

D R A F T
FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

[For Style Committee Review Prior to Summer Meeting]

With Prefatory Notes and Comments

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ON UNIFORM STATE LAWS

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[OMITTED]

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Prefatory Note

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

To address the legal uncertainty over the common law business trust, at least thirty states have enacted legislation that validates the trust as a permissible form of business organization. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [citation] (collecting state statutes). But the entity that arises under the more recent of these statutes is better understood as a “statutory business trust,” “statutory trust entity,” or “statutory trust” than as a common law business trust with statutory validation. See the Comment to Section 101.

Since the 1980s, statutory trust entities have thrived in a variety of niches, particularly in the organization of mutual funds and the practice of asset securitization. See Sitkoff, *supra*; Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 *Bus. Law.* 559 (2003); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 *Yale L.J.* 165 (1997); Sheldon A. Jones, Laura M. Moret, & James M. Storey, *The Massachusetts Business Trust and Registered Investment Companies*, 13 *Del. J. Corp. L.* 421 (1988). ~~Moreover, under a recent IRS revenue ruling, in certain configurations~~ The statutory trust may be ~~has~~ also come to be used in various tax-advantaged real estate transactions. See, e.g., Rev. Rul. 2004-86, 2004-33 IRB 191.

A statutory trust differs from a common law trust in several important respects. A common law trust, whether its purpose is donative or commercial, arises from private action without the involvement of a public official. See Uniform Trust Code §401 (2000); Restatement (Third) of Trusts §10 (2003). Because a common law trust is not a juridical entity, it must sue, be sued, and transact over property in the name of the trustee in the trustee’s capacity as such. By contrast, a statutory trust is created by ~~making a filing with~~ delivering a certificate of trust to a public official, typically the Secretary of State, for filing in the public record. See Section 201. Moreover, a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue, be sued, and transact over property in its own name. See Sections 301, ~~305~~ 307.

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

The primary stimulus for the drafting of the Uniform Statutory Trust Entity Act is the increasing popularity of statutory trust entities, chiefly in the structured finance and mutual fund industries. Increasing use of statutory trusts as a mode of business organization has led to a recognition that in many states the status of such trusts is unclear and that much of the existing legislation is out of date or incomplete. Practitioners, entrepreneurs, and scholars struggle to understand the law governing statutory trusts. The case law on statutory trusts is surprisingly sparse.

The Uniform Statutory Trust Entity Act validates the statutory trust as a permissible form of business organization and brings the disparate and often inadequate existing approaches into uniformity.

Models for Drafting. Although the Uniform Statutory Trust Entity Act is the first Uniform Act on the subject of statutory business trusts, comprehensive statutory trust regimes exist in several states. Notable examples include Connecticut, Delaware, Maryland, New Hampshire, Nevada, South Dakota, Wyoming, and Virginia, all of which were referred to in the drafting process. However, in drafting the substantive provisions of the Uniform Statutory Trust Entity Act, the drafting committee was influenced primarily by the Delaware Statutory Trust Act.

In choosing to follow Delaware, the drafting committee relied on a recent study that presents data on the number of statutory trusts formed in each state. See Sitkoff, *supra*, at _____. According to this study, the number of statutory trusts formed under the Delaware Act vastly exceeds the number formed in all other states, surpassing second-place Connecticut by a factor of almost ten to one. *Id.* at _____. The study also presents data on new trust formations. The new formation data show that the Delaware statutory trust has come also to dominate the Massachusetts business trust for the organization of business trusts more generally. *Id.* at _____. A further reason for following the Delaware model was to ensure that a statutory trust under this act would receive treatment under applicable regulatory law similar to that of a Delaware statutory trust. For a general discussion of the Delaware Statutory Trust Act, see Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* ch. 19 (3d ed. 2005 Supp.).

Although under Section 105 ordinary trust law supplements this Act, ~~numerous-several~~ substantive provisions of this Act were drawn from corporate law, not from trust law. See, e.g., ~~305(b) (attachment of statutory trust property); 401 (management by or under the authority of the trustees); 404 (standards of conduct of trustees); 408 (interested transactions); 506 (limited liability of “a domestic business corporation”).~~ Looking to the corporate law model on these issues is consistent with the hybrid approach of the Delaware Act and reflects the nature of a statutory trust as a juridical entity. The Uniform Statutory Trust Entity Act is an unincorporated entity statute.

In drafting the public filing and other provisions not unique to the statutory trust form,

the drafting committee took the Uniform Limited Partnership Act (2001) and the Revised Uniform Limited Liability Company Act (2006) as its starting points. For guidance on the common law of trusts, the drafting committee took the Uniform Trust Code (2000) as its starting point.

Innovative Provisions. Although much of the Uniform Statutory Trust Entity Act reflects a reorganization and refinement of provisions found in the Delaware Statutory Trust Act, the Uniform Act contains several innovations including: (1) specification of rules that are not subject to override in the statutory trust's governing instrument (~~§103(b)~~103(c)); (2) exclusion of trusts with a prevailingly donative purpose (§302); (3) clearer guidance on the relationship of ordinary trust law to statutory trust entities (§105); (4) clearer guidance on the relationship between the common law trust and statutory trust entities (~~§804905~~); and (5) systematic treatment of conversion and, merger (Article 6), and of dissolution (Article 7), ~~and dissolution (Article 6)~~.

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

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

There is, however, no separate body of general business law that rivals ordinary trust law for application to a common law trust that has a business purpose. The common law of trusts applies to all trusts ~~created~~ 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 ~~with that have a business or commercial purpose to the extent that the trust instrument or other legislation do not~~ displace the Code's provisions ~~are not displaced by the trust instrument or other legislation~~. 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 ~~804905~~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 ~~is more like~~ 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, ~~305~~ 307-08. Like those entities, but unlike a common law trust, a statutory trust is formed by ~~making a filing with~~ delivering a certificate of trust to a public official for filing. Compare Section 201 with Uniform Trust Code §401 (2000) and Restatement (Third) of Trusts §10 (2003). Further, Section 105 provides that ordinary trust law supplements this Act in governing statutory trusts, but only to the extent not modified or displaced by this Act or the governing instrument—and this Act modifies or displaces a host of ordinary trust law principles including those concerning fiduciary standards of conduct (Section 404) and termination of trusts (Section ~~304~~ 306). Section ~~804~~ 905(b) allows an existing common law trust that does not have a prevailingly donative purpose to convert into a statutory trust by ~~filing~~ delivering a certificate of trust for filing under Section 201.

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

UNIFORM STATUTORY TRUST ENTITY ACT

[ARTICLE] 1

GENERAL PROVISIONS

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

Comment

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

The drafting committee included the word “entity” in the title for two reasons. First, the creature of this act is indeed a trust entity. It has the power to sue, be sued, and transact over property in its own name. A common law trust, by contrast, is not a juridical entity. Second, ~~use of the word “entity” in the title differentiates this act from the Uniform Trust Code, which is a codification of the common law of trusts. However, to conform with prevailing trade usage under the Delaware Statutory Trust Act, the entity that arises under this Act is called a “statutory trust,” not a “statutory trust entity.” See Section 102(14). Further, because the drafting committee wanted a statutory trust under this act to receive treatment under applicable regulatory law similar to that of a Delaware statutory trust, the entity features of a statutory trust under this act closely resemble those of a Delaware statutory trust. Moreover, because the entity features of a statutory trust under this Act closely resemble those of a Delaware statutory trust, the drafting committee assumed the applicability of Rev. Rul. 2004-86, 2004-33 IRB 191, to a statutory trust under this Act. [Three questions for discussion: (1) Are we comfortable saying this? (2) Should we ask the IRS for confirmation? (3) Should this statement be located instead or in addition as a comment to 102(14)? Regarding question 2, the Conference has done so before, for example in connection with the intersection of the generation skipping transfer tax and the Uniform Statutory Rule Against Perpetuities.]~~

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

1
2 Second, the drafting committee endeavored to avoid any implication ~~that whether a~~
3 statutory trust would ~~necessarily~~ qualify as a “business trust” under the bankruptcy code. ~~[For~~
4 ~~discussion: Rutledge’s suggestion to Sitkoff that the rest of this paragraph should be~~
5 ~~deleted.]~~ Under the bankruptcy code, the definition of a “debtor” eligible for bankruptcy includes
6 a “person,” 11 U.S.C. §101(13), the definition of “person” includes a “corporation,” id.
7 §101(41), and the definition of “corporation” includes a “business trust.” Id. §101(9). Hence, a
8 “business trust” might qualify as an eligible “debtor.” Bankruptcy eligibility is a significant
9 issue for trusts used as special purpose entities in structured finance transactions, a principal use
10 of the modern statutory trust in practice. Such trusts are often designed to be “bankruptcy
11 remote.” Thus, as in the leading case of *In re Secured Equipment Trust of Eastern Airlines, Inc.*,
12 38 F.3d 86 (2d Cir. 1994), in certain configurations trusts used in securitization transactions have
13 indeed been held not to be “business trusts” under the bankruptcy code. ~~The ultimate form of~~
14 ~~“bankruptcy remoteness” is the use of an entity that is not an eligible debtor under the~~
15 ~~bankruptcy code.~~

16
17 Third, the drafting committee was influenced by the revealed preference for “statutory
18 trust” over “business trust” among existing users of statutory business trusts as evidenced by the
19 dominant position of the Delaware Statutory Trust Act relative to the statutory or business trust
20 acts of the other states. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [in
21 progress]. In 2002 Delaware recast the “Delaware Business Trust Act” as the “Delaware
22 Statutory Trust Act,” replacing nearly every reference to “business trust” with “statutory trust.”
23 See 73 Del. Laws 329. The Connecticut statute, which is the second most popular, is likewise
24 cast as a Statutory Trust Act. See Connecticut Statutory Trust Act §§34-500, 34-501(2).

25 26 27 **SECTION 102. DEFINITIONS.**

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

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

32 (3) “Common law trust” means a fiduciary relationship with respect to property arising
33 from a manifestation of intention to create that relationship and subjecting the person that holds
34 title to the property to duties to deal with the property for the benefit of charity or for one or
35 more persons, at least one of which is not the sole trustee, whether or not the purpose of the trust

1 is donative or commercial. The term includes the type of trust known at common law as a
2 “business trust,” “Massachusetts trust,” or “Massachusetts business trust”.

3 (4) “Designated office” means:

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

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

7 (5) “Foreign statutory trust” means a trust entity that is formed under the laws of a
8 jurisdiction other than this state and is required by those laws to file a record with a public
9 official in that jurisdiction.

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

11 (7) “Person” means an individual, corporation, ~~statutory trust, foreign statutory trust,~~
12 ~~common law trust, estate, trust, partnership, limited partnership, limited liability company,~~
13 ~~association, joint venture, public corporation, government or governmental subdivision, agency,~~
14 ~~or instrumentality, or any other legal or commercial entity. [For discussion: Style objects to~~
15 ~~our not using the boilerplate definition of “person.” Here is a tracked changes version of~~
16 ~~this section edited to match the boilerplate: “Person” means an individual, corporation,~~
17 ~~estate, trust, partnership, limited partnership, limited liability company, association, joint~~
18 ~~venture, public corporation, government or governmental subdivision, agency, or~~
19 ~~instrumentality, or any other legal or commercial entity.]~~

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

22 (9) “Record” means information that is inscribed on a tangible medium or that is stored in

an electronic or other medium and is retrievable in perceivable form.

(10) “Recorded transmission” means any form of communication that creates a record.

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

(A) the spouse of the person;

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

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

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

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

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

~~[For discussion: There has been continuing discontentment with this paragraph (11). At the last meeting it was suggested that we examine several other potential models, and it was also decided tentatively that an entity owned by one of the covered individuals should be covered. Hence, here are some alternative models:~~

~~•SEC Rule 16a-1(e)—~~

~~○“The term immediate family shall mean any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, and shall include adoptive relationships.”~~

~~•SEC Rule 144(a)—~~

~~○(1) An affiliate of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.~~

~~○(2) The term person when used with reference to a person for whose account securities are to be sold in reliance upon this section includes, in addition to such person, all of the following persons:~~

~~▪(i) Any relative or spouse of such person, or any relative of such spouse, any~~

- one of whom has the same home as such person;
- (ii) Any trust or estate in which such person or any of the persons specified in paragraph (a)(2)(i) of this section collectively own 10 percent or more of the total beneficial interest or of which any of such persons serve as trustee, executor or in any similar capacity; and
 - (iii) Any corporation or other organization (other than the issuer) in which such person or any of the persons specified in paragraph (a)(2)(i) of this section are the beneficial owners collectively of 10 percent or more of any class of equity securities or 10 percent or more of the equity interest.

• *RMBCA 8.60*—

○(5) “Related person” means:

- (i) the director’s spouse;
- (ii) a child, stepchild, grandchild, parent, step parent, grandparent, sibling, step sibling, half sibling, aunt, uncle, niece or nephew (or spouse of any thereof) of the director or of the director’s spouse;
- (iii) an individual living in the same home as the director;
- (iv) an entity (other than the corporation of an entity controlled by the corporation) controlled by the director or any person specified above in this subdivision (5);
- (v) a domestic or foreign (A) business or nonprofit corporation (other than the corporation or an entity controlled by the corporation) of which the director is a director, (B) unincorporated entity of which the director is a general partner or a member of the governing body, or (C) individual, trust, or estate for whom or of which the director is a trustee, guardian, personal representative or like fiduciary; or
- (vi) a person that is, or an entity that is controlled by, an employer of the director.

○Official Comment 5 to RMBCA 8.60:

——— Six categories of “related person” of the director are set out in subdivision (5). These categories are specific, exclusive and preemptive.

——— The first three categories involved closely related family, or near-family, individuals as specified in clauses (i) through (iii). The causes are exclusive insofar as family relationships are concerned and include adoptive relationships. The references to a “spouse” include a common-law spouse. Clause (iii) covers personal, as opposed to business, relationships; for example, clause (iii) does not cover a lessee.

——— Regarding the subcategories of persons described in clause (v) from the perspective of *X Co.*, certain of *D*’s relationships with other entities and *D*’s fiduciary relationships are always a sensitive concern, separate and apart from whether *D* has a financial interest in the transaction. Clause (v) reflects the policy judgment that *D* cannot escape *D*’s legal obligation to act in the best interests of another person for whom *D* has such a relationship and, accordingly, that such a relationship (without regard to any financial interest on *D*’s parks) should cause the relevant entity to have “related person” status.

——— The term “employer” as used in subdivision (5)(vi) is not separately defined that should be interpreted sensibly in light of the purpose of the subdivision. The relevant inquiry is whether *D*, because of employment

~~relationship with an employer who had significant stake in the outcome of the transaction, is likely to be influenced to act in the interest of that employer rather than in the interest of X Co.~~

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

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

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

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

(14) “Statutory trust” means an unincorporated entity formed under this [act].~~For discussion: Style would like us to delete “unincorporated.” But the term is used in the RMBCA and elsewhere.]~~

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

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

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

Comment

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

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

4
5 Paragraphs (2), (6), and ~~(4516)~~ define “certificate of trust,” “governing instrument,” and
6 “trust instrument” respectively. The certificate of trust is the record that must be filed with a
7 public official under Section 201 to form a statutory trust. The trust instrument is the transaction
8 document that provides for the governance of the affairs of the statutory trust and that need not
9 be made part of the public record. Together, the certificate of trust and the trust instrument
10 compose the governing instrument. The term “governing instrument” is in the singular to
11 conform with standard commercial usage. Conflicts between the certificate of trust and the
12 governing instrument are resolved pursuant to Section 201(d). Although Paragraph (15) is
13 phrased in the singular, consistent with current commercial practice the drafting committee
14 contemplated that there would often be more than one “trust instrument.” Section 104(c) makes
15 the authorization of multiple instruments explicit.

16
17 Paragraph (11) defines the term “related person,” which is used in Sections 408 and 505
18 concerning the legality of certain interested transactions. In using but not defining the term
19 “substantial” in Paragraph (11)(D), the drafting committee contemplated that a totality of the
20 circumstances test would apply. Section 406 defines the term “independent trustee” with respect
21 to a statutory trust that is an investment company under the Investment Company Act of 1940.

22
23 ~~[Depending on how we resolve the discussion question in the comment to Section~~
24 ~~101, commentary on 102(14) and the 2004 revenue ruling might go here.]~~

25
26 —Paragraph ~~(4617)~~ defines trustee as a person designated as such in accordance with the
27 governing instrument or applicable law. For discussion of trustee appointment, see the Comment
28 to Section 401.

30 31 **SECTION 103. DEFAULT AND MANDATORY RULES.**

32 (a) Except as otherwise provided in the governing instrument, this [act] governs the
33 management and affairs of the statutory trust and the rights, interests, duties, obligations, powers,
34 and relations between and among the trustees, beneficial owners, and other persons.

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

36 (1) any provision relating to the management and affairs of the statutory trust;

37 (2) any provision relating to the rights, interests, duties, obligations, and powers

1 of the trustees, beneficial owners, and other persons; and

2 (3) any other provision that is not inconsistent with this [act].

3 (b~~c~~) The terms of the governing instrument prevail over any provision of this [act]

4 except:

5 (1) the provisions of [Articles] 2, 7, 8 and 89;

6 (2) the exclusion of a prevailingly donative purpose under Section 302;

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

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

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

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

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

21 (8) the right of a beneficial owner to information under Section 503, but the
22 governing instrument may prescribe the standards for assessing whether information is

1 reasonably related to the beneficial owner's ability to enforce its rights as a beneficial owner if
2 the standards are not manifestly unreasonable;

3 (9) the right of a beneficial owner to bring a derivative action under Section 508,
4 but the governing instrument may modify the terms of Section 508 to subject the right to
5 additional standards and restrictions including the requirement that beneficial owners owning a
6 specified amount or type of beneficial interest join in bringing the derivative action, provided
7 that the additional standards and restrictions are not manifestly unreasonable; and

8 (10) the provisions of Sections 601, 604, 605, 608, and 609; ~~and~~

9 ~~the rules under Section 611 for dissolution of a statutory trust.~~

10 **Comment**

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

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

19
20 **Mandatory Rules.** Paragraph (c) lists the provisions of this act that are not subject to
21 override in the governing instrument of a statutory trust. Most concern the rights of nonparties
22 or public filing and notice requirements. By contrast, with two exceptions all the provisions of
23 this Act concerning the duties and powers of a trustee, relations among trustees, and the rights
24 and interests of a beneficial owner may be overridden or at least altered by the terms of the
25 governing instrument. The first exception is the mandatory prohibition of indemnification,
26 advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless
27 indifference in paragraph (c)(7). This exception is familiar trust law. See Restatement
28 (Second) of Trusts §222 (1959); George G. Bogert & George T. Bogert, The Law of Trusts and
29 Trustees §542 (rev. 2d ed. 1993); Uniform Trust Code §1008 (2000). See also John H.
30 Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1121-25 (2004). ~~In~~
31 ~~2006, the Delaware Statutory Trust Act was revised in a similar vein. See 2006 Delaware Laws~~
32 ~~Ch. 418 §7, revising Delaware Statutory Trust Act §3806(e). As revised, The Delaware Statutory~~
33 ~~Trust Act likewise limits the permissible scope of exoneration. See Delaware Statutory Trust~~
34 ~~Act §3806(e), which provides that the “governing instrument may provide for the limitation or~~

1 elimination of any and all liabilities for breach of contract and breach of duty (including
2 fiduciary duties) of a trustee . . . ; provided, that the governing instrument may not eliminate the
3 implied contractual covenant of good faith and fair dealing.” Limitations on permissible
4 exoneration are also familiar business entity law. See, e.g., Delaware General Corporation Law
5 §102(b)(7).

6
7 ~~[This paragraph was moved up from later in this comment, but with tracking off so~~
8 ~~that changes within the paragraph would be indicated.]~~ There second exception is contained
9 in paragraph (b)(5), which makes mandatory the invalidity under Section 405(b) of a direction
10 to a trustee or other person that is manifestly contrary to the terms of the governing instrument or
11 would constitute a serious breach of fiduciary duty. The reference to serious breach of fiduciary
12 duty is designed to exclude an inconsequential, immaterial, or technical breach that does not
13 harm a beneficial owner. For some purposes, trust law distinguishes between serious and not
14 serious breaches of trust. See, e.g., Uniform Trust Code §706(b)(1) (2000); Austin W. Scott,
15 William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed.
16 2006); Restatement (Second) of Trusts §107 cmt. b (1959). However, the effect of paragraph
17 (c)(5) is limited by paragraph (c)(4), which allows the trustee’s fiduciary duty to be altered by
18 the governing instrument if the alteration is not manifestly unreasonable.

19
20 Paragraphs (b)(4), (b)(6), (b)(8), and (b)(9) allow the governing instrument to alter
21 the nature of the trustee’s fiduciary obligation, the right of a trustee to information, the right of a
22 beneficial owner to information, and the right of a beneficial owner to bring a derivative action,
23 but only if the alteration is not “manifestly unreasonable.” In opting for a “manifestly
24 unreasonable” standard instead of Delaware’s “good faith and fair dealing” formulation, see
25 ~~2006 Delaware Laws Ch. 418 §5, revising Delaware Statutory Trust Act §3806(c) and (e),~~ the
26 drafting committee took notice of the use of “manifestly unreasonable” in Revised Uniform
27 Limited Liability Company Act §110(d) (2006); Uniform Limited Partnership Act §110(b)
28 (2001), Revised Uniform Partnership Act §103(b) (1997), Uniform Limited Liability Company
29 Act §103(b) (1996), and intended a similar meaning here. See generally also Mark J.
30 Loewenstein, Fiduciary Duties and Unincorporated Business Entities: In Defense of the
31 “Manifestly Unreasonable” Standard, ~~—41 Tulsa L. Rev. —411 (2006).~~ ~~The term is also used~~
32 ~~variously in Uniform Commercial Code §§1-201(28); 1-302(b); 2A-103(u); 4-103(a); 8-~~
33 ~~402(e)(1); 8-403(e); 9-603(a).~~

34
35 Because paragraph (c) refers specifically to other sections of the Act, enacting
36 jurisdictions that modify those other sections may also need to modify paragraph (c).

37
38 **Relationship to Mandatory Rules Under the Uniform Trust Code.** Under Section
39 105 of this act, the law pertaining to common law trusts supplements this act to the extent it is
40 not displaced by this act or the governing instrument. Hence, in an enacting jurisdiction that has
41 also enacted the Uniform Trust Code, the Code will apply to a statutory trust to the extent that
42 the Code’s provisions are not displaced by this act or the governing instrument. Because
43 paragraph (c) of this section does not include Section 105, the rules stated in UTC §105 that are
44 mandatory with respect to a common law trust are not mandatory with respect to a statutory

1 trust. To prevent evasion of the UTC’s mandatory rules, which enforce public policy limitations
2 on donative transfers, Section 302 of this Act provides that a statutory trust may not have “a
3 prevailing donative purpose.” For further discussion of the relationship between this Act, the
4 common law, and the Uniform Trust Code, see the Prefatory Note to this Act under the heading
5 “Relationship to Common Law Trusts and the Uniform Trust Code” and the comments to
6 Sections 105 and 302.

7
8 **Registered Investment Companies.** The Investment Company Act of 1940 (the “1940
9 Act”) trumps this Act with respect to a statutory trust that registers as an investment company.
10 For such a statutory trust the 1940 Act imposes additional mandatory rules. See, e.g., the
11 Comments to Sections ~~209–207~~ (name of statutory trust), 408 (interested transactions), 410
12 (indemnification, advancement, and exoneration), 411 (delegation by trustee), and 412 (action by
13 trustees).

14
15 ~~Because paragraph (b) refers specifically to other sections of the Act, enacting~~
16 ~~jurisdictions that modify those other sections may also need to modify paragraph (b).~~
17

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

19 ~~—— (a) Subject to Section 103(b), a governing instrument may contain:~~

20 ~~—— (1) any provision relating to the management and affairs of the statutory trust;~~

21 ~~—— (2) any provision relating to the rights, interests, duties, obligations, and powers~~
22 ~~of the trustees, beneficial owners, and other persons; and~~

23 ~~—— (3) any other provision that is not inconsistent with this [act]. [This paragraph is~~
24 ~~redundant with Section 103(a).]~~

25 (b) Subject to Section ~~103(b)~~ 103(c), a governing instrument may:

26 (1) provide the means by which beneficial ownership is determined and
27 evidenced;

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

29 (3) provide for one or more series under Section 309;

30 ~~(3)~~ if and to the extent that voting rights are granted under the governing

instrument, include provisions relating to:

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

(B) waiver of notice;

(C) action by consent without a meeting;

(D) establishment of record dates, quorum requirements, or voting in person, by proxy, recorded transmission, telephone, or video conference, or in any other manner; or

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

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

(A) amendment of the governing instrument;

(B) accomplishment of a merger, conversion, or reorganization;

(C) appointment of one or more trustees;

(D) sale, lease, exchange, transfer, pledge or other disposition of all or any part of the assets of the statutory trust or the assets of any series;

(E) dissolution of the statutory trust. ~~[For discussion: This provision is in tension with Section 103(b)(11), which makes Section 612 mandatory.]~~

~~[For discussion: Is not this provision mooted by Section 306(a)?]~~

(65) provide for the present or future creation of more than one statutory trust,

including the creation of a future statutory trust to which all or any part of the assets, liabilities,

1 profits, or losses of any existing statutory trust may be transferred or exchanged, and for the
2 conversion of beneficial interests in an existing statutory trust, or series thereof, into beneficial
3 interests in the separate statutory trust, or series thereof;

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

9 | (78) provide rights to any person, including a person that is not a party to the
10 governing instrument;

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

17 | (910) provide that a person becomes a beneficial owner, acquires a beneficial
18 interest, and is bound by the governing instrument if the person complies with the conditions for
19 becoming a beneficial owner set forth in the governing instrument such as payment to the
20 statutory trust or to a previous beneficial owner;

21 | (4011) provide that a person may comply under paragraph (9) by a representative
22 authorized by the person orally, in a record, or by conduct; ~~such as payment by the~~

representative for a beneficial interest ~~[For discussion: “by” the representative versus “to” the representative.]~~;

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

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

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

Comment

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

The unusual principal sources citation reflects the drafting committee’s decision to collect in a single section—that is, in paragraphs (b) and (c) of this Section—the various permissive rules regarding the scope of the governing instrument that are scattered throughout the Delaware and Connecticut Statutory Trust Acts. The main exceptions concern the statement of permissive rules regarding the creation of one or more series of a statutory trust in Section 306309(a), and the permissive rules regarding the allowable remedies for a beneficial owner’s breach in Section 501(c).

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

1 permissibility of such provisions. Similar reasoning underlies the provision of a detailed
2 schedule of powers in Uniform Trust Code §816 (2000) in addition to the broad general
3 statement in Uniform Trust Code §815.

4
5 ~~Paragraph (a) emphasizes the freedom of contract afforded to transactional planners by~~
6 ~~the Uniform Statutory Trust Entity Act, which is primarily a default statute.~~

7
8 ~~Paragraph (b) enumerates a nonexhaustive list of provisions that may validly be included~~
9 ~~in a statutory trust's governing instrument. The drafting committee concluded that the demand~~
10 ~~of third parties and transactional planners to see language that expressly authorizes specific~~
11 ~~terms justified inclusion of a detailed list. Prior to statutory confirmation, doubts sometimes~~
12 ~~arose in opinion letters. Similar reasoning underlies the provision of a detailed schedule of~~
13 ~~powers in Uniform Trust Code §816 (2000) notwithstanding the broad general statement in~~
14 ~~Uniform Trust Code §815.~~

15
16
17 **SECTION 105. APPLICABILITY OF TRUST LAW.** The law of this state pertaining
18 to common law trusts supplements this [act], except to the extent modified or displaced by the
19 governing instrument.

20 **Comment**

21
22 **Principal Sources** – Uniform Trust Code §106 (2000); Delaware Statutory Trust Act
23 §3809; Connecticut Statutory Trust Act §34-519.

24
25 Consistent with the Delaware Statutory Trust Act, the Uniform Statutory Trust Entity Act
26 provides that state trust law, not corporate law, supplements this Act and the terms of the
27 governing instrument. Thus, in an enacting jurisdiction that has also enacted the Uniform Trust
28 Code, the Code will apply to a statutory trust to the extent that the Code's provisions—including
29 the mandatory rules scheduled in UTC §105—are not displaced by this act or the governing
30 instrument. For discussion of why the rules under the UTC that are mandatory with respect to a
31 common law trust are not mandatory with respect to a statutory trust, see the comment to Section
32 103 under the heading "Relationship to Mandatory Rules Under the Uniform Trust Code."
33 ~~However, because this Act's schedule of mandatory rules in Section 103 does not include this~~
34 ~~Section, the rules scheduled in Uniform Trust Code §105 that are mandatory with respect to a~~
35 ~~common law trust are not mandatory with respect to a statutory trust. [For discussion: This~~
36 ~~statement warrants discussion.] To prevent evasion of the mandatory rules in the Uniform~~
37 ~~Trust Code, which enforce public policy limitations on donative transfers, Section 302 of this~~
38 ~~Act provides that a statutory trust may not have "a prevailingly donative purpose." For further~~
39 ~~discussion of the relationship between this Act and the common law and the Uniform Trust~~
40 ~~Code, see the Prefatory Note to this Act under the heading "Relationship to Common Law Trusts~~
41 ~~and the Uniform Trust Code."~~

1
2 In looking to trust law to supply defaults to fill gaps in this act and the governing
3 instrument, the drafting committee was strongly influenced by the revealed preference for trust
4 law among existing users of statutory trusts as evidenced by the popularity of the Delaware Act
5 as compared to the business trust acts (such as those in Arizona, Indiana, Kansas, Mississippi,
6 Montana, Oregon, Tennessee, Washington, and West Virginia) that look to corporate law. See
7 Robert H. Sitkoff, The Rise of the Statutory Business Trust [in progress].
8

9 SECTION 106. RULES OF CONSTRUCTION.

10 (a) This [act] must be liberally construed to give maximum effect to the principle of
11 freedom of contract and to the enforceability of governing instruments. ~~[For discussion: Style~~
12 ~~wants (a) deleted (or at least moved to the comment) and (b) moved to 105. The purpose of~~
13 ~~(b) is stated in the comment below.]~~

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

16 Comment

17
18 **Principal Sources** – Delaware Statutory Trust Act §3825; Connecticut Statutory Trust
19 Act §34-546; Uniform Statute and Rule Construction Act §18 (1995).
20

21 Paragraph (a) emphasizes the freedom of contract afforded to transactional planners by
22 the Uniform Statutory Trust Entity Act, which is primarily a default statute.
23

24 Paragraph (b) admonishes the courts not to apply to this Act the canon of construction
25 that statutes in derogation of the common law are to be strictly construed. Although Revised
26 Uniform Partnership Act §104 (1997) does not include a similar admonition on the ground that
27 the “principle is now so well established that it is not necessary to so state in the Act,” id. cmt.,
28 the drafting committee for the Uniform Statutory Trust Entity Act included this admonition
29 because several of this Act’s provisions are designed specifically to reject the application to a
30 statutory trust of one or more common law trust principles. Put differently, several provisions of
31 this Act derogate the common law. Those provisions should be interpreted accordingly in accord
32 with their purpose.

1 [ARTICLE] 2

2 FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

3 SECTION 201. CERTIFICATE OF TRUST.

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

6 (b) A certificate of trust must contain:

- 7 (1) the name of the statutory trust, which must comply with Section ~~209~~207;
- 8 (2) the street and mailing addresses of the designated office of the ~~statutory~~ trust;
- 9 (3) the name and street and mailing addressed of the initial agent of the ~~statutory~~
10 trust for service of process; and
- 11 (4) notice if the ~~statutory~~ trust might have one or more series.

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

14 (d) Subject to Section ~~205~~204(c) a statutory trust is formed when a certificate of trust that
15 complies with subsection (b) is filed by the [Secretary of State].

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

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

21 (2) the certificate of trust, statement of cancellation, or change or articles of
22 conversion or merger prevails as to a person, other than a trustee or a beneficial owner, that

1 reasonably relies to its detriment on the filed record.

2 **Comment**

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

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

12
13 A statutory trust comes into existence only if (1) a certificate of trust is prepared and
14 delivered to the specified public official for filing, and (2) the public official files the certificate.
15 (For more on the meaning of “filing,” see Section ~~205~~204 and the comment thereto.) The
16 certificate of trust provides notice to interested third parties of the existence of the statutory trust
17 and the identification of the statutory trust’s initial agent for service of process. Pursuant to
18 Section ~~309~~4(b)(2), the certificate of trust also puts third parties on notice if the statutory trust
19 further segregates its assets and liabilities by creating one or more series.

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

29
30 Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
31 instrument.

32 33 **SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF** 34 **TRUST.**

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

37 (1) the name of the ~~statutory~~ trust;

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

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

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

(1) cause the certificate to be amended; or

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

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

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

(e) Subject to Section ~~205~~204(c), an ~~amendment~~ amended or restated certificate is effective when filed by the [Secretary of State].

Comment

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

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

Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing instrument.

~~SECTION 203. STATEMENT OF CANCELLATION.~~

1 ~~_____ (a) A terminated statutory trust that has completed winding up shall deliver to the~~
2 ~~[Secretary of State] for filing a statement of cancellation that states:~~
3 ~~_____ (1) the name of the statutory trust;~~
4 ~~_____ (2) the date of filing of its initial certificate of trust;~~
5 ~~_____ (3) that the statutory trust has completed winding up; and~~
6 ~~_____ (4) any other information as determined by the trustees filing the statement.~~
7 ~~_____ (b) Subject to Section 205(c), a statement of cancellation is effective when filed by the~~
8 ~~[Secretary of State].~~

9 **Comment**

10
11 ~~_____ **Principal Sources**—Uniform Limited Partnership Act §203 (2001); Delaware Statutory~~
12 ~~Trust Act §3810; Connecticut Statutory Trust Act §34-503.~~

13 ~~_____~~
14 ~~_____ Unlike Uniform Limited Partnership Act §203, this section requires the filing of a~~
15 ~~statement of cancellation when a statutory trust is terminated.~~

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

19
20 **SECTION ~~204~~203. SIGNING OF RECORDS.**

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

23 ~~_____ (b) Any person may sign by an attorney in fact any record filed pursuant to this [act].~~~~**[For**~~
24 ~~**discussion: Style says that “This is redundant of the law of agency.”]**~~

25 **Comment**

26
27 **Principal Sources** – Uniform Limited Partnership Act §204 (2001); Delaware Statutory
28 Trust Act §3811; Connecticut Statutory Trust Act §34-504.

29
30 ~~_____ Paragraph (b) confirms that the signing of a public record by a trustee is a delegable act.~~

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

4
5 | **SECTION ~~205~~204. DELIVERY TO AND FILING OF RECORDS BY**
6 **[SECRETARY OF STATE]; EFFECTIVE TIME AND DATE.**

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

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

15 | (c) Except as otherwise provided in Sections ~~206-205~~ and ~~214~~212, a record delivered to
16 the [Secretary of State] for filing under this [act] may specify an effective time and a delayed
17 effective date. Except as otherwise provided in this [act], a record filed by the [Secretary of
18 State] is effective:

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

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

24 (3) if the record specifies a delayed effective date but not an effective time, at

1 12:01 a.m. on the earlier of:

2 (A) the specified date; or

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

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

6 (A) the specified date; or

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

8 **Comment**
9

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

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

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

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

33 Consistent with the existing statutory trust acts, but inconsistent with most corporate
34 codes, this Act makes no provision for collecting a franchise tax. See generally Marcel Kahan &
35 Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205,
36 1218-33 (2001).
37

1 | Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
2 | instrument.
3 |

4 | **SECTION ~~206~~205. CORRECTING FILED RECORD.**

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

8 | (b) A statement of correction under subsection (a) may not state a delayed effective date
9 | and must:

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

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

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

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

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

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

21 | **Comment**

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

23 | A statement of correction is appropriate only to correct inaccuracies that existed or
24 | signatures that were defective “at the time of filing.” A statement of correction may not be used
25 |
26 |

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

10
11 **SECTION ~~207~~206. CERTIFICATE OF EXISTENCE OR REGISTRATION.**

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 ~~statutory~~ trust;

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

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

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

22 and

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

25 ~~(b) The [Secretary of State], upon request and payment of the requisite fee, shall furnish a~~
26 ~~certificate of registration for a foreign statutory trust if the records filed in the [office of the~~
27 ~~Secretary of State] show that the [Secretary of State] has filed a certificate of authority, has not~~

revoked the certificate of authority, and has not filed a notice of cancellation. A certificate of registration must state: ~~[For Discussion: Because Style believes that (b) and part of (c) should be moved to Article 7, it asks that we reconsider our decision last time not to do so. To that end, it has supplied Sitkoff and Vigdor with a revision of this section, and a new section for Article 7 (called “Certificate of Registration”).]~~

~~_____ (1) the foreign statutory trust's name and any alternate name adopted under
Section 706 for use in this state;~~

~~_____ (2) that all fees and penalties due under this [act] or other law to the [Secretary of State] have been paid;~~

~~_____ (3) that the [Secretary of State] has not revoked its certificate of authority and has not filed a notice of cancellation[; and~~

~~_____ (4) whether the foreign statutory trust's most recent annual report required by Section 215 has been filed by the [Secretary of State]].~~

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

Comment

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

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

Section ~~205~~204(b) provides a mechanism for obtaining a certified copy of a certificate of

1 trust even if the trust has been terminated.

2
3 ~~A certificate of registration furnished under paragraph (b) is different than a certificate of~~
4 ~~authority under Section 705.~~

5
6 ~~Paragraphs (a)(5) and (b)(4) are bracketed in recognition of the diversity of approaches~~
7 ~~among the states with respect to annual reports. Uniformity is not expected.~~

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

11
12 **~~SECTION 208. ADMINISTRATIVE DISSOLUTION.~~**

13 ~~—— (a) A certificate of trust may be canceled by the [Secretary of State] in the manner~~
14 ~~provided in subsections (b) and (c) if the statutory trust does not:~~

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

17 ~~—— (2) appoint and maintain an agent for service of process;~~

18 ~~—— (3) deliver for filing a statement of a change under Section 213 within 30 days~~
19 ~~after a change has occurred in the name or address of the agent for service of process; or~~

20 ~~—— (4) file the annual report required by Section 215].~~

21 ~~—— (b) To cancel a certificate of trust, the [Secretary of State] must prepare, sign, and file a~~
22 ~~notice of administrative dissolution and send a copy to the statutory trust's agent for service of~~
23 ~~process or, if the statutory trust does not appoint and maintain a proper agent in this state, to the~~
24 ~~statutory trust's designated office. The notice must state:~~

25 ~~—— (1) the effective date of cancellation, which must be at least 60 days after the date~~
26 ~~the [Secretary of State] sends the copy; and~~

27 ~~—— (2) the basis for the cancellation under subsection (a).~~

1 ~~—— (c) The authority of a statutory trust to transact business ceases on the effective date of~~
2 ~~cancellation unless the statutory trust cures the failures to comply with subsection (a) stated in~~
3 ~~the notice.~~

4 ~~—— (d) If a statutory trust cures the failures stated in the notice of cancellation under~~
5 ~~subsection (c), the [Secretary of State] shall indicate that the statutory trust is reinstated on the~~
6 ~~filed notice. The reinstatement of the statutory trust relates back for all purposes to the date of~~
7 ~~the notice of cancellation. [For discussion: (1) Rutledge’s letter to Sitkoff of April 2, 2007~~
8 ~~regarding administrative dissolution, and (2) ReULLCA §§705-707. Both were circulated~~
9 ~~with this draft.]~~

10 **Comment**

11 ~~—— **Principal Source** — Uniform Limited Partnership Act §906 (2001).~~

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

14 **SECTION ~~209~~207. NAME OF STATUTORY TRUST.**

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

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

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

21 (b) The name of a statutory trust may contain the words: “company”, “association”,
22 “club”, “foundation”, “fund”, “institute”, “society”, “union”, “syndicate”, “limited”, or “trust”,
23

1 or words or abbreviations of similar import, and may contain the name of a beneficial owner, a
2 trustee, or any other person.

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

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

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

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

15 (A) has merged into the applicant;

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

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

19 (d) Subject to Section 706807, this section applies to any foreign statutory trust
20 transacting business in this state, having a ~~certificate of authority~~certificate of qualification to
21 transact business in this state, or applying for a ~~certificate of authority~~certificate of qualification.

22 **Comment**
23

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

3
4 The drafting committee opted not to require a traditional limited liability appellation.
5 Such a requirement would be inconsistent with current practice under the Delaware Act, though
6 the drafting committee contemplated that enacting jurisdictions with a strong policy regarding
7 names of limited liability entities might modify this Section accordingly. Moreover, other
8 regulatory law will sometimes limit the range of permissible names notwithstanding this Section.
9 For example, the names of mutual funds typically do not contain a limited liability appellation,
10 but Section 35(d) of the Investment Company Act of 1940, which is applicable to a statutory
11 trust that is a registered investment company, prohibits “materially deceptive or misleading”
12 names. 15 U.S.C. §80a-34(d). See also Rule 35d-1, 17 C.F.R. §270.35d-1 (listing types of
13 names that have been deemed “materially deceptive or misleading”).

14
15 Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
16 instrument.

17
18 **SECTION ~~210~~208. RESERVATION OF NAME.**

19 (a) The exclusive right to the use of a name that complies with Section ~~209~~207 may be
20 reserved by:

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

23 (2) a statutory trust or a qualified foreign statutory trust intending to adopt the
24 name;

25 (3) a foreign statutory trust intending to obtain a ~~certificate of authority~~certificate
26 of qualification to transact business in this state and adopt the name;

27 (4) a person intending to organize a foreign statutory trust and intending to have it
28 obtain a ~~certificate of authority~~certificate of qualification to transact business in this state and
29 adopt the name;

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

(6) a foreign statutory trust formed under a name that does not comply with Section ~~209~~207, but the name reserved under this paragraph may differ from the foreign statutory trust's name only to the extent necessary to comply with Section ~~209~~207.

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

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

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

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

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

(e) Subject to Section ~~205~~204(c), a transfer or termination under subsection (d) is effective when the [Secretary of State] files the notice of transfer.

Comment

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

1 Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
2 instrument.
3

4 **SECTION ~~214~~209. AGENT FOR SERVICE OF PROCESS.**

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

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

10 **Comment**

11
12 **Principal Sources** – Uniform Limited Partnership Act §114 (2001); Delaware Statutory
13 Trust Act §3804; Connecticut Statutory Trust Act §34-507.
14

15 Under Section 201(a)(3), the initial designation of a statutory trust's agent for service of
16 process is made in the original certificate of trust. Under Section 702(a)(3), the initial
17 designation of a foreign statutory trust's agent for service of process is made in the original
18 application for a ~~certificate of authority~~certificate of qualification. The initial designation may
19 be changed pursuant to a statement of change under Section ~~213~~211, by an amendment to the
20 certificate of trust under Section 202, or by an annual report under Section ~~215~~214(e)~~-if the~~
21 ~~jurisdiction has adopted Section 215.~~

22
23 Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
24 instrument.
25

26 **SECTION ~~212~~210. CHANGE OF DESIGNATED OFFICE OR AGENT FOR**
27 **SERVICE OF PROCESS.**

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

31 (1) the name of the ~~statutory trust or qualified foreign statutory trust;~~

(2) the street and mailing addresses of the current designated office of the
~~statutory trust or qualified statutory trust;~~

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

(4) the name and street and mailing addresses of the current agent of the ~~statutory~~
~~trust or qualified foreign statutory trust~~ for service of process;- and

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

(b) A statement of change is effective as provided in Section ~~205~~204(c).

Comment

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

Paragraph (a) uses “may” rather than “must” because a statutory trust may also change
the information by an amendment to its certificate of trust under Section 202 and a qualified
foreign statutory trust may also change the information by an amendment to its ~~certificate of~~
~~authority~~certificate of qualification under Section ~~703~~805. Further, if the information currently
in the public record is not inaccurate, a statutory trust or qualified foreign statutory trust may
change the information in an annual report under Section ~~215~~214(e) ~~if the jurisdiction has~~
~~enacted Section 215~~.

Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
instrument.

SECTION ~~213~~212. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.

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

(b) After receiving a statement of resignation under subsection (a), the [Secretary of

State] shall file it and transmit a copy to the designated office of the statutory trust or qualified foreign statutory trust and another copy to the principal office if the address of the office appears in the records of the [Secretary of State] and is different from the address of the designated office.

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

Comment

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

This section provides the exclusive means for an agent to resign without cooperation from the statutory trust or qualified foreign statutory trust and the only way the agent, rather than the statutory trust or foreign statutory trust, can effect a change in the public record. Unlike most records authorized or required to be delivered to the filing officer for filing under this Act, a statement of resignation may not provide for a delayed effective date. Paragraph (c) mandates the effective date. An effective date included in a statement of resignation is disregarded. To satisfy Section ~~212~~213(a), the statutory trust or qualified foreign statutory trust must designate a new agent for service of process before the effective date. If the statutory trust or foreign statutory trust fails to do so, under Section 214 service on the statutory trust or foreign statutory trust may be made on the {Secretary of State}.

Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing instrument.

SECTION ~~214~~213. SERVICE OF PROCESS.

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

(b) If a statutory trust or qualified foreign statutory trust does not appoint or maintain an agent for service of process in this state or the agent for service of process cannot with

1 reasonable diligence be found at the agent's address on file with the [Secretary of State], the
2 [Secretary of State] is an agent of the ~~statutory trust or qualified foreign statutory trust~~ for service
3 of process.

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

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

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

12 (2) the date shown on the return receipt, if signed on behalf of the ~~statutory trust~~
13 ~~or qualified foreign statutory trust~~; -or

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

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

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

21 **Comment**

22
23 **Principal Source** – Uniform Limited Partnership Act §117 (2001).
24

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

3
4 Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
5 instrument.

6
7 **~~{~~SECTION ~~215~~214. ANNUAL REPORT FOR [SECRETARY OF STATE].**

8 **~~[NOTE: This Section, which was 211 in the prior draft, has been moved here and~~**
9 **~~bracketed per our last drafting session. The move was made without the tracking on, so~~**
10 **~~that changes within the section since last time would be indicated.]~~**

11 ———(a) A statutory trust or qualified foreign statutory trust must deliver to the [Secretary of
12 State] for filing an annual report that contains the name of the ~~statutory trust or qualified foreign~~
13 ~~statutory~~-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
21 ~~qualified foreign statutory~~-trust is formed; and

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

process in this state.

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

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

An annual report must be delivered to the [Secretary of State] between [January 1 and April 1] of each subsequent calendar year.

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

(e) If an annual report under this section contains an address of a designated office or the name or address of an agent for service of process which differs from the information shown in the records of the [Secretary of State] immediately before the filing, the differing information in the annual report is considered a statement of change under Section 212.}

Comment

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

~~This Section is in brackets in recognition of the diversity of practice among the states regarding annual reports. Uniformity is not expected. If adopted, under Under Section 403(b)103(c)(1), this Section would not be subject to override by the governing instrument.~~

1 [ARTICLE] 3

2 AUTHORIZATION; GOVERNING LAW; DURATION; POWERS

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

5 Comment

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

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

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

19 Comment

20
21 Principal Sources – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
22 Act §34-502a.
23

24 This Section provides that a statutory trust may be formed for “any lawful purpose except
25 for a prevailingly donative purpose.” Thus, in addition to use in a commercial transaction, a
26 statutory trust may be used in a custodial or other context that need not be for profit. See Section
27 307. 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

1 By prohibiting a statutory trust from having “a prevailingly donative purpose,” the
2 drafting committee avoided the necessity of designing a comprehensive schedule of mandatory
3 rules applicable only to statutory trusts with such a purpose, a task made more difficult by the
4 increasing differentiation among the states on these matters, particularly with respect to the
5 rights of the settlor’s creditors in a self-settled trust and the continued application of the Rule
6 Against Perpetuities to interests held in trust. See Robert H. Sitkoff & Max M. Schanzenbach,
7 Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes,
8 115 Yale L.J. 356 (2005).

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

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

33
34 Most of the foregoing rules are scheduled in Uniform Trust Code §105 (2000), the Code’s
35 schedule of mandatory rules. For discussion of why the rules under the UTC that are mandatory
36 with respect to a common law trust are not mandatory with respect to a statutory trust, see the
37 comment to Section 103 under the heading “Relationship to Mandatory Rules Under the
38 Uniform Trust Code.”

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

1 | 427 (2004).

2 |
3 | Under Section ~~403(b)~~103(c)(2), this Section is not subject to override by the governing
4 | instrument.

5 |
6 | **SECTION 303. STATUTORY TRUST SOLELY LIABLE FOR DEBTS,**

7 | **OBLIGATIONS, AND LIABILITIES OF STATUTORY TRUST.** A debt, obligation, or
8 | other liability of a statutory trust, whether arising in contract, tort, or otherwise, is solely the
9 | debt, obligation, or liability of the trust. A beneficial owner, trustee, agent of the trust, or agent
10 | of the trustee is not personally liable, directly or indirectly, by way of contribution or otherwise,
11 | for a debt, obligation, or liability of the trust solely by reason of being or acting as a trustee,
12 | beneficiary, agent of the trust, or agent of the trustee.

13 | **Comment**

14 | **Principal Sources** – Delaware Statutory Trust Act §3803; Connecticut Statutory trust
15 | Act §34-523; Revised Uniform Partnership Act §306 (1994); Uniform Limited Liability
16 | Company Act §303; Uniform Limited Partnership Act §§303, 404 (2001); Uniform Trust Code
17 | §507 (2000).

18 |
19 | This section implements the concept that the statutory trust is a separate legal entity on
20 | three margins. First, this section confirms that a trustee, as a manager of the statutory trust, is
21 | not liable for the debts, obligations, and liabilities of the statutory trust. As such, this section
22 | overrides the outmoded common law rule that held the trustee liable for the debts of the trust but
23 | that gave the trustee a right to indemnity out of the trust fund. Compare Restatement (Second) of
24 | Trusts §§244, 261 (1959) (stating the old rule), with Uniform Trust Code §1010 (2000)
25 | (eliminating the personal liability of the trustee for debts, obligations, and liabilities arising in
26 | the trustee’s fiduciary capacity). However, nothing in this Section limits the personal liability of
27 | the trustee to the statutory trust for breach of duty under Section 404.

28 |
29 | Second, this section confirms that the statutory trust, not the agents of the statutory trust
30 | or the trustee, is liable for the debts, obligations, and liabilities of the trust incurred by an agent
31 | of the trust or the trustee acting on behalf of the trust or the trustee.

32 |
33 | Third, this section confirms the limited liability of a beneficial owner by providing that
34 | the beneficial owner of a statutory trust is not liable for the debts, obligations, or liabilities of the
35 | statutory trust. Accordingly, this section confirms that the “control test” of Williams v.
36 | Inhabitants of Milton, 102 N.E. 355 (Mass. 1913), and Restatement (Second) of Agency §14B

(1958), is not applicable to a statutory trust. Under the control test, if a beneficial owner of a common law business trust had a say in the administration of the trust or the right to remove and replace the trustees, the beneficial owner might be held liable for the debts of the trust. By contrast, under this section a beneficial owner may participate in the management of the statutory trust without exposure to liability for the debts of the statutory trust. For discussion of a beneficial owner's limited liability under the Delaware Statutory Trust Act, see Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations §19.3 (3d ed. 2005 Supp.).

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

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

(b) No creditor of a beneficial owner or of a trustee shall have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the statutory trust.

Comment

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

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

1 Finkelstein, The Delaware Law of Corporations & Business Organizations §19.4, at 19-9 – 19-
2 10 (3d ed. 2005 Supp.). For a general discussion of asset partitioning rules in organizational law,
3 see Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 Yale
4 L.J. 387 (2000); Henry Hansmann & Ugo Mattei, The Functions of Trust Law: A Comparative
5 Legal and Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998). See also Henry Hansmann,
6 Reinier Kraakman, & Richard Squire, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333
7 (2006).
8
9

10 SECTION 303305. GOVERNING LAW. The law of this state governs:

- 11 (1) the internal affairs of a statutory trust;
- 12 (2) the liability of a beneficial owner as beneficial owner and a trustee as trustee for the
- 13 debts, obligations, or other liabilities of a statutory trust; and
- 14 (3) the liability of a series of a statutory trust with respect to the statutory trust and other
- 15 series thereof.

16 **Comment**

17
18 **Principal Sources** – Connecticut Statutory Trust Act §34-502; Uniform Limited
19 Partnership Act §106 (2001); Revised Uniform Limited Liability Company Act §106 (2006).

20
21 Under paragraph (1) the internal affairs of a statutory trust formed under this act are
22 governed by the laws of this state no matter in which state the statutory trust operates. Although
23 the term “internal affairs” may be indeterminate at its edges, the concept certainly includes
24 interpretation and enforcement of the governing instrument and relations among the trustees,
25 beneficial owners, and the statutory trust. See generally Restatement (Second) of Conflict of
26 Laws §302 cmt. a(1971) (defining “internal affairs” with reference to corporate law as “the
27 relations inter se of the corporation, its shareholders, directors, officers or agents”).
28

29 Paragraph (2) supports Sections ~~413-303-04~~ and ~~506~~ by confirming that the liability of a
30 beneficial owner or a trustee for the debts, obligations, or other liabilities of the statutory trust is
31 governed by the law of this state. This paragraph is stated separately from Paragraph (1) because
32 the liabilities of a beneficial owner or trustee to third parties is arguably not an internal affair.
33 See, e.g., Restatement (Second) of Conflict of Laws §307 (1971) (treating shareholders’ liability
34 separately from the internal affairs doctrine).
35

36 Section ~~701-801~~(a) states rules for qualified foreign statutory trusts that parallel and are
37 analogous in scope to those of this section.
38

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

4 **SECTION ~~304~~306. DURATION.**

5 (a) A statutory trust has perpetual existence.

6 (b) A statutory trust, or any series thereof, may not be terminated or revoked by a
7 beneficial owner or other person except in accordance with this [act] or the terms of the
8 governing instrument of the ~~statutory~~ trust.

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

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

13 **Comment**
14

15 **Principal Sources** – Delaware Statutory Trust Act §3808; Connecticut Statutory Trust
16 Act §34-518.
17

18 Following the corporate default rule of perpetual existence, paragraph (a) provides a default
19 rule of perpetual existence for a statutory trust. See also Section 701, which provides for dissolution
20 of a statutory trust only upon the occurrence of an event or circumstance stated in the governing
21 instrument. The duration of a common law trust, by contrast, is curtailed by the Rule Against
22 Perpetuities. See Restatement (Second) of Property: Donative Transfers § 2.1 (1983).
23 Accordingly, unless the governing instrument provides otherwise, under this section a statutory trust
24 is exempt from the Rule Against Perpetuities. Without taking a position on the policy soundness of
25 the tax-driven movement to abolish the Rule Against Perpetuities with respect to donative trusts, see
26 Max M. Schanzenbach & Robert H. Sitkoff, Perpetuities or Taxes? Explaining the Rise of the
27 Perpetual Trust, 27 Cardozo L. Rev. 2465 (2006), the drafting committee concluded that the dead-
28 hand worries that underpin the Rule does not apply to a statutory trust. Under Section 302, a
29 statutory trust may not have a prevailing donative purpose.
30

31 Paragraph (b) confirms that a statutory trust may only be terminated in accordance with the
32 terms of this Act or the governing instrument. Thus, paragraph (b) overrides the rules of common
33 law ~~of~~ trust termination that would otherwise be applicable to a statutory trust pursuant to Section
34 105. Those rules are concerned with mediating the tension between the donor's intent and

subsequent contrary preferences of the beneficiaries, see Robert H. Sitkoff, An Agency Costs Theory of Trust Law, 89 Cornell L. Rev. 621, 658-63 (2004), an issue that is not applicable to a statutory trust inasmuch as a statutory trust under this Act may not have a prevailingly donative purpose. Instead, the drafting committee contemplated that pursuant to Section 104(b)(98) the governing instrument would provide for termination of the statutory trust or modification of the governing instrument if such provisions are desirable.

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

Paragraph (d) overrides the application to a statutory trust under Section 105 of the common law rule of merger whereby the legal and equitable title to the trust property merge and the trust terminates if the same person is the sole trustee and sole beneficiary. See Restatement (Third) of Trusts §69 (2003); Restatement (Second) of Trusts §341 (1959).

~~———— [For discussion, whether to override the common law merger doctrine. See, e.g., Restatement (Third) of Trusts §69, which says “If the legal title to the trust property and the entire beneficial interest become untied in one person, the trust terminates.”]~~

SECTION ~~305~~307. POWER TO SUE AND BE SUED; ~~TITLE TO TRUST~~ PROPERTY.

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

(b) Except as otherwise provided in Section ~~306~~309, the property of a statutory trust is subject to attachment and execution as if it were a domestic ~~“business”?~~ corporation for the debts, obligations, or other liabilities of the trust.

~~———— (c) Legal title to the property of a statutory trust or any part thereof may be held in the name of any trustee of the statutory trust, in its capacity as trustee, with the same effect as if the property were held in the name of the statutory trust. [For discussion: Relation of this provision, if any, to Section 104(b)(11).]~~

Comment

Principal Sources – Delaware Statutory Trust Act §§3803-3805; Connecticut Statutory

Trust Act §§34-518, 34-523; Uniform Limited Partnership Act §303 (2001).

Paragraph (a) implements the concept that a statutory trust is a separate juridical entity by confirming that a statutory trust has the power to sue and be sued in its own name.

Paragraph (b) addresses the attachment and execution of a statutory trust's property unless the statutory trust has formed one or more series under Section 309 by absorbing the rules applicable to a domestic corporation in like circumstances.

~~Paragraph (c) gives the trustee the option of holding property of the statutory trust in the name of the trustee in the trustee's capacity as such even though the statutory trust is a juridical entity that can hold property in its own name. The drafting committee reasoned that this provision would be useful for a statutory trust that has dealings in a state that has not provided for a statutory trust entity because property ownership by a trustee in the trustee's capacity as such is familiar from the use of common law trusts. Indeed, because a common law trust is not an entity separate from its trustee, property held in a common law trust must be held by the trustee in its capacity as such. To police the boundary of the trustee's personal assets and the assets of the trust, the common law imposes on the trustee duties to earmark trust property and not to commingle it with the trustee's own. See Uniform Trust Code §810 (2000); Restatement (Third) of Trusts §84 (T.D. No. 4, 2005); Restatement (Second) of Trusts §179 (1959). The drafting committee contemplated that under appropriate circumstances Section 404(b) would be read to require similar conduct by a trustee of a statutory trust that takes title to property of the statutory trust in the name of the trustee in the trustee's capacity as such.~~

SECTION ~~307~~308. POWER TO HOLD PROPERTY; TITLE TO TRUST

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

Comment

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

This Section implements the concept that a statutory trust is an entity separate from its trustee and beneficial owners by confirming that a statutory trust may transact over property in its own name. The property of a common law trust, by contrast, must be held in the name of the trustee as such. ~~See also Section 408.~~

However, this section also permits the statutory trust to take title to property in the name

1 of the trustee in the trustee's capacity as such even though the statutory trust is a juridical entity
2 that can hold property in its own name. The drafting committee reasoned that this provision
3 would be useful for a statutory trust that has dealings in a state that has not provided for a
4 statutory trust entity because property ownership by a trustee in the trustee's capacity as such is
5 familiar from the use of common law trusts. To police the boundary of the trustee's personal
6 assets and the assets of the trust, the common law imposes on the trustee duties to earmark trust
7 property and not to commingle it with the trustee's own. See Uniform Trust Code §810 (2000);
8 Restatement (Third) of Trusts §84 (T.D. No. 4, 2005); Restatement (Second) of Trusts §179
9 (1959). The drafting committee contemplated that under appropriate circumstances Section
10 404(b) would be read to require similar conduct by a trustee of a statutory trust that takes title to
11 property of the statutory trust in the name of the trustee in the trustee's capacity as such.
12

13 **SECTION ~~306~~309. SERIES OF STATUTORY TRUST.**

14 (a) The governing instrument may:

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

21 (2) provide for designated series of trustees, beneficial owners, or beneficial
22 interests having separate rights, powers, or duties with respect to ~~For discussion: This change~~
23 ~~came from style on the ground that the original was "unnecessary repetition."~~ profits and
24 losses associated with specified property or obligations, and permit the series to have a separate
25 business purpose or investment objective;

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

(b) If the governing instrument of a statutory trust creates one or more series as provided in subsection (a), the debts, obligations, liabilities, and expenses incurred, contracted for, or otherwise existing with respect to a particular series are enforceable against the assets of the series only, and not against the assets of the ~~statutory~~ trust generally or any other series thereof, and none of the debts, obligations, or other liabilities, or expenses incurred, contracted for, or otherwise existing with respect to the ~~statutory~~ trust generally or any other series thereof are enforceable against the assets of the series if:

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

(2) notice of the limitation on liabilities of a series is set forth in the certificate of trust.

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

Comment

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

1
2 Paragraph (a) confirms that a statutory trust may be organized with one or more series.
3 The organization of a master statutory trust with several series is particularly common among
4 statutory trusts that are registered investment companies under the Investment Company Act of
5 1940, as amended, 15 U.S.C. Sections 80a-1 et seq. (the “1940 Act”). Rule 18f-2 under the
6 1940 Act permits an investment company to have multiple series, provided that any matter
7 required by the 1940 Act or other applicable law to be submitted to the holders of the
8 outstanding voting securities of a series company shall not be deemed to have been effectively
9 acted upon unless approved by the holders of a majority of the outstanding voting securities of
10 each series of stock affected by such matter. Rule 18f-2 also specifies certain instances where
11 the vote is required by all of the security holders of the investment company and other instances
12 where only the security holders of a series are required to vote.
13

14 Paragraph (b) provides that if a statutory trust that has created separate series under
15 paragraph (a), the debts, liabilities, and other obligations of a particular series are enforceable
16 against the assets of that series only, but only if (1) separate records are maintained for each
17 series and (2) notice of the limitation on liabilities of a series is set forth in the certificate of trust.
18 Under Section 201 the certificate of trust is made part of the public record and must indicate
19 whether the statutory trust might create one or more series.
20

21 Paragraph (c) addresses Section 18 of the 1940 Act, which governs the capital structure
22 of an investment company. The 1940 Act was intended to prevent inequitable or discriminatory
23 provisions that fail to protect the preferences and privileges of the holders of shares and
24 excessive borrowing or issuance of senior securities (where there are preferences of rights
25 among classes) that expose the fund and its shareholders to additional risk. Accordingly, Section
26 18 defines and places restrictions on “senior securities” while at the same time allowing
27 segregated pools of assets (i.e., separate funds or series) to be created under a single trust, and
28 separate classes of shares representing interests in the same pool of assets with certain limited
29 instances where there are different voting rights or dividend preferences.-
30

31 ~~Paragraph (b) provides that if a statutory trust that has created separate series under~~
32 ~~paragraph (a), the debts, liabilities, and other obligations of a particular series are enforceable~~
33 ~~against the assets of that series only, but only if (1) separate records are maintained for each~~
34 ~~series and (2) notice of the limitation on liabilities of a series is set forth in the certificate of trust.~~
35 ~~Under Section 201 the certificate of trust is made part of the public record and must indicate~~
36 ~~whether the statutory trust might create one or more series.~~
37

38 ~~Paragraph (c) [Assistance on this portion of the comment is invited, particularly from~~
39 ~~Bibb and Victor.]~~
40

41 ~~Section 612 provides for the dissolution of a series.~~

1 [ARTICLE 4]

2 TRUSTEES AND TRUST MANAGEMENT

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

5 Comment

6 Principal Sources – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
7 Act §34-517; ~~Uniform Trust Code §815 (2000)~~; Uniform Limited Partnership Act §105 (2001);
8 Delaware General Corporation Law §141; Revised Model Business Corporation Act §8.01
9 (2002).

10
11 Section 102(16) defines trustee as a person designated as such in accordance with the
12 governing instrument or applicable law. Section 104(b)(4~~5~~)(C) confirms that the governing
13 instrument may provide for trustee appointment. However, because no provision in this Act
14 provides default rules for trustee appointment, if the governing instrument does not provide for
15 trustee appointment, then under Section 105 the applicable law is the state’s law pertaining to
16 trustee appointment in common law trusts. For treatment of the default rules of trustee
17 appointment, removal, and succession in common law trusts, see Restatement (Third) of Trusts
18 §§31-37 (2003); Uniform Trust Code §§701-02, 704-06 (2000); Restatement (Second) of Trusts
19 §§101, 106-08 (1959).
20

21 SECTION 402. TRUSTEE POWERS.

22 ———(a) —A trustee may exercise:

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

27 ———(b) ~~The trustee’s exercise of a power is subject to the fiduciary duties prescribed by~~
28 ~~Section 404 [An alternative: this [article]].~~

29 Comment

1 **Principal Source** –Uniform Trust Code §815 (2000).
2

3 ~~Paragraph (a)~~ This section is intended to grant trustees the broadest possible powers, but
4 to be exercised always in accordance with the duties of the trustee and any limitations stated in
5 the terms of the trust. Hence, paragraph (a) overrides the application to a statutory trust under
6 Section 105 of the outmoded common law rule that a trustee has only those powers granted by
7 the trust instrument. See Uniform Trust Code §815 (2000); Restatement (Third) of Trusts §85
8 cmt. a (T.D. No. 4, 2005).
9

10 ~~Paragraph (b) confirms that~~ However, the existence of a power, regardless of its source,
11 does not speak to the question whether in a particular case it is consistent with the trustee's
12 fiduciary obligation to exercise that power. The trustee's exercise of the broad powers conferred
13 by this section is always subject to the trustee's fiduciary obligations. ~~As the official comment~~
14 ~~to Uniform Trust Code §815 (2000) explains, "A power differs from a duty. A duty imposes an~~
15 ~~obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise~~
16 ~~of which is not obligatory. The existence of a power, however created or granted, does not speak~~
17 ~~to the question of whether it is prudent under the circumstances to exercise the power."~~ See also
18 Uniform Trust Code §815 cmt. (2000); Restatement (Third) of Trusts §§70, 86 (T.D. No. 4,
19 2005); John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale L.J. 625, 640-
20 43 (1995).
21

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

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

27 (b) A person, other than a ~~beneficiary~~ beneficial owner, that in good faith deals with a
28 trustee is not required to inquire into the extent of ~~the a~~ trustee's powers or the propriety of ~~their~~
29 its exercise.

30 ~~[For discussion: Whether to include also the following paragraphs (c), (d), and (e),~~
31 ~~which are also taken from UTC 1012:~~

1 ———(c) A person ~~who~~that in good faith delivers assets to a trustee need not ensure their
2 proper application.

3 (d) A person, other than a ~~beneficiary~~beneficial owner, ~~who~~that in good faith assists a
4 former trustee as if the former trustee were still trustee, or who in good faith and for value deals
5 with a former trustee as if the former trustee were still trustee, without knowledge that the
6 trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

7 ~~(e) Comparable protective provisions of other laws relating to commercial transactions~~
8 ~~or transfer of securities by fiduciaries prevail over the protection provided by this section.]~~

9 Comment

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

11
12 ~~———[For discussion: Here is the full text of the official comment from UTC 1012, which~~
13 ~~will need to be revised to reflect our different context and purpose, and whether we include~~
14 ~~(c), (d), and (e).]~~

15
16 ~~———This section is derived from Section 7 of the Uniform Trustee Powers Act.~~

17
18 ~~———Subsection Paragraph (a) protects two different classes of persons: (1) a persons other~~
19 ~~than a beneficiariesbeneficial owner ~~who~~that assists a -trustee with a transaction, and (2) a~~
20 ~~persons other than beneficiariesa beneficial owner ~~who~~that deals with the trustee for- value. As~~
21 ~~long as the assistance was provided or the transaction was entered into in good faith and without~~
22 ~~knowledge, a third persons in either category ~~are~~is protected in the transaction even if -the~~
23 ~~trustee was exceeding or improperly exercising the power. For the definition of “know,” see~~
24 ~~Section 104. This Code does not define “good faith” for purposes of this and the next section.~~
25 ~~Defining good faith with reference to the definition used in the State’s commercial statutes~~
26 ~~would be consistent with the purpose of this section, which is to treat commercial transactions~~
27 ~~with trustees similar to other commercial transactions.~~

28
29 ~~Subsection Paragraph (b) confirms that a third party ~~who~~that is acting in good faith is not~~
30 ~~charged with a duty to inquire into the extent of a trustee’s powers or the propriety of ~~their~~its~~
31 ~~exercise. The third party may assume that the trustee has the necessary power. Consequently,~~
32 ~~there is no need to request or examine a copy of the trust instrument. A third party who wishes~~
33 ~~assurance that the trustee has the necessary authority instead should request a certification of~~
34 ~~trust as provided in Section 1013. Subsection (b), and the comparable provisions enacted in~~
35 ~~numerous States, are intended to negate the rule, followed by some courts, Thus, paragraph (b)~~

overrides the application to a statutory trust under Section 105 of the common law rule that a third party is charged with constructive notice of the trust instrument and its contents. ~~The cases are collected in~~ See George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section §897 (Rev. 2d ed. 1995); and Austin W. Scott & William F. Fratcher, The Law of Trusts Section §297 (4th ed. 1989).

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

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

~~Subsection (e) clarifies that a statute relating to commercial transactions controls whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by comparable protective provisions of these other laws. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer Act. End discussion note.]~~

SECTION 404. STANDARDS OF CONDUCT FOR TRUSTEES.

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

(b) A trustee ~~of a statutory trust~~ shall discharge its duties with the care that a person ~~in a~~ similarly situated position would reasonably believe appropriate under similar circumstances.

Comment

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

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

1
2 Under Section ~~403(b)~~103(c), the trustee's standards of conduct under this section are
3 mandatory rules that are not subject to override by the governing instrument. However, the
4 governing instrument may prescribe the standards by which "good faith," "best interests of the
5 statutory trust," and "care that a person in a like position would reasonable believe appropriate
6 under similar circumstances" are determined provided that the standards are not "manifestly
7 unreasonable." See also Delaware Statutory Trust Act §3806(c), which ~~as revised in 2006~~
8 provides that a trustee's fiduciary duties "may be expanded or restricted or eliminated by
9 provisions in the governing instrument; provided, that the governing instrument may not
10 eliminate the implied contractual covenant of good faith and fair dealing," and §3806(e), which
11 provides that a "governing instrument may provide for the limitation or elimination of any and
12 all liabilities for . . . breach of duties (including fiduciary duties) . . . ; provided, that a governing
13 instrument may not limit or eliminate liability for any act or omission that constitutes a bad faith
14 violation of the implied contractual covenant of good faith and fair dealing."
15

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

26 ~~Because the standards of conduct stated in this section are drawn from corporate law, the~~
27 ~~drafting committee contemplated that by default the business judgment rule would apply in~~
28 ~~litigation under paragraph (b) unless the governing instrument provides otherwise. [For~~
29 ~~discussion: RMBCA 8.31, Standards of Liability for Directors, which says:~~
30

31 ~~(a) A director shall not be liable to the corporation or its shareholders for any decision~~
32 ~~to take or not to take action, or any failure to take any action, as a director, unless the~~
33 ~~party asserting liability in a proceeding establishes that:~~

34 ~~(1) any provision in the articles of incorporation authorized by section 2.02(b)(4) or~~
35 ~~the protection afforded by section 8.61 for action taken in compliance with section~~
36 ~~8.62 or 8.63, if interposed as a bar to the proceeding by the director, does not~~
37 ~~preclude liability; and~~

38 ~~(2) the challenged conduct consisted or was the result of:~~

39 ~~(i) action not in good faith; or~~

40 ~~(ii) a decision~~

41 ~~(A) which the director did not reasonably believe to be in the best interests~~
42 ~~of the corporation, or~~

43 ~~(B) as to which the director was not informed to an extent the director~~
44 ~~reasonably believed appropriate in the circumstances; or~~

1 (iii) a lack of objectivity due to the director's familial, financial or business
2 relationship with, or a lack of independence due to the director's domination or
3 control by, another person having a material interest in the challenged conduct
4 (A) which relationship or which domination or control could reasonably be
5 expected to have affected the director's judgment respecting the challenged
6 conduct in a manner adverse to the corporation, and
7 (B) after a reasonable expectation to such effect has been established, the
8 director shall not have established that the challenged conduct was
9 reasonably believed by the director to be in the best interests of the
10 corporation; or
11 (iv) a sustained failure of the director to devote attention to ongoing oversight of the
12 business and affairs of the corporation, or a failure to devote timely attention, by
13 making (or causing to be made) appropriate inquiry, when particular facts and
14 circumstances of significant concern materialize that would alert a reasonably
15 attentive director to the need therefore; or
16 (v) receipt of a financial benefit to which the director was not entitled or any other
17 breach of the director's duties to deal fairly with the corporation and its
18 shareholders that is actionable under applicable law.
19 (b) The party seeking to hold the director liable:
20 (1) for money damages, shall also have the burden of establishing that:
21 (i) harm to the corporation or its shareholders has been suffered, and
22 (ii) the harm suffered was proximately caused by the director's challenged
23 conduct; or
24 (2) for other money payment under a legal remedy, such as compensation for the
25 unauthorized use of corporate assets, shall also have whatever persuasion burden
26 may be called for to establish that the payment sought is appropriate in the
27 circumstances; or
28 (3) for other money payment under an equitable remedy, such as profit recovery by
29 or disgorgement to the corporation, shall also have whatever persuasion burden
30 may be called for to establish that the equitable remedy sought is appropriate in the
31 circumstances.
32 (c) Nothing contained in this section shall (1) in any instance where fairness is at issue,
33 such as consideration of the fairness of a transaction to the corporation under section
34 8.61(b)(3), alter the burden of proving the fact or lack of fairness otherwise applicable,
35 (2) alter the fact or lack of liability of a director under another section of this Act, such
36 as the provisions governing the consequences of an unlawful distribution under section
37 8.33 or a transactional interest under section 8.61, or (3) affect any rights to which the
38 corporation or a shareholder may be entitled under another statute of this state or the
39 United States.]
40
41
42

43 **SECTION 405. DIRECTION OF TRUSTEES.** [NOTE: In the prior draft this was
44 section 409, but per our last meeting it has been moved here, right after the section on
45 fiduciary duties. The cut-and-past was made with the tracking off so that the changes

~~made within the section and its comment would be indicated differently from the language that was not changed.]~~

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

(b) If the terms of a statutory trust confer upon a person a power to direct certain actions of a trustee or other person, the trustee or other person shall act in accordance with an exercise of the power unless the direction is manifestly ~~[For discussion: Style would like us to drop “manifestly.”]~~ contrary to the terms of the governing instrument or the trustee knows or has reason to know that following the direction would constitute a serious breach of fiduciary duty by the trustee.

(c) Neither the power to direct a trustee or other person nor the exercise of the power by any person, including a beneficial owner, causes the person to be a trustee or imposes on the person duties, including fiduciary duties, or liabilities relating thereto, to a statutory trust or to a beneficial owner thereof.

Comment

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

Paragraph (a) ratifies the use of a directed trustee, meaning a trustee that must act in accordance with the directions of another person. Under paragraph (b), however, the trustee must not follow a direction that is manifestly contrary to the terms of the governing instrument or that the trustee knows or has reason to know would constitute a serious breach of fiduciary duty. Cf. Restatement (Third) of Trusts §75 (T.D. No. 4, 2005); Restatement (Second) of Trusts §185 (1959).

The reference in paragraph (b) to “serious” breach of fiduciary duty is designed to exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial owner. For some purposes, trust law distinguishes between “serious” and not serious breaches of trust. See, e.g., Uniform Trust Code §706(b)(1) (2000); Austin Wakeman Scott, William F.

1 Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed. 2006);
2 Restatement (Second) of Trusts §107 cmt. b (1959).

3
4 The trustee's determination whether a direction is "manifestly contrary to the terms of the
5 governing instrument" or "would constitute a serious breach of fiduciary duty by the trustee" is
6 subject to the trustee's fiduciary obligations ~~under Section 404~~. The drafting committee
7 contemplated that, in accord with conventional trust practice, a trustee could seek judicial
8 resolution of whether an instruction falls within the exclusion of paragraph (b) by applying to the
9 appropriate court for instructions. See Restatement (Second) of Trusts §259 (1959); Restatement
10 (Third) of Trusts §71 (T.D. No. 4, 2005).

11
12 Under Section ~~403(b)~~103(c)(5), the limitation on direction of trustees stated in paragraph
13 (b) is not subject to override by the governing instrument.

14
15 Under paragraph (c), unless the governing instrument provides otherwise, a person that
16 has the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to
17 the statutory trust or the beneficial owners.

18
19 In conjunction with Section 411, this section facilitates the current practice in existing
20 statutory trusts of creating a trusteeship with respect to some, but not all, aspects of the trust—
21 for example, in a mutual fund with an investment advisor or in a securitization transaction with a
22 person whose consent is required before the statutory trust can petition for bankruptcy.
23

24 **SECTION 406. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT**
25 **COMPANY.**

26 (a) In this section, the terms "affiliated person" and "interested person" have the
27 meanings set forth in the Investment Company Act of 1940, as amended, 15 U.S.C. Section 80a-
28 1 et seq., or any rule adopted thereunder.

29 (b) If a statutory trust is registered as an investment company under the Investment
30 Company Act of 1940, as amended, 15 U.S.C. Section 80a-1 et seq.[, or any successor statute
31 thereto,] a trustee is an independent trustee for all purposes under this [act] if the trustee is not an
32 interested person of the ~~statutory~~ trust. The receipt of compensation for service as an
33 independent trustee of the ~~statutory~~ trust and for service as an independent trustee of one or more

1 other investment companies managed by a single investment adviser or an affiliated person of an
2 investment adviser, does not affect the status of the trustee as an independent trustee under this
3 section.

4 **Comment**

6 **Principal Source** – Delaware Statutory Trust Act §3801.

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

19
20 In 1998 the Maryland legislature effectively overruled *Strougo* by amending the
21 Maryland corporate code to provide that directors who are not “interested persons” under the
22 Investment Company Act of 1940 also would be deemed disinterested under Maryland law. See
23 Md. Code (Corporations & Associations) §2-405.3. A similar provision took effect in
24 Massachusetts in 1999, see Mass. Laws. 182, § 2B, and in Delaware in 2000, see Delaware
25 Statutory Trust Act §3801(h). Almost all mutual funds are organized as Maryland corporations,
26 Massachusetts trusts, or Delaware statutory trusts. See Robert H. Sitkoff, *The Rise of the*
27 *Statutory Business Trust* [in progress]. Consistent with the Maryland, Massachusetts, and
28 Delaware legislation, this section rejects *Strougo* by deeming a trustee to be independent if he or
29 she is not an interested person under the Investment Company Act of 1940, as amended.

30
31 ~~———[For discussion: Are there further suggested changes to this comment, perhaps~~
32 ~~from Bibb and Victor?]~~
33

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

37 **Comment**

1 Under Section ~~403(b)~~103(c)(6), the trustee's right to information under this section is not
2 subject to override by the governing instrument. However, the trustee's right to information is
3 limited to information "reasonably related to" the trustee's discharge of its duties as trustee, and
4 under Section ~~403(b)~~103(c)(6) 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 By linking the trustee's information rights to the scope of the trustee's duties as trustee,
9 this section makes the trustee's right to information function specific. This section therefore
10 allows for the creation of a limited-role or directed trustee that will not have access to
11 confidential information unrelated to the trustee's limited role. At the same time, this section
12 ensures that such a trustee will have access to information reasonably related to discharging the
13 trustee's duties in connection with the trustee's limited role.
14

15 Section 503 provides a comparable rule for a beneficial owner's right to information.
16

17 **SECTION 408. INTERESTED TRANSACTIONS.**

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

24 (b) A transaction under subsection (a) is voidable by the statutory trust unless the related
25 party shows that the transaction is fair to the trust. ~~No contract or transaction between a statutory~~
26 ~~trust and a trustee, officer, employee, or manager of the statutory trust, or between a statutory~~
27 ~~trust and any other person in which a trustee, officer, employee, or manager of the statutory trust~~
28 ~~is a trustee, officer, employee, or manager or has a financial interest, shall be void or voidable~~
29 ~~solely for this reason, or solely because the trustee, officer, employee, or manager is present at or~~
30 ~~participates in the decision of the statutory trust to authorize the contract or transaction, or solely~~

1 because the trustee, officer, employee, or manager's votes are counted for such purpose, if the
2 contract or transaction is fair to the statutory trust as of the time it is authorized, approved or
3 ratified, by the trustees or beneficial owners. **[For discussion: (1) Whether to require**
4 **disclosure of the interested person's interest. (2) Whether to include related persons. This**
5 **draft of paragraph (b) is based on DGCL 144(a)(3).]**

6 Comment

7 **Principal Sources** – Delaware Statutory Trust Act §3806; Delaware General Corporation
8 Law §144.
9

10 Consistent with the use of the term “best interests” instead of “sole interest” in Section
11 404(a), this section abrogates the no-further-inquiry rule of the common law of trusts, which
12 forbids self-dealing transactions. See Restatement (Third) of Trusts §78 (T.D. No. 5, 2005);
13 Restatement (Second) of Trusts §170 (1959); John H. Langbein, Questioning the Trust Law Duty
14 of Loyalty: Sole Interest or Best Interest?, 114 Yale L.J. 929 (2005); Melanie B. Leslie, Trusting
15 Trustees: Fiduciary Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005).
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 ON GOVERNING INSTRUMENT.**

24 ~~—— (a) —~~ A trustee, officer, employee, manager, or committee of a statutory trust, or other
25 person designated pursuant to Section 104(b)(7) is not liable to the trust or to a beneficial owner
26 for breach of any duty, including a fiduciary duty, to the extent the breach resulted from the
27 good-faith reliance on: ~~that acts in good faith reliance on~~

28 —— (1) the terms of the governing instrument;

29 —— (2) the records of the statutory trust; or

30 —— (3) the opinions, reports, or statements of another person in the other person's

1 ~~professional or expert competence. is not liable to the statutory trust or to a beneficial owner for~~
2 ~~breach of any duty, including a fiduciary duty, to the extent the breach resulted from the reliance.~~
3 ~~—— (b) An officer, employee, manager, or committee of a statutory trust, or other person~~
4 ~~designated pursuant to Section 104(b)(6) that acts in good faith reliance on the terms of the~~
5 ~~governing instrument is not liable to the statutory trust or to a beneficial owner for breach of any~~
6 ~~duty, including a fiduciary duty, to the extent the breach resulted from the reliance.~~

7 **Comment**

8 **Principal Source** – Uniform Trust Code §1006 (2000); Delaware Statutory Trust Act
9 §3806; Connecticut Statutory Trust Act §34-517.

10
11 A trustee, officer, employee, manager, committee, or other such person or persons should
12 be able to administer a statutory trust with dispatch and without concern that a reasonable
13 reliance on the terms of the governing instrument, the records of the statutory trust, or the
14 opinions of experts is misplaced. This section protects a person that so relies ~~on a trust~~
15 ~~instrument~~, but only to the extent the breach of trust resulted from such reliance and only if the
16 person's reliance was in good faith.

17
18 ~~—— The drafting committee contemplated that a trustee's good faith reliance on the records of~~
19 ~~the statutory trust, or on a report made by a person that is within the person's professional or~~
20 ~~expert competence, would be protected from liability under Section 404(b) by the business~~
21 ~~judgment rule. [For discussion: Delaware Statutory Trust Act §3806(k), which as revised in~~
22 ~~2006 now says, "A trustee, beneficial owner or an officer, employee, manager or other~~
23 ~~person designated in accordance with paragraph (b)(7) of this section shall be fully~~
24 ~~protected in relying in good faith upon the records of the statutory trust and upon~~
25 ~~information, opinions, reports or statements presented by another trustee, beneficial owner~~
26 ~~or officer, employee, manager or other person designated in accordance with paragraph~~
27 ~~(b)(7) of this section, or by any other person as to matters the trustee, beneficial owner or~~
28 ~~officer, employee, manager or other person designated in accordance with paragraph (b)(7)~~
29 ~~of this section reasonably believes are within such other person's professional or expert~~
30 ~~competence, including information, opinions, reports or statements as to the value and~~
31 ~~amount of the assets, liabilities, profits or losses of the statutory trust, or the value and~~
32 ~~amount of assets or reserves or contracts, agreements or other undertakings that would be~~
33 ~~sufficient to pay claims and obligations of the statutory trust or to make reasonable~~
34 ~~provision to pay such claims and obligations, or any other facts pertinent to the existence~~
35 ~~and amount of assets from which distributions to beneficial owners or creditors might~~
36 ~~properly be paid."}]~~
37

SECTION 410. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.

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

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

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

Comment

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

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

Under Section ~~103(b)~~103(c)(7), this section’s prohibition of indemnification, advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless indifference is not subject to override by the governing instrument. Prohibiting indemnification, advancement, or exoneration for such conduct is consistent with traditional trust doctrine. See Restatement (Second) of Trusts §222 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §542 (rev. 2d ed. 1993); Uniform Trust Code §1008. See also John H.

1 Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1121-25 (2004). It is
2 also consistent with the Delaware Statutory Trust Act. ~~As revised in 2006,~~ See Delaware
3 Statutory Trust Act §3806(e), which provides that the “governing instrument may provide for the
4 limitation or elimination of any and all liabilities for breach of contract and breach of duty
5 (including fiduciary duties) of a trustee . . . ; provided, that the governing instrument may not
6 eliminate the implied contractual covenant of good faith and fair dealing.” Limitations on
7 permissible exoneration are also familiar business entity law. See, e.g., Delaware General
8 Corporation Law §102(b)(7). ~~See 2006 Delaware Laws Ch. 418 §7.~~

9
10 Any indemnification provision in the governing instrument of a statutory trust operating
11 as a mutual fund is subject to Section 17(h) of the Investment Company Act of 1940, which
12 generally prohibits a fund from including in its organizational documents any provision that
13 protects a trustee or officer of a fund against liability to the fund or its shareholders by reason of
14 “willful misfeasance, bad faith, gross negligence, or reckless disregard” of the person’s duties as
15 trustee or officer. 15 U.S.C. § 80a-17(h).

16
17 The SEC has taken the position that, before advancing legal fees to a trustee of a mutual
18 fund, the fund’s “board must either (1) obtain assurances, such as by obtaining insurance or
19 receiving collateral provided by the [trustee], that the advance will be repaid if the trustee is
20 found to have engaged in disabling conduct, or (2) have a reasonable belief that the [trustee] has
21 not engaged in disabling conduct and ultimately will be entitled to indemnification.” SEC
22 Interpretation: Matters Concerning Independent Directors of Investment Companies, Investment
23 Company Act Rel. No. 24083 (Oct. 14, 1999), 1999 WL 820629, *10. The SEC has also taken
24 the position that there is a rebuttable presumption that an independent trustee (see Section 406)
25 has not engaged in disabling conduct. *Id.*

26 27 **SECTION 411. DELEGATION BY TRUSTEE.**

28 (a) A trustee may delegate duties and powers that a prudent trustee of comparable skills
29 could properly delegate under the circumstances. The trustee shall exercise reasonable care,
30 skill, and caution in:

- 31 (1) selecting an agent;
- 32 (2) establishing the scope and terms of the delegation; and
- 33 (3) periodically reviewing the agent’s actions in order to monitor the agent’s
- 34 performance and compliance with the terms of the delegation.

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

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

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

5 (e) By accepting a delegation of powers or duties from the trustee of a statutory trust that
6 is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

7 8 **Comment**

9 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
10 Act §34-517; Uniform Trust Code §807 .
11

12 This section reverses the outmoded common law rule against delegation by a trustee. In
13 reversing the common law rule against delegation, the drafting committee followed both the
14 Delaware Statutory Trust Act and the modern trend with respect to common law trusts. Most
15 states have abrogated the common law nondelegation rule with legislation based on the Uniform
16 Prudent Investor Act, Uniform Trust Code, or the Restatement (Third) of Trusts. See Uniform
17 Trust Code §807 (2000); Uniform Prudent Investor Act §9 (1994); Restatement (Third) of
18 Trusts: Prudent Investor Rule §171 (1992). See also Restatement (Third) of Trusts §80 (T.D.
19 No. 4, 2005). See generally John H. Langbein, Reversing the Nondelegation Rule of Trust-
20 Investment Law, 59 Mo. L. Rev. 105 (1994).
21

22 Paragraphs (a), (c), (d), and (e) track the language of Uniform Trust Code §807 (2000),
23 which is derived from Uniform Prudent Investor Act §9 (1994). Following the Delaware
24 Statutory Trust Act, ~~however,~~ paragraph (b) treats delegation to a co-trustee in the same manner
25 as delegation to another agentperson. By contrast, traditional trust law disfavors delegation by
26 one co-trustee to another. See Restatement (Second) of Trusts §184 (1959). See also Uniform
27 Trust Code §703(e) (2000); Restatement (Third) of Trusts §81 cmt. c(1) (T.D. No. 4, 2005).
28

29 Mutual funds often receive a common set of services from an organization that
30 specializes in operating mutual funds, which is typically the investment adviser or an affiliate.
31 The trustees monitor the service providers and the Investment Company Act of 1940 requires the
32 trustees to approve the contracts with the adviser and distributor. See 15 U.S.C. § 80a-15.
33

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

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

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

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

9 **Comment**

10
11 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
12 Act § 34-517; Delaware General Corporation law §228; Uniform Trust Code §703 (2000).

13
14 In accord with Uniform Trust Code §703(a) (2000) and Restatement (Third) of Trusts
15 §39 (2003), paragraph (a)(1) rejects the common law rule requiring unanimity among the
16 trustees of a private trust, replacing it with a default rule requiring a majority of the trustees.

17
18 The remainder of this section allows for maximum flexibility in the mechanics of
19 allowing the trustees to act or vote on actions. Section 104(b)(~~34~~) confirms that the rules stated
20 in this Section are subject to override by the governing instrument.

21
22 The Investment Company Act of 1940 requires a mutual fund's investment advisory
23 contract, underwriting contract, fidelity bond, independent public accountants, and other such
24 matters to be approved by the trustees of the mutual fund. See 15 U.S.C. § 80a-15(a); 15 U.S.C.
25 80a-31(a); 17 C.F.R. § 270.17g-1. Investment advisory and underwriting contracts, and
26 selection of independent public accountants, must be approved by the noninterested trustees at an
27 in-person meeting. See 15 U.S.C. §80a-15(c); 15 U.S.C. 80a-31(a).

28 29 **~~SECTION 413. NO RIGHTS OF TRUSTEE'S CREDITORS IN TRUST~~**

30 **~~PROPERTY.~~** ~~Property of a statutory trust is not subject to personal obligations of the trustee.~~

31 ~~In the event that the trustee becomes insolvent or bankrupt, the trustee's creditors have no claim~~
32 ~~upon the assets of the statutory trust.~~

1 **Comment**

2 ~~—— **Principal Sources** Uniform Trust Code §507 (2000); Delaware Statutory Trust Act~~
3 ~~§3805.~~

4
5 ~~—— This section confirms that the personal creditors of a trustee have no recourse against the~~
6 ~~assets of the statutory trust. The rule of this section is familiar from the operation of common~~
7 ~~law trusts. See Uniform Trust Code Restatement §507 (2000); Restatement (Third) of Trusts~~
8 ~~§42 cmt. c (2003); Restatement (Second) of Trusts §308 (1959). The protection afforded by this~~
9 ~~section is also consistent with that provided by the Bankruptcy Code. Property in which the~~
10 ~~trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. See 11 U.S.C.~~
11 ~~§541(d). For a general discussion of asset partitioning rules in organizational law, see Henry~~
12 ~~Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 Yale L.J. 387~~
13 ~~(2000); Henry Hansmann & Ugo Mattei, The Functions of Trust Law: A Comparative Legal and~~
14 ~~Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998). See also Henry Hansmann, Reinier~~
15 ~~Kraakman, & Richard Squire, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333 (2006).~~

16
17 ~~—— **SECTION 414. TRUSTEE NOT LIABLE FOR ACTS, OMISSIONS, OR**~~
18 ~~**OBLIGATIONS OF STATUTORY TRUST.** An obligation of a statutory trust, whether~~
19 ~~arising in contract or tort or otherwise, is not an obligation of a trustee. A trustee, by reason of~~
20 ~~being a trustee, is not liable to any person other than the statutory trust or a beneficial owner for~~
21 ~~any act, omission, or obligation of the statutory trust or any series thereof.~~

22 **Comment**

23 ~~—— **Principal Source** Uniform Limited Liability Company §303 (1996).~~

24 ~~—— This section implements the concept that the statutory trust is an entity separate from its~~
25 ~~trustee by confirming that a trustee, as a manager of the statutory trust, is not liable for the debts,~~
26 ~~obligations, and liabilities of the statutory trust. As such, this section overrides the outmoded~~
27 ~~common law rule that held the trustee liable for the debts of the trust but that gave the trustee a~~
28 ~~right to indemnity out of the trust fund. Compare Restatement (Second) of Trusts §§244, 261~~
29 ~~(1959) (stating the old rule), with Uniform Trust Code §1010 (2000) (eliminating the personal~~
30 ~~liability of the trustee for debts, obligations, and liabilities arising in the trustee's fiduciary~~
31 ~~capacity).~~

32
33 ~~—— Nothing in this Section limits the personal liability of the trustee to the statutory trust for~~
34 ~~breach of duty under Section 404.~~

1 ~~SECTION 415. AGENTS, OFFICERS, EMPLOYEES, MANAGERS,~~
2 ~~COMMITTEES AND AGENTS NOT LIABLE FOR ACTS, OMISSIONS, OR~~
3 ~~OBLIGATIONS OF STATUTORY TRUST.~~ Any person acting pursuant to Section 104(b)(6)
4 is not liable, by reason of acting in that capacity, to any person other than the statutory trust or a
5 beneficial owner for any act, omission, or obligation of the statutory trust or any series thereof.

6 **Comment**
7

8 ~~Principal Sources~~ Delaware Statutory Trust Act §3803; Connecticut Statutory Trust
9 Act §34-523.
10

11 ~~A statutory trust acts through agents. This section confirms that the statutory trust, not~~
12 ~~the statutory trust's agents, is liable for the acts, omissions, and obligations of agents acting on~~
13 ~~the statutory trust's behalf.~~

1 [ARTICLE] 5

2 BENEFICIARIES AND BENEFICIAL RIGHTS

3 SECTION 501. CONTRIBUTIONS BY BENEFICIAL OWNERS.

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

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

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

21 (1) reduction or elimination of the defaulting beneficial owner's proportionate
22 interest in the statutory trust;

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

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

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

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

or

(6) fixing the value of the defaulting beneficial owner's beneficial interest by appraisal or by formula and redemption or sale of the defaulting beneficial owner's beneficial interest at that value.

Comment

Principal Sources – Delaware Statutory Trust Act §3802; Connecticut Statutory Trust Act §34-515.

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

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

Under Section 104(b)(1), the governing instrument may provide the means by which beneficial ownership is determined and evidenced. Under Section 104(b)(~~910~~)-(1011), the governing instrument may specify the conditions under which a person becomes a beneficial owner.

SECTION 502. REDEMPTION OF BENEFICIAL INTERESTS. A statutory trust

1 may acquire, by purchase, redemption, or otherwise, any beneficial interest in the statutory trust.

2 ~~An A beneficial interest so acquired by a statutory the trust is canceled.~~

3 **Comment**

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

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

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

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

19 **Comment**

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

21
22 Under Section ~~403(b)~~103(c)(8), a beneficial owner’s right to information under this
23 section is not subject to override by the governing instrument. However, a beneficial owner’s
24 right to information under this section is limited to information “necessary” for the beneficial
25 owner to enforce its rights as such, and under Section ~~403(b)~~103(c)(8) the governing instrument
26 may prescribe the standards by which “necessary” is determined if those standards are not
27 “manifestly unreasonable.” Imposing a mandatory right to information critical to the
28 beneficiary’s ability to enforce the trust is familiar law. See Restatement (Second) of Trusts
29 §173 cmt. c (1959).
30

31 Section 404 provides a comparable rule for a trustee’s right to information.
32

33 **SECTION 504. ~~RIGHTS OF BENEFICIAL OWNER IN TRUST~~**

34 **~~PROPERTY~~BENEFICIAL INTERESTS.**

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

~~(b) A beneficial interest in the statutory trust is personal property regardless of the nature of the property of the statutory trust. A beneficial owner does not have any interest in specific property of the statutory trust.~~

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

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

(c) Unless the statutory trust is a registered investment company under the Investment Company Act of 1940, as amended, 15 U.S.C. Section 80a-1 et seq., a beneficial owner does not have a right to demand or to receive a distribution from the trust in any form other than money, except that the trust may distribute an asset in-kind if each part of the asset is fungible with each other part and each beneficial owner receives a percentage of the asset equal in value to the beneficial owner's share of the distribution.

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

Comment

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

Paragraph (a) implements the concept that a statutory trust is an entity separate from its beneficial owners by confirming that a creditor of a beneficial owner cannot seize property of the statutory trust. For discussion of the parallel provision in the Delaware Statutory Trust Act, see Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations §19.4, at 19-9–19-

1 | ~~10 (3d ed. 2005 Supp.).~~

2
3 | Paragraph (ea) provides as a default rule that a beneficial owner's interest in the statutory
4 | trust is freely transferable. ~~Thus, this~~ This paragraph therefore overrides the rule in some states,
5 | which would otherwise be applicable to a statutory trust pursuant to Section 105, that makes a
6 | common law trust spendthrift by default. See Jeffrey A. Schoenblum, 2007 Multistate Guide to
7 | Estate Planning Table 9.05, Part 1, Column 2 (collecting authority). However, because the rule
8 | stated in paragraph (ea) is not scheduled in Section ~~403(b)~~ 103(c), it is subject to override by the
9 | governing instrument. Section 104(b)(2) confirms that the governing instrument may limit a
10 | beneficial owner's right to transfer its beneficial interest.

11
12 | Under Section 104(b)(~~4213~~), the governing instrument may provide for the establishment
13 | of record dates for ~~allocations and~~ distributions.
14

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

21 | **Comment**

22
23 | **Principal Source** – Delaware Statutory Trust Act §3806.
24

25 | ~~**SECTION 506. LIMITED LIABILITY OF BENEFICIAL OWNERS.** A beneficial~~
26 | ~~owner has the same limitation of liability accorded to a shareholder of a domestic business~~
27 | ~~corporation.~~

28 | **Comment**

29
30 | ~~**Principal Sources** – Delaware Statutory Trust Act §3803; Connecticut Statutory Trust~~
31 | ~~Act §34-523.~~

32
33 | ~~By providing as a default rule that the beneficial owners of a statutory trust enjoy the~~

1 same limited liability as shareholders of a domestic corporation, this section confirms that the
2 “control test” of *Williams v. Inhabitants of Milton*, 102 N.E. 355 (Mass. 1913), and Restatement
3 (Second) of Agency §14B (1958), is not applicable to a statutory trust. Under the control test, if
4 a beneficial owner of a common law business trust had a say in the administration of the trust or
5 the right to remove and replace the trustees, the beneficial owner might be held liable for the
6 debts of the trust. By contrast, under this section a beneficial owner may participate in the
7 management of the statutory trust without exposure to liability for the debts of the statutory trust.
8 For discussion of the parallel provision in the Delaware Statutory Trust Act, see Wendell Fenton
9 & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A. Finkelstein, *The*
10 *Delaware Law of Corporations & Business Organizations* §19.3 (3d ed. 2005 Supp.).
11

12 **SECTION ~~507~~506. VOTING OR CONSENT BY BENEFICIAL OWNERS.** On any
13 matter that is to be acted on by beneficial owners, the following rules apply:

14 (1) The beneficial owners act by majority of their ~~vote~~number. ~~[For discussion:~~
15 ~~“majority of their vote” is unclear. What “vote” rights do the beneficial owners have? Per~~
16 ~~capita? Per capital?]~~

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

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

25 **Comment**

26
27 **Principal Source** – Delaware Statutory Trust Act §3806; Delaware General Corporation
28 Law §228.

29
30 Except for a conversion, merger, or dissolution under Article 6, nothing in this act

1 provides for the beneficial owners to act on any matter. However, because the beneficial owners
2 may be given such a right by the terms of the governing instrument, ~~paragraph (a)~~ this paragraph
3 supplies a default rule requiring a majority of the number of beneficial interests owners.
4 Although the drafting committee contemplated that the governing instrument typically will
5 address voting rules by providing a per capital or other share-based allocation of voting rights,
6 the drafting committee declined the suggestion to try to incorporate such a rule as a default
7 because such rules are necessarily transaction-specific and hence infeasible to specify in a one-
8 size-fits-all default. Compare Revised Uniform Partnership Act §401(f) (1997), which provides
9 that “[e]ach partner has equal rights in the management and conduct of the partnership business.”

10
11 The Investment Company Act of 1940, as amended, specifies the percentage of vote
12 necessary to approve certain actions related to the investment company. In other instances, 1940
13 Act requires the action to be approved at a shareholders’ meeting called for that purpose. In such
14 instances, approval of the action by written consent without notice would not be valid. For
15 example, Section 16(a) of the 1940 Act provides that “no person shall serve as a director of an
16 investment company unless elected to that office by the holders of the outstanding voting
17 securities of such company, at an annual or a special meeting duly called for that purpose.” In
18 addition, investment companies seeking the vote of shareholders on specific actions must comply
19 with rules governing the communication to, and solicitation of, their shareholders. See Rules
20 14a-1 to 14b-2 under the Securities Exchange Act of 1934, as amended. These rules are
21 significantly more comprehensive than most state statutes and rules governing communications
22 to shareholders and other aspects of a shareholder meeting.

23
24 Section 104(b)(34) confirms that the rules stated in this Section are subject to override by
25 the governing instrument.

26
27 ~~—— [For discussion: Is there a ’40 Act section relevant for statutory trusts that are~~
28 ~~mutual funds? If so, assistance on explanatory commentary is invited, particularly from~~
29 ~~Bibb and Victor.]~~

30 31 SECTION 508. DERIVATIVE ACTION.

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

34 (1) the beneficial owner first makes a demand on the trustees, requesting that the
35 trustees cause the ~~statutory~~ trust to bring an action to enforce the right, and the trustees do not
36 bring the action within a reasonable time; or

37 (2) a demand would be futile.

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

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

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

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

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

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

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

13 (1) any proceeds or other benefits of a derivative action on behalf of a statutory
14 trust, whether by judgment, compromise, or settlement, are the property of the ~~statutory~~ trust and
15 not of the derivative plaintiff; and

16 (2) if the derivative plaintiff receives any proceeds, it shall immediately remit
17 them to the ~~statutory~~ trust.

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

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

1 **Comment**

2
3 **Principal Sources** - Uniform Limited Partnership Act §§1002-1005 (2001); Delaware
4 Statutory Trust Act §3816; Connecticut Statutory Trust Act §34-522.

5
6 | Under Section ~~103(b)~~103(c)(9), the right of a beneficial owner to bring a derivative
7 action under this Section may not be eliminated by the governing instrument. However, Section
8 | ~~103(b)~~103(c)(9) permits the governing instrument to subject the right to additional standards and
9 restrictions including the requirement that beneficial owners owning a specified amount or type
10 of beneficial interest join in bringing the derivative action, provided that the additional standards
11 and restrictions are not manifestly unreasonable.

12
13 In preserving a mandatory right to bring a derivative action, but allowing that right to be
14 subjected to additional standards and restrictions that are not manifestly unreasonable, ~~the~~
15 ~~drafting committee endeavored to strike an honorable compromise between~~this section balances
16 two policy aims that are in tension. On the one hand, without the right to bring a derivative
17 action, a beneficial owner might have no recourse in the event of trustee misconduct. On the
18 other hand, without appropriate safeguards, a meritless derivative action might be brought with
19 the aim of extracting a quick settlement. See, e.g., Reinier Kraakman, Hyun Park, & Steven
20 Shavell, When Are Shareholder Suits in Shareholder Interests?, 82 Georgetown L.J. 1733
21 (1994).

22
23 ~~————[Further suggestions for this comment are welcome, particularly from Bibb and~~
24 ~~Victor concerning Section 16(e) of the '40 Act.]~~

1 [ARTICLE] 6

2 | **CONVERSION AND, MERGER, ~~AND DISSOLUTION~~**

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

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

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

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

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

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

11 | (6) “Governing statute” ~~of an organization~~ means the statute that governs the
12 organization’s internal affairs.

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

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

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

1 **Comment**

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

3
4 This section contains definitions specific to this Article. Under Section
5 | ~~403(b)~~103(c)(10), this Section is not subject to override by the governing instrument.
6

7 **SECTION 602. CONVERSION.**

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

11 | ~~(1) the other organization's governing statute authorizes the conversion;~~
12 | ~~—————(21) the conversion is not prohibited by the law of the jurisdiction that enacted the~~
13 | other organization's governing statute; and
14 | ~~(32) the other organization complies with its governing statute in effecting the~~
15 | conversion.

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

17 (1) the name and form of the organization before conversion;
18 (2) the name and form of the organization after conversion;
19 (3) the terms and conditions of the conversion, including the manner and basis for
20 converting interests in the converting organization into any combination of money, interests in
21 the converted organization, and other consideration; and
22 (4) the organizational documents of the converted organization.

23 **Comment**

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

25
26 In a statutory conversion an existing entity changes its form, the jurisdiction of its

governing statute, or both. For example, a statutory trust formed under the laws of one jurisdiction might convert to a corporation, limited liability company, or limited partnership under the laws of the same or another jurisdiction (referred to in some statutes as “domestication”).

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

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

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

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

(a) A plan of conversion must be consented to by all trustees and all beneficial owners of a converting statutory trust. ~~[For discussion: Rutledge note to Sitkoff urging additional language to the effect that “no beneficial owner shall have the right to dissent from a conversion.” Rutledge also suggests a parallel provision with respect to mergers.]~~

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

(1) as provided in the plan; and

(2) except as prohibited by the plan, by the same consent as was required to approve the plan. ~~[For discussion: Style asks, “When does the authority to amend or abandon a plan end?”]~~

Comment

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

2
3 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries
4 | is a default rule that may be overridden by the governing instrument. See Section 104(b)(45)(B).
5 Hence, the governing instrument may state a different quantum of consent or provide a different
6 approval mechanism. Varying this subsection’s rule means that a beneficial owner might be
7 subject to a conversion (including a “squeeze out” conversion) without consent and with no
8 appraisal remedy. If the converting organization is a statutory trust subject to this Act, the
9 trustee of the converting organization is subject to the duties and obligations stated in this Act.
10 Those duties would apply to the process and terms under which the conversion occurs.
11 However, if the governing instrument allows for a conversion with less than unanimous consent,
12 the mere fact that a beneficial owner objects to a conversion does not mean that a trustee that is
13 favoring, arranging, consenting to, or effecting the conversation has breached a duty under this
14 Act.
15

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

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

26 (a) After a conversion is approved:

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

29 | (A) a statement that the ~~statutory~~ trust has been converted into another
30 organization;

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

33
34 (C) a statement that the conversion was approved as required by this [act];

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

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

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

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

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

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

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

~~—————(1) if the converted organization is not a statutory trust, as provided by the governing statute of the converted organization; or~~

~~—————(2) if the converted organization is a statutory trust, when the certificate of trust takes effect.~~

Comment

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

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

3
4 Under Section ~~403(b)~~103(c)(10), this Section is not subject to override by the governing
5 instrument.

6 7 **SECTION 605. EFFECT OF CONVERSION.**

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

10 (b) When a conversion takes effect:

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

13 (2) all debts, obligations, ~~or~~and other liabilities of the converting organization
14 continue as debts, obligations, or other liabilities of the converted organization;

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

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

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

22 (6) except as otherwise agreed, the conversion does not dissolve a converting
23 statutory trust or any series thereof for the purposes of Sections ~~611 and 612~~701.

24 (c) A converted organization that is a foreign organization consents to the jurisdiction of
25 the courts of this state to enforce any debt, obligation, or other liability for which the converting

1 statutory trust is liable, if, before the conversion, the converting statutory trust was subject to suit
2 in this state on the debt, obligation, or other liability. A converted organization that is a foreign
3 organization and not authorized to transact business in this state appoints the [Secretary of State]
4 as its agent for service of process for purposes of enforcing a debt, obligation, or other liability
5 under this subsection. Service on the [Secretary of State] under this subsection is made in the
6 same manner and with the same consequences as in Section 214(c) and (d).

7 **Comment**

8 Principal Source – Uniform Limited Partnership Act §1105 (2001).
9

10 Paragraph (a) confirms that conversion changes an entity’s legal type, but does not create
11 a new entity. Unlike a merger, a conversion involves a single entity. Therefore under paragraph
12 (b) a conversion does not transfer any of the entity’s rights or obligations. For further
13 discussion, see Model Entity Transactions Act §406 (2006) and comment 1 thereto.
14

15 | Under Section ~~403(b)~~103(c)(10), this Section is not subject to override by the governing
16 instrument.
17

18 **SECTION 606. MERGER.**

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

- 21 (1) the governing statute of each of the other organizations authorizes the merger;
22 (2) the merger is not prohibited by the law of a jurisdiction that enacted any of the
23 governing statutes; and
24 (3) each of the other organizations complies with its governing statute in effecting
25 the merger.

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

- 27 (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.

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

SECTION 607. ACTION ON PLAN OF MERGER BY CONSTITUENT

STATUTORY TRUST.

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

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

(1) as provided in the plan; and

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

Comment

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

The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries is a default rule that may be overridden by the governing instrument. See Section 104(b)(45)(B). Hence, the governing instrument may state a different quantum of consent or provide a completely different approval mechanism. Varying this subsection’s rule means that a beneficial owner might be subject to a merger (including a “squeeze out” merger) without consent and with no appraisal remedy. The trustee of a constituent statutory trust is subject to the duties and obligations stated in this Act, and those duties would apply to the process and terms under which the merger occurs. However, if the governing instrument allows for a merger with less than unanimous consent, the mere fact a beneficial owner objects to a merger does not mean that a trustee that is favoring, arranging, consenting to, or effecting the merger has breached a duty under this Act.

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

SECTION 608. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.

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

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

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

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

(1) the name and form of each constituent organization and the jurisdiction of its

1 governing statute;

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

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

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

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

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

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

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

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

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

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

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

22 (A) compliance with subsection (c); or

(B) subject to Section ~~205~~204(c)(2), (3), or (4), as specified in the articles of merger; or

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

Comment

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

Under Section ~~403(b)~~103(c)(10), this Section is not subject to override by the governing instrument.

SECTION 609. EFFECT OF MERGER.

(a) When a merger becomes effective:

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

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

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

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

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

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

organization;

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

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

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

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

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

(b) A surviving organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability owed by a constituent organization, if before the merger the constituent organization was subject to suit in this state on the obligation. A surviving organization that is a foreign organization and not authorized to transact business in this state appoints the [Secretary of State] as its agent for service of process for the purposes of enforcing a debt, obligation, or other liability under this subsection. Service on the [Secretary of State] under this subsection is made in the same manner and with the same consequences as in Section ~~215~~213(c) and (d).

Comment

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

Under Section ~~403(b)~~103(c)(10), this Section is not subject to override by the governing instrument.

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

Comment

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

~~SECTION 611. DISSOLUTION OF STATUTORY TRUST. [For discussion, the four notes on this section that were circulated with this draft on a separate page styled “discussion notes regarding USTEA Section 611 (Dissolution of Statutory Trust).”]~~

~~(a) A statutory trust may be dissolved by agreement of all trustees and beneficial owners.~~

~~_____ (b) Upon dissolution of a statutory trust and until the filing of a statement of cancellation, the trustees or other persons that under the governing instrument are responsible for winding up the statutory trust's affairs, in the name of and for and on behalf of the statutory trust, may:~~

~~(1) institute, maintain, and defend suits, whether civil, criminal, or administrative;~~

~~(2) settle and close the business of the statutory trust;~~

~~(3) dispose of and convey the property of the statutory trust;~~

~~(4) discharge or make reasonable provision for the liabilities of the statutory trust;~~

and

~~(5) distribute to the beneficial owners any remaining assets of the statutory trust.~~

~~(c) A statutory trust that has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, and unmatured claims and obligations, known to the statutory trust and all claims and obligations that are known to the statutory trust but for which the identity of the claimant is unknown, in accordance with the following rules:~~

1 ~~_____ (1) If there are sufficient assets, the claims and obligations must be paid in full,~~
2 ~~and any provision for payment must be made in full.~~

3 ~~_____ (2) If there are insufficient assets, the claims and obligations must be paid or~~
4 ~~provided for according to their priority and, among claims and obligations of equal priority,~~
5 ~~ratably to the extent of assets available therefor.~~

6 ~~_____ (3) Any remaining assets must be distributed to the beneficial owners.~~

7 ~~_____ (d) Any person, including any trustee, that under the governing instrument is responsible~~
8 ~~for winding up a statutory trust's affairs which has complied with this section is not liable to the~~
9 ~~claimants of the statutory trust by reason of the person's actions in winding up the statutory trust.~~

10 ~~_____ (e) On application of any person that shows good cause, the [appropriate court] may~~
11 ~~appoint a person to be a receiver for a terminated statutory trust with the power to undertake any~~
12 ~~action that might have been done by the statutory trust before its termination if the action is~~
13 ~~necessary for final settlement of unfinished business of the statutory trust. [Moved here from~~

14 ~~Section 203.]~~

15 **Comment**

16
17 ~~_____ **Principal Source** — Delaware Statutory Trust Act §3808; Delaware Limited Liability~~
18 ~~Company Act §18-805.~~

19
20 ~~_____ Paragraph (a) provides as a default rule that a statutory trust may be dissolved by~~
21 ~~agreement of all the trustees and all the beneficiaries.~~

22
23 ~~_____ Paragraph (e) provides for the possibility that after dissolution additional unfinished~~
24 ~~business of the statutory trust is discovered.~~

25
26 ~~_____ Under Section 103(b)103(c)(11), this Section is not subject to override by the governing~~
27 ~~instrument.~~

28
29 ~~[As noted above, we have four discussion issues on this section that were circulated with~~
30 ~~this draft on a separate page styled “discussion notes regarding USTEA Section 611~~

1 ~~(Dissolution of Statutory Trust).”]~~

2
3 ~~SECTION 612. DISSOLUTION OF SERIES.~~

4 ~~—— (a) A series may be dissolved and its affairs wound up without causing the dissolution of~~
5 ~~the statutory trust or any other series thereof in accordance with the following rules:~~

6 ~~—— (1) The dissolution, winding up, liquidation, or termination of any series does not~~
7 ~~affect the limitation of liability with respect to a series.~~

8 ~~—— (2) A series is dissolved and its affairs must be wound up at the time or upon the~~
9 ~~happening of events specified in the governing instrument of the statutory trust.~~

10 ~~—— (3) Upon dissolution of a series of a statutory trust, the persons that under the~~
11 ~~governing instrument of the statutory trust are responsible for winding up the series’s affairs, in~~
12 ~~the name of the statutory trust and for and on behalf of the statutory trust and the series, may take~~
13 ~~all actions with respect to the series as are permitted under Section 604(a) and shall provide for~~
14 ~~the claims and obligations of the series and distribute the assets of the series as provided Section~~
15 ~~604(b).~~

16 ~~—— (b) Any person, including a trustee, that under the governing instrument is responsible for~~
17 ~~winding up the affairs of a series under subsection (a) which has complied with this section is~~
18 ~~not liable to the claimants of the series by reason of the person’s actions in winding up the series.~~

19 ~~—— [For discussion: (1) The omission in this Section of several paragraphs in the~~
20 ~~comparable Section 611. (2) Whether this section should be moved into Section 306 on~~
21 ~~series.]~~

22 **Comment**

23 ~~—— Principal Source — Delaware Statutory Trust Act §3808.~~
24

1 | ~~_____ This section parallels and is analogous in scope and effect to Section 604, except that it~~
2 | ~~applies to a series rather than the entire statutory trust. On the series concept, see the Comment~~
3 | ~~to Section 306.~~

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 304, which provides as a default rule that a statutory trust has
12 perpetual existence, this Section provides that a statutory trust is dissolved only upon the
13 occurrence of an event or circumstance stated in the governing instrument. Thus, in contrast
14 with almost all other unincorporated business organizations, in a statutory trust dissolution is not
15 available as a remedy for alleged oppressive conduct.

16
17 Under Section 103(c)(1), the provisions of this section are not subject to override by the
18 governing instrument. However, the governing instrument need not provide for an event or
19 circumstance that causes dissolution. See Section 306.
20

21 SECTION 702. WINDING UP.

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

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

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

27 (2) may:

28 (A) deliver to the [Secretary of State] for filing a statement of dissolution

1 stating the name of the trust and that the trust is dissolved;

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

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

6 (D) transfer the trust's property;

7 (E) settle disputes by mediation or arbitration;

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

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

11 (c) On application of any person that shows good cause, the [appropriate court] may
12 appoint a person to be a receiver for a ~~terminated-dissolved~~ statutory trust with the power to
13 undertake any action that might have been done by the ~~statutory trust before its termination~~
14 during its winding up if the action is necessary for final settlement of unfinished business of the
15 ~~statutory trust~~.

16 Comment

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

19
20 If the governing instrument of a statutory trust provides for the dissolution of the trust,
21 then ~~upon~~ from the event or circumstance that triggers dissolution, the statutory trust may
22 continue only for the purpose of ~~dissolution~~ winding up.

23
24 In winding up the statutory trust within a reasonable time, the trustees are neither
25 required to undertake a fire sale of the assets of the statutory trust on unfavorable terms nor
26 permitted to continue the trust endlessly under the guise of winding down. Thus, the question of
27 what period of time is “reasonable” under paragraph (b)(2)(B) turns on the totality of the
28 circumstances.

Paragraph (c) provides for the possibility that after dissolution additional unfinished business of the statutory trust is discovered.

Under Section ~~403(b)~~103(c)(1), the provisions of this section are not subject to override by the governing instrument, ~~except that the governing instrument need not provide for an event or circumstance that triggers a dissolution. In other words, under Section 304 a statutory trust may have perpetual existence, but if the governing instrument provides for an event or circumstance of dissolution under Section 701, then the provisions of this section govern that dissolution as mandatory law.~~ **[Comments solicited: Does this paragraph make sense? Since the trust may be perpetual, and indeed that is the default, perhaps the dissolution rules of this section should likewise be default? If not, what do you think of the approach of this paragraph?]**

SECTION 703. KNOWN CLAIMS AGAINST DISSOLVED STATUTORY TRUST.

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

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

- (1) specify the information required to be included in a claim;
- (2) provide a mailing address to which the claim is to be sent;
- (3) state the deadline for receipt of the claim, which may not be less than 120 days after the date the notice is received by the claimant; and
- (4) state that the claim will be barred if not received by the deadline.

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

- (1) the claim is not received by the specified deadline; or
- (2) if the claim is timely received but rejected by the trust:

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

4 (B) the claimant does not commence the required action within the 90
5 days.

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

8 **Comment**

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

10
11 ~~_____ [Comments solicited: Same questions as in the comment to Section 703].~~ Under
12 Section 103(c)(1), the provisions of this section are not subject to override by the governing
13 instrument.
14

15 **SECTION 704. OTHER CLAIMS AGAINST DISSOLVED STATUTORY TRUST.**

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

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

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

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

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

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

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

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

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

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

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

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

Comment

Principal Source – Revised Uniform Limited Liability Company Act §704 (2006).
~~[Comments solicited: Same questions as in the comment to Section 703].~~

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

SECTION 705. ADMINISTRATIVE DISSOLUTION.

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

(1) pay, within 60 days after the due date, any fee, tax, or penalty due to the

1 [Secretary of State]; or

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

4 (b) If the [Secretary of State] determines that a ground exists for administratively
5 dissolving a statutory trust, the [Secretary of State] shall file a record of the determination and
6 serve the trust with a copy of the filed record.

7 (c) If within 60 days after service of the copy pursuant to subsection (b) a statutory trust
8 does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the
9 [Secretary of State] that each ground determined by the [Secretary of State] does not exist, the
10 [Secretary of State] shall dissolve the trust administratively by preparing, signing, and filing a
11 declaration of dissolution that states the grounds for dissolution. The [Secretary of State] shall
12 serve the trust with a copy of the filed declaration.

13 (d) A statutory trust that has been administratively dissolved continues in existence but,
14 subject to Section 706, may carry on only activities necessary to wind up its activities and
15 liquidate its assets under Sections 702 and 708 and to notify claimants under Sections 703 and
16 704.

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

19 **Comment**

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

21
22 | Under Section ~~403(b)~~103(c)(1), the provisions of this section are not subject to override
23 by the governing instrument.
24
25

1 **SECTION 706. REINSTATEMENT FOLLOWING ADMINISTRATIVE**

2 **DISSOLUTION.**

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

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

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

8 (3) that the trust's name satisfies the requirements of Section ____.

9 (b) If the [Secretary of State] determines that an application under subsection (a) contains
10 the required information and that the information is correct, the [Secretary of State] shall prepare
11 a declaration of reinstatement that states this determination, sign and file the original of the
12 declaration of reinstatement, and serve the statutory trust with a copy.

13 (c) When a reinstatement becomes effective, it relates back to and takes effect as of the
14 effective date of the administrative dissolution and the statutory trust may resume its activities as
15 if the dissolution had not occurred.

16 **Comment**

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

18
19 | Under Section ~~403(b)~~103(c)(1), the provisions of this section are not subject to override
20 by the governing instrument.
21

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

23 (a) If the [Secretary of State] rejects a statutory trust's application for reinstatement
24 following administrative dissolution, the [Secretary of State] shall prepare, sign, and file a notice

1 that explains the reason for rejection and serve the trust with a copy of the notice.

2 (b) Within 30 days after service of a notice of rejection of reinstatement under subsection
3 (a), a statutory trust may appeal from the rejection by petitioning the [appropriate court] to set
4 aside the dissolution. The petition must be served on the [Secretary of State] and contain a copy
5 of the [Secretary of State's] declaration of dissolution, the trust's application for reinstatement,
6 and the [Secretary of State's] notice of rejection.

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

9 **Comment**

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

11
12 | Under Section ~~403(b)~~103(c)(1), the provisions of this section are not subject to override
13 by the governing instrument.
14

15 **SECTION 708. DISTRIBUTION OF ASSETS IN WINDING UP STATUTORY**
16 **TRUST'S ACTIVITIES.**

17 | (a) In winding up its activities, a statutory trust must first apply its assets to discharge its
18 obligations to creditors.

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

21 **Comment**

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

23 ~~— [Comments solicited: Should paragraph (a) be mandatory?]~~

24
25 Under Section 103(c)(1), the provisions this section are not subject to override by the
26 governing instrument.
27

1 | [ARTICLE] ~~78~~

2 | FOREIGN STATUTORY TRUSTS

3 | SECTION ~~701~~801. GOVERNING LAW.

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

6 | (1) the internal affairs of the ~~foreign statutory~~ trust;

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

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

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

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

17 | Comment

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

22 |
23 | Paragraph (a) parallels and is analogous in scope and effect to Section ~~303-305~~ for a
24 | domestic statutory trust. Paragraph (b) allows for a foreign statutory trust to operate
25 | domestically even if the law governing it is different from the laws governing domestic statutory
26 | trusts, but under paragraph (c) a foreign statutory trust cannot engage in any business or exercise
27 | any power that a domestic statutory trust could not.
28 |

1 Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
2 instrument.
3

4 **SECTION ~~702~~802. APPLICATION FOR ~~CERTIFICATE OF~~**
5 **AUTHORITY~~CERTIFICATE OF QUALIFICATION~~.**

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

9 _____(1) the name of the ~~foreign statutory~~ trust and, if the name does not comply with
10 Section 209, an alternate name adopted pursuant to Section ~~706~~807(a).

11 _____(2) the name of the state or other jurisdiction under whose law the ~~foreign~~
12 ~~statutory~~ trust is formed;

13 _____(3) the street and mailing addresses of the ~~foreign statutory~~ trust's principal office
14 and, if the laws of the jurisdiction under which the ~~foreign statutory~~ trust is formed require it to
15 maintain an office in that jurisdiction, the street and mailing address of the required office; and

16 _____(4) the name and street and mailing addresses of the ~~foreign statutory~~ trust's
17 initial agent for service of process in this state.

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

22 **Comment**
23

24 **Principal Source** – Uniform Limited Partnership Act §902 (2001).
25

1 | A ~~certificate of authority~~certificate of qualification applied for under this section is
2 | different than a certificate of existence or registration furnished under Section 207.

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

6 |
7 | **SECTION ~~703803~~. AMENDMENT OR RESTATEMENT OF CERTIFICATE.**

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

11 | (1) the name of the ~~qualified foreign statutory trust~~;

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

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

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

18 | (1) cause the certificate to be amended; or

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

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

23 | (d) An amendment or restated ~~certificate of authority~~certificate of qualification of a
24 | foreign statutory trust is effective as provided in Section ~~205204~~204(c).

25 | **Comment**

1
2 **Principal Source** – Uniform Limited Partnership Act §202 (2001).
3

4 Paragraph (a) provides a mechanism for updating a statutory trust's ~~certificate of~~
5 ~~authority~~certificate of qualification. Paragraph (b) imposes an obligation directly on the trustee
6 rather than on the statutory trust.
7

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

11 **SECTION ~~7048~~104. ACTIVITIES NOT CONSTITUTING TRANSACTING**
12 **BUSINESS.**

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

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

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

18 (3) maintaining accounts in financial institutions;

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

22 (5) selling through independent contractors;

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

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

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

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

(10) transacting business in interstate commerce.

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

(c) A person is not deemed to be doing business in the state solely by reason of being a trustee or a beneficial owner of a foreign statutory trust.

Comment

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

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

Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing instrument.

SECTION 705805. FILING OF APPLICATION FOR CERTIFICATE OF AUTHORITY CERTIFICATE OF QUALIFICATION. If all filing fees have been paid, unless the [Secretary of State] determines that an application for a ~~certificate of authority~~certificate of qualification of a foreign statutory trust does not comply with the filing requirements of this [act], the [Secretary of State] shall file the application, ~~prepare, sign, and file~~ a ~~certificate of authority to transact business in this state and make available a copy of the filed~~

1 | ~~certificate to the foreign statutory trust or its representative.~~

2 | **Comment**

3 |

4 | **Principal Source** —~~Based on~~ Uniform Limited Partnership Act §904 (2001).

5 |

6 | ~~A certificate of authority~~certificate of qualification filed under this section is different

7 | than a certificate of registration under Section ~~207~~806.

8 |

9 | Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing

10 | instrument.

11 |

12 | **SECTION 806. CERTIFICATE OF REGISTRATION**

13 | (a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish a

14 | certificate of registration for a foreign statutory trust if the records filed in the [office of the

15 | Secretary of State] show that the [Secretary of State] has filed a certificate of qualification, has

16 | not revoked the certificate of qualification, and has not filed a notice of cancellation. A

17 | certificate of registration must state:

18 | (1) the name of the trust and any alternate name adopted under Section 807 for

19 | use in this state;

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

21 | (3) that the [Secretary of State] has not revoked its certificate of qualification and

22 | has not filed a notice of cancellation; and

23 | (4) whether the foreign statutory trust's most recent annual report required by

24 | Section 214 has been filed by the [Secretary of State].

25 | (b) Subject to any qualification stated in the certificate, a certificate of registration issued

26 | by the [Secretary of State] to a foreign statutory trust may be relied upon as conclusive evidence

27 | 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 registration 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.

SECTION ~~706~~807. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.

(a) A foreign statutory trust whose name does not comply with Section ~~407~~207 may not obtain a ~~certificate of authority~~certificate of qualification until it adopts, for the purpose of transacting business in this state, an alternate name that complies with Section ~~407~~207. A foreign statutory trust that adopts an alternate name under this subsection and obtains a ~~certificate of authority~~certificate of qualification with the name need not comply with [fictitious or assumed name statute]. After obtaining a ~~certificate of authority~~certificate of qualification with an alternate name, a foreign statutory trust shall transact business in this state under the name unless the ~~foreign statutory~~ trust is authorized under [fictitious or assumed name statute] to transact business in this state under another name.

(b) If a qualified foreign statutory trust changes its name to one that does not comply with Section 107, it may not thereafter transact business in this state until it complies with subsection (a) and obtains an amended ~~certificate of authority~~certificate of qualification.

Comment

Principal Source – Uniform Limited Partnership Act §905 (2001).

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

4 | **SECTION ~~707~~808. REVOCATION OF CERTIFICATE OF**
5 | **AUTHORITYQUALIFICATION.**

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

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

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

12 | (3) file an annual report; or

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

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

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

22 | (2) the basis for the revocation.

23 | (c) Unless a foreign statutory trust cures the failures to comply with subsection (a) stated

1 in the notice of revocation before the date state in the notice, the authority of the ~~foreign~~
2 ~~statutory~~ trust to transact business in this state ceases on that date.

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

7 **Comment**

8
9 **Principal Source** – Uniform Limited Partnership Act §906 (2001).

10
11 Paragraph (a)(3)–(4) is bracketed in recognition of the diversity of approaches among the
12 states with respect to annual reports ((a)(3)) and taxes and other fees ((a)(4)). Uniformity is not
13 expected.

14
15 Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
16 instrument.

17 18 **SECTION ~~708~~809. CANCELLATION OF CERTIFICATE OF** 19 **~~AUTHORITY~~CERTIFICATE OF QUALIFICATION; EFFECT OF FAILURE TO HAVE** 20 **~~CERTIFICATE~~.**

21 (a) To cancel its ~~certificate of authority~~certificate of qualification to transact business in
22 this state, a qualified foreign statutory trust must deliver to the [Secretary of State] for filing a
23 notice of cancellation that states:

24 (1) the name of the ~~foreign statutory~~ trust;

25 (2) the date of filing of its initial ~~certificate of authority~~certificate of qualification;

26 (3) that the ~~certificate of authority~~certificate of qualification is being canceled;

27 and

1 (4) any other information as determined by the trustees filing the statement.

2 (b) A ~~certificate of authority~~certificate of qualification under subsection (a) is canceled
3 when the notice of cancellation becomes effective under Section 205204. ~~[For discussion,~~
4 ~~whether to split this section into two, with (a) and (b) as cancellation of certificate of~~
5 ~~authority, and the rest as effect of failure to have a certificate.]~~

6 **Comment**

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

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

13 **SECTION 810. EFFECT OF FAILURE TO HAVE CERTIFICATE.**

14 (ea) A foreign statutory trust transacting business in this state may not maintain an action
15 or proceeding in this state unless it has a ~~certificate of authority~~certificate of qualification to
16 transact business in this state.

17 (db) The failure of a foreign statutory trust to have a ~~certificate of authority~~certificate of
18 qualification to transact business in this state does not impair the validity of a contract or act of
19 the ~~foreign statutory trust~~ or prevent the ~~foreign statutory trust~~ from defending an action or
20 proceeding in this state.

21 (c) ~~[For discussion, whether to add a provision based on ReULLCA 808(c), which~~
22 ~~says “A member or manager~~trustee or beneficial owner of a foreign limited liability company is
23 not liable for the debts, obligations, or other liabilities of the company solely because the
24 company transacted business in this state without a ~~certificate of authority~~certificate of
25 qualification.”]

(ed) If a foreign statutory trust transacts business in this state without a ~~certificate of authority~~certificate of qualification or cancels its ~~certificate of authority~~certificate of qualification, ~~it~~the trust appoints the [Secretary of State] as its agent for service of process for actions arising out of the transaction of business in this state.

Comment

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

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

SECTION ~~709~~810. ACTION BY [ATTORNEY GENERAL]. The [Attorney General] may maintain an action to enjoin a foreign statutory trust from transacting business in this state in violation of this [article].

Comment

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

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

1 | [ARTICLE] 98

2 | MISCELLANEOUS PROVISIONS

3 | ~~[For discussion: Rutledge urges that we include a reservation of power to amend or~~
4 | ~~repeal clause. Such a clause appeared in an earlier draft, but was later removed when the~~
5 | ~~conference dropped the clause from its routine boilerplate.]—~~

6 | SECTION ~~801~~901. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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

9 | **Comment**

10 |
11 | **Principal Source** – Uniform Limited Partnership Act §1201 (2001).

12 |
13 | Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
14 | instrument.
15 |

16 | SECTION ~~802~~902. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
17 | AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the federal
18 | Electronic Signatures in Global and National Commerce Act[, 15 U.S.C. Section 7001 et seq.],
19 | but this [act] does not modify, limit, or supersede Section 101(c) of that act or authorize
20 | electronic delivery of any of the notices described in Section ~~403(b)~~103(c) of that act.

21 | **Comment**

22 |
23 | **Principal Source** – Uniform Limited Partnership Act §1203 (2001).

24 |
25 | Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
26 | instrument.
27 |
28 |

1 file a certificate of trust with [the Secretary of State] before the effective date of this [act] may
2 elect to be governed by the provisions of this [act] by filing an amendment to its certificate of
3 trust under Section 202.]

4 [(d) On [two years] after the effective date of this [act], this [act] governs the
5 organization and internal affairs of all trusts created pursuant to a statute of this state that was
6 required by that statute to file a certificate of trust with the [Secretary of State] before the
7 effective date of this [act].]

8 Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
9 instrument.

10 11 **Comment**

12
13 **Principal Source** – Uniform Limited Partnership Act §1206 (2001).

14 This Act governs all statutory trusts formed on or after the Act’s effective date. For pre-
15 existing statutory trusts, this section establishes an optional “elect in” period and a mandatory,
16 all-inclusive date of two years following the effective date. Beginning on the all-inclusive date,
17 each pre-existing statutory trust that has not previously elected in becomes subject to this Act—
18 including the schedule of mandatory rules in Section ~~403(b)~~103(c)—by operation of law.

19
20 Paragraph (a) confirms that this act does not govern a common law trust unless the trust
21 elects to be governed by the terms of this act by filing a certificate of trust under Section 201.
22 ~~€However,~~ consistent with Section 302, paragraph (b) of this Section prohibits a common law
23 trust with a prevailingly donative purpose from ~~converting to becoming~~ a statutory trust.

24
25 The drafting committee contemplated that some enacting jurisdictions might modify this
26 section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not
27 expected—to address other transition problems arising from differences between this Act and
28 prior law. For example, an enacting jurisdiction might choose to allow trusts formed under a
29 prior statute to remain governed by the prior statute for longer than the two years suggested in
30 paragraph (d). ~~–[For discussion: States that lack a reserved power clause. Perhaps the~~
31 ~~answer is simply to remark the problem in this comment?]~~

32
33 **SECTION ~~805~~906. REPEALS.** On [all-inclusive date], the following acts are repealed:

34 (1) [the State Statutory Trust Act as amended and in effect immediately before the

effective date of this [act]];

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

(3) [the State Real Estate Investment Trust Act as amended an in effect immediately before the effective date of this [act]].

Comment

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

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

Paragraph (3) supplies model language for enacting jurisdictions that have previously enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a REIT, is not a type of trust but rather is a tax status awarded to any business entity that qualifies under 26 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under 26 U.S.C. §860D. In spite of the use of the word “trust” in its title, there is no reason why a REIT must be organized as a trust, whether statutory or common law. Indeed, in contemporary practice nearly all publicly-traded REITs are organized as Maryland corporations, not as trusts. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* __ [citation]. Nonetheless, a number of states have enacted REIT statutes that authorize the creation of a REIT-specific entity designed to qualify as a REIT under the Internal Revenue Code. Because a statutory trust under this Act could serve the same purpose, the drafting committee contemplated that enacting jurisdictions might take the occasion of enacting this act to repeal their REIT statutes.

Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing instrument.

SECTION ~~806~~907. EFFECTIVE DATE. This [act] takes effect

Comment

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

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

1 effective date.

2

3 | Under Section ~~403(b)~~103(c)(1), this Section is not subject to override by the governing
4 instrument.