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FOR DISCUSSION ONLY

HARMONIZED
UNIFORM STATUTORY TRUST ENTITY ACT
(Amendments to Uniform Statutory Trust Entity Act)

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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HARMONIZED
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WITH REPORTERS' NOTES

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM STATUTORY TRUST ENTITY ACT

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HARMONIZED UNIFORM STATUTORY TRUST ENTITY ACT
(Amendments to Uniform Statutory Trust Entity Act)

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1 **HARMONIZED UNIFORM STATUTORY TRUST ENTITY ACT**
2 **(Amendments to Uniform Statutory Trust Entity Act)**
3

4 **ARTICLE 1**

5 **GENERAL PROVISIONS**

6 * * *

7 **SECTION 102. DEFINITIONS.** In this [act]:

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

10 (2) “Certificate of trust” means the record filed by the [Secretary of State] under Section
11 201. The term includes the record as amended or restated.

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

18 ~~(4) “Designated office” means:~~

19 ~~(A) for a statutory trust, the street address that it is required to designate under~~
20 ~~Section 201(b)(2); or~~

21 ~~(B) for a foreign statutory trust, its principal office.~~

22 ~~(5)~~ (4) “Foreign statutory trust” means a trust that is formed under the laws of a
23 jurisdiction other than this state which would be a statutory trust if formed under the laws of this
24 state.

~~(6)~~ (5) “Governing instrument” means the trust instrument and certificate of trust.

~~(7)~~ (6) “Jurisdiction”, used to refer to a political entity, means the United States, a state, a foreign country, or a subdivision of a foreign country.

~~(8)~~ (7) “Person” means an individual, corporation, statutory trust, estate, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity. The term does not include a common-law trust.

~~(9)~~ (8) “Property” means all property, whether real, personal, or mixed, or tangible or intangible, or any interest therein.

~~(10)~~ (9) “Qualified foreign statutory trust” means a foreign statutory trust that is registered to do business in this state pursuant to a certificate of registration filed by the [Secretary of State].

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

~~(12)~~ (11) “Related party”, with respect to a party that is a trustee, officer, employee, manager, or beneficial owner, means:

(A) the spouse of the party;

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

(C) an individual having the same residence as the party;

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

(E) a trust, estate, legally incapacitated individual, conservatee, or minor for

1 which the party is a fiduciary; or

2 (F) a person that directly or indirectly controls, is controlled by, or is under
3 common control with, the party.

4 ~~(13)~~ (12) “Series trust” means a statutory trust that has one or more series created under
5 Section 401.

6 ~~(14)~~ (13) “Sign” means, with the present intent to authenticate or adopt a record:

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

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

10 ~~(15)~~ (14) “State” means a state of the United States, the District of Columbia, Puerto
11 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
12 jurisdiction of the United States.

13 ~~(16)~~ (15) “Statutory trust”, except in the phrase “foreign statutory trust”, means an entity
14 formed under this [act].

15 ~~(17)~~ (16) “Trust” includes a common-law trust, statutory trust, and foreign statutory
16 trust.

17 ~~(18)~~ (17) “Trust instrument” means a record other than the certificate of trust which
18 provides for the governance of the affairs of a statutory trust and the conduct of its business. The
19 term includes a trust agreement, a declaration of trust, and bylaws.

20 ~~(19)~~ (18) “Trustee” means a person designated, appointed, or elected as a trustee of a
21 statutory trust or foreign statutory trust in accordance with the governing instrument or
22 applicable law.

1 **Reporters' Notes**

2
3 In contrast with RUPA, ULPA, and Re-ULLCA, USTEA does not define “contribution”
4 or “distribution” or “transferee”.

5
6 *Former Section 102(4)[designated office]* – Deleted in recognition that it is no longer
7 appropriate to require a domestic entity to have an office, in addition to a registered agent, within
8 the state.

9 * * *

10 *(TEXT INCLUDED FOR INFORMATIONAL PURPOSES)*

11 **SECTION 105. APPLICABILITY OF TRUST LAW.** The law of this state pertaining
12 to common-law trusts supplements this [act]. However, a governing instrument may supersede
13 or modify application to the statutory trust of any law of this state pertaining to common-law
14 trusts.

15 **Reporters' Notes**

16
17 As indicated by this section and section 106(a), USTEA reflects an amalgam of trust and
18 contract concepts – a situation to keep in mind when making harmonization decisions.
19

20 **SECTION 106. RULE OF CONSTRUCTION.**

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

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

25 **Reporters' Notes**

26
27 Subsection (a) states a proposition that was considered at length and rejected by the
28 drafting committees for ULPA and Re-ULLCA.
29
30

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 state:

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

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

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

11 ~~(4)~~ (3) if the trust may have one or more series, a statement to that effect.

12 (c) A certificate of trust may contain any term in addition to those required by subsection
13 (b).

14 (d) Subject to Section 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) A filed certificate of trust, a filed statement of cancellation or change, or filed articles
17 of conversion or merger prevail over inconsistent terms of a trust instrument.

18 **Reporters' Notes**

19
20 *Subsection (b)* – The deletion follows from the decision not to require an in-state office.

21
22 *Subsection (e)* – Note the sharp difference between this rule and the rule created in
23 ULLCA and followed in ULPA (2001) and Re-ULLCA. See, e.g., Re-ULLCA, § 112(d), which
24 provides in pertinent part:

25
26 if a record that has been delivered by a limited liability company to the [Secretary of
27 State] for filing and has become effective under this [act] conflicts with a provision of the
28 operating agreement:

29 (1) the operating agreement prevails as to members, dissociated members,

1 transferees, and managers; and
2 (2) the record prevails as to other persons to the extent they reasonably
3 rely on the record.
4

5 * * *

6
7 **ARTICLE 5**

8 **TRUSTEES AND TRUST MANAGEMENT**

9 * * *

10 *(TEXT INCLUDED FOR INFORMATIONAL PURPOSES)*

11 **SECTION 506. GOOD-FAITH RELIANCE.** A trustee, officer, employee, manager,
12 or committee of a statutory trust, or other person designated pursuant to Section 103(e)(8), is not
13 liable to the trust or to a beneficial owner for breach of any duty, including a fiduciary duty, to
14 the extent the breach results from good-faith reliance on:

15 (1) a term of the governing instrument;

16 (2) a record of the statutory trust; or

17 (3) an opinion, report, or statement of another person that the person to which the
18 opinion, report, or statement is made or delivered reasonably believes is within the other person's
19 professional or expert competence and is made or delivered to the trustee, officer, employee,
20 manager, or committee of a statutory trust, or other person designated pursuant to Section
21 103(e)(8).

22 **Reporters' Notes**

23
24 *Section 506(1)* – Under this provision, a trustee who breaches a duty escapes liability if
25 the breach was based on an erroneous but good faith interpretation of the governing instrument.
26 This approach differs sharply from the law of limited liability companies and limited
27 partnerships and, in particular, from RUPA, ULLCA, ULPA (2001), and Re-ULLCA.
28

29 * * *

1 (TEXT INCLUDED FOR INFORMATIONAL PURPOSES)

2 **SECTION 509. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.**

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

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

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

16 **Reporters' Notes**

17
18 *Subsection (a)* – Re-ULLCA, ULPA (2001), and RUPA all provide a default rule
19 requiring indemnification. Re-ULLCA and ULPA (2001) also authorize the purchasing of
20 insurance.

21
22 *Subsection (b)* – Compare HULLCA, § 408(c), which states the proposition in the active
23 voice. That provision also reflects a decision by the Committee on Style to substitute “promise”
24 for “undertaking”.
25

26 *Subsection (c)* – Compare the more specific constraints stated in HULLCA, § 110(f):
27

28 (f) The operating agreement ~~may alter or eliminate the indemnification for a~~
29 ~~member or manager provided by Section 408(a) and~~ may eliminate or limit a member or
30 manager's liability to the limited liability company and members for money damages,
31 whether directly or by providing indemnification therefor, except for:

- 1 (1) breach of the duty of loyalty;
2 (2) a financial benefit received by the member or manager to which the member
3 or manager is not entitled;
4 (3) a breach of a duty under Section 406;
5 (4) intentional infliction of harm on the company or a member; or
6 (5) an intentional violation of criminal law.
7

8 * * *

9 **ARTICLE 6**

10 **BENEFICIARIES AND BENEFICIAL RIGHTS**

11 * * *

12 **SECTION 603. CONTRIBUTION BY BENEFICIAL OWNER.**

13 (a) ~~A contribution of a beneficial owner to a statutory trust may be in cash, property, or~~
14 ~~services rendered or a promissory note or other obligation to contribute cash or property or to~~
15 ~~perform services.~~ A contribution may consist of property or other benefit to a limited liability
16 company, including money, services performed, promissory notes, other agreements to
17 contribute money or property, and contracts for services to be performed. A person may become
18 a beneficial owner of a statutory trust and may receive a beneficial interest in a statutory trust
19 without making a contribution or being obligated to make a contribution to the trust.

20 (b) A beneficial owner is liable to the statutory trust for failure to perform an obligation
21 to contribute cash or property or to perform services, even if the beneficial owner is unable to
22 perform because of death, disability, or any other reason. If a beneficial owner does not make the
23 required contribution of cash, property, or services, the beneficial owner is obligated, at the
24 option of the trust, to contribute cash equal to that part of the value of the contribution that has
25 not been made. This obligation is in addition to any other right, including the right to specific
26 performance, that the trust has against the beneficial owner under the governing instrument or

1 applicable law.

2 (c) The governing instrument may provide that a beneficial owner that fails to make a
3 required contribution, or comply with the terms and conditions of the governing instrument, is
4 subject to specified penalties for or consequences of the failure, including:

5 (1) reduction or elimination of the defaulting beneficial owner's proportionate
6 interest in the statutory trust or series thereof;

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

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

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

13 (5) redemption or sale of the defaulting beneficial owner's beneficial interest at a
14 value fixed by appraisal or by formula; and

15 (6) specific performance of an obligation under the governing instrument.

16 **Reporters' Notes**

17
18 *Subsection (b)* – Other entity acts provide that a compromise of a contribution obligation
19 does not affect the rights of creditors who extended credit in reliance on the original obligation.
20 See, e.g., HULLCA, § 403(b): “A creditor of a limited liability company which extends credit or
21 otherwise acts in reliance on an obligation described in subsection (a) without notice of any
22 compromise under this subsection may enforce the obligation.”

23
24 *Subsection (c)* – This list of remedies differs substantially from the comparable
25 provisions of the other entity acts. Particularly noteworthy: condoning the imposition of
26 “penalties”.

27
28 *Subsection (c)(3)* – Note “forfeiture” and query whether the intent or effect is to relieve
29 the law's general disfavor of forfeiture.

30
31 *Absence of distribution recapture provisions* – Unlike ULLCA, ULPA (2001), Re-

1 ULLCA, and HUPA, USTEPA does not provide for the recapture of distributions made while the
2 entity is insolvent.
3

4 * * *

5 **SECTION 606. CHARGING ORDER.**

6 (a) If a beneficial interest is not freely transferable by a beneficial owner so that the
7 transferee has all rights of the transferor, a judgment creditor of a beneficial owner may, in the
8 capacity of judgment creditor, satisfy the judgment against the beneficial owner's beneficial
9 interest only as provided in this section.

10 (b) On application by a judgment creditor of a beneficial owner, the [appropriate court]
11 may ~~issue~~ enter a charging order against the beneficial owner's right to distributions from the
12 trust for the unsatisfied ~~part~~ amount of the judgment, ~~and:~~ A charging order constitutes a lien on
13 the beneficial owner's right to distributions and requires the limited liability company to pay
14 over to the person to which the charging order was issued any distribution that would otherwise
15 have been paid to the beneficial owner.

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

18 (1) appoint a receiver of the distributions subject to the charging order, with the
19 power to ~~enforce the beneficial owner's right to a distribution~~ make all inquiries the beneficial
20 owner may have made; and

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

22 ~~(e) A charging order issued under subsection (b) is a lien on the beneficial owner's right~~
23 ~~to distributions and requires the statutory trust to pay over to the judgment creditor any~~
24 ~~distribution that would otherwise be paid to the beneficial owner until the judgment has been~~

1 satisfied.

2 (d) Upon a showing that distributions under a charging order will not pay the judgment
3 debt within a reasonable time, the court may foreclose the lien and order the sale of the beneficial
4 owner's rights to distribution from the trust. The purchaser at the foreclosure sale obtains only
5 those rights and does not thereby become a beneficial owner.

6 (e) At any time before foreclosure under subsection (d), the beneficial owner whose
7 rights to distributions are subject to a charging order under subsection (b) may extinguish the
8 charging order by satisfying the judgment and filing a certified copy of the satisfaction with the
9 court that issued the charging order.

10 ~~(d)~~ (f) At any time before foreclosure under subsection (d), A a statutory trust or a
11 beneficial owner that is owner whose rights to distributions are not subject to a charging order
12 issued under subsection (b) may pay to the judgment creditor the full amount due under the
13 judgment lien and thereby succeed to the rights of the judgment creditor, including the charging
14 order.

15 ~~(e)~~ (g) This [act] does not deprive a beneficial owner or a transferee of the beneficial
16 interest of any exemption applicable to the beneficial interest.

17 **Reporters' Notes**

18
19 Generally, this section has been conformed to the template that evolved through RUPA,
20 ULLCA, ULPA (2001) and Re-ULLCA. However, even as revised, this section does not
21 expressly extend the charging order remedy to transferees of a beneficial owner's beneficial
22 interest. *But see* subsection (e), which refers to "transferee". Note also that USTEA does not
23 define "transferee".
24

25 *Subsection (a)* – Addition necessary for harmonization and to avoid appearing to override
26 the rights of secured creditors. Query whether a charging order is available when the beneficial
27 interest is freely transferable.
28

29 *Subsection (b)* – Second sentence relocated from former subsection (c) for the sake of
30 harmonization.

1
2 *Subsection (c)(1)* – Consistent with Re-ULLCA, the revised language narrows the court’s
3 powers, to avoid a judgment creditor having standing to claim that the trust should make a
4 distribution.

5
6 *Subsection (d)* – The foreclosure remedy has been part of the Conference’s approach to
7 unincorporated business entities since 1914. *See* UPA § 28. Eliminating foreclosure:
8

- 9 • tips the balance inordinately away from the rights of legitimate creditors of beneficial
10 owners and in favor of those seeking primarily to “protect assets;”
11 • creates a major “dis-harmony” among the Conference business entity acts; and
12 • is all the more remarkable in a statute that, absent a contrary agreement, has free
13 transferability of ownership interests.
14

15 *Subsection (f)* – The phrase “a charging order issued under subsection (b)” is probably
16 superior to the Re-ULLCA formulation (“the charging order”).