 accord with conventional trust practice, a trustee could seek judicial resolution of whether an
26 instruction falls within the exclusion of paragraph (b) by applying to the appropriate court for
27 instructions. See Restatement (Second) of Trusts §259 (1959); Restatement (Third) of Trusts
28 ~~§71 (T.D. No. 4, 2005)~~§71 (2007).
29

30 Under Section 103(c)(5), the limitation on direction of trustees stated in paragraph (b) is
31 not subject to override by the governing instrument.
32

33 Under paragraph (c), unless the governing instrument provides otherwise, a person that
34 has the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to
35 the statutory trust or ~~the~~ beneficial owners. **[For Discussion: Paragraph (c), which comes**
36 **from the Delaware statute, is convoluted (compare how much cleaner is the comment).**
37 **Can’t we do better?]**
38

39 In conjunction with Section 411, this section facilitates the current practice in existing
40 statutory trusts of creating a trusteeship with respect to some, but not all, aspects of the trust—
41 for example, in a mutual fund with an investment advisor or in a securitization transaction with a
42 person whose consent is required before the statutory trust can petition for bankruptcy.
43

SECTION 406. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT COMPANY.

(a) In this section, the terms “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., [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., [and any regulations issued thereunder,] [or any successor statute thereto,][Discussion/Style Issue: Brackets and Investment Company Act consistency throughout.] 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 for service as an independent trustee of the trust and for service as an independent trustee of one or more other investment companies managed by a single investment adviser or an affiliated person of an investment adviser, does not affect the status of the trustee as an independent trustee under this section.

Comment

Principal Source – Delaware Statutory Trust Act §3801.

It is not uncommon for a director of a mutual fund to serve on multiple mutual fund boards. Section 403 addresses the question of trustee independence in such circumstances, rejecting *Strougo v. Scudder, Stevens & Clark*, 964 F. Supp. 783 (S.D.N.Y. 1997) (applying Maryland law). In *Strougo* the plaintiffs claimed that directors serving on multiple boards within a mutual fund complex became “interested” by virtue of their close financial relationship with the investment advisor. 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 directors prior to filing suit. The court ~~held that excused~~ the plaintiffs ~~were excused~~ from the demand requirement because the fund’s directors served on multiple boards within the same fund complex, receiving “substantial remuneration,” and hence were not independent from the adviser. *Id.* at 793-95.

In 1998 the Maryland legislature effectively overruled *Strougo* by amending the Maryland corporate code to provide that directors who are not “interested persons” under the

Investment Company Act of 1940 also would be deemed disinterested under Maryland law. See Md. Code (Corporations & Associations) §2-405.3. A similar provision took effect in Massachusetts in 1999, see Mass. Laws. 182, § 2B, and in Delaware in 2000, see Delaware Statutory Trust Act §3801(h). Almost all mutual funds are organized as Maryland corporations, Massachusetts trusts, or Delaware statutory trusts. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [in progress]. Consistent with the Maryland, Massachusetts, and Delaware legislation, this section rejects *Strougo* by deeming a trustee to be independent if he or she is not an interested person under the Investment Company Act of 1940, as amended.

SECTION 407. TRUSTEE’S RIGHT TO INFORMATION. A trustee has the right to information relating to the affairs of the statutory trust reasonably related to the trustee’s discharge of the trustee’s duties as trustee.

Comment

Under Section 103(c)(6), the trustee’s right to information under this section is not subject to override by the governing instrument. However, the trustee’s right to information is limited to information “reasonably related to” the trustee’s discharge of its duties as trustee, and under Section 103(c)(6) the governing instrument may prescribe the standards by which “reasonably related” is determined provided that 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 allows for the creation of a limited-role or directed trustee that will not have access to confidential information unrelated to the trustee’s limited role. 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.

Section 503 provides a comparable rule for a beneficial owner’s right to information.

SECTION 408. INTERESTED TRANSACTIONS.

(a) Subject to subsection (b), a trustee, officer, employee, or manager of a statutory trust, or a related person of a trustee, officer, employee, or manager, may lend money to, borrow money from, act as a surety, guarantor, or endorser for, guarantee or assume one or more obligations of, provide collateral for, and transact other business with the trust and has the same rights and obligations with respect to any such matter as a person that is not a trustee, officer,

employee, manager, or related person of a trustee, officer, employee, or manager.

(b) A transaction under subsection (a) is voidable by the statutory trust unless the related party shows that the transaction is fair to the trust.

Comment

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

Consistent with the use of the term “best interests” instead of “sole interest” in Section 404(a), this section abrogates the no-further-inquiry rule of the common law of trusts, which forbids self-dealing transactions. See Restatement (Third) of Trusts §78 (~~T.D. No. 5, 2005~~2007); Restatement (Second) of Trusts §170 (1959); 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).

[For Discussion: By “voidable,” do we mean to adopt the “entire fairness” test familiar from corporate law, and if so, shouldn’t we say so in the comment? And do we need to explain what happens when the trust voids a loan? Presumably we mean that the trust is freed from the obligation though perhaps the lender is entitled to restitution.]

The application of this section to a statutory trust that is registered as an investment company is preempted by the Investment Company Act of 1940, which generally prohibits a trustee, officer, employee, manager, and their related persons 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), (d).

SECTION 409. GOOD-FAITH RELIANCE. A trustee, officer, employee, manager, or committee of a statutory trust, or other person designated pursuant to Section 104(b)(7) 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 resulted from the good-faith reliance on:

- (1) the terms of the governing instrument;
- (2) the records of the statutory trust; or
- (3) the opinions, reports, or statements of another person that are in the other person’s professional or expert competence and are made or delivered to the trustee, officer, employee,

1 manager, or committee of a statutory trust, or other person designated pursuant to Section
2 104(b)(7).

3 **Comment**

4 **Principal Source** – Uniform Trust Code §1006 (2000); Delaware Statutory Trust Act
5 §3806; Connecticut Statutory Trust Act §34-517.

6
7 A trustee, officer, employee, manager, committee, or other such person or persons should
8 be able to administer a statutory trust with dispatch and without concern that a reasonable
9 reliance on the terms of the governing instrument, the records of the statutory trust, or the
10 opinions of experts is misplaced. This section protects a person that so relies, but only to the
11 extent the breach of trust resulted from such reliance and only if the person's reliance was in
12 good faith. [For Discussion: Use of the term "good faith" again. An important point,
13 perhaps worth mentioning in this comment, is that good faith prohibits shopping for an
14 expert opinion for cover to undertake a dubious action.]
15

16
17 **SECTION 410. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.**

18 (a) A statutory trust may indemnify and hold harmless any trustee or beneficial owner or
19 other person with respect to any claim or demand on the person by reason of the person's
20 relationship with the trust if the claim or demand does not arise from the person's bad faith,
21 willful misconduct, or reckless indifference. [For Discussion: Question from the floor why
22 this provision is permissive and not mandatory.]

23 (b) Expenses, including reasonable attorney's fees and costs, incurred by a trustee,
24 beneficial owner, or any other person in connection with a claim or demand on the person by
25 reason of the person's relationship with or to a statutory trust may be paid by the trust in advance
26 of the final disposition of the claim or demand upon an undertaking by or on behalf of the person
27 to repay the trust if the person is ultimately determined not to be entitled to be indemnified under
28 subsection (a).

29 (c) A term in the governing instrument relieving or exonerating a trustee from liability is

unenforceable to the extent that it relieves the trustee from liability for conduct involving bad faith, willful misconduct, or reckless indifference.

Comment

Principal Sources – Delaware Statutory Trust Act §3817; Connecticut Statutory Trust Act §34-524; Delaware General Corporation Law §145; Uniform Trust Code §§105, 1008 (2000).

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

Under Section 103(c)(7), this section's prohibition of indemnification, advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless indifference is not subject to override by the governing instrument. Prohibiting indemnification, advancement, or exoneration for such conduct is consistent with traditional trust doctrine **[For Discussion, addition of "and the drafting committee contemplated that this section would be interpreted in accordance with existing trust law precedent" or something in that vein.]** See Restatement (Second) of Trusts §222 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §542 (rev. 2d ed. 1993); Uniform Trust Code §1008. See also John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U.L. Rev. 1105, 1121-25 (2004). It is also consistent with the Delaware Statutory Trust Act. See Delaware Statutory Trust Act §3806(e), which provides that the "governing instrument may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing instrument may not eliminate the implied contractual covenant of good faith and fair dealing." Limitations on permissible exoneration are also familiar business entity law. See, e.g., Delaware General Corporation Law §102(b)(7).

Any indemnification provision in the governing instrument of a statutory trust ~~operating~~ 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).

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." SEC Interpretation: Matters Concerning Independent Directors of Investment Companies, Investment Company Act Rel. No. 24083 (Oct. 14, 1999), 1999 WL 820629, *10. The SEC has also taken

1 the position that there is a rebuttable presumption that an independent trustee (see Section 406)
2 has not engaged in disabling conduct. Id.
3

4 **SECTION 411. DELEGATION BY TRUSTEE.**

5 (a) A trustee may delegate duties and powers ~~that a prudent trustee of comparable skills~~
6 ~~could properly delegate under the circumstances.~~ The trustee ~~shall~~ must exercise reasonable
7 ~~care, skill, and caution in~~ the care that a person similarly situated would reasonably believe
8 appropriate under similar circumstances in **[For Discussion: (1) The move from trust language**
9 **to corporate language, paralleling Section 404, and (2) the interaction of this Section with**
10 **Section 409.]**:

11 (1) selecting an agent;

12 (2) establishing the scope and terms of the delegation; and

13 (3) periodically reviewing the agent's actions in order to monitor the agent's
14 performance and compliance with the terms of the delegation.

15 (b) Subject to subsection (a), a trustee may delegate duties and powers to a co-trustee.

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

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

20 (e) An agent submits to the jurisdiction of the courts of this State by accepting a
21 delegation of powers or duties from the trustee of a statutory trust that is subject to the law of
22 this state.

23 **Comment**

24 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
25 Act §34-517; Uniform Trust Code §807 .

1
2 This section reverses the outmoded common law rule against delegation by a trustee. In
3 reversing the common law rule against delegation, the drafting committee followed both the
4 Delaware Statutory Trust Act and the modern trend with respect to common law trusts. Most
5 states have abrogated the common law nondelegation rule with legislation based on the Uniform
6 Prudent Investor Act, Uniform Trust Code, or the Restatement (Third) of Trusts. See Uniform
7 Trust Code §807 (2000); Uniform Prudent Investor Act §9 (1994); Restatement (Third) of
8 Trusts: Prudent Investor Rule §171 (1992). See also Restatement (Third) of Trusts §80 (T.D.
9 No. 4, 2005~~2007~~); ~~See generally~~ John H. Langbein, Reversing the Nondelegation Rule of Trust-
10 Investment Law, 59 Mo. L. Rev. 105 (1994).

11
12 Paragraphs (a), (c), (d), and (e) ~~track the language of~~ are patterned on Uniform Trust Code
13 §807 (2000), which is derived from Uniform Prudent Investor Act §9 (1994). This section
14 deviates from prior uniform acts, however, on the issue of delegation to a co-trustee. Following
15 the Delaware Statutory Trust Act, paragraph (b) treats delegation to a co-trustee in the same
16 manner as delegation to another person. By contrast, traditional trust law disfavors delegation by
17 one co-trustee to another. See Restatement (Second) of Trusts §184 (1959). See also Uniform
18 Trust Code §703(e) (2000); Restatement (Third) of Trusts §81 cmt. c(1) (T.D. No. 4, 2005~~2007~~).
19 **[For Discussion: Whether to include further explanation. The basic idea is that in an**
20 **ordinary trust, we assume that if two trustees are named, the donor intended each to be a**
21 **check on the other. By contrast, in commercial statutory trust practice, we have limited**
22 **purpose trustees.]**

23
24 Mutual funds often receive a common set of services from an organization that
25 specializes in operating mutual funds, which is typically the investment adviser or an affiliate.
26 The trustees monitor the service providers and the Investment Company Act of 1940 requires the
27 trustees to approve the contracts with the adviser and distributor. See 15 U.S.C. § 80a-15.
28

29 **SECTION 412. ACTION BY TRUSTEES.** On any matter that is to be acted on by
30 trustees:

- 31 (1) the trustees may act by majority of their number;
- 32 (2) the trustees may act without a meeting, without previous notice, and without a vote, if
33 a consent or consents, in a record, setting forth the action so taken, are signed by ~~trustees having~~
34 ~~at least~~ the minimum number of trustees necessary to authorize or take the action at a meeting at
35 which all trustees entitled to vote thereon were present and voted, but prompt notice of the action
36 must be given to those trustees that did not consent; and
- 37 (3) a trustee may vote in person or by proxy, but if by proxy, the proxy must be in a

1 signed record.

2 **Comment**

3
4 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
5 Act § 34-517; Delaware General Corporation law §228; Uniform Trust Code §703 (2000).
6

7 In accord with Uniform Trust Code §703(a) (2000) and Restatement (Third) of Trusts
8 §39 (2003), paragraph (a)(1) rejects the common law rule requiring unanimity among the
9 trustees of a private trust, replacing it with a default rule requiring a majority of the trustees.
10

11 The remainder of this section allows for maximum flexibility in the mechanics of
12 allowing the trustees to act or vote on actions. Section 104(b)(4) confirms that the rules stated in
13 this Section are subject to override by the governing instrument.
14

15 The Investment Company Act of 1940 requires a mutual fund's investment advisory
16 contract, underwriting contract, fidelity bond, independent public accountants, and other such
17 matters to be approved by the trustees of the mutual fund. See 15 U.S.C. § 80a-15(a); 15 U.S.C.
18 80a-31(a); 17 C.F.R. § 270.17g-1. Investment advisory and underwriting contracts, and
19 selection of independent public accountants, must be approved by the noninterested trustees at an
20 in-person meeting. See 15 U.S.C. §80a-15(c); 15 U.S.C. 80a-31(a).

1 [ARTICLE] 5

2 BENEFICIARIES AND BENEFICIAL RIGHTS

3 [For Discussion: Article 5 was heavily revised after the Spring 2007 Salt Lake City
4 meeting, before the summer reading. The question thus arises, do these revisions call for a
5 reordering of the sections of article 5?]
6

7 SECTION 501. CONTRIBUTIONS BY BENEFICIAL OWNERS.

8 (a) A contribution of a beneficial owner to a statutory trust may be in cash, property, or
9 services rendered or a promissory note or other obligation to contribute cash or property or to
10 perform services. A person may become a beneficial owner of a statutory trust and may receive
11 a beneficial interest in a statutory trust without making a contribution or being obligated to make
12 a contribution to the trust.

13 (b) A beneficial owner is liable to the statutory trust for failure to perform any promise to
14 contribute cash or property or to perform services, even if the beneficial owner is unable to
15 perform because of death, disability, or any other reason. If a beneficial owner does not make
16 the required contribution of property or services, the beneficial owner is obligated, at the option
17 of the trust, to contribute cash equal to that portion of the value of the contribution that has not
18 been made. This option is in addition to, and not in place of, any other rights, including the right
19 to specific performance, that the trust may have against the beneficial owner under the governing
20 instrument or applicable law.

21 (c) The governing instrument may provide that a beneficial owner that fails to make a
22 contribution that the beneficial owner is obligated to make or fails to perform in accordance
23 with, or to comply with the terms and conditions of, the governing instrument is subject to
24 specified penalties or consequences of the failure, including:

25 (1) reduction or elimination of the defaulting beneficial owner's proportionate

1 interest in the statutory trust;

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

4 (3) forced sale or forfeiture of the defaulting beneficial owner's beneficial
5 interest;

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

7 ~~(5) imposing imposition of~~ an obligation to repay a loan to the statutory trust by
8 another beneficial owner of the amount necessary to meet the defaulting beneficial owner's
9 commitment; and

10 ~~(5) fixing the value of the defaulting beneficial owner's beneficial interest by~~
11 ~~appraisal or by formula and~~ redemption or sale of the defaulting beneficial owner's beneficial
12 interest at ~~that value~~ a value fixed by appraisal or by formula and.

13 Comment

14
15 **Principal Sources** – Delaware Statutory Trust Act §3802; Connecticut Statutory Trust
16 Act §34-515.

17
18 Although statutory trusts are used primarily as a mode of business organization in
19 commercial transactions, paragraph (a) acknowledges that a beneficial owner may obtain a
20 beneficial interest without an exchange of consideration, an event that is not uncommon in
21 existing commercial practice. However, a statutory trust may not be used to effect a donative
22 transfer because Section 302 prohibits a statutory trust from having a “prevailingly donative
23 purpose.”

24
25 Paragraph (c) repudiates the hostility of traditional law to penalties, thereby resolving the
26 doubts that arose prior to statutory confirmation about the validity of particular remedies for a
27 beneficial owner's breach.

28
29 Under Section 104(b)(1), the governing instrument may provide the means by which
30 beneficial ownership is determined and evidenced. Under Section 104(b)(10)-(11), the
31 governing instrument may specify the conditions under which a person becomes a beneficial
32 owner.
33

SECTION 502. REDEMPTION OF BENEFICIAL INTERESTS. A statutory trust may acquire, by purchase, redemption, or otherwise, any beneficial interest in the ~~statutory~~ trust. A beneficial interest so acquired by the trust is canceled.

Comment

Principal Source – Delaware Statutory Trust Act §3818.

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(e); 17 CFR §270.22c-1. In narrowly defined circumstances, this redemption right and obligation may be postponed. See 15 U.S.C. §80a-22(e). The redemption proceeds may be reduced by various fees retained by the fund and/or its selling agent (i.e., sales loads and redemption fees). See 17 CFR §§270.22c-2; 270.6c-10.

SECTION 503. BENEFICIAL OWNER’S RIGHT TO INFORMATION. A

beneficial owner has the right to information relating to the affairs of the statutory trust

reasonably related to the beneficial owner’s ability to enforce its rights as beneficial owner

[For Discussion: (1) Is this section exclusive—that is, does a common law right to information survive the act? (2) What happens in the event of disagreement—that is, should we provide for a summary proceeding as in other business law? (3) Should the comment observe that in this area a standard “reasonably related” in fact provides broader information rights than the rule-based, scheduling of accessible information?]

Comment

Principal Source – Delaware Statutory Trust Act §3819.

Under Section 103(c)(8), 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 “necessary” for the beneficial owner to enforce its rights as such, and under Section 103(c)(8) the governing instrument may prescribe the standards by which “necessary” is determined if those standards are not “manifestly unreasonable.” Imposing a mandatory right to information critical to the beneficiary’s ability to enforce the trust is familiar law. See Restatement (Second) of Trusts §173 cmt. c (1959); T.P. Gallanis, The Trustee’s Duty to Inform, 85 N.C. L. Rev. 1595 (2007).

Section 404 provides a comparable rule for a trustee's right to information.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28
- 29
- 30

(b) When 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 corporation with respect to the distribution.

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

Principal Source – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust Act §34-516; Revised Uniform Limited Liability Company Act §404 (2006).

1 [For Discussion: The possibility of a self-settled spendthrift statutory trust. Assuming that
2 the Committee does not want to allow for such a trust, we will need to consider a charging
3 order provision for trusts that opt out of 504(a) (that is, for trusts without freely
4 transferable beneficial interests). Two sample charging order models follow.
5

6 1. ReULLCA 305 (2006)

7 (a) On application by a judgment creditor of a member or transferee, a court may
8 enter a charging order against the transferable interest of the judgment debtor for the
9 unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment
10 debtor's transferable interest and requires the limited liability company to pay over to the
11 person to which the charging order was issued any distribution that would otherwise be
12 paid to the judgment debtor.

13 (b) To the extent necessary to effectuate the collection of distributions pursuant to a
14 charging order in effect under subsection (a), the court may:

15 (1) appoint a receiver of the distributions subject to the charging order, with
16 the power to make all inquiries the judgment debtor might have made; and

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

18 (c) Upon a showing that distributions under a charging order will not pay the
19 judgment debt within a reasonable time, the court may foreclose the lien and order the sale
20 of the transferable interest. The purchaser at the foreclosure sale only obtains the
21 transferable interest, does not thereby become a member, and is subject to Section 502.

22 (d) At any time before foreclosure under subsection (c), the member or transferee
23 whose transferable interest is subject to a charging order under subsection (a) may
24 extinguish the charging order by satisfying the judgment and filing a certified copy of the
25 satisfaction with the court that issued the charging order.

26 (e) At any time before foreclosure under subsection (c), a limited liability company
27 or one or more members whose transferable interests are not subject to the charging order
28 may pay to the judgment creditor the full amount due under the judgment and thereby
29 succeed to the rights of the judgment creditor, including the charging order.

30 (f) This [act] does not deprive any member or transferee of the benefit of any
31 exemption laws applicable to the member's or transferee's transferable interest.

32 (g) This section provides the exclusive remedy by which a person seeking to enforce
33 a judgment against a member or transferee may, in the capacity of judgment creditor,
34 satisfy the judgment from the judgment debtor's transferable interest.
35

36 2. Rutledge's Unified Kentucky Model

37 (a) This section provides the exclusive remedy by which the judgment creditor of a
38 member or the assignee of a member may satisfy a judgment out of the judgment debtor's
39 limited liability company interest.

40 (b) On application to a court of competent jurisdiction by a judgment creditor of a
41 member or a member's assignee, a court may charge the judgment debtor's interest in the
42 limited liability company with payment of the unsatisfied amount of the judgment. To the
43 extent so charged, the judgment creditor has only the rights of a assignee and shall have no
44 right to participate in the management or to cause the dissolution of the limited liability
45 company. The court may appoint a receiver of the share of the distributions due or to
46 become due to the judgment debtor in respect of the limited liability company interest and

1 make all other orders, directions, accounts, and inquiries the judgment creditor might have
2 made or which the circumstances of the case may require to give effect to the charging
3 order.

4 (c) A charging order constitutes a lien on and the right to receive distributions made
5 with respect to the judgment debtor's limited liability company interest. A charging order
6 does not of itself constitute an assignment of the limited liability company interest.

7 (d) The court may order a foreclosure upon the limited liability company interest
8 subject to the charging order at any time. The purchaser of the liability company interest
9 at the foreclosure sale has the rights of a assignee. At any time before foreclosure, the
10 charged limited liability company interest may be redeemed:

11 (1) By the judgment debtor;

12 (2) With property other than limited liability company property, by one

13 (3) or more of the other members; and

14 (4) With limited liability company property, by the limited liability company
15 with the consent of all members whose interest are not so charged.

16 (e) This section does not deprive a member or a member's transferee of the benefit
17 of any exemption laws applicable to the member's or transferee's limited liability company
18 interest.]

19
20 Under Section 104(b)(13), the governing instrument may provide for the establishment of
21 record dates for distributions.
22

23 **SECTION 505. TRANSACTION WITH BENEFICIAL OWNER.** A beneficial
24 owner or related person of a beneficial owner may lend money [For Discussion: Section 501
25 uses “cash,” but here we use “money.” Reasoned?] to, borrow money from, act as a surety,
26 guarantor or endorser for, guarantee or assume one or more obligations of, provide collateral for,
27 or transact other business with the statutory trust and, subject to law other than this [act], has the
28 same rights and obligations with respect to those matters as a person that is not a beneficial
29 owner.

30 **Comment**

31
32 **Principal Source** – Delaware Statutory Trust Act §3806.
33

34 **SECTION 506. VOTING OR CONSENT BY BENEFICIAL OWNERS.** On any
35 matter that is to be acted on by beneficial owners, the following rules apply:

1 (1) The beneficial owners may act by majority of their number.

2 (2) The beneficial owners may take the action without a meeting, without notice, and
3 without a vote, if a consent, or consents, in a record, setting forth the action so taken, are signed
4 by beneficial owners having at least the minimum number of votes necessary to authorize or take
5 the action at a meeting at which all beneficial owners entitled to vote thereon were present and
6 voted, but prompt notice of the action must be given to those beneficial owners that did not
7 consent.

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

10 **Comment**

11
12 **Principal Source** – Delaware Statutory Trust Act §3806; Delaware General Corporation
13 Law §228.

14
15 Except for a conversion, merger, or dissolution under Article 6, nothing in this act
16 provides for the beneficial owners to act on any matter. However, because the beneficial owners
17 may be given such a right by the terms of the governing instrument, this paragraph supplies a
18 default rule requiring a majority of the number of beneficial owners. Although the drafting
19 committee contemplated that the governing instrument typically will address voting rules by
20 providing a per capital or other share-based allocation of voting rights, the drafting committee
21 declined the suggestion to try to incorporate such a rule as a default because such rules are
22 necessarily transaction-specific and hence infeasible to specify in a one-size-fits-all default.
23 Compare Revised Uniform Partnership Act §401(f) (1997), which provides that “[e]ach partner
24 has equal rights in the management and conduct of the partnership business.”

25
26 The Investment Company Act of 1940, as amended, specifies the percentage of vote
27 necessary to approve certain actions related to the investment company. In other instances, 1940
28 Act requires the action to be approved at a shareholders’ meeting called for that purpose. In such
29 instances, approval of the action by written consent without notice would not be valid. For
30 example, Section 16(a) of the 1940 Act provides that “no person shall serve as a director of an
31 investment company unless elected to that office by the holders of the outstanding voting
32 securities of such company, at an annual or a special meeting duly called for that purpose.” In
33 addition, investment companies seeking the vote of shareholders on specific actions must comply
34 with rules governing the communication to, and solicitation of, their shareholders. See Rules
35 14a-1 to 14b-2 under the Securities Exchange Act of 1934, as amended. These rules are
36 significantly more comprehensive than most state statutes and rules governing communications
37 to shareholders and other aspects of a shareholder meeting.

1
2 Section 104(b)(4) confirms that the rules stated in this Section are subject to override by
3 the governing instrument.
4

5 **SECTION 507. DERIVATIVE ACTION.**

6 (a) A beneficial owner may maintain a derivative action in the [appropriate court] to
7 enforce a right of the statutory trust if:

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

11 (2) a demand would be futile.

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

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

15 (2) whose status as a beneficial owner devolved upon the person by operation of
16 law or pursuant to the terms of the governing instrument from a person that was a beneficial
17 owner at the time of the conduct.

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

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

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

23 (d) Except as otherwise provided in subsection (e):

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

1 the derivative plaintiff; and

2 (2) if the derivative plaintiff receives any proceeds, it shall immediately remit
3 them to the trust. **[For Continued Discussion: Election of remedies.]**

4 (e) If a derivative action on behalf of a statutory trust is successful in whole or in part, the
5 court may award the plaintiff reasonable expenses, including reasonable attorney's fees and
6 costs, from the recovery by the trust. **[For Discussion: The common fund doctrine.]**

7 (f) A derivative action on behalf of a statutory trust may not be voluntarily dismissed or
8 settled without the court's approval. **[For Discussion: The intersection of the collusive
9 settlement problem and the limited mandatory nature of this provision under Section
10 103(c)(9).]**

11 **Comment**

12
13 **Principal Sources** - Uniform Limited Partnership Act §§1002-1005 (2001); Delaware
14 Statutory Trust Act §3816; Connecticut Statutory Trust Act §34-522.

15
16 Under Section 103(c)(9), the right of a beneficial owner to bring a derivative action under
17 this Section may not be eliminated by the governing instrument. However, Section 103(c)(9)
18 permits the governing instrument to subject the right to additional standards and restrictions,
19 including the requirement that beneficial owners owning a specified amount or type of beneficial
20 interest join in bringing the derivative action, provided that the additional standards and
21 restrictions are not manifestly unreasonable.

22
23 In preserving a mandatory right to bring a derivative action, but allowing that right to be
24 subjected to additional standards and restrictions that are not manifestly unreasonable, this
25 section balances two policy aims that are in tension. On the one hand, without the right to bring
26 a derivative action, a beneficial owner might have no recourse in the event of trustee misconduct.
27 On the other hand, without appropriate safeguards, a meritless derivative action might be
28 brought with the aim of extracting a quick settlement. See, e.g., Reinier Kraakman, Hyun Park,
29 & Steven Shavell, When Are Shareholder Suits in Shareholder Interests?, 82 Georgetown L.J.
30 1733 (1994).

1 [ARTICLE] 6

2 CONVERSION AND MERGER

3 SECTION 601. DEFINITIONS. In this [article]:

4 (1) “Constituent organization” means an organization that is party to a merger.

5 (2) “Constituent statutory trust” means a constituent organization that is a statutory trust.

6 (3) “Converted organization” means the organization into which a converting
7 organization converts pursuant to Sections 602 through 605.

8 (4) “Converting organization” means an organization that converts into another
9 organization pursuant to Section 602.

10 (5) “Converting statutory trust” means a converting organization that is a statutory trust.

11 (6) “Governing statute” means the statute that governs the organization’s internal affairs.

12 (7) “Organization” means a general partnership, including a limited liability partnership;
13 limited partnership, including a limited liability limited partnership; limited liability company;
14 corporation; foreign statutory trust; or any other person having a governing statute. The term
15 includes a domestic or foreign organization whether or not organized for profit.

16 [For discussion: This definition of “organization” excludes a common law trust and
17 hence excludes a Massachusetts business trust. This issue was flagged in Salt Lake City,
18 but we did not have time for discussion about how to address it. The issue was also raised
19 independently from the floor at the summer reading. It appears that we have at least three
20 options:

21 (1) continue to exclude common law business trusts from conversion and merger
22 (though per Section 905 such a trust could become a statutory trust by filing a
23 certification of trust pursuant to Section 201);

24 (2) alter the definition of organization to include common law trusts and then
25 modify the references to “governing statute” throughout; or

26 (3) add a domestication provision.

27 Each option has pros and cons that require ventilation and then a policy decision by the
28 committee.]

29
30 (8) “Organizational documents” means the basic records that create the organization and

determine its internal governance and the relations among the persons that own it, have an interest in it, or are members of it.

(9) “Surviving organization” means an organization into which one or more other organizations are merged, whether the surviving organization preexisted the merger or was created by the merger.

Comment

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

This section contains definitions specific to this Article. Under Section 103(c)(10), this Section is not subject to override by the governing instrument.

SECTION 602. CONVERSION.

(a) An organization other than a statutory trust may convert to a statutory trust, and a statutory trust may convert to another organization pursuant to this section and Sections 603 through 605 and a plan of conversion, if:

(1) the conversion is not prohibited by the law of the jurisdiction that enacted the other organization’s governing statute[Note “governing statute”; here is a nice example of the problem with absorbing Massachusetts trusts into the existing conversion infrastructure.];
and

(2) the other organization complies with its governing statute in effecting the conversion.

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

(1) the name and form of the organization before conversion;

(2) the name and form of the organization after conversion;

(3) the terms and conditions of the conversion, including the manner and basis for

1 converting interests in the converting organization into any combination of money, interests in
2 the converted organization, and other consideration; and

3 (4) the organizational documents of the converted organization.

4 **Comment**

5 **Principal Sources** – Uniform Limited Partnership Act §1102 (2001).

6
7 In a statutory conversion an existing entity changes its form, the jurisdiction of its
8 governing statute, or both. For example, a statutory trust formed under the laws of one
9 jurisdiction might convert to a corporation, limited liability company, or limited partnership
10 under the laws of the same or another jurisdiction (referred to in some statutes as
11 “domestication”).
12

13 In contrast to a merger, which involves at least two entities, a conversion involves only
14 one. The converting and converted organization are the same entity. See Section 605(a). For
15 this Act to apply to a conversion, either the converting or converted organization must be a
16 statutory trust subject to this Act.
17

18 A plan of conversion may provide that some persons with interests in the converting
19 organization will receive interests in the converted organization while other persons with
20 interests in the converting organization will receive some other form of consideration. Thus, a
21 “squeeze out” conversion is possible.
22

23 For a general discussion of conversion and its effect, see Model Entity Transactions Act
24 §406 (2006) and comment 1 thereto.
25

26 **SECTION 603. ACTION ON PLAN OF CONVERSION BY CONVERTING** 27 **STATUTORY TRUST.**

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

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

32 (1) as provided in the plan; and

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

1 approve the plan.

2 **Comment**

3 **Principal Source** – Uniform Limited Partnership Act §1103 (2001).
4

5 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries
6 is a default rule that may be overridden by the governing instrument. See Section 104(b)(5)(B).
7 Hence, the governing instrument may state a different quantum of consent or provide a different
8 approval mechanism. Varying this subsection’s rule means that a beneficial owner might be
9 subject to a conversion (including a “squeeze out” conversion) without consent and with no
10 appraisal remedy. If the converting organization is a statutory trust subject to this Act, the
11 trustee of the converting organization is subject to the duties and obligations stated in this Act.
12 Those duties would apply to the process and terms under which the conversion occurs.
13 However, if the governing instrument allows for a conversion with less than unanimous consent,
14 the mere fact that a beneficial owner objects to a conversion does not mean that a trustee that is
15 favoring, arranging, consenting to, or effecting the conversion has breached a duty under this
16 Act.
17

18 In the case of a statutory trust that is a registered investment company organized as an
19 open-end mutual fund, a shareholder may elect to redeem any or all beneficial interests in the
20 statutory trust at the current net asset value per share, see 17 C.F.R. §270.22c-1, which is a price
21 that is akin to an appraisal value. Except for limited circumstances, a mutual fund is required to
22 pay proceeds to the redeeming shareholder within seven days of the date of redemption request.
23 See 15 U.S.C. §80a-22(e). Thus, a mutual fund generally does not afford dissenting rights to its
24 shareholders because any shareholder of a mutual fund being converted may redeem fund shares
25 at net asset value prior to the closing date of the proposed conversion.
26

27 **SECTION 604. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.**

28 (a) After a conversion is approved:

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

- 31 (A) a statement that the trust has been converted into another organization;
32 (B) the name and form of the converting organization and the jurisdiction
33 of its governing statute;
34 (C) a statement that the conversion was approved as required by this [act];
35 (D) a statement that the conversion is not prohibited by the governing

statute of the converted organization; and

(E) if the converted organization is a foreign organization not authorized to transact business in this state, the street and mailing addresses of an office that the [Secretary of State] may use for the purposes of Section 605(c); and

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

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

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

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

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

Comment

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

Under paragraph (b) the effective date of a conversion is determined under the governing statute of the converted organization.

Under Section 103(c)(10), this Section is not subject to override by the governing instrument.

SECTION 605. EFFECT OF CONVERSION.

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

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

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

3 (2) all debts, obligations, and other liabilities of the converting organization
4 continue as debts, obligations, or other liabilities of the converted organization;

5 (3) an action or proceeding pending by or against the converting organization may
6 be continued as if the conversion had not occurred;

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

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

12 (6) except as otherwise agreed, the conversion does not dissolve a converting
13 statutory trust or any series thereof for the purposes of Section 701.

14 (c) A converted organization that is a foreign organization consents to the jurisdiction of
15 the courts of this state to enforce any debt, obligation, or other liability for which the converting
16 statutory trust is liable, if, before the conversion, the converting statutory trust was subject to suit
17 in this state on the debt, obligation, or other liability. A converted organization that is a foreign
18 organization and not authorized to transact business in this state appoints the [Secretary of State]
19 as its agent for service of process for purposes of enforcing a debt, obligation, or other liability
20 under this subsection. Service on the [Secretary of State] under this subsection is made in the
21 same manner and with the same consequences as in Section 214(c) and (d).

22 **Comment**

23 Principal Source – Uniform Limited Partnership Act §1105 (2001).
24

1 Paragraph (a) confirms that conversion changes an entity's legal type, but does not create
2 a new entity. Unlike a merger, a conversion involves a single entity. Therefore under paragraph
3 (b) a conversion does not transfer any of the entity's rights or obligations. For further
4 discussion, see Model Entity Transactions Act §406 (2006) and comment 1 thereto.

5
6 Under Section 103(c)(10), this Section is not subject to override by the governing
7 instrument.
8

9 **SECTION 606. MERGER.**

10 (a) A statutory trust may merge with one or more other constituent organizations
11 pursuant to this section and Sections 607 through 609 and a plan of merger if:

12 (1) the governing statute of each of the other organizations authorizes the merger;

13 (2) the merger is not prohibited by the law of a jurisdiction that enacted any of the
14 governing statutes; and

15 (3) each of the other organizations complies with its governing statute in effecting
16 the merger.

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

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

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

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

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

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

1 **Comment**

2 **Principal Source** – Uniform Limited Partnership Act §1106 (2001).
3

4 For this Act to apply to a merger, at least one of the constituent organizations must be a
5 statutory trust subject to this Act.
6

7 A plan of merger may provide that some persons with interests in a constituent
8 organization will receive interests in the surviving organization, while other persons with
9 interests in the same constituent organization will receive some other form of consideration.
10 Thus, a “squeeze out” merger is possible. As noted in the comment to Section 603, the duties
11 and obligations stated in this Act apply to a trustee of a constituent organization that is a
12 statutory trust subject to this Act. Those duties would apply to the process and terms under
13 which a “squeeze out” merger occurs.
14

15 **SECTION 607. ACTION ON PLAN OF MERGER BY CONSTITUENT**

16 **STATUTORY TRUST.**

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

19 (b) After a merger is approved, and at any time before a filing is made under Section 608,
20 a constituent statutory trust may amend the plan or abandon the planned merger:

21 (1) as provided in the plan; and

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

24 **Comment**

25 **Principal Sources** – Uniform Limited Partnership Act §1107 (2001).
26

27 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries
28 is a default rule that may be overridden by the governing instrument. See Section 104(b)(5)(B).
29 Hence, the governing instrument may state a different quantum of consent or provide a
30 completely different approval mechanism. Varying this subsection’s rule means that a beneficial
31 owner might be subject to a merger (including a “squeeze out” merger) without consent and with
32 no appraisal remedy. The trustee of a constituent statutory trust is subject to the duties and
33 obligations stated in this Act, and those duties would apply to the process and terms under which
34 the merger occurs. However, if the governing instrument allows for a merger with less than

1 unanimous consent, the mere fact a beneficial owner objects to a merger does not mean that a
2 trustee that is favoring, arranging, consenting to, or effecting the merger has breached a duty
3 under this Act.
4

5 For the reasons discussed in the comment to Section 603, a mutual fund generally does
6 not afford dissenting rights to its shareholders because any shareholder of an acquired mutual
7 fund may redeem acquired fund shares at net asset value prior to the closing date of the proposed
8 reorganization of the acquired fund.
9

10 **SECTION 608. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.**

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

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

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

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

17 (1) the name and form of each constituent organization and the jurisdiction of its
18 governing statute;

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

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

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

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

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

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

(6) if the surviving organization is a foreign organization not authorized to transact business in this state, the street and mailing addresses of an office that the [Secretary of State] may use for the purposes of Section 609(b); and

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

(c) The articles of merger ~~shall~~must be delivered to the office of the [Secretary of State] for filing.

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

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

(A) compliance with subsection (c); or

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

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

Comment

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

Under Section 103(c)(10), this Section is not subject to override by the governing instrument.

SECTION 609. EFFECT OF MERGER.

(a) When a merger becomes effective:

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

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

(3) all property owned by each constituent organization that ceases to exist vests in the surviving organization;

(4) all debts, obligations, and other liabilities of each constituent organization that ceases to exist continue as debts, obligations, or other liabilities of the surviving organization;

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

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

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

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

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

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

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

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

1 | on the obligation. A surviving organization that is a foreign organization ~~and~~ not authorized to
2 | transact business in this state appoints the [Secretary of State] as its agent for service of process
3 | for the purposes of enforcing a debt, obligation, or other liability under this subsection. Service
4 | on the [Secretary of State] under this subsection is made in the same manner and with the same
5 | consequences as provided in Section 213(c) and (d).

6 | **Comment**

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

8 |
9 | Under Section 103(c)(10), this Section is not subject to override by the governing
10 | instrument.

11 |
12 | **SECTION 610. [ARTICLE] NOT EXCLUSIVE.** This [article] does not preclude an
13 | entity from being converted or merged under law other than this [act].

14 | **Comment**

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

1 [ARTICLE] 7

2 DISSOLUTION AND WINDING UP

3 [Introductory Notes: (1) This Article, which derives from ReULLCA, is not as polished as
4 the rest of the act because it has never been vetted in a drafting session. It was quickly
5 assembled for the summer reading after our Spring 2007 Salt Lake City meeting. It is
6 therefore not surprising that this article was the most heavily commented upon from the
7 floor during the summer reading. (2) Several provisions in this Article may require
8 revision to account for series trusts.]
9

10 SECTION 701. EVENTS CAUSING DISSOLUTION. A statutory trust is dissolved,
11 and its activities must be wound up, upon the occurrence of:

- 12 (1) an event or circumstance that the governing instrument states causes dissolution; or
13 (2) an administrative dissolution under Section 705. [For Discussion, three related
14 questions that were raised during the summer meeting: (1) whether we should allow
15 dissolution as a remedy for oppression; (2) whether a statutory trust could be dissolved by
16 a court as a remedy, perhaps for fraud or in some other non-oppression context; (3)
17 whether we need a comment here or elsewhere (perhaps in Section 105) that addresses
18 election of remedies.]

19 Comment

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

21
22 Consistent with Section ~~304~~306, which provides as a default rule that a statutory trust has
23 perpetual existence, this Section provides that a statutory trust is dissolved only upon the
24 occurrence of an event or circumstance stated in the governing instrument. Thus, in contrast
25 with almost all other unincorporated business organizations, in a statutory trust dissolution is not
26 available as a remedy for alleged oppressive conduct.
27

28 Under Section 103(c)(1), the provisions of this section are not subject to override by the
29 governing instrument. However, the governing instrument need not provide for an event or
30 circumstance that causes dissolution. See Section 306.
31

32 SECTION 702. WINDING UP.

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

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

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

6 (2) may:

7 (A) deliver to the [Secretary of State] for filing a statement of dissolution
8 stating the name of the trust and that the trust is dissolved;

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

11 (C) institute, maintain, and defend actions and proceedings, whether civil,
12 criminal, or administrative;

13 (D) transfer the trust's property;

14 (E) settle disputes by mediation or arbitration **[For Discussion, two**
15 **comments from the summer reading: (1) that we should say "by alternative dispute**
16 **resolution" instead of "by mediation or arbitration," and (2) that we should delete (b)(2)(E)**
17 **on the theory that it is redundant of (b)(1).]**;

18 (F) deliver to the [Secretary of State] for filing a statement of termination
19 stating the name of the trust and that the trust is terminated; and

20 (G) perform other acts necessary or appropriate to the winding up.

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

1 final settlement of unfinished business of the trust.

2 **Comment**

3 **Principal Source** – Revised Uniform Limited Liability Company Act §702 (2006);
4 Delaware Limited Liability Company Act §18-805.

5
6 If the governing instrument of a statutory trust provides for the dissolution of the trust,
7 then ~~from~~upon the event or circumstance that triggers dissolution, the statutory trust may
8 continue only for the purpose of winding up.

9
10 In winding up the statutory trust within a reasonable time, the trustees are neither
11 required to undertake a fire sale of the assets of the statutory trust on unfavorable terms nor
12 permitted to continue the trust endlessly under the guise of winding down. ~~Thus, the~~The
13 question of what period of time is “reasonable” under paragraph (b)(2)(B) turns on the totality of
14 the circumstances.

15
16 Paragraph (c) provides for the possibility that after dissolution additional unfinished
17 business of the statutory trust is discovered. [For Discussion: Whether paragraph (c) should
18 be broader than “unfinished” business.]

19
20 Under Section 103(c)(1), the provisions of this section are not subject to override by the
21 governing instrument.

22 23 **SECTION 703. KNOWN CLAIMS AGAINST DISSOLVED STATUTORY** 24 **TRUST.**

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

27 (b) A dissolved statutory trust may [For Discussion: Because 703(b) is permissive, the
28 question arose in the summer meeting whether a trust could opt instead to use newspaper
29 notice under 704 to kill off a known claim.] in a record notify its known claimants of the
30 dissolution. The notice must:

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

32 (2) provide a mailing address to which the claim is to be sent;

33 (3) state the deadline for receipt of the claim, which may not be less than 120 days

1 after the date the notice is received by the claimant; and

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

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

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

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

7 (A) the trust causes the claimant to receive a notice in a record stating that
8 the claim is rejected and will be barred unless the claimant commences an action against the trust
9 to enforce the claim within 90 days after the claimant receives the notice; and

10 (B) the claimant does not commence the required action within the 90
11 days. [For Discussion: The rationale for why this section—section 703—does not have an
12 analogue to Section 704(d).]

13 (d) This section does not apply to a claim based on an event occurring after the effective
14 date of dissolution or a liability that on that date is contingent. [For Discussion: Question from
15 the floor whether “contingent” is broad enough to include “unmatured” or “unliquidated”
16 claims”?]

17 Comment

18 **Principal Source** – Revised Uniform Limited Liability Company Act §703 (2006).
19 Under Section 103(c)(1), the provisions of this section are not subject to override by the
20 governing instrument.

21
22 [For Discussion: Based on the comments from the floor, we need at least two
23 additional types of commentary. First, either a prefatory note or a comment to 701 that
24 outlines the dissolution process. Second, a comment to 703 and/or 704 that outlines the
25 process of barring known and unknown claims and the reasons for making these sections
26 permissive (i.e., if you don’t give notice, the claim isn’t barred).]
27

28 SECTION 704. OTHER CLAIMS AGAINST DISSOLVED STATUTORY

1 **TRUST.[For Discussion: Ambiguity in the caption to this Section.]**

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

4 (b) The notice authorized by subsection (a) must:

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

8 (2) describe the information required to be contained in a claim and provide a
9 mailing address to which the claim is to be sent; and

10 (3) state that a claim against the trust is barred unless an action to enforce the
11 claim is commenced within [five] years after publication of the notice.

12 (c) If a dissolved statutory trust publishes a notice in accordance with subsection (b),
13 unless the claimant commences an action to enforce the claim against the trust within five years

14 **[For Discussion: The five year window. We received many questions about why five**
15 **years.]**after the publication date of the notice, the claim of each of the following claimants is
16 barred:

17 (1) a claimant that did not receive notice in a record under Section 703; **[For**
18 **Discussion: Whether a trust could use this provision to kill off a known claim by use of a**
19 **newspaper notice.]**

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

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

23 (d) A claim not barred under this section may be enforced:

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

2 (2) if assets of the trust have been distributed after dissolution, against a beneficial
3 owner to the extent of that person's proportionate share of the assets distributed to the beneficial
4 owner after dissolution, but a beneficial owner's total liability for all claims under this paragraph
5 does not exceed the total amount of assets distributed to the beneficial owner after dissolution.

6 **Comment**

7 **Principal Source** – Revised Uniform Limited Liability Company Act §704 (2006).

8
9 Under Section 103(c)(1), the provisions of this section are not subject to override by the
10 governing instrument.

11
12 **[For Discussion, two more questions from the summer reading: (1) Should we have**
13 **commentary here and/or to 703 to the effect that a secured party is not barred from**
14 **enforcing the security, though to the extent the debt is undersecured, the undersecured**
15 **part can be bared; (2) Do we want the trustees to have any “zone of insolvency” duties to**
16 **creditors?]**

17
18 **SECTION 705. ADMINISTRATIVE DISSOLUTION.** **[For Discussion, two**
19 **questions from the floor: (1) how might this section be harmonized with Section 808, and**
20 **(2) should the effective date of a dissolution depend on whether the dissolution was**
21 **administrative or triggered by an event stated in the governing instrument?]**

22 (a) The [Secretary of State] may dissolve a statutory trust administratively if the trust
23 does not:

24 (1) pay, within 60 days after the due date, any fee, tax, or penalty due to the
25 [Secretary of State]; or

26 (2) deliver, within 60 days after the due date, its annual report to the [Secretary of
27 State].

28 (b) If the [Secretary of State] determines that a ground exists for administratively
29 dissolving a statutory trust, the [Secretary of State] shall file a record of the determination and

1 | serve [For Discussion: Send/serve.] the trust with a copy of the filed record.

2 | (c) If within 60 days after service of the copy pursuant to subsection (b) a statutory trust
3 | does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the
4 | [Secretary of State] that each ground determined by the [Secretary of State] does not exist, the
5 | [Secretary of State] shall dissolve the trust administratively by preparing, signing, and filing a
6 | declaration of dissolution that states the grounds for dissolution. The [Secretary of State] shall
7 | serve [For Discussion: Send/serve.] the trust with a copy of the filed declaration.

8 | (d) A statutory trust that has been administratively dissolved continues in existence but,
9 | subject to Section 706, may carry on only activities necessary to wind up its activities and
10 | liquidate its assets under Sections 702 and 708 and to notify claimants under Sections 703 and
11 | 704.

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

14 | **Comment**

15 | **Principal Source** – Revised Uniform Limited Liability Company Act §705 (2006).

16 |
17 | Under Section 103(c)(1), the provisions of this section are not subject to override by the
18 | governing instrument.
19 |

20 | **SECTION 706. REINSTATEMENT FOLLOWING ADMINISTRATIVE** 21 | **DISSOLUTION.**

22 | (a) A statutory trust that has been administratively dissolved may apply to the [Secretary
23 | of State] for reinstatement within [two] years after the effective date of dissolution. The
24 | application must be delivered to the [Secretary of State] for filing and state:

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

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

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

3 (b) If the [Secretary of State] determines that an application under subsection (a) contains
4 the required information and that the information is correct, the [Secretary of State] shall prepare
5 a declaration of reinstatement that states this determination, sign and file the original of the
6 declaration of reinstatement, and serve [Send/Serve again.] the statutory trust with a copy.

7 (c) When a reinstatement becomes effective, it relates back to and takes effect as of the
8 effective date of the administrative dissolution and the statutory trust may resume its activities as
9 if the dissolution had not occurred. [For Discussion: There is no requirement for the
10 secretary of state to act within a particular time. What happens if the secretary of state
11 just sits on the application? One option is to deem the application approved if the
12 secretary of state fails to act within a specified period of time.]

13 **Comment**

14 **Principal Source** – Revised Uniform Limited Liability Company Act §706 (2006).

15
16 Under Section 103(c)(1), the provisions of this section are not subject to override by the
17 governing instrument.
18

19 **SECTION 707. APPEAL FROM REJECTION OF REINSTATEMENT.**

20 (a) If the [Secretary of State] rejects a statutory trust's application for reinstatement
21 following administrative dissolution, the [Secretary of State] shall prepare, sign, and file a notice
22 that explains the reason for rejection and serve [send/serve again] the trust with a copy of the
23 notice.

24 (b) Within 30 days after service of a notice of rejection of reinstatement under subsection
25 (a), a statutory trust may appeal from the rejection by petitioning the [appropriate court] to set

1 | aside the dissolution. The petition must be served on send/serve the [Secretary of State] and
2 | contain a copy of the [Secretary of State's] declaration of dissolution, the trust's application for
3 | reinstatement, and the [Secretary of State's] notice of rejection.

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

6 | **Comment**

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

8 |
9 | Under Section 103(c)(1), the provisions of this section are not subject to override by the
10 | governing instrument. [For Discussion: A comment from the summer meeting—"If a trust
11 | has no right to appeal an administrative dissolution, but only a right to appeal a denial of
12 | reinstatement, I think you need a provision allowing the agency or a court to stay the
13 | limitation on the conduct of activities provided by 705(b) pending a decision of the
14 | application for reinstatement. This may obviate the need to impose time limits on
15 | applications for reinstatement and may avoid potential constitutional problems."]
16 |

17 | **SECTION 708. DISTRIBUTION OF ASSETS IN WINDING UP STATUTORY** 18 | **TRUST'S ACTIVITIES.**

19 | (a) In winding up its activities, a statutory trust shall first apply its assets to discharge its
20 | obligations to creditors.

21 | (b) After a statutory trust complies with subsection (a), any surplus must be distributed to
22 | the beneficial owners in proportion to their beneficial interests.

23 | **Comment**

24 | **Principal Source** – Revised Uniform Limited Liability Company Act §708 (2006).

25 |
26 | Under Section 103(c)(1), the provisions this section are not subject to override by the
27 | governing instrument.

1 [ARTICLE] 8

2 FOREIGN STATUTORY TRUSTS

3 SECTION 801. GOVERNING LAW.

4 (a) The law of the state or other jurisdiction under which a foreign statutory trust is
5 formed governs:

6 (1) the internal affairs of the trust;

7 (2) the liability of a beneficial owner as beneficial owner and trustee as trustee for
8 the debts, obligations, or other liabilities of the trust; and

9 (3) the liability of a series of a foreign statutory trust with respect to the trust and
10 other series thereof.

11 (b) The [Secretary of State] may not deny a foreign statutory trust a certificate of
12 qualification by reason of any difference between the laws of the jurisdiction under which the
13 foreign statutory trust is formed and the laws of this state.

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

17 Comment

18
19 **Principal Sources** – Revised Uniform Limited Liability Company §801 (2006); Uniform
20 Limited Partnership Act §901 (2001); Delaware Statutory Trust Act §3851; Connecticut
21 Statutory Trust Act §34-530.

22
23 Paragraph (a) parallels and is analogous in scope and effect to Section 305 for a domestic
24 statutory trust. Paragraph (b) allows for a foreign statutory trust to operate domestically even if
25 the law governing it is different from the laws governing domestic statutory trusts, but under
26 paragraph (c) a foreign statutory trust cannot engage in any business or exercise any power that a
27 domestic statutory trust could not.

28
29 Under Section 103(c)(1), this Section is not subject to override by the governing
30 instrument.

1

2 **SECTION 802. APPLICATION FOR CERTIFICATE OF QUALIFICATION.**

3 (a) A foreign statutory trust may apply for a certificate of qualification to transact
4 business in this state by delivering an application to the [Secretary of State] for filing. The
5 application must contain:

6 (1) the name of the trust and, if the name does not comply with Section 209, an
7 alternate name adopted pursuant to Section 807(a).

8 (2) the name of the state or other jurisdiction under whose law the trust is formed;

9 (3) the street and mailing addresses of the trust's principal office and, if the laws
10 of the jurisdiction under which the trust is formed require it to maintain an office in that
11 jurisdiction, the street and mailing address of the required office; and

12 (4) the name and street and mailing addresses of the trust's initial agent for
13 service of process in this state.

14 (b) A foreign statutory trust shall deliver with a completed application under subsection
15 (a) a certificate of existence or a record of similar import signed by the [Secretary of State] or
16 other official having custody of the foreign statutory trust's publicly filed records in the state or
17 other jurisdiction under whose law the foreign statutory trust is formed.

18 **Comment**

19
20 **Principal Source** – Uniform Limited Partnership Act §902 (2001).

21
22 A certificate of qualification applied for under this section is different than a certificate of
23 existence ~~or registration~~ furnished under Section 207 or a certificate of registration under Section
24 806.

25
26 Under Section 103(c)(1), this Section is not subject to override by the governing
27 instrument.
28

1 **SECTION 803. AMENDMENT OR RESTATEMENT OF CERTIFICATE.**

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

4 (1) the name of the trust;

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

6 (3) the changes that the amendment makes to the certificate as most recently
7 amended or restated.

8 (b) A trustee that knows or has reason to know that any information in a filed certificate
9 of qualification was incorrect when the certificate was filed or has become incorrect due to
10 changed circumstances shall promptly:

11 (1) cause the certificate to be amended; or

12 (2) if appropriate, deliver to the [Secretary of State] for filing a statement of
13 correction pursuant to Section 206.

14 (c) A certificate of qualification of a foreign statutory trust may be amended at any time
15 for any purpose as determined by the trustees.

16 (d) An amendment or restated certificate of qualification of a foreign statutory trust is
17 effective as provided in Section 204(c).

18 **Comment**

19
20 **Principal Source** – Uniform Limited Partnership Act §202 (2001).

21
22 Paragraph (a) provides a mechanism for updating a statutory trust's certificate of
23 qualification. Paragraph (b) imposes an obligation directly on the trustee rather than on the
24 statutory trust.

25
26 Under Section 103(c)(1), this Section is not subject to override by the governing
27 instrument.
28

1 **SECTION 804. ACTIVITIES NOT CONSTITUTING TRANSACTING**

2 **BUSINESS.**

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

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

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

8 (3) maintaining accounts in financial institutions;

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

12 (5) selling through independent contractors;

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

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

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

20 (9) conducting an isolated transaction that is completed within 30 days and is not
21 in the course of similar transactions; and

22 (10) transacting business in interstate commerce.**[For Discussion: What about**
23 **ownership of property that is not income producing, or doing business as a member of an**

1 **LLC or a limited partner in a LLP?**

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

5 (c) A person ~~is not deemed to be doing~~does not do business in the state solely by reason
6 of being a trustee or a beneficial owner of a foreign statutory trust that does do business in this
7 state.

8 **Comment**

9
10 **Principal Sources** – Uniform Limited Partnership Act §903 (2001).

11
12 The schedule of activities that in paragraph (a) that do not constitute transacting business
13 in the state are illustrative and not exhaustive. As revised in 2006, the Delaware Statutory Trust
14 Act contains a similar schedule. See 2006 Delaware Laws Ch. 418 §20 (H.B. 445), adding
15 Delaware Statutory Trust Act §3863.

16
17 Under Section 103(c)(1), this Section is not subject to override by the governing
18 instrument.

19
20 **SECTION 805. APPLICATION FOR CERTIFICATE OF QUALIFICATION.** If
21 all filing fees have been paid, unless the [Secretary of State] determines that an application for a
22 certificate of qualification of a foreign statutory trust does not comply with the filing
23 requirements of this [act], the [Secretary of State] shall file the application.

24 **Comment**

25
26 **Principal Source** –Uniform Limited Partnership Act §904 (2001).

27
28 A certificate of qualification filed under this section is different than a certificate of
29 registration under Section 806.

30
31 Under Section 103(c)(1), this Section is not subject to override by the governing
32 instrument.

1 **SECTION 806. CERTIFICATE OF REGISTRATION.**

2 (a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish a
3 certificate of registration for a foreign statutory trust if the records filed in the [office of the
4 Secretary of State] show that the [Secretary of State] has filed a certificate of qualification, has
5 not revoked the certificate of qualification, and has not filed a notice of cancellation. A
6 certificate of registration must state:

7 (1) the name of the trust and any alternate name adopted under Section 807 for
8 use in this state;

9 (2) that all fees and penalties due to the [Secretary of State] have been paid;

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

12 (4) whether the foreign statutory trust's most recent annual report required by
13 Section 214 has been filed by the [Secretary of State].

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

17 **Comment**

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

19 The provisions of this section, which concern the issuance of a certificate of registration
20 for a qualified foreign statutory trust, are analogous to the provisions of Section 206 concerning
21 the issuance of a certificate of existence for a statutory trust.

22
23 Under Section 103(c)(1), this Section is not subject to override by the governing
24 instrument.

25
26 **SECTION 807. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.**

1 (a) A foreign statutory trust whose name does not comply with Section 207 may not
2 obtain a certificate of qualification until it adopts, for the purpose of transacting business in this
3 state, an alternate name that complies with Section 207. A foreign statutory trust that adopts an
4 alternate name under this subsection and obtains a certificate of qualification with the name need
5 not comply with [fictitious or assumed name statute]. After obtaining a certificate of
6 qualification with an alternate name, a foreign statutory trust shall transact business in this state
7 under the name unless the trust is authorized under [fictitious or assumed name statute] to
8 transact business in this state under another name.

9 (b) If a qualified foreign statutory trust changes its name to one that does not comply with
10 Section 107, it may not thereafter transact business in this state until it complies with subsection
11 (a) and obtains an amended certificate of qualification.

12 **Comment**

13
14 **Principal Source** – Uniform Limited Partnership Act §905 (2001).

15
16 Under Section 103(c)(1), this Section is not subject to override by the governing
17 instrument.
18

19 **SECTION 808. REVOCATION OF CERTIFICATE OF QUALIFICATION.**

20 (a) A certificate of qualification of a qualified foreign statutory trust to transact business
21 in this state may be revoked by the [Secretary of State] in the manner provided in subsections (b)
22 and (c) if the trust does not:

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

24 (2) deliver for filing a statement of change within 30 days after a change has
25 occurred in the name or address of the agent;

26 (3) file an annual report; or

1 (4) pay, within 60 days after the due date, any fee, tax, or penalty due to the
2 [Secretary of State].

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

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

9 (2) the basis for the revocation.

10 (c) Unless a foreign statutory trust cures the failures to comply with subsection (a) stated
11 in the notice of revocation before the date state in the notice, the authority of the trust to transact
12 business in this state ceases on that date.

13 (d) If a foreign statutory trust cures the failures stated in the notice of revocation under
14 subsection (c), the [Secretary of State] shall indicate that the trust is reinstated on the filed
15 notice. The reinstatement of the trust relates back for all purposes to the date of the notice of
16 revocation.

17 **Comment**

18
19 **Principal Source** – Uniform Limited Partnership Act §906 (2001).

20
21 Under Section 103(c)(1), this Section is not subject to override by the governing
22 instrument.
23

24 **SECTION 809. CANCELLATION OF CERTIFICATE OF QUALIFICATION.**

25 (a) To cancel its certificate of qualification to transact business in this state, a qualified
26 foreign statutory trust must deliver to the [Secretary of State] for filing a notice of cancellation

1 that states:

2 (1) the name of the trust;

3 (2) the date of filing of its initial certificate of qualification;

4 (3) that the certificate of qualification is being canceled; and

5 (4) any other information as determined by the trustees filing the statement.

6 (b) A certificate of qualification under subsection (a) is canceled when the notice of
7 cancellation becomes effective under Section 204.

8 **Comment**

9
10 **Principal Source** – Uniform Limited Partnership Act §907 (2001).

11
12 Under Section 103(c)(1), this Section is not subject to override by the governing
13 instrument.
14

15 **SECTION 810. EFFECT OF FAILURE TO HAVE CERTIFICATE.**

16 (a) A foreign statutory trust transacting business in this state may not maintain an action
17 or proceeding in this state unless it has a certificate of qualification to transact business in this
18 state.

19 (b) The failure of a foreign statutory trust to have a certificate of qualification to transact
20 business in this state does not impair the validity of a contract or act of the trust or prevent the
21 trust from defending an action or proceeding in this state.

22 (c) A trustee or beneficial owner of a ~~foreign limited liability company~~ statutory trust is
23 not liable for the debts, obligations, or other liabilities of the ~~company~~ trust solely because the
24 ~~company~~ trust transacted business in this state without a certificate of qualification.

25 (d) If a foreign statutory trust transacts business in this state without a certificate of
26 qualification or cancels its certificate of qualification, the trust appoints the [Secretary of State]

1 as its agent for service of process for actions arising out of the transaction of business in this
2 state.

3 **Comment**
4

5 **Principal Source** – Uniform Limited Partnership Act §907 (2001).
6

7 Under Section 103(c)(1), this Section is not subject to override by the governing
8 instrument.
9

10 **SECTION 811. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]
11 may maintain an action to enjoin a foreign statutory trust from transacting business in this state
12 in violation of this [article].

13 **Comment**
14

15 **Principal Source** – Uniform Limited Partnership Act §908 (2001).
16

16 Under Section 103(c)(1), this Section is not subject to override by the governing
17 instrument.

1 **[ARTICLE] 9**

2 **MISCELLANEOUS PROVISIONS**

3 **SECTION 901. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
4 applying and construing this uniform act, consideration must be given to the need to promote
5 uniformity of the law with respect to its subject matter among states that enact it.

6 **Comment**

7
8 **Principal Source** – Uniform Limited Partnership Act §1201 (2001).
9

10 Under Section 103(c)(1), this Section is not subject to override by the governing
11 instrument.
12

13 **SECTION 902. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
14 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the federal
15 Electronic Signatures in Global and National Commerce Act[, 15 U.S.C. Section 7001 et seq.],
16 but this [act] does not modify, limit, or supersede Section 101(c) of that act or authorize
17 electronic delivery of any of the notices described in Section 103(c) of that act.

18 **Comment**

19
20 **Principal Source** – Uniform Limited Partnership Act §1203 (2001).
21

22 Under Section 103(c)(1), this Section is not subject to override by the governing
23 instrument.
24
25

26 **SECTION 903. SAVING CLAUSE.** This [act] does not affect an action commenced,
27 proceeding brought, or right accrued before this [act] takes effect.

28 **Comment**

29
30 **Principal Source** – Uniform Limited Partnership Act §1207 (2001).
31

1 Under Section 103(c)(1), this Section is not subject to override by the governing
2 instrument.
3

4 **SECTION 904. RESERVATION OF POWER TO AMEND OR REPEAL.** The
5 [name of state legislature] has power to amend or repeal all or part of this [act] at any time and
6 all statutory trusts and foreign statutory trusts subject to this [act] are governed by the
7 amendment or repeal.

8 **Comment**
9

10 **Principal Source** – Revised Model Business Corporation Act §1.02 (2002).
11

12 **[For Discussion: (1) Necessity of an explanatory comment, and (2) other models**
13 **besides the RMBCA. At the summer reading we were urged to look at Section 103 of the**
14 **new Uniform Cooperative Association Act, which says “A limited cooperative association**
15 **governed by this [act] is subject to any amendment or repeal of this [act].”]**
16

17 Under Section 103(c)(1), this Section is not subject to override by the governing
18 instrument.
19

20 **SECTION 905. APPLICATION TO EXISTING RELATIONSHIPS.**

21 (a) This [act] does not limit, prohibit, or invalidate the existence, acts, or obligations of
22 any common-law trust created or doing business in this state before or after [the effective date of
23 the act]. The laws of this state other than this [act] pertaining to trusts apply to common-law
24 trusts.

25 (b) A common-law trust arising under the law of this state before or after [the effective
26 date of this [act]] that does not have a prevailingly donative purpose may elect to be governed by
27 this [act] by filing of a certificate of trust under Section 201.

28 [(c) A trust created pursuant to a statute of this state that was required by that statute to
29 file a certificate of trust with [the Secretary of State] before [the effective date of this [act]] may
30 elect to be governed by the provisions of this [act] by filing an amendment to its certificate of

1 trust under Section 202.]

2 [(d) On [two years] after [the effective date of this [act]], this [act] governs the
3 organization and internal affairs of all trusts created pursuant to a statute of this state that was
4 required by that statute to file a certificate of trust with the [Secretary of State] before the
5 effective date of this [act].]

6 **Comment**

7
8 **Principal Source** – Uniform Limited Partnership Act §1206 (2001).

9 This Act governs all statutory trusts formed on or after the Act’s effective date. For pre-
10 existing statutory trusts, this section establishes an optional “elect in” period and a mandatory,
11 all-inclusive date of two years following the effective date. Beginning on the all-inclusive date,
12 each pre-existing statutory trust that has not previously elected in becomes subject to this Act—
13 including the schedule of mandatory rules in Section 103(c)—by operation of law.

14
15 Paragraph (a) confirms that this act does not govern a common law trust unless the trust
16 elects to be governed by the terms of this act by filing a certificate of trust under Section 201.
17 However, consistent with Section 302, paragraph (b) of this Section prohibits a common law
18 trust with a prevailingly donative purpose from becoming a statutory trust.

19
20 The drafting committee contemplated that some enacting jurisdictions might modify this
21 section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not
22 expected—to address other transition problems arising from differences between this Act and
23 prior law. For example, an enacting jurisdiction might choose to allow trusts formed under a
24 prior statute to remain governed by the prior statute for longer than the two years suggested in
25 paragraph (d).

26
27 Under Section 103(c)(1), this Section is not subject to override by the governing
28 instrument.

29
30 **SECTION 906. REPEALS.** On [all-inclusive date], the following acts are repealed:

31 (1) [the State Statutory Trust Act as amended and in effect immediately before [the
32 effective date of this [act]]];

33 (2) [the State Business Trust Act as amended and in effect immediately before [the
34 effective date of this [act]]]; and

(3) [the State Real Estate Investment Trust Act as amended and in effect immediately before [the effective date of this [act]]].

Comment

Principal Sources – Uniform Limited Partnership Act §1205 (2001).

Paragraphs (1) and (2) supply model language for enacting jurisdictions that have previously enacted a Statutory Trust Act or a 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 business entity that qualifies under 26 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under 26 U.S.C. §860D. ~~In spite of the use of the word “trust” in its title, Although the Internal Revenue Code at one time favored the trust form for the organization of a REIT, the code today does not regulate the form of entity. Accordingly,~~ there is no longer any reason why a REIT must be organized as a trust, whether statutory or common law. Indeed, in contemporary practice nearly all most publicly-traded REITs are organized as Maryland corporations, not as trusts. See Robert H. Sitkoff, The Rise of the Statutory Business Trust __ [citation]. Nonetheless, prior to the liberalization of the tax code, a number of states have enacted REIT statutes that authorize the creation of a REIT-specific trust entity designed to qualify as a REIT under the ~~Internal Revenue Code code~~. Because a statutory trust under this Act could serve the same purpose, the drafting committee contemplated that enacting jurisdictions might take the occasion of enacting this act to repeal their REIT statutes.

Under Section 103(c)(1), this Section is not subject to override by the governing instrument.

SECTION 907. EFFECTIVE DATE. This [act] takes effect

Comment

Principal Source – Uniform Limited Partnership Act §1204 (2001).

Section ~~804~~ 905 specifies how this Act affects statutory trusts, with special provisions pertaining to statutory trusts formed before the Act’s effective date. Section 804 contains no comparable provisions for foreign statutory trusts. Therefore, once this Act is effective, it applies immediately to all foreign statutory trusts, whether formed before or after the Act’s effective date.

Under Section 103(c)(1), this Section is not subject to override by the governing instrument.