

DRAFT
FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For February 29 – March 1, 2008 Drafting Committee Meeting

With Prefatory Notes and Comments

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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 a corporate form of organization.

To address 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.

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 in the name of the trustee in the trustee’s capacity as such. By contrast, a statutory trust is 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 in its own name. See Sections 301, 307-308.

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.

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.

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 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 laws into uniformity.

Models for Drafting. Although the Uniform Statutory Trust Entity Act is the first Uniform Act on the subject of statutory business trusts, comprehensive statutory trust regimes exist in several states. Notable examples include Connecticut, Delaware, Maryland, New Hampshire, Nevada, South Dakota, Wyoming, and Virginia, all of which were consulted in the drafting of the Uniform Act. 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 and the number of new statutory trust formations over the last several years. See Sitkoff, *supra*, at ___. These data indicate that the Delaware Act dominates the field. *Id.* at ___. 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 are drawn from corporate rather than trust law. See, e.g., Sections 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, referencing also the Second and Third Restatements of Trusts.

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 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); (5) systematic treatment of conversion and merger (Article 6), and of dissolution (Article 7); and an entire article on series trusts (Article 3A [placeholder]).

Default and Mandatory Rules. Most of the Uniform Statutory Trust Entity Act consists of default rules that apply only if the governing instrument does not sufficiently address 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 customarily considered to be 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); 1 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 applies to a common law trust that has a business purpose. The common law of trusts applies to all trusts arising under the common law, 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, 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 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 consultation with experts in the structured finance, bankruptcy, mutual fund, and estate planning
13 industries, the drafting committee rejected those and other such titles in favor of “Uniform
14 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

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

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

4 (7) “Jurisdiction” means a state or a foreign country.

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

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

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

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

14 (A) the spouse of the person;

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

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

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

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

22 (F) a person that is directly or indirectly controlled by, or is under common
23 control of, the person.

1 (11A [placeholder]) “Series” means [For Discussion: Whether to define “series,” and
2 if so, how to do so?]

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

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

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

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

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

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

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

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

17 **Comment**

18
19 **Principal Sources** – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
20 Act §34-501; Uniform Limited Partnership Act §102 (2001); SEC Rule 144(a)(1), 17 C.F.R.
21 §230.144(a)(1).
22

23 Paragraphs (2), (6), and (16) define “certificate of trust,” “governing instrument,” and
24 “trust instrument” respectively. The certificate of trust is the record that under Section 201 must
25 be delivered to a public official for filing to form a statutory trust. The trust instrument is the
26 transaction document that provides for the governance of the affairs of the statutory trust and that
27 need not be made part of the public record. Together, the certificate of trust and the trust
28 instrument compose the governing instrument. The term “governing instrument” is in the
29 singular to conform with standard commercial usage. Conflicts between the certificate of trust
30 and the governing instrument are resolved pursuant to Section 201(d). Although the term “trust

1 instrument” is phrased in the singular, consistent with current commercial practice the drafting
2 committee contemplated that there would often be more than one “trust instrument.” Section
3 104(b) makes authorization of multiple instruments explicit.
4

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

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

15 Paragraph (11A) defines “series” [**Commentary re series definition, provided a
16 definition is given.**]
17

18 Paragraph (17) defines “trustee” as a person designated as such in accordance with the
19 governing instrument or applicable law. For discussion of trustee appointment, see the Comment
20 to Section 401.
21

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

23 (a) Subject to subsection (c) and the terms of the governing instrument, this [act] governs
24 the management and affairs of the statutory trust and the rights, interests, duties, obligations, and
25 powers of, and the relations among, the trustees, 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 (3A [placeholder]) **[For Discussion: Which provisions of Article 3A should**
3 **be mandatory?]**

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

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

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

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

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

21 (8A[placeholder]) the right of a judgment creditor of a beneficial owner to seek a
22 charging order under Section 504A[placeholder].

23 (9) the right of a beneficial owner to bring a derivative action under Section 507,

1 but the governing instrument may subject the right to additional standards and restrictions
2 including the requirement that beneficial owners owning a specified amount or type of beneficial
3 interest join in bringing the derivative action, if the additional standards and restrictions are not
4 manifestly unreasonable; and

5 (10) Sections 601, 604, 605, 608, and 609.

6 **Comment**

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

11
12 Because paragraph (c) refers specifically to other sections of the Act, enacting
13 jurisdictions that modify those other sections may also need to modify paragraph (c).

14
15 **Default Rules.** Paragraphs (a) and (b) emphasize that the Uniform Statutory Trust Entity
16 Act is primarily a default statute. Most of the Act’s provisions may be overridden by the terms
17 of the governing instrument.

18
19 **Mandatory Rules.** Paragraph (c) schedules the provisions of this act that are not subject
20 to override in the governing instrument of a statutory trust. Most concern the rights of
21 nonparties or public filing and notice requirements. By contrast, with two exceptions all the
22 provisions of this Act concerning the powers and duties of a trustee, relations among trustees,
23 and the rights and interests of a beneficial owner may be overridden or at least altered by the
24 terms of the governing instrument. The first exception is the mandatory prohibition of
25 indemnification, advancement, or exoneration for conduct involving bad faith, willful
26 misconduct, or reckless indifference in paragraph (c)(7). This exception is familiar trust law.
27 See Restatement (Second) of Trusts §222 (1959); George G. Bogert & George T. Bogert, *The*
28 *Law of Trusts and Trustees* §542 (rev. 2d ed. 1993); Uniform Trust Code §1008 (2000). See
29 also John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U.L. Rev. 1105, 1121-25
30 (2004). The Delaware Statutory Trust Act likewise limits the permissible scope of exoneration.
31 See Delaware Statutory Trust Act §3806(e), which provides that the “governing instrument may
32 provide for the limitation or elimination of any and all liabilities for breach of contract and
33 breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing
34 instrument may not eliminate the implied contractual covenant of good faith and fair dealing.”
35 Limitations on permissible exoneration are also familiar corporate and alternative entity law.
36 See, e.g., Delaware General Corporation Law §102(b)(7); Delaware Limited Liability Company
37 Act §18-1101.

38
39 The second exception is contained in paragraph (c)(5), which makes mandatory the
40 invalidity under Section 405(b) of a direction to a trustee or other person that is manifestly

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

10
11 Paragraphs (c)(4), (c)(6), (c)(8), and (c)(9) allow the governing instrument to alter the
12 nature of the trustee’s fiduciary obligation, the right of a trustee to information, the right of a
13 beneficial owner to information, and the right of a beneficial owner to bring a derivative action,
14 but only if the alteration is not “manifestly unreasonable.” In opting for the “manifestly
15 unreasonable” standard instead of Delaware’s “good faith and fair dealing” formulation, see
16 Delaware Statutory Trust Act §3806(c) and (e), the drafting committee took notice of the use of
17 the term “manifestly unreasonable” in Revised Uniform Limited Liability Company Act §110(d)
18 (2006); Uniform Limited Partnership Act §110(b) (2001), Revised Uniform Partnership Act
19 §103(b) (1997), Uniform Limited Liability Company Act §103(b) (1996), and intended a similar
20 meaning here. See also Mark J. Loewenstein, Fiduciary Duties and Unincorporated Business
21 Entities: In Defense of the “Manifestly Unreasonable” Standard, 41Tulsa L. Rev. 411 (2006).

22
23 **Relationship to Mandatory Rules and the Uniform Trust Code.** Section 105(a)
24 provides that the law of this state pertaining to common-law trusts supplements this act.
25 However, Section 105(b) provides that, subject only to the mandatory rules scheduled above in
26 Section 103(c), the governing instrument of a statutory trust may override or modify the
27 application to the statutory trust of any rule pertaining to common-law trusts. Accordingly, in an
28 enacting jurisdiction that has also enacted the Uniform Trust Code (UTC), the UTC will apply to
29 a statutory trust, but only to the extent that the Code’s provisions are not displaced by this act or
30 the governing instrument. No provision of the UTC, including the rules stated in UTC §105 that
31 are mandatory with respect to a common law trust, is mandatory with respect to a statutory trust.
32 Likewise, regardless of whether an enacting jurisdiction has also enacted the UTC, any common
33 law rule that is mandatory with respect to a common law trust may nonetheless be overridden
34 with respect to a statutory trust by the governing instrument of the statutory trust. In sum, the
35 governing instrument of a statutory trust may override or alter any rule of trust law other than
36 those scheduled in §103(c) of this act. **[For Discussion: This paragraph has been reworked.
37 But is it more clear? And can it be improved further?]**

38
39 To prevent evasion of the public policy limitations on donative transfers that underpin the
40 mandatory rules applicable to a common-law trust, see John H. Langbein, Mandatory Rules in
41 the Law of Trusts, 98 Nw. U.L. Rev. 1105 (2004), Section 302 of this Act provides that a
42 statutory trust may not have “a prevailingly donative purpose.” For further discussion of the
43 relationship between this Act, the common law, and the Uniform Trust Code, see the Prefatory
44 Note to this Act under the heading “Relationship to Common Law Trusts and the Uniform Trust
45 Code” and the comments to Sections 105 and 302.

1 **Registered Investment Companies.** The Investment Company Act of 1940 (the “1940
2 Act”) trumps this Act with respect to a statutory trust that registers as an investment company.
3 For such a statutory trust the 1940 Act imposes additional mandatory rules. See, e.g., the
4 Comments to Sections 207 (name of statutory trust), 408 (interested transactions), 410
5 (indemnification, advancement, and exoneration), 411 (delegation by trustee), and 412 (action by
6 trustees).
7

8 **SECTION 104. SCOPE OF GOVERNING INSTRUMENT.**

9 (a) Subject to Section 103(c), a governing instrument may:

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

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

13 (3) provide for one or more series under Article 3A.;

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

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

18 (B) waiver of notice;

19 (C) action by consent without a meeting;

20 (D) establishment of record dates, quorum requirements, or voting in
21 person, by proxy, any form of communication that creates a record, telephone, or video
22 conference, or in any other manner; or

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

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

1 (A) amendment of the governing instrument;
2 (B) accomplishment of a merger, conversion, or reorganization;
3 (C) appointment of one or more trustees;
4 (D) sale, lease, exchange, transfer, pledge or other disposition of all or any
5 part of the assets of the statutory trust or the assets of any series thereof; and

6 (E) dissolution of the statutory trust;

7 (6) provide for the present or future creation of more than one statutory trust,
8 including the creation of a future statutory trust to which all or any part of the assets, liabilities,
9 profits, or losses of any existing statutory trust may be transferred or exchanged, and for the
10 conversion of beneficial interests in an existing statutory trust, or series thereof, into beneficial
11 interests in the separate statutory trust, or series thereof; **[For Discussion: Whether to collect**
12 **these scattered “or series thereof” references into a single section at the end of Article 3A.]**

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

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

20 (9) provide for the manner in which the governing instrument may be amended,
21 including by requiring the approval of a person that is not a party to the instrument or the
22 satisfaction of specified conditions and, to the extent the instrument provides for the manner in
23 which it may be amended, provide that it may be amended only in that manner or as otherwise

1 permitted by law, but the approval of any person may be waived by the person and these
2 conditions may be waived by all persons for whose benefit the conditions were intended;

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

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

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

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

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

18 **Comment**

19 **Principal Sources** – Scattered sections of the Delaware and Connecticut Statutory Trust
20 Acts.

21
22 The unusual principal sources citation reflects the drafting committee’s decision to
23 collect in a single section various permissive rules regarding the scope of the governing
24 instrument that are scattered throughout the Delaware and Connecticut Statutory Trust Acts. The
25 main exceptions concern the statement of permissive rules regarding the creation of one or more
26 series of a statutory trust in Section 301A[**Further updating may be required depending on**
27 **the resolution of the discussion note embedded in paragraph (a)(6).**], and the permissive
28 rules regarding the allowable remedies for a beneficial owner’s breach in Section 501(c).

1
2 By scheduling a nonexhaustive list of provisions that may validly be included in a
3 statutory trust’s governing instrument, this section is the permissive rule analogue to Section
4 103(c), which schedules the mandatory rules that cannot be overridden in the governing
5 instrument. The drafting committee concluded that the demand of third parties and transactional
6 planners to see language that expressly authorizes specific terms justified inclusion of a detailed
7 list in addition to the broad statement of freedom of contract in Sections 103(a)-(b) and 106.
8 Statutory confirmation reduces transaction costs by resolving doubts in practice over the
9 permissibility of such provisions. Similar reasoning underlies the provision of a detailed
10 schedule of powers in Uniform Trust Code §816 (2000) in addition to the broad general
11 statement in Uniform Trust Code §815.

12
13 **SECTION 105. APPLICABILITY OF TRUST LAW.**

14 (a) The law of this state pertaining to common-law trusts supplements this [act].

15 (b) Subject to section 103(c), the governing instrument may override or modify the
16 application to the statutory trust of any law of this state pertaining to common-law trusts.

17 **Comment**

18 **Principal Sources** – Uniform Trust Code §106 (2000); Delaware Statutory Trust Act
19 §3809; Connecticut Statutory Trust Act §34-519.

20
21 **Trust Law Supplements this Act.** Paragraph (a) provides that state trust law
22 supplements this Act and the terms of the governing instrument. In looking to trust law to fill
23 gaps in this act and the governing instrument, the drafting committee was strongly influenced by
24 the revealed preference for trust law among existing users of statutory trusts as evidenced by the
25 popularity of the Delaware Statutory Trust Act, which likewise looks to trust law, in comparison
26 to the business trust acts (such as those in Arizona, Indiana, Kansas, Mississippi, Montana,
27 Oregon, Tennessee, Washington, and West Virginia) that look to corporate law. See Robert H.
28 Sitkoff, *The Rise of the Statutory Business Trust* [in progress].

29
30 **No Mandatory Rules Other Than Those Scheduled in Section 103(c).** Paragraph (b)
31 confirms that, except for the mandatory rules scheduled in §103(c), the governing instrument
32 may override any rule or law pertaining to common-law trusts that would otherwise be
33 applicable to a statutory trust under paragraph (a). For further discussion, see the comment to
34 Section 103 under the heading “Relationship to Mandatory Rules and the Uniform Trust Code.”
35

36 **Relationship to the Uniform Trust Code.** In an enacting jurisdiction that has also
37 enacted the Uniform Trust Code, the joint effect of paragraphs (a) and (b) is to make the Code
38 applicable to a statutory trust, but only to the extent that the Code’s provisions—including the
39 mandatory rules scheduled in UTC §105—are not displaced by this act or the trust’s governing
40 instrument. For further discussion, see the comment to Section 103 under the heading
41 “Relationship to Mandatory Rules and the Uniform Trust Code.”

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 under Section
12 301A[placeholder].

13
14 (c) A certificate of trust may contain any information in addition to that required by
15 subsection (b) which is not inconsistent with this [act].

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

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

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

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

1 **Comment**

2
3 **Principal Sources** – Uniform Limited Partnership Act §201 (2001); Delaware Statutory
4 Trust Act §3810; Connecticut Statutory Trust Act §34-503.

5
6 Unlike a common law trust, a statutory trust is a creature of statute that requires a filing
7 with the state to come into existence. Filing rules are typical of limited liability entities. Such
8 filing rules serve a notice function, alerting interested parties to creation and existence of a new
9 limited liability juridical entity. See Section 204(b), which entitles any person to a certified copy
10 of a filing made pursuant to this act.

11
12 A statutory trust comes into existence only if (1) a certificate of trust is prepared and
13 delivered to the specified public official for filing, and (2) the public official files the certificate.
14 (For more on the meaning of “filing,” see Section 204 and the comment thereto.) The certificate
15 of trust provides notice to interested third parties of the existence of the statutory trust and the
16 identification of the statutory trust’s initial agent for service of process. Pursuant to Section
17 305A(2), the certificate of trust also puts third parties on notice if the statutory trust further
18 segregates its assets and liabilities by creating one or more series.

19
20 Although formed by making a public filing, a statutory trust is also a creature of contract.
21 As such, it will be possible, though improper, for the trust instrument to be inconsistent with the
22 certificate of trust or other public filings relating to the statutory trust. Paragraph (d) provides
23 the rule for determining which prevails in such circumstances. Under paragraph (d)(1), the
24 inconsistent provision of the trust instrument prevails with respect to trustees and beneficial
25 owners. Under paragraph (d)(2), the terms of the public filings trust prevail with respect to all
26 other parties that reasonably rely on the filing. The public filing controls for a party other than a
27 trustee or beneficial owner because such a party is entitled to rely on the public record.

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

31
32 **SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF**
33 **TRUST.**

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

36 (1) the name of the trust;

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

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

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

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

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

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

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

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

13 **Comment**

14
15 **Principal Sources** – Uniform Limited Partnership Act §202 (2001); Delaware Statutory
16 Trust Act §3810; Connecticut Statutory Trust Act §34-503.

17
18 Paragraph (a) provides a mechanism for updating a statutory trust’s filed certificate of
19 trust. Paragraph (b) imposes an obligation directly on the trustee rather than on the statutory
20 trust.

21
22 Under Section 103(c)(1), this Section is not subject to override by the governing
23 instrument.

24
25 **SECTION 203. SIGNING OF RECORDS.**

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

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

29 **Comment**

1
2 **Principal Sources** – Uniform Limited Partnership Act §204 (2001); Delaware Statutory
3 Trust Act §3811; Connecticut Statutory Trust Act §34-504.

4
5 Paragraph (b) confirms that the signing of a public record by a trustee is a delegable act.

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

9
10 **SECTION 204. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY**
11 **OF STATE]; EFFECTIVE TIME AND DATE.**

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

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

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

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

27 (2) if the record specifies an effective time but not a delayed effective date, on the

1 date the record is filed at the time specified in the record;
2 (3) if the record specifies a delayed effective date but not an effective time, at
3 12:01 a.m. on the earlier of:
4 (A) the specified date; or
5 (B) the 90th day after the record is filed; or
6 (4) if the record specifies an effective time and a delayed effective date, at the
7 specified time on the earlier of:
8 (A) the specified date; or
9 (B) the 90th day after the record is filed.

10 **Comment**

11
12 **Principal Sources** – Uniform Limited Partnership Act §206 (2001); Delaware Statutory
13 Trust Act §3812; Connecticut Statutory Trust Act §34-505.

14
15 For a record prepared by a private person to become part of the public record under this
16 Act, (1) someone must put a properly prepared version of the record into the possession of the
17 public official specified in the Act as the appropriate filing officer, and (2) the filing officer must
18 determine that the record complies with the filing requirements of this Act and then officially
19 make the record part of the public record. This Act refers to the first step as “delivery to the
20 [Secretary of State] for filing” and refers to the second step as “filing.” Thus, under this Act
21 “filing” is an official act.

22
23 Under paragraph (a), the caption need only indicate the title of the record—for example,
24 “Certificate of Trust” or “Statement of Change for Statutory Trust.” Filing officers typically
25 note on a filed record the fact, date, and time of filing. Copies provided by the filing officer
26 under paragraph (a) should contain that notation. This Act does not provide a remedy if the
27 filing officer wrongfully fails or refuses to file a record.

28
29 Paragraph (c) allows most records to have a delayed effective date, up to 90 days after
30 the date the record is filed by the filing officer. A record specifying a longer delay will not be
31 rejected. Instead, under paragraph (c)(3) and (4), the delayed effective date is adjusted by
32 operation of law to the “90th day after the record is filed.” This Act does not require the filing
33 officer to notify anyone of the adjustment.

34
35 Consistent with the existing statutory trust acts, but inconsistent with most corporate
36 codes, this Act makes no provision for collecting a franchise tax. See generally Marcel Kahan &
37 Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205,

1 1218-33 (2001).

2

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

5

6 **SECTION 205. CORRECTING FILED RECORD.**

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

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

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

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

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

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

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

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

23

Comment

24

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

26

27 A statement of correction is appropriate only to correct inaccuracies that existed or
28 signatures that were defective “at the time of filing.” A statement of correction may not be used

1 to amend or revise a record that was accurate when filed but has become inaccurate as a result of
2 subsequent events.

3
4 Under paragraph (c), a statement of correction “relates back” by way of retroactive
5 application except against persons that have relied on the uncorrected record and would be
6 adversely affected if the correction related back.

7
8 Under Section 103(c)(1), this Section is not subject to override by the governing
9 instrument.

10
11 **SECTION 206. CERTIFICATE OF EXISTENCE.**

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

16 (1) the name of the trust;

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

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

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

21 and

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

24 (b) Subject to any qualification stated in the certificate, a certificate of existence issued
25 by the [Secretary of State] may be relied upon as conclusive evidence that the statutory trust is in
26 existence.

27 **Comment**

28 **Principal Source** – Uniform Limited Partnership Act §209 (2001).
29

1
2 A certificate of existence can reveal only information present in the public record. Under
3 this Act significant information bearing on the status of a statutory trust may be outside the
4 public record. Section 806 provides for the issuance of a certificate of registration for a qualified
5 foreign statutory trust.

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

9
10 **SECTION 207. NAME OF STATUTORY TRUST.**

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

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

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

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

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

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

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

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

6 (A) has merged with the applicant;

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

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

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

13 **Comment**

14
15 **Principal Sources** – Uniform Limited Partnership Act §108 (2001); Delaware Statutory
16 Trust Act §3814.

17
18 The drafting committee opted not to require that the name of a statutory trust contain a
19 traditional limited liability appellation. Such a requirement would be inconsistent with current
20 practice under the Delaware Act, though the drafting committee contemplated that enacting
21 jurisdictions with a strong policy regarding names of limited liability entities might modify this
22 Section accordingly. Moreover, other regulatory law will sometimes limit the range of
23 permissible names notwithstanding this Section. For example, the names of mutual funds
24 typically do not contain a limited liability appellation, but Section 35(d) of the Investment
25 Company Act of 1940, which is applicable to a statutory trust that is a registered investment
26 company, prohibits “materially deceptive or misleading” names. 15 U.S.C. §80a-34(d). See also
27 Rule 35d-1, 17 C.F.R. §270.35d-1 (listing types of names that have been deemed “materially
28 deceptive or misleading”).

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

32
33 **SECTION 208. RESERVATION OF NAME.**

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

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

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

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

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

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

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

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

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

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

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

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

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

9 **Comment**

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

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

14
15 **SECTION 209. AGENT FOR SERVICE OF PROCESS.**

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

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

21 **Comment**

22
23 **Principal Sources** – Uniform Limited Partnership Act §114 (2001); Delaware Statutory
24 Trust Act §3804; Connecticut Statutory Trust Act §34-507.

25
26 Under Section 201(a)(3), the initial designation of a statutory trust’s agent for service of
27 process is made in the original certificate of trust. Under Section 802(a)(3), the initial
28 designation of a foreign statutory trust’s agent for service of process is made in the original
29 application for a certificate of qualification [**The term “certificate of qualification” is to be**
30 **updated after the Article 8 vocabulary issues are resolved. Cross-reference in this**

1 **comment to provisions for a FST naming an agent of process to come.].** The initial
2 designation may be changed pursuant to a statement of change under Section 210, by an
3 amendment to the certificate of trust under Section 202, or by an annual report under Section
4 213(e).

5
6 Under Section 103(c)(1), this Section is not subject to override by the governing
7 instrument.
8

9 **SECTION 210. CHANGE OF DESIGNATED OFFICE OR AGENT FOR**
10 **SERVICE OF PROCESS.**

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

14 (1) the name of the trust;

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

16 (3) if the designated office is to be changed, the street and mailing addresses of
17 the new designated office;

18 (4) the name and street and mailing addresses of the current agent of the trust for
19 service of process; and

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

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

23 **Comment**

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

25
26
27 Paragraph (a) uses “may” rather than “must” because a statutory trust may also change
28 the information by an amendment to its certificate of trust under Section 202 and a qualified
29 foreign statutory trust may also change the information by an amendment to its certificate of
30 qualification under Section 805. Further, if the information currently in the public record is not
31 inaccurate, a statutory trust or qualified foreign statutory trust may change the information in an

1 annual report under Section 213(e).

2
3 Under Section 103(c)(1), this Section is not subject to override by the governing
4 instrument.

5
6 **SECTION 211. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

7 (a) To resign as an agent for service of process of a statutory trust or qualified foreign
8 statutory trust, the agent must deliver to the [Secretary of State] for filing a statement of
9 resignation containing the name of the trust, and the resigning agent must transmit a copy to the
10 designated office of the statutory trust or qualified foreign statutory trust and another copy to the
11 principal office if the address of the office appears in the records of the [Secretary of State] and
12 is different from the address of the designated office.

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

15 **Comment**

16
17 **Principal Source** – Uniform Limited Partnership Act §116 (2001).

18
19 This section provides the exclusive means for an agent to resign without cooperation
20 from the statutory trust or qualified foreign statutory trust and the only way the agent, rather than
21 the statutory trust or foreign statutory trust, can effect a change in the public record. Unlike most
22 records authorized or required to be delivered to the filing officer for filing under this Act, a
23 statement of resignation may not provide for a delayed effective date.

24
25 Paragraph (b) mandates the effective date. An effective date included in a statement of
26 resignation is disregarded. To satisfy Section 212(a), the statutory trust or qualified foreign
27 statutory trust must designate a new agent for service of process before the effective date. If the
28 statutory trust or foreign statutory trust fails to do so, under Section 212 service on the statutory
29 trust or foreign statutory trust may be made on the Secretary of State.

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

33
34 **SECTION 212. SERVICE OF PROCESS.**

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

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

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

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

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

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

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

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

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

1 **Comment**

2
3 **Principal Source** – Uniform Limited Partnership Act §117 (2001).

4
5 Paragraph (f) confirms that the authority of the Secretary of State to accept process under
6 a state long-arm statute exists independently of paragraphs (b) through (e) of this Section.

7
8 Under Section 103(c)(1), this Section is not subject to override by the governing
9 instrument.

10
11 **SECTION 213. ANNUAL REPORT FOR [SECRETARY OF STATE].**

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

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

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

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

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

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

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

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

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

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

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

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

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

15 **Comment**

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

17
18 A statutory trust that fails to comply with this section is subject to administrative
19 dissolution. See Section 701.

20
21 Under Section 103(c)(1), this Section is not subject to override by the governing
22 instrument.

23

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

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

38 By prohibiting a statutory trust from having “a prevailingly donative purpose,” the
39 drafting committee avoided the necessity of designing a comprehensive schedule of mandatory

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

7
8 Examples of mandatory rules applicable to common law trusts that drafters might
9 otherwise try to avoid by using a statutory trust include the following:

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

31
32 Most of the foregoing rules are referenced in Uniform Trust Code §105 (2000), the Code's
33 schedule of mandatory rules. For discussion of why the rules that are mandatory with respect to
34 a common law trust are not mandatory with respect to a statutory trust, see the comments to
35 Sections 103 and 105.

36
37 The drafting committee declined the suggestion to prohibit statutory trusts from having a
38 charitable purpose on the ground that a statutory trust with a charitable purpose would be
39 covered by existing regulatory law applicable to charitable entities. See Marion R. Fremont-
40 Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* 187-427
41 (2004).

42
43 Under Section 103(c)(2), this Section is not subject to override by the governing
44 instrument.

1 governing instrument of the trust.

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

4 (d) A statutory trust does not terminate if the same person is the sole trustee and sole
5 beneficial owner.

6 **Comment**

7
8 **Principal Sources** – Delaware Statutory Trust Act §3808; Connecticut Statutory Trust
9 Act §34-518.

10
11 Following the corporate default rule of perpetual existence, paragraph (a) provides a default
12 rule of perpetual existence for a statutory trust. See also Section 701, which provides for dissolution
13 of a statutory trust only upon the occurrence of an event or circumstance stated in the governing
14 instrument. The duration of a common law trust, by contrast, is curtailed by the Rule Against
15 Perpetuities. See Restatement (Second) of Property: Donative Transfers § 2.1 (1983).
16 Accordingly, unless the governing instrument provides otherwise, under this section a statutory trust
17 is exempt from the Rule Against Perpetuities. Without taking a position on the policy soundness of
18 the tax-driven movement to abolish the Rule Against Perpetuities with respect to donative trusts, see
19 Max M. Schanzenbach & Robert H. Sitkoff, Perpetuities or Taxes? Explaining the Rise of the
20 Perpetual Trust, 27 Cardozo L. Rev. 2465 (2006), the drafting committee concluded that the dead-
21 hand worries that underpin the Rule do not apply to a statutory trust. Under Section 302, a
22 statutory trust may not have a prevailingly donative purpose.

23
24 Paragraph (b) confirms that a statutory trust may only be terminated in accordance with the
25 terms of this Act or the governing instrument. Thus, paragraph (b) overrides the rules of common
26 law trust termination that would otherwise be applicable to a statutory trust pursuant to Section 105.

27 Those rules are concerned with mediating the tension between the donor’s intent and subsequent
28 contrary preferences of the beneficiaries, see Robert H. Sitkoff, An Agency Costs Theory of Trust
29 Law, 89 Cornell L. Rev. 621, 658-63 (2004), an issue that is not applicable to a statutory trust
30 because a statutory trust under this Act may not have a prevailingly donative purpose. Instead, the
31 drafting committee contemplated that pursuant to Section 104(b)(9) the governing instrument would
32 provide for termination of the statutory trust or modification of the governing instrument if such
33 provisions are desirable.

34
35 Paragraph (c) confirms that the rule of partnership law under which a partnership is
36 dissolved upon the death or incapacity of one of the partners does not apply to a statutory trust or
37 any series thereof .

38
39 Paragraph (d) overrides the application to a statutory trust under Section 105 of the
40 common law rule of merger whereby legal and equitable title to the trust property merge and the
41 trust terminates if the same person is the sole trustee and sole beneficiary. See Restatement

1 (Third) of Trusts §69 (2003); Restatement (Second) of Trusts §341 (1959); Comment, The
2 Doctrine of Merger as Applied to Commercial Trusts, 29 Yale L.J. 97 (1919).
3

4 **SECTION 307. POWER TO SUE AND BE SUED.**

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

6 (b) Except as otherwise provided in [article] 3A, the property of a statutory trust is
7 subject to attachment and execution to satisfy a debt, obligation, or other liability of the trust.

8 **Comment**
9

10 **Principal Sources** – Delaware Statutory Trust Act §§3803-3805; Connecticut Statutory
11 Trust Act §§34-518, 34-523; Uniform Limited Partnership Act §303 (2001).
12

13 Paragraph (a) implements the concept that a statutory trust is an entity separate from the
14 trustee and beneficial owner by confirming that a statutory trust has the power to sue and be sued
15 in its own name.
16

17 Paragraph (b) addresses the attachment and execution of a statutory trust’s property
18 subject to the possibility that the statutory trust has formed one or more series under Article 3A.
19

20 **SECTION 308. POWER TO HOLD PROPERTY; TITLE TO TRUST**

21 **PROPERTY.** A statutory trust has the power to hold or take title to property in its own name,
22 or in the name of a trustee in the trustee’s capacity as trustee, whether in an active, passive, or
23 custodial capacity.

24 **Comment**

25 **Principal Source** – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
26 Act §34-502a.
27

28 This Section implements the concept that a statutory trust is an entity separate from its
29 trustee and beneficial owners by confirming that a statutory trust may transact over property in
30 its own name. The property of a common law trust, by contrast, must be held in the name of the
31 trustee as such.
32

33 However, this section also permits the statutory trust to take title to property in the name
34 of the trustee in the trustee’s capacity as such even though the statutory trust is an entity separate
35 from the trustee and beneficial owner that can hold property in the name of the trust. The

1 drafting committee reasoned that this provision would be useful for a statutory trust that has
2 dealings in a state that has not provided for a statutory trust entity. Property ownership by a
3 trustee in the trustee's capacity as such is familiar from the use of common law trusts. To police
4 the boundary of the trustee's personal assets and the assets of the trust, the common law imposes
5 on the trustee duties to earmark trust property and not to commingle it with the trustee's own.
6 See Uniform Trust Code §810 (2000); Restatement (Third) of Trusts §84 (2007); Restatement
7 (Second) of Trusts §179 (1959). The drafting committee contemplated that under appropriate
8 circumstances Section 404(b) would be read to require similar conduct by a trustee of a statutory
9 trust that takes title to property of the statutory trust in the name of the trustee in the trustee's
10 capacity as such.
11

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

2
3 **SERIES TRUSTS**

4
5
6 **[For Discussion: Which of the provisions of this article should be added to the schedule of**
7 **mandatory rules in Section 103(c)?]**

8
9
10 **SECTION 301A. SERIES OF STATUTORY TRUST.** The governing instrument

11 may:

12 (1) provide for series of trustees, beneficial owners, or beneficial interests, having such
13 relative rights, powers, and duties as the governing instrument may provide, and provide for the
14 creation of additional series of trustees, beneficial owners, or beneficial interests, having such
15 relative rights, powers, and duties as may be established, including rights, powers, and duties
16 senior or subordinate to existing series of trustees, beneficial owners, or beneficial interests;

17 (2) provide for designated series of trustees, beneficial owners, or beneficial interests
18 having separate rights, powers, or duties with respect to profits and losses associated with
19 specified property or obligations, and permit the series to have a separate business purpose or
20 investment objective; and

21 (3) grant to, or withhold from, all or certain trustees or beneficial owners, or a specified
22 series of trustees or beneficial owners, the right to vote, separately or with any or all other series
23 of the trustees or beneficial owners, on any matter.

24 **Comment**

25
26 **Principal Sources** – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust
27 Act §34-518.

28
29 This section confirms that a statutory trust may be organized with one or more series.
30 The organization of a master statutory trust with several series is particularly common among
31 statutory trusts that are registered investment companies under the Investment Company Act of
32 1940, as amended, 15 U.S.C. Sections 80a-1 et seq. (the “1940 Act”). Rule 18f-2 under the

1 1940 Act permits an investment company to have multiple series, provided that any matter
2 required by the 1940 Act or other applicable law to be submitted to the holders of the
3 outstanding voting securities of a series company shall not be deemed to have been effectively
4 acted upon unless approved by the holders of a majority of the outstanding voting securities of
5 each series of stock affected by such matter. Rule 18f-2 also specifies certain instances where
6 the vote is required by all of the security holders of the investment company and other instances
7 where only the security holders of a series are required to vote.
8
9

10 **SECTION 302A. SERIES NOT SEPARATE ENTITY.** A series of a statutory trust is

11 not an entity separate from the statutory trust.

12 **Comment**

13
14 **[For Discussion: What, if anything, should this comment give by way of general**
15 **explanation or specific guidance? For example, should the comment discuss the**
16 **impossibility (or not) of bankruptcy by a series? Should the comment remark that not**
17 **treating each series as a separate entity is essential for compatibility with current practice**
18 **in the mutual fund industry? Should the comment observe that the Delaware act**
19 **(implicitly) rejects separate entity status for series?]**
20
21

22 **SECTION 303A. NAME OF SERIES.** The name of each series must contain the

23 entire name of the statutory trust and must be distinguishable from the names of the other series
24 of the trust.

25 **Comment**

26
27 **Principal Source – 805 ILCS 180/37-40(c)**

28
29 **[For Discussion: What if any general explanation or specific guidance should the**
30 **comment to this section provide?]**
31

32 **SECTION 304A. APPORTIONMENT AMONG SERIES.**

33 (a) A series of a statutory trust is chargeable by the trust or another series thereof for any
34 debt, obligation, or other liability incurred or otherwise existing with respect to or traceable to
35 the series to be charged.

36 (b) Each series of a statutory trust is chargeable with an equal share of any debt,

1 obligation or other liability incurred or otherwise existing with respect to the trust that is not
2 traceable to a series thereof.

3 **Comment**

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

6
7 **(2) Can we improve the language of (b)? The point of paragraph (b) is to supply a**
8 **default rule of for apportionment among the series for trust-level debts and costs. As**
9 **written, paragraph (b) creates a default of equal apportionment. Although equal**
10 **apportionment is unlikely to be “right” rule, the “right” rule will be transaction specific**
11 **and so necessarily the province of the governing instrument. Perhaps a useful analogy is to**
12 **the voting rights default rules of section 506. As the comment to that section explains, “The**
13 **drafting committee contemplated that the governing instrument typically will address**
14 **voting rules by providing a per capital or other share-based allocation of voting rights.**
15 **However, the drafting committee declined the suggestion to try to incorporate such a rule**
16 **as a default. Such rules are necessarily transaction-specific and hence infeasible to specify**
17 **in a one-size-fits-all default.”**

18
19 **(3) In addition to addressing the foregoing matters (including emphasis of the**
20 **default nature of this section), what other commentary, if any, should be provided here?]**
21

22 **SECTION 305A. LIABILITY OF SERIES. [For Discussion: Should this section**
23 **and section 304A appear in reverse order?]** If a statutory trust has one or more series as
24 provided in section 301A, a debt, obligation, or other liability incurred or otherwise existing with
25 respect to a particular series is enforceable against the assets of the series only, and not against
26 the assets of the trust generally or any other series thereof, and none of the debts, obligations, or
27 other liabilities incurred, contracted for, or otherwise existing with respect to the trust generally
28 or any other series thereof is enforceable against the assets of the series if:

29 (1) separate and distinct records are maintained for the series and the assets associated
30 with the series are held in separate and distinct records, directly or indirectly, including through a
31 nominee or otherwise, and accounted for in separate and distinct records separately from the
32 other assets of the trust, or any other series thereof; and

1 (2) notice of the possibility of one or more series is set forth in the certificate of trust
2 pursuant to Section 201.

3 **Comment**
4
5

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

9 This section provides that if a statutory trust creates separate series under Section 301A,
10 the debts, liabilities, and other obligations of a particular series are enforceable against the assets
11 of that series only, but only if (1) separate records are maintained for each series and (2) notice
12 of the limitation on liabilities of a series is set forth in the certificate of trust.
13

14 The earmarking requirement of paragraph (1) safeguards the separate interests of the
15 beneficial owners of each series by clarifying the boundaries between the assets and liabilities of
16 each series. For similar reasons, the earmarking requirement also protects third parties that deal
17 with a series trust. Third parties are further protected by paragraph (2), which conditions limited
18 liability across series on notice in the certificate of trust that the trust might have one or more
19 series.
20

21 Failure to satisfy paragraph (1) through adequate earmarking exposes the property of one
22 series to the claims of the creditors of another series. In such a case, the failure to maintain
23 separate records would likely amount to a breach of trust under Section 404, remediable by a
24 beneficial owner in a derivative or direct suit against the trustee.
25

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

34 **Comment**
35

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

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

14 **SECTION 307A. DISSOLUTION OF SERIES.**[For Discussion: When we
15 discussed Article 3A at the Fall 2007 Chicago meeting, we tentatively decided to address
16 dissolution of a series in Article 7. But when we turned to article 7, we failed to take up the
17 issue. The key questions therefore remain open: (1) where should series dissolution be
18 addressed, and (2) how? The Delaware Act’s provisions on dissolution of a series (12 Del.
19 Code §3808(f)-(g)) are reproduced below:

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

36 **(g) Upon dissolution of a series of a statutory trust, the persons who under the governing**
37 **instrument of the statutory trust are responsible for winding up such series' affairs may, in**
38 **the name of the statutory trust and for and on behalf of the statutory trust and such series,**
39 **take all actions with respect to the series as are permitted under subsection (d) of this**

1 section and shall provide for the claims and obligations of the series and distribute the
2 assets of the series as provided under subsection (e) of this section. Any person, including
3 any trustee, who under the governing instrument is responsible for winding up such series'
4 affairs who has complied with subsection (e) of this section shall not be personally liable to
5 the claimants of the dissolved series by reason of such person's actions in winding up the
6 series.]
7

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

10 SECTION 309A. [For Discussion: Per earlier discussion notes, this is where we
11 could schedule all the permissive “or series thereof” provisions.]

12 Comment

13
14 Principal Source –
15

1 [ARTICLE 4]

2 TRUSTEES AND TRUST MANAGEMENT

3 [For Discussion: In the Fall 2007 Chicago meeting we did not give much consideration to
4 whether the provisions of this Article should be reordered. For example, sections 411 and
5 412 seem out of place, with section 411 perhaps better located before or after section 405
6 and section 412 perhaps better located after section 402.]

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

10 Comment

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

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

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

26 (1) powers conferred by the governing instrument;

27 (2) except as limited by the governing instrument, any other powers necessary or
28 convenient to carry out the business and affairs of the statutory trust; and

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

30 Comment

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

32
33 This section is intended to grant trustees the broadest possible powers. Hence, this
34 section overrides the application to a statutory trust under Section 105 of the outmoded common

1 law rule that a trustee has only those powers granted by the trust instrument. See Uniform Trust
2 Code §815 (2000); Restatement (Third) of Trusts §85 cmt. a (2007).

3
4 However, the existence of a power, regardless of its source, does not speak to the
5 question whether the exercise of that power in a particular case is consistent with the trustee's
6 fiduciary obligation. The trustee's exercise of the broad powers conferred by this section is
7 always subject to the trustee's fiduciary obligations. See Uniform Trust Code §815 cmt. (2000);
8 Restatement (Third) of Trusts §§70, 86 (2007); John H. Langbein, *The Contractarian Basis of the*
9 *Law of Trusts*, 105 *Yale L.J.* 625, 640-43 (1995).

10
11 **SECTION 403. PROTECTION OF PERSON DEALING WITH TRUSTEE.**

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

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

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

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

24 **Comment**

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

26
27 Paragraph (a) protects two different classes of persons: (1) a person other than a
28 beneficial owner that assists a trustee with a transaction, and (2) a person other than a beneficial
29 owner that deals with the trustee for value. As long as the assistance was provided or the
30 transaction was entered into in good faith and without knowledge that the trustee was exceeding

1 or improperly exercising the trustee’s powers, a third person in either category is protected in the
2 transaction.

3
4 Paragraph (b) confirms that a third party that is acting in good faith is not charged with a
5 duty to inquire into the extent of a trustee’s power or the propriety of its exercise. The third
6 party may assume that the trustee has the necessary power. Paragraph (b) therefore overrides the
7 application to a statutory trust under Section 105 of the common law rule that a third party is
8 charged with constructive notice of the trust instrument and its contents. See George G. Bogert
9 & George T. Bogert, *The Law of Trusts and Trustees* §897 (Rev. 2d ed. 1995); 4 Austin W. Scott
10 & William F. Fratcher, *The Law of Trusts* Section §297 (4th ed. 1989).

11
12 Paragraph (c) protects any person, including a beneficial owner, that in good faith
13 delivers property to a trustee. The standard of protection in Restatement (Second) of Trusts §321
14 (1959) is phrased differently, but the result is similar. Under the Restatement (Second) of Trusts,
15 the person delivering property to a trustee is liable if at the time of the delivery the person had
16 notice that the trustee was misapplying or intending to misapply the property.

17
18 Paragraph (d) extends the protections afforded by this section to assistance provided to or
19 dealings for value with a former trustee. The third party is protected as if the former trustee still
20 held the office if the third party acted in good faith.

21 22 **SECTION 404. STANDARDS OF CONDUCT FOR TRUSTEES.**

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

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

27 **Comment**

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

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

32
33 Under Section 103(c), the trustee’s standards of conduct under this section are mandatory
34 rules that are not subject to override by the governing instrument. However, the governing
35 instrument may prescribe the standards by which “good faith,” “best interests of the statutory
36 trust,” and “care that a person in a like position would reasonable believe appropriate under
37 similar circumstances” are determined provided that the standards are not “manifestly
38 unreasonable.” Compare Delaware Statutory Trust Act §3806(c), which provides that a trustee’s

1 fiduciary duties “may be expanded or restricted or eliminated by provisions in the governing
2 instrument; provided, that the governing instrument may not eliminate the implied contractual
3 covenant of good faith and fair dealing,” and §3806(e), which provides that a “governing
4 instrument may provide for the limitation or elimination of any and all liabilities for . . . breach
5 of duties (including fiduciary duties) . . .; provided, that a governing instrument may not limit or
6 eliminate liability for any act or omission that constitutes a bad faith violation of the implied
7 contractual covenant of good faith and fair dealing.”
8

9 The drafting committee opted to model the trustee’s duties on the corporate fiduciary
10 obligation as stated in Revised Model Business Corporation Act §8.30 (2002) rather than the
11 more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a
12 mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the
13 context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of
14 commercial actors. For a statement of the duties of loyalty and prudence in trust law, see
15 Restatement (Third) of Trusts §§77-78 (2007). For a comparison, see Robert H. Sitkoff, Trust
16 Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82 (2003). See
17 also the sources cited in the Comment to Section 408.
18

19 **SECTION 405. DIRECTION OF TRUSTEES.**

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

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

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

31 **Comment**

32 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust

1 Act §34-517; Uniform Trust Code §808 (2000).

2
3 Paragraph (a) ratifies the use of a directed trustee, meaning a trustee that must act in
4 accordance with the directions of another person. Under paragraph (b), however, the trustee
5 must not follow a direction that is manifestly contrary to the terms of the governing instrument
6 or that the trustee knows or has reason to know would constitute a serious breach of fiduciary
7 duty. For general discussion, see Restatement (Third) of Trusts §75 (2007); Restatement
8 (Second) of Trusts §185 (1959) Richard W. Nenko, Directed Trusts: Can Directed Trustees
9 Limit Their Liability?, 21 Prob. & Prop. 45 (Nov./Dec. 2007).

10
11 Paragraph (b) confirms that the governing instrument may provide that a person that has
12 the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to the
13 statutory trust or a beneficial owner.

14
15 The reference in paragraph (c) 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 Uniform Trust Code §706(b)(1) (2000); Austin Wakeman
19 Scott, William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th
20 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 (2007).

29
30 Under Section 103(c)(5), the limitation on direction of trustees stated in paragraph (c) is
31 not subject to override by the governing instrument.

32
33
34 In conjunction with Section 411 [**For Discussion: Shouldn’t Section 411 appear**
35 **immediately before or after this section?**], this section facilitates the current practice in
36 existing statutory trusts of creating a trusteeship with respect to some, but not all, aspects of the
37 trust—for example, in a mutual fund with an investment advisor or in a securitization transaction
38 with a person who is responsible for distribution computations or whose consent is required
39 before the statutory trust can petition for bankruptcy.

40
41 **SECTION 406. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT**
42 **COMPANY.**

43 (a) In this section, the terms “affiliated person” and “interested person” have the

1 meanings set forth in the Investment Company Act of 1940, [as amended,] 15 U.S.C. Section
2 80a-1 et seq., [and any regulations issued thereunder].

3 (b) If a statutory trust is registered as an investment company under the Investment
4 Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [and any regulations
5 issued thereunder,] [or any successor statute thereto,] **[Style Question for McKay: Inconsistent**
6 **Citation to and Brackets in Investment Company Act references throughout the act.]** a
7 trustee is an independent trustee for all purposes under this [act] if the trustee is not an interested
8 person of the trust. The receipt of compensation for service as an independent trustee of the trust
9 and for service as an independent trustee of one or more other investment companies managed
10 by a single investment adviser or an affiliated person of an investment adviser, does not affect
11 the status of the trustee as an independent trustee under this section.

12 **Comment**

13
14 **Principal Source** – Delaware Statutory Trust Act §3801.

15
16 It is not uncommon for a director of a mutual fund to serve on multiple mutual fund
17 boards. Section 403 addresses the question of trustee independence in such circumstances,
18 rejecting *Strougo v. Scudder, Stevens & Clark*, 964 F. Supp. 783 (S.D.N.Y. 1997) (applying
19 Maryland law). In *Strougo* the plaintiffs claimed that directors serving on multiple boards within
20 a mutual fund complex became “interested” by virtue of their close financial relationship with
21 the investment advisor. The plaintiffs brought a derivative suit against a fund’s investment
22 advisor alleging excessive fees. The plaintiffs did not, however, make a demand on the directors
23 prior to filing suit. The court excused the plaintiffs from the demand requirement because the
24 fund’s directors served on multiple boards within the same fund complex, receiving “substantial
25 remuneration,” and hence were not independent from the adviser. *Id.* at 793-95.

26
27 In 1998 the Maryland legislature effectively overruled *Strougo* by amending the
28 Maryland corporate code to provide that directors who are not “interested persons” under the
29 Investment Company Act of 1940 also would be deemed disinterested under Maryland law. See
30 Md. Code (Corporations & Associations) §2-405.3. A similar provision took effect in
31 Massachusetts in 1999, see Mass. Laws. 182, § 2B, and in Delaware in 2000, see Delaware
32 Statutory Trust Act §3801(h). Almost all mutual funds are organized as Maryland corporations,
33 Massachusetts trusts, or Delaware statutory trusts. See Robert H. Sitkoff, *The Rise of the*
34 *Statutory Business Trust* [in progress]. Consistent with the Maryland, Massachusetts, and
35 Delaware legislation, this section rejects *Strougo* by deeming a trustee to be independent if he or

1 she is not an interested person under the Investment Company Act of 1940, as amended.
2

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

6 **Comment**

7 Under Section 103(c)(6), the trustee’s right to information under this section is not
8 subject to override by the governing instrument. However, the trustee’s right to information is
9 limited to information “reasonably related to” the trustee’s discharge of its duties as trustee, and
10 under Section 103(c)(6) the governing instrument may prescribe the standards by which
11 “reasonably related” is determined provided that those standards are not “manifestly
12 unreasonable.”
13

14 By linking the trustee’s information rights to the scope of the trustee’s duties as trustee,
15 this section makes the trustee’s right to information function specific. This section therefore
16 allows for the creation of a limited-role or directed trustee that will not have access to
17 confidential information unrelated to the trustee’s limited role. At the same time, this section
18 ensures that such a trustee will have access to information reasonably related to discharging the
19 trustee’s duties in connection with the trustee’s limited role.
20

21 Section 503 provides a comparable rule for a beneficial owner’s right to information.
22

23 **SECTION 408. INTERESTED TRANSACTIONS.**

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

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

1 **Comment**

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

4
5 Consistent with the use of the term “best interests” instead of “sole interest” in Section
6 404(a), this section abrogates the no-further-inquiry rule of the common law of trusts, which
7 forbids self-dealing transactions even if the transaction is fair and in the best interests of the trust
8 and the beneficiaries. See Restatement (Third) of Trusts §78 (2007); Restatement (Second) of
9 Trusts §170 (1959); John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest
10 or Best Interest?, 114 Yale L.J. 929 (2005); Melanie B. Leslie, Trusting Trustees: Fiduciary
11 Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005). Instead, this section
12 follows the corporate model whereby an interested transaction is voidable by the statutory trust
13 unless the related party shows that the transaction is fair to the trust. For discussion of the
14 fairness test as applied in corporate law, see Steven M. Bainbridge, Corporation Law and
15 Economics §7.2, at pp. 315-16 (2002), citing Marciano v. Nakash, 535 A.2d 400 (Del. 1987).

16
17 The application of this section to a statutory trust that is registered as an investment
18 company is preempted by the Investment Company Act of 1940, which generally prohibits a
19 trustee, officer, employee, manager, and their related persons from lending money to, borrowing
20 money from, and engaging in other transactions with the mutual fund without exemptive relief
21 from the Securities and Exchange Commission. See 15 U.S.C. §80a-17(a), (d).

22
23 **SECTION 409. GOOD-FAITH RELIANCE.** A trustee, officer, employee, manager,
24 or committee of a statutory trust, or other person designated pursuant to Section 104(b)(7) is not
25 liable to the trust or to a beneficial owner for breach of any duty, including a fiduciary duty, to
26 the extent the breach resulted from the good-faith reliance on:

27 (1) the terms of the governing instrument;

28 (2) the records of the statutory trust; or

29 (3) the opinions, reports, or statements of another person that are in the other person’s
30 professional or expert competence and are made or delivered to the trustee, officer, employee,
31 manager, or committee of a statutory trust, or other person designated pursuant to Section
32 104(b)(7).

33 **Comment**

1 **Principal Source** – Uniform Trust Code §1006 (2000); Delaware Statutory Trust Act
2 §3806; Connecticut Statutory Trust Act §34-517.

3
4 A trustee, officer, employee, manager, committee, or other such person or persons should
5 be able to administer a statutory trust with dispatch and without concern that a reasonable
6 reliance on (1) the terms of the governing instrument, (2) the records of the statutory trust, or (3)
7 the opinions of experts is misplaced. This section protects a person that so relies, but only to the
8 extent the breach of trust resulted from such reliance and only if the person’s reliance was in
9 good faith. “Taking the advice of legal counsel,” for example, “evidences prudence on the part
10 of the trustee. Reliance on the advice of counsel, however, is not a complete defense to an
11 alleged breach of trust, because that would reward a trustee who shopped for legal advice that
12 would support the trustee’s desired course of conduct or who otherwise acted unreasonably in
13 procuring or following legal advice. In seeking and considering advice of counsel, the trustee
14 has a duty to act with prudence. Thus, if a trustee has selected trust counsel prudently and in
15 good faith, and has relied on plausible advice on a matter within counsel’s expertise, th trustee’s
16 conduct is significantly probative of prudence.” Restatement (Third) of Trusts §77 cmt. b(2)
17 (2007).
18

19 **SECTION 410. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.**

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

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

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

1
2
3 **Comment**

4 **Principal Sources** – Delaware Statutory Trust Act §3817; Connecticut Statutory Trust
5 Act §34-524; Delaware General Corporation Law §145; Uniform Trust Code §§105, 1008
6 (2000).

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

11
12 Under Section 103(c)(7), this section’s prohibition of indemnification, advancement, or
13 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference is not
14 subject to override by the governing instrument. Prohibiting indemnification, advancement, or
15 exoneration for such conduct is consistent with traditional trust doctrine, and the drafting
16 committee contemplated that this section would be interpreted in accordance with existing trust
17 law precedent.. See Restatement (Second) of Trusts §222 (1959); George G. Bogert & George
18 T. Bogert, *The Law of Trusts and Trustees* §542 (rev. 2d ed. 1993); Uniform Trust Code §1008.
19 See also John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U.L. Rev. 1105,
20 1121-25 (2004). It is also consistent with the Delaware Statutory Trust Act. See Delaware
21 Statutory Trust Act §3806(e), which provides that the “governing instrument may provide for the
22 limitation or elimination of any and all liabilities for breach of contract and breach of duty
23 (including fiduciary duties) of a trustee . . . ; provided, that the governing instrument may not
24 eliminate the implied contractual covenant of good faith and fair dealing.” Limitations on
25 permissible exoneration are also familiar business entity law. See, e.g., Delaware General
26 Corporation Law §102(b)(7).

27
28 Any indemnification provision in the governing instrument of a statutory trust that
29 operates as a mutual fund is subject to Section 17(h) of the Investment Company Act of 1940,
30 which generally prohibits a fund from including in its organizational documents any provision
31 that protects a trustee or officer of a fund against liability to the fund or its shareholders by
32 reason of “willful misfeasance, bad faith, gross negligence, or reckless disregard” of the person’s
33 duties as trustee or officer. 15 U.S.C. § 80a-17(h).

34
35 The SEC has taken the position that, before advancing legal fees to a trustee of a mutual
36 fund, the fund’s “board must either (1) obtain assurances, such as by obtaining insurance or
37 receiving collateral provided by the [trustee], that the advance will be repaid if the trustee is
38 found to have engaged in disabling conduct, or (2) have a reasonable belief that the [trustee] has
39 not engaged in disabling conduct and ultimately will be entitled to indemnification.” SEC
40 Interpretation: *Matters Concerning Independent Directors of Investment Companies*, Investment
41 Company Act Rel. No. 24083 (Oct. 14, 1999), 1999 WL 820629, *10. The SEC has also taken
42 the position that there is a rebuttable presumption that an independent trustee (see Section 406)
43 has not engaged in disabling conduct. *Id.*

44
45 **SECTION 411. DELEGATION BY TRUSTEE.**

1 (a) A trustee may delegate duties and powers. The trustee must exercise the care that a
2 person similarly situated would reasonably believe appropriate under the circumstances in:

3 (1) selecting an agent;

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

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

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

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

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

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

15 **Comment**

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

18
19 This section reverses the outmoded common law rule against delegation by a trustee. In
20 reversing the common law rule against delegation, the drafting committee followed both the
21 Delaware Statutory Trust Act and the modern trend with respect to common law trusts. Most
22 states have abrogated the common law nondelegation rule with legislation based on the Uniform
23 Prudent Investor Act, Uniform Trust Code, or the Restatement (Third) of Trusts. See Uniform
24 Trust Code §807 (2000); Uniform Prudent Investor Act §9 (1994); Restatement (Third) of
25 Trusts: Prudent Investor Rule §171 (1992). See also Restatement (Third) of Trusts §80 (2007);
26 John H. Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Mo. L. Rev.
27 105 (1994).

28
29 Paragraphs (a), (c), (d), and (e) are patterned on Uniform Trust Code §807 (2000), which
30 is derived from Uniform Prudent Investor Act §9 (1994). This section deviates from prior
31 uniform acts, however, on the issue of delegation to a co-trustee. Following the Delaware

1 Statutory Trust Act, paragraph (b) treats delegation to a co-trustee in the same manner as
2 delegation to another person. By contrast, traditional trust law disfavors delegation by one co-
3 trustee to another. See Restatement (Second) of Trusts §184 (1959). See also Uniform Trust
4 Code §703(e) (2000); Restatement (Third) of Trusts §81 cmt. c(1) (2007). The traditional rule
5 reflects the assumption that, if the donor names more than one trustee, the donor intended each to
6 be a check on the other(s). That policy does not fit commercial statutory trust practice, in which
7 limited purpose or function trustees are common.

8
9 Mutual funds often receive a common set of services from an organization that
10 specializes in operating mutual funds, which is typically the investment adviser or an affiliate.
11 The trustees monitor the service providers and the Investment Company Act of 1940 requires the
12 trustees to approve the contracts with the adviser and distributor. See 15 U.S.C. § 80a-15.
13

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

16 (1) the trustees act by majority of their number;

17 (2) the trustees may act without a meeting, without previous notice, and without a vote, if
18 a consent or consents, in a record, setting forth the action so taken, are signed by the minimum
19 number of trustees necessary to authorize or take the action at a meeting at which all trustees
20 entitled to vote thereon were present and voted, but prompt notice of the action must be given to
21 those trustees that did not consent; and

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

24 **Comment**

25
26 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
27 Act § 34-517; Delaware General Corporation law §228; Uniform Trust Code §703 (2000).
28

29 In accord with Uniform Trust Code §703(a) (2000) and Restatement (Third) of Trusts
30 §39 (2003), paragraph (a)(1) rejects the common law rule requiring unanimity among the
31 trustees of a private trust, replacing it with a default rule requiring a majority of the trustees.
32

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

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The Investment Company Act of 1940 requires a mutual fund’s investment advisory contract, underwriting contract, fidelity bond, independent public accountants, and other such matters to be approved by the trustees of the mutual fund. See 15 U.S.C. § 80a-15(a); 15 U.S.C. 80a-31(a); 17 C.F.R. § 270.17g-1. Investment advisory and underwriting contracts, and selection of independent public accountants, must be approved by the noninterested trustees at an 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?][We did not resolve this question at the Fall 2007
6 meeting in Chicago.]

7
8 SECTION 501. CONTRIBUTIONS BY BENEFICIAL OWNERS.

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

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

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

- 26 (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) imposition of an obligation to repay a loan to the statutory trust by another
7 beneficial owner of the amount necessary to meet the defaulting beneficial owner’s commitment;
8 and
9 (5) redemption or sale of the defaulting beneficial owner’s beneficial interest at a
10 value fixed by appraisal or by formula.

11 **Comment**

12
13 **Principal Sources** – Delaware Statutory Trust Act §3802; Connecticut Statutory Trust
14 Act §34-515.

15
16 Although statutory trusts are used primarily as a mode of business organization in
17 commercial transactions, paragraph (a) acknowledges that a beneficial owner may obtain a
18 beneficial interest without an exchange of consideration, an event that is not uncommon in
19 existing commercial practice. However, a statutory trust may not be used to effect a donative
20 transfer because Section 302 prohibits a statutory trust from having a “prevalingly donative
21 purpose.”

22
23 Paragraph (c) repudiates the hostility of traditional law to penalties, thereby resolving the
24 doubts that arose prior to statutory confirmation about the validity of particular remedies for a
25 beneficial owner’s breach.

26
27 Under Section 104(b)(1), the governing instrument may provide the means by which
28 beneficial ownership is determined and evidenced. Under Section 104(b)(10)-(11), the
29 governing instrument may specify the conditions under which a person becomes a beneficial
30 owner.

31
32 **SECTION 502. REDEMPTION OF BENEFICIAL INTERESTS.** A statutory trust
33 may acquire, by purchase, redemption, or otherwise, any beneficial interest in the trust. A

1 beneficial interest so acquired is canceled.

2 **Comment**

3
4 **Principal Source** – Delaware Statutory Trust Act §3818.

5
6 A registered investment company organized as an open-end mutual fund generally is
7 obligated to honor redemption requests by its shareholders at the net asset value per share next
8 calculated after receipt of the request, with payment to be made in cash (or, in some cases, in
9 kind) within seven days of the request. See 15 U.S.C. §80a-22(e); 17 CFR §270.22c-1. In
10 narrowly defined circumstances, this redemption right and obligation may be postponed. See 15
11 U.S.C. §80a-22(e). The redemption proceeds may be reduced by various fees retained by the
12 fund and/or its selling agent (i.e., sales loads and redemption fees). See 17 CFR §§270.22c-2;
13 270.6c-10.
14

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

16 beneficial owner has the right to information relating to the affairs of the statutory trust
17 reasonably related to the beneficial owner’s ability to enforce its rights as beneficial owner.

18 **Comment**

19 **Principal Source** – Delaware Statutory Trust Act §3819.

20
21 Under Section 103(c)(8), a beneficial owner’s right to information under this section is
22 not subject to override by the governing instrument. However, a beneficial owner’s right to
23 information under this section is limited to information “necessary” for the beneficial owner to
24 enforce its rights as such, and under Section 103(c)(8) the governing instrument may prescribe
25 the standards by which “necessary” is determined if those standards are not “manifestly
26 unreasonable.”
27

28 Imposing a mandatory, minimum right to information critical to the beneficiary’s ability
29 to enforce the trust is familiar law. For example, Restatement (Third) of Trusts §82 cmt. a(2)
30 (2007), provides that “a beneficiary is always entitled . . . to request such information as is
31 reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and
32 otherwise to enforce his or her rights under the trust.” See also 3 Austin Wakeman Scott,
33 William F. Fratcher, & Mark L. Ascher, 1 Scott and Ascher on Trusts §17.5, at p. 1202 (5th ed.
34 2006); Restatement (Second) of Trusts §173 cmt. c (1959); T.P. Gallanis, *The Trustee’s Duty to*
35 *Inform*, 85 N.C. L. Rev. 1595 (2007).
36

37 The drafting committee declined the suggestion to include in this section a schedule of
38 accessible information on the ground that such a rule-based schedule necessarily would be over-
39 and under-inclusive. Instead, the committee contemplated that the term “reasonably related”
40 would provide a more robust and flexible right to information by allowing a court to order the

1 release of any type of information that bears on enforcement of the beneficial owner’s beneficial
2 interest.

3
4 Under Section 103(c)(8), the governing instrument may prescribe the standards by which
5 “reasonably related” is determined, provided that those standards are not “manifestly
6 unreasonable.”

7
8 Section 404 provides a comparable rule for a trustee’s right to information.
9

10 **SECTION 504. BENEFICIAL INTERESTS.**

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

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

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

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

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

22 **Comment**

23
24 **Principal Source** – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust
25 Act §34-516; Revised Uniform Limited Liability Company Act §404 (2006).
26

27 Paragraph (a) provides as a default rule that a beneficial owner’s interest in the statutory
28 trust is freely transferable. This paragraph therefore overrides the rule in some states, which
29 would otherwise be applicable to a statutory trust pursuant to Section 105, that makes a common law
30 trust spendthrift by default. See Jeffrey A. Schoenblum, 2008 Multistate Guide to Estate Planning
31 Table 9.05, Part 1, Column 2 (collecting authority). However, because the rule stated in paragraph
32 (a) is not scheduled in Section 103(c), it is subject to override by the governing instrument. Section
33 104(b)(2) confirms that the governing instrument may limit a beneficial owner’s right to transfer

1 its beneficial interest. Section 504A[placeholder number] provides for a charging order against
2 a beneficial owner’s rights to distributions in the event that the beneficial owner’s beneficial
3 interest is not freely transferable.
4

5 **[Proposed comment re paragraph c, from Bibb: In the case of a statutory trust that**
6 **is a registered investment company organized as an open-end mutual fund, a shareholder**
7 **(beneficial owner) may request a redemption of any or all of his shares (beneficial**
8 **interests) and the statutory trust is legally obligated to honor the redemption request and**
9 **pay the redemption proceeds within seven days (except under limited circumstances such**
10 **as an emergency). See 15 U.S.C. Sec.80(a)-22(e). The redemption proceeds must be in the**
11 **form of cash unless the open-end mutual fund has filed with the U.S. Securities and**
12 **Exchange Commission a notification of election on Form N-18F-1. See 17 C.F.R. Sec.**
13 **270.18f-1. In such case, the open-end mutual fund may pay the redemption in-kind**
14 **(i.e., pay assets of the fund instead of cash) to a shareholder who during the previous 90-**
15 **day period has redeemed \$250,000 or more of shares or shares equal to one or**
16 **more percent of the net asset value of the fund. Id.]**
17

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

21
22 **SECTION 504A[placeholder-number] CHARGING ORDER.**

23 **[For discussion: (1) Removal of exclusivity language from the ReULLCA/Kentucky**
24 **model, and (2) the meaning of “transferable.”](a) If a beneficial interest is not transferable or**
25 **otherwise subject to a lien by a judgment creditor of a beneficial owner, then on application by a**
26 **judgment creditor of a beneficial owner, the [appropriate court] may enter a charging order**
27 **against the beneficial owner’s right to distributions from the trust for the unsatisfied amount of**
28 **the judgment.**

29 (b) A charging order issued under paragraph (a) constitutes a lien on the beneficial
30 owner’s right to distributions and requires the statutory trust to pay over to the judgment creditor
31 any distribution that would otherwise be paid to the beneficial owner until the unsatisfied amount
32 of the judgment has been satisfied.

33 (c) To effectuate the collection of distributions pursuant to a charging order in effect
34 under paragraph (a), the court may:

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

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

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

7 (e) This [act] does not deprive any member or transferee of the benefit of any exemption
8 laws applicable to the member’s or transferee’s transferable interest.

9 **Comment**

10 **Principal Source** - Revised Uniform Limited Liability Company Act §305 (2006).

11 **[Comment to come. Substance depends on the resolution of the discussion questions**
12 **noted above.]**

13 Under Section 103(c)(8a[placeholder]), the right of a judgment creditor of a beneficial
14 owner to seek a charging order may not be eliminated by the governing instrument.
15

16 **SECTION 505. TRANSACTION WITH BENEFICIAL OWNER.** A beneficial
17 owner or related person of a beneficial owner may lend money to, borrow money from, act as a
18 surety, guarantor or endorser for, guarantee or assume one or more obligations of, provide
19 collateral for, or transact other business with the statutory trust and, subject to law other than this
20 [act], has the same rights and obligations with respect to those matters as a person that is not a
21 beneficial owner.
22

23 **Comment**

24 **Principal Source** – Delaware Statutory Trust Act §3806.
25

26 **SECTION 506. VOTING OR CONSENT BY BENEFICIAL OWNERS.** On any
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29

1 matter that is to be acted on by beneficial owners, the following rules apply:

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

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

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

11 **Comment**

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

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

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

1 significantly more comprehensive than most state statutes and rules governing communications
2 to shareholders and other aspects of a shareholder meeting.

3
4 Section 104(b)(4) confirms that the rules stated in this Section are subject to override by
5 the governing instrument.
6

7 **SECTION 507. DERIVATIVE ACTION.**

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

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

13 (2) a demand would be futile.

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

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

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

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

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

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

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

26 (1) any proceeds or other benefits of a derivative action on behalf of a statutory

1 trust, whether by judgment, compromise, or settlement, are the property of the trust and not of
2 the derivative plaintiff; and

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

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

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

10 **Comment**

11
12 **Principal Sources** - Uniform Limited Partnership Act §§1002-1005 (2001); Delaware
13 Statutory Trust Act §3816; Connecticut Statutory Trust Act §34-522.

14
15 Under Section 103(c)(9), the right of a beneficial owner to bring a derivative action under
16 this Section may not be eliminated by the governing instrument. However, Section 103(c)(9)
17 permits the governing instrument to subject the right to additional standards and restrictions,
18 including the requirement that beneficial owners owning a specified amount or type of beneficial
19 interest join in bringing the derivative action, provided that the additional standards and
20 restrictions are not manifestly unreasonable.

21
22 In preserving a mandatory right to bring a derivative action, but allowing that right to be
23 subjected to additional standards and restrictions that are not manifestly unreasonable, this
24 section balances two policy aims that are in tension. On the one hand, without the right to bring
25 a derivative action, a beneficial owner might have no recourse in the event of trustee misconduct.
26 On the other hand, without appropriate safeguards, a meritless derivative action might be
27 brought with the aim of extracting a quick settlement. See, e.g., Reinier Kraakman, Hyun Park,
28 & Steven Shavell, *When Are Shareholder Suits in Shareholder Interests?*, 82 *Georgetown L.J.*
29 1733 (1994).

30
31 For a discussion of remedies, see the comment to Section 105.
32

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 law” means the law that governs the organization’s internal affairs.

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

16 (8) “Organizational documents” means the basic records that create the organization and
17 determine its internal governance and the relations among the persons that own it, have an
18 interest in it, or are members of it.

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

22 Comment

23 Principal Source – Uniform Limited Partnership Act §1101 (2001).
24

1 This section contains definitions specific to this Article.
2

3 Paragraph (7) includes a common law trust within the definition of “organization.”
4 Hence, a common law trust may convert to or merge with a statutory trust under this Article if
5 such a conversion or merger is permitted by the trust’s governing law. Unlike the formation of a
6 new statutory trust by filing a certificate of trust under Section 201 (an option expressly afforded
7 to a common law trust under Section 905), conversion or merger under this Article preserves
8 continuity in the organization’s relationships with third parties. See Sections 605 and 609 and
9 the comments thereto. **[For Discussion: (1) Does this comment fairly represent our
10 discussed rational for changing “governing statute” to “governing law” and altering
11 appearances of “entity” to “organization”? (2) Can this comment be made more clear?]**
12

13 Under Section 103(c)(10), this definitions stated in this Section are not subject to
14 override by the governing instrument.
15

16 SECTION 602. CONVERSION.

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

20 (1) the conversion is not prohibited by the law of the jurisdiction that enacted the
21 other organization’s governing law; and

22 (2) the other organization complies with its governing law in effecting the
23 conversion.

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

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

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

27 (3) the terms and conditions of the conversion, including the manner and basis for
28 converting interests in the converting organization into any combination of money, interests in
29 the converted organization, and other consideration; and

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

1 **Comment**

2 **Principal Sources** – Uniform Limited Partnership Act §1102 (2001).
3

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

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

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

19 For a general discussion of conversion and its effect, see Model Entity Transactions Act
20 §406 (2006) and comment 1 thereto.
21

22 **SECTION 603. ACTION ON PLAN OF CONVERSION BY CONVERTING**

23 **STATUTORY TRUST.**

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

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

28 (1) as provided in the plan; and

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

31 **Comment**

32 **Principal Source** – Uniform Limited Partnership Act §1103 (2001).
33

34 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries
35 is a default rule that may be overridden by the governing instrument. See Section 104(b)(5)(B).

1 Hence, the governing instrument may state a different quantum of consent or provide a different
2 approval mechanism. Varying this subsection’s rule means that a beneficial owner might be
3 subject to a conversion (including a “squeeze out” conversion) without consent and with no
4 appraisal remedy. If the converting organization is a statutory trust subject to this Act, the
5 trustee of the converting organization is subject to the duties and obligations stated in this Act.
6 Those duties would apply to the process and terms under which the conversion occurs.
7 However, if the governing instrument allows for a conversion with less than unanimous consent,
8 the mere fact that a beneficial owner objects to a conversion does not mean that a trustee that is
9 favoring, arranging, consenting to, or effecting the conversation has breached a duty under this
10 Act.

11
12 In the case of a statutory trust that is a registered investment company organized as an
13 open-end mutual fund, a shareholder may elect to redeem any or all beneficial interests in the
14 statutory trust at the current net asset value per share, see 17 C.F.R. §270.22c-1, which is a price
15 that is akin to an appraisal value. Except for limited circumstances, a mutual fund is required to
16 pay proceeds to the redeeming shareholder within seven days of the date of redemption request.
17 See 15 U.S.C. §80a-22(e). Thus, a mutual fund generally does not afford dissenting rights to its
18 shareholders because any shareholder of a mutual fund being converted may redeem fund shares
19 at net asset value prior to the closing date of the proposed conversion.
20

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

22 (a) After a conversion is approved:

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

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

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

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

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

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

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

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

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

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

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

11 **Comment**

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

13
14 Under paragraph (b) the effective date of a conversion is determined under the governing
15 law of the converted organization.

16
17 Under Section 103(c)(10), this Section is not subject to override by the governing
18 instrument.

19
20 **SECTION 605. EFFECT OF CONVERSION.**

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

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

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

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

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

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

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

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

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

18 **Comment**

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

20
21 Paragraph (a) confirms that conversion changes an organization’s legal type, but does not
22 create a new organization. Unlike a merger, a conversion involves a single organization.
23 Therefore under paragraph (b) a conversion does not transfer any of the organization’s rights or
24 obligations. For further discussion, see Model Entity Transactions Act §406 (2006) and
25 comment 1 thereto.

26
27 Under Section 103(c)(10), this Section is not subject to override by the governing
28 instrument.

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SECTION 606. MERGER.

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

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

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

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

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

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

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

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

money, interests in the surviving organization, and other consideration;

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

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

Comment

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

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

1
2 A plan of merger may provide that some persons with interests in a constituent
3 organization will receive interests in the surviving organization, while other persons with
4 interests in the same constituent organization will receive some other form of consideration.
5 Thus, a “squeeze out” merger is possible. As noted in the comment to Section 603, the duties
6 and obligations stated in this Act apply to a trustee of a constituent organization that is a
7 statutory trust subject to this Act. Those duties would apply to the process and terms under
8 which a “squeeze out” merger occurs.
9

10 SECTION 607. ACTION ON PLAN OF MERGER BY CONSTITUENT

11 STATUTORY TRUST.

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

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

16 (1) as provided in the plan; and

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

19 Comment

20 **Principal Sources** – Uniform Limited Partnership Act §1107 (2001).
21

22 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries
23 is a default rule that may be overridden by the governing instrument. See Section 104(b)(5)(B).
24 Hence, the governing instrument may state a different quantum of consent or provide a
25 completely different approval mechanism. Varying this subsection’s rule means that a beneficial
26 owner might be subject to a merger (including a “squeeze out” merger) without consent and with
27 no appraisal remedy. The trustee of a constituent statutory trust is subject to the duties and
28 obligations stated in this Act, and those duties would apply to the process and terms under which
29 the merger occurs. However, if the governing instrument allows for a merger with less than
30 unanimous consent, the mere fact a beneficial owner objects to a merger does not mean that a
31 trustee that is favoring, arranging, consenting to, or effecting the merger has breached a duty
32 under this Act.
33

34 For the reasons discussed in the comment to Section 603, a mutual fund generally does
35 not afford dissenting rights to its shareholders because any shareholder of an acquired mutual

1 fund may redeem acquired fund shares at net asset value prior to the closing date of the proposed
2 reorganization of the acquired fund.
3

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

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

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

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

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

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

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

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

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

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

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

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

24 (6) if the surviving organization is a foreign organization not authorized to

1 transact business in this state, the street and mailing addresses of an office that the [Secretary of
2 State] may use for the purposes of Section 609(b); and

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

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

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

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

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

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

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

14 **Comment**

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

16
17 Under Section 103(c)(10), this Section is not subject to override by the governing
18 instrument.
19

20 **SECTION 609. EFFECT OF MERGER.**

21 (a) When a merger becomes effective:

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

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

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

1 in the surviving organization;

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

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

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

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

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

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

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

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

18 (b) A surviving organization that is a foreign organization consents to the jurisdiction of
19 the courts of this state to enforce any debt, obligation, or other liability owed by a constituent
20 organization if, before the merger, the constituent organization was subject to suit in this state on
21 the obligation. A surviving organization that is a foreign organization not authorized to transact
22 business in this state appoints the [Secretary of State] as its agent for service of process for the
23 purposes of enforcing a debt, obligation, or other liability under this subsection. Service on the

1 [Secretary of State] under this subsection is made in the same manner and with the same
2 consequences as provided in Section 213(c) and (d).

3 **Comment**

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

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

9 **SECTION 610. [ARTICLE] NOT EXCLUSIVE.** This [article] does not preclude an
10 organization from being converted or merged under law other than this [act].

11 **Comment**

12 **Principal Source** – Uniform Limited Partnership Act §1113 (2001).
13

1 [ARTICLE] 7

2 DISSOLUTION AND WINDING UP

3
4 SECTION 701. EVENTS CAUSING DISSOLUTION. A statutory trust is dissolved,

5 and its activities must be wound up, upon the occurrence of:

6 (1) an event or circumstance that the governing instrument states causes dissolution; or

7 (2) an administrative dissolution under Section 705.

8 Comment

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

10
11 Consistent with Section 306, which provides as a default rule that a statutory trust has
12 perpetual existence, this Section provides that a statutory trust is dissolved upon the occurrence
13 of an event or circumstance stated in the governing instrument.

14
15 Under Section 103(c)(1), the provisions of this section are not subject to override by the
16 governing instrument. However, the governing instrument need not provide for an event or
17 circumstance that causes dissolution. See Section 306.

18
19 SECTION 702. WINDING UP.

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

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

23 (1) discharge the trust’s debts, obligations, and other liabilities, settle and close
24 the trust’s activities, and marshal and distribute the assets of the trust; and

25 (2) deliver to the [Secretary of State] for filing a statement of dissolution stating
26 the name of the trust and that the trust is dissolved;

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

28 (1) preserve the trust’s activities and property as a going concern for a

1 reasonable time;

2 (2) institute, maintain, and defend actions and proceedings, whether civil,

3 criminal, or administrative;

4 (3) transfer the trust's property;

5 (4) settle disputes;

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

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

11 **Comment**

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

14
15 If the governing instrument of a statutory trust provides for the dissolution of the trust,
16 then upon the event or circumstance that triggers dissolution, the statutory trust may continue
17 only for the purpose of winding up.

18
19 In winding up the statutory trust within a reasonable time, the trustees are neither
20 required to undertake a fire sale of the assets of the statutory trust on unfavorable terms nor
21 permitted to continue the trust endlessly under the guise of winding down. The question of what
22 period of time is “reasonable” under paragraph (c)(1) turns on the totality of the circumstances.

23
24 Paragraph (d) provides for the possibility that after dissolution additional unfinished
25 business of the statutory trust is discovered.

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

29

30 **SECTION 703. KNOWN CLAIMS AGAINST DISSOLVED STATUTORY**

31 **TRUST.**

32 (a) Except as provided in subsection (d), a dissolved statutory trust may give notice of a

1 known claim under subsection (b), which has the effect provided in subsection (c).

2 (b) A dissolved statutory trust may in a record notify its known claimants of the

3 dissolution. The notice must:

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

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

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

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

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

9 (c) A claim against a dissolved statutory trust is barred if the requirements of subsection

10 (b) are met and:

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

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

13 (A) the trust notifies the claimant in a record that the claim is rejected and

14 will be barred unless the claimant commences an action against the trust to enforce the claim

15 within 90 days after the claimant receives the notice; and

16 (B) the claimant does not commence the required action within the 90

17 days.

18 (d) This section does not apply to a claim based on an event occurring after the effective

19 date of dissolution or a liability that on that date is unmatured or contingent.

20 **Comment**

21 **Principal Source** – Revised Uniform Limited Liability Company Act §703 (2006).

22

23 **[For Discussion: (1) The difference in paragraph (d) between “unmatured” and**
24 **“contingent” claims and whether that difference should be addressed in the comment. (2)**
25 **Whether to include here or elsewhere (if elsewhere, where?) a summary of the interaction**
26 **of Sections 703 and 704 and the operation of article 7 more generally.]**

1
2 Under Section 103(c)(1), the provisions of this section are not subject to override by the
3 governing instrument.
4

5 **SECTION 704. UNKNOWN CLAIMS AGAINST DISSOLVED STATUTORY**

6 **TRUST.**

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

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

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

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

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

17 (c) If a dissolved statutory trust publishes a notice in accordance with subsection (b),
18 unless the claimant commences an action to enforce the claim against the trust within five years
19 after the publication date of the notice, the claim of each of the following claimants is barred:

20 (1) a claimant that did not receive notice in a record under Section 703;

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

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

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

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

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

5 **Comment**

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

7
8 Under Section 103(c)(1), the provisions of this section are not subject to override by the
9 governing instrument.

10
11 **[For Discussion: At the Fall 2007 meeting in Chicago, I was instructed to examine the role**
12 **of the courts in the Delaware dissolution provisions. But after reviewing the Delaware**
13 **Statutory Trust Act, I haven't found any such provisions. Perhaps I've missed something**
14 **obvious, but in all events we need to discuss the issue.]**

15
16 **SECTION 705. ADMINISTRATIVE DISSOLUTION.**

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

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

20 (2) deliver for filing a statement of change within 30 days after a change has
21 occurred in the name or address of the agent;

22 (3) file an annual report; or

23 (4) pay, within 60 days after the due date, any fee, tax, or penalty due to the
24 [Secretary of State].

25 (b) If the [Secretary of State] determines that a ground exists for administratively
26 dissolving a statutory trust, the [Secretary of State] must prepare, sign, and file a notice of
27 dissolution and send a copy to the trust's agent for service of process, or if the trust does not
28 appoint and maintain a proper agent in this state, to the trust's designated office. The notice

1 must state:

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

4 (2) the basis for the revocation.

5 (c) Unless a statutory trust cures the failures to comply with subsection (a) stated in the
6 notice of dissolution before the date state in the notice, the [Secretary of State] shall dissolve the
7 trust administratively by preparing, signing, and filing a declaration of dissolution that states the
8 grounds for dissolution. The [Secretary of State] shall prepare, sign, and file a notice of
9 dissolution and send a copy to the trust’s agent for service of process, or if the trust does not
10 appoint and maintain a proper agent in this state, to the trust’s designated office.

11 (d) A statutory trust that has been administratively dissolved continues in existence but,
12 subject to Section 706, may carry on only activities necessary to wind up its activities and
13 liquidate its assets under Sections 702 and 708 and to notify claimants under Sections 703 and
14 704.

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

17 **Comment**

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

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 706. REINSTATEMENT FOLLOWING ADMINISTRATIVE**
24 **DISSOLUTION.**

25 (a) A statutory trust that has been administratively dissolved may apply to the [Secretary

1 of State] for reinstatement within [two] years after the effective date of dissolution. The
2 application must be delivered to the [Secretary of State] for filing and state:

- 3 (1) the name of the trust and the effective date of its dissolution;
- 4 (2) that the grounds for dissolution did not exist or have been eliminated; and
- 5 (3) that the trust’s name satisfies the requirements of Section 207.

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

10 (c) When a reinstatement becomes effective, it relates back to and takes effect as of the
11 effective date of the administrative dissolution and the statutory trust may resume its activities as
12 if the dissolution had not occurred. **[For Discussion: We should reconsider the question of**
13 **what happens if the SecState just sits on the application?]**

14 **Comment**

15 **Principal Source** – Revised Uniform Limited Liability Company Act §706 (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 707. APPEAL FROM REJECTION OF REINSTATEMENT.**

21 (a) If the [Secretary of State] rejects a statutory trust’s application for reinstatement
22 following administrative dissolution, the [Secretary of State] shall prepare, sign, and file a notice
23 that explains the reason for rejection and send a copy to the trust’s agent for service of process.
24

25 (b) Within 30 days after service of a notice of rejection of reinstatement under subsection

1 (a), a statutory trust may appeal from the rejection by petitioning the [appropriate court] to set
2 aside the dissolution. The petition must be delivered to the [Secretary of State] and contain a
3 copy of the [Secretary of State's] declaration of dissolution, the trust's application for
4 reinstatement, and the [Secretary of State's] notice of rejection.

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

7 **Comment**

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

9
10 Under Section 103(c)(1), the provisions of this section are not subject to override by the
11 governing instrument.
12

13 **SECTION 708. DISTRIBUTION OF ASSETS IN WINDING UP STATUTORY**
14 **TRUST'S ACTIVITIES.**

15 (a) In winding up its activities, a statutory trust shall first apply its assets to discharge its
16 obligations to creditors. **[For discussion: This section will be affected by the addition, if any,**
17 **of a court process per the discussion note in section 704 above.]**

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

20 **Comment**

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

22
23 Under Section 103(c)(1), the provisions this section are not subject to override by the
24 governing instrument.
25

1 [ARTICLE] 8

2 FOREIGN STATUTORY TRUSTS

3 [FOR DISCUSSION: We have made numerous changes to the vocabulary of this section,
4 changing more and more of the original language and structure of the ULPA model from
5 meeting to meeting. Because these ad hoc changes have come incrementally, it was not
6 surprising when at the last meeting we discovered inconsistencies throughout the Article. I
7 tried to clean up those inconsistencies, clipping an errant thread here and there, but on
8 each attempt, the whole Article began to unravel. Accordingly, we will need to give this
9 Article attention.]

10
11 SECTION 801. GOVERNING LAW.

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

14 (1) the internal affairs of the trust;

15 (2) the liability of a beneficial owner as beneficial owner and trustee as trustee for
16 the debts, obligations, or other liabilities of the trust or any series thereof; and

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

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

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

25 **Comment**

26
27 **Principal Sources** – Revised Uniform Limited Liability Company §801 (2006); Uniform
28 Limited Partnership Act §901 (2001); Delaware Statutory Trust Act §3851; Connecticut
29 Statutory Trust Act §34-530.

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

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

9
10 **SECTION 802. APPLICATION FOR CERTIFICATE OF QUALIFICATION.**

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

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

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

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

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

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

26 **Comment**

27 **Principal Source** – Uniform Limited Partnership Act §902 (2001).
28
29

1 A certificate of qualification applied for under this section is different than a certificate of
2 existence furnished under Section 207 or a certificate of registration under Section 806. [Article
3 **2 cross-references (e.g., 205, 209), to come after resolution of the global Article 8 issues are**
4 **resolved.]**

5
6 Under Section 103(c)(1), this Section is not subject to override by the governing
7 instrument.
8

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

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

12 (1) the name of the trust;

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

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

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

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

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

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

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

26 **Comment**

27 **Principal Source** – Uniform Limited Partnership Act §202 (2001).
28

1
2 Paragraph (a) provides a mechanism for updating a statutory trust's certificate of
3 qualification. Paragraph (b) imposes an obligation directly on the trustee rather than on the
4 statutory trust.

5
6 Under Section 103(c)(1), this Section is not subject to override by the governing
7 instrument.
8

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

10 **BUSINESS.**

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

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

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

16 (3) maintaining accounts in financial institutions;

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

20 (5) selling through independent contractors;

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

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

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

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

3 (10) transacting business in interstate commerce.

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

7 (c) A person does not do business in the state solely by reason of being a trustee or a
8 beneficial owner of a foreign statutory trust that does transact business in this state.

9 **Comment**

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

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

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

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

24 **Comment**

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

26 An application for qualification filed under this section is different than a certificate of
27 registration under Section 806.
28

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

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SECTION 806. CERTIFICATE OF QUALIFICATION.

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

- (1) the name of the trust and any alternate name adopted under Section 807 for use in this state;
- (2) that all fees and penalties due to the [Secretary of State] have been paid;
- (3) that the [Secretary of State] has not filed a notice of cancellation; and
- (4) whether the foreign statutory trust’s most recent annual report required by Section 214 has been filed by the [Secretary of State].

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

Comment

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

The provisions of this section, which concern the issuance of a certificate of qualification for a qualified foreign statutory trust, are analogous to the provisions of Section 206 concerning the issuance of a certificate of existence for a statutory trust.

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

1 (2) deliver for filing a statement of change within 30 days after a change has
2 occurred in the name or address of the agent;
3 (3) file an annual report; or
4 (4) pay, within 60 days after the due date, any fee, tax, or penalty due to the
5 [Secretary of State].

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

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

12 (2) the basis for the revocation.

13 (c) Unless a foreign statutory trust cures the failures to comply with subsection (a) stated
14 in the notice of revocation before the date state in the notice, the authority of the trust to transact
15 business in this state ceases on that date.

16 (d) If a foreign statutory trust cures the failures stated in the notice of revocation under
17 subsection (c), the [Secretary of State] shall indicate that the trust is reinstated on the filed
18 notice. The reinstatement of the trust relates back for all purposes to the date of the notice of
19 revocation.

20 **Comment**

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

22 Under Section 103(c)(1), this Section is not subject to override by the governing
23 instrument.
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1 state without a certificate of qualification.

2 (d) If a foreign statutory trust transacts business in this state without a certificate of
3 qualification or cancels its certificate of qualification, the [Secretary of State] is its agent for
4 service of process for actions arising out of the transaction of business in this state.

5 **Comment**

6
7 **Principal Source** – Uniform Limited Partnership Act §907 (2001).

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

12 **SECTION 811. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]
13 may maintain an action to enjoin a foreign statutory trust from transacting business in this state
14 in violation of this [article].

15 **Comment**

16
17 **Principal Source** – Uniform Limited Partnership Act §908 (2001).

18 Under Section 103(c)(1), this Section is not subject to override by the governing
19 instrument.
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[ARTICLE] 9

MISCELLANEOUS PROVISIONS

SECTION 901. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In

applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Comment

Principal Source – Uniform Limited Partnership Act §1201 (2001).

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

SECTION 902. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND

NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act[, 15 U.S.C. Section 7001 et seq.], but this [act] does not modify, limit, or supersede Section 101(c) of that act or authorize electronic delivery of any of the notices described in Section 103(c) of that act.

Comment

Principal Source – Uniform Limited Partnership Act §1203 (2001).

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

SECTION 903. SAVING CLAUSE. This [act] does not affect an action commenced,

proceeding brought, or right accrued before this [act] takes effect.

Comment

Principal Source – Uniform Limited Partnership Act §1207 (2001).

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 all
6 statutory trusts and foreign statutory trusts subject to this [act] are governed by the amendment or
7 repeal.

8 **Comment**

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10 **Principal Source** – Revised Model Business Corporation Act §1.02 (2002).

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

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15 **SECTION 905. APPLICATION TO EXISTING RELATIONSHIPS.**

16 (a) This [act] does not limit, prohibit, or invalidate the existence, acts, or obligations of any
17 common-law trust created or doing business in this state before or after [the effective date of the
18 act]. The laws of this state other than this [act] pertaining to trusts apply to common-law trusts.

19 (b) A common-law trust arising under the law of this state before or after [the effective date
20 of this [act]] that does not have a prevailingly donative purpose may elect to be governed by this
21 [act] by filing of a certificate of trust under Section 201.

22 [(c) A trust created pursuant to a statute of this state that was required by that statute to file
23 a certificate of trust with [the Secretary of State] before [the effective date of this [act]] may elect
24 to be governed by the provisions of this [act] by filing an amendment to its certificate of trust
25 under Section 202.]

26 [(d) On [two years] after [the effective date of this [act]], this [act] governs the organization
27 and internal affairs of all trusts created pursuant to a statute of this state that was required by that

1 statute to file a certificate of trust with the [Secretary of State] before the effective date of this
2 [act].]

3 **Comment**
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5 **Principal Source** – Uniform Limited Partnership Act §1206 (2001).

6 This Act governs all statutory trusts formed on or after the Act’s effective date. For pre-
7 existing statutory trusts, this section establishes an optional “elect in” period and a mandatory, all-
8 inclusive date of two years following the effective date. Beginning on the all-inclusive date, each
9 pre-existing statutory trust that has not previously elected in becomes subject to this Act—
10 including the schedule of mandatory rules in Section 103(c)—by operation of law.
11

12 Paragraphs (a) and (b) confirm that this act does not govern a common law trust unless the
13 trust forms a statutory trust by filing a certificate of trust under Section 201. However, consistent
14 with Section 302, paragraph (b) of this Section prohibits a common law trust with a prevalingly
15 donative purpose from becoming a statutory trust. An alternative mode for a common law trust to
16 become a statutory trust is provided by the conversion provisions of Article 6. Unlike the
17 formation of a new statutory trust by filing a certificate of trust under Section 201, the conversion
18 provisions of Article 6 allow for the conversion of another organization into the statutory trust
19 form while preserving continuity in the converting organization’s relationships with third parties.
20 See the Comments to Sections 601 and 605.
21

22 The drafting committee contemplated that some enacting jurisdictions might modify this
23 section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not
24 expected—to address other transition problems arising from differences between this Act and prior
25 law. For example, an enacting jurisdiction might choose to allow trusts formed under a prior
26 statute to remain governed by the prior statute for longer than the two years suggested in paragraph
27 (d).
28

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

32 **SECTION 906. REPEALS.** On [all-inclusive date], the following acts are repealed:

33 (1) [the State Statutory Trust Act as amended and in effect immediately before [the
34 effective date of this [act]]];

35 (2) [the State Business Trust Act as amended and in effect immediately before [the
36 effective date of this [act]]]; and

37 (3) [the State Real Estate Investment Trust Act as amended and in effect immediately

1 before [the effective date of this [act]]].

2 **Comment**

3 **Principal Sources** – Uniform Limited Partnership Act §1205 (2001).

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5 Paragraphs (1) and (2) supply model language for enacting jurisdictions that have
6 previously enacted a Statutory Trust Act or a Business Trust Act.

7
8 Paragraph (3) supplies model language for enacting jurisdictions that have previously
9 enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a
10 REIT, is not a type of trust but rather is a tax status awarded to any entity that qualifies under 26
11 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under 26 U.S.C.
12 §860D. Although the Internal Revenue Code at one time favored the trust form for the
13 organization of a REIT, the code today does not regulate the form of entity. Accordingly, there is
14 no longer any reason why a REIT must be organized as a trust, whether statutory or common law.
15 Indeed, in contemporary practice most publicly-traded REITs are organized as Maryland
16 corporations, not as trusts. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* __
17 [citation]. Nonetheless, prior to the liberalization of the tax code, a number of states enacted REIT
18 statutes that authorize the creation of a trust entity designed to qualify as a REIT under the code.
19 Because a statutory trust under this Act could serve the same purpose, the drafting committee
20 contemplated that enacting jurisdictions might take the occasion of enacting this act to repeal their
21 REIT statutes.

22
23 Under Section 103(c)(1), this Section is not subject to override by the governing
24 instrument.

25
26 **SECTION 907. EFFECTIVE DATE.** This [act] takes effect

27 **Comment**

28
29 **Principal Source** – Uniform Limited Partnership Act §1204 (2001).

30
31 Section 905 specifies how this Act affects statutory trusts, with special provisions
32 pertaining to statutory trusts formed before the Act’s effective date. Section 804 contains no
33 comparable provisions for foreign statutory trusts. Therefore, once this Act is effective, it applies
34 immediately to all foreign statutory trusts, whether formed before or after the Act’s effective date.

35
36 Under Section 103(c)(1), this Section is not subject to override by the governing
37 instrument.