

D R A F T

FOR DISCUSSION ONLY

# UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

~~For April 20-22, 2007 Drafting Committee Meeting~~

~~*With Prefatory Notes and Comments*~~

**FOR FALL 2007 MEETING**  
**CHANGES SINCE SALT LAKE CITY MEETING TRACKED**

**UNIFORM STATUTORY TRUST ENTITY ACT**

**WITH PREFATORY NOTE AND COMMENTS**

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ON UNIFORM STATE LAWS

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# UNIFORM STATUTORY TRUST ENTITY ACT

## Prefatory Note

**Introduction.** In large part because of uncertainty over the legal status of the business trust at common law, use of the common law trust as a mode of business organization declined over the course of the twentieth century. Today, most commercial enterprises that are not organized as a sole proprietorship make use of the partnership, limited liability company, or 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 also come to be used in various tax-advantaged real estate transactions. See, e.g., *Rev. Rul.* 2004-86, 2004-33 *IRB* 191.

A statutory trust differs from a common law trust in several important respects. A common law trust, whether its purpose is donative or commercial, arises from private action without the involvement of a public official. See *Uniform Trust Code* §401 (2000); *Restatement (Third) of Trusts* §10 (2003). Because a common law trust is not a juridical entity, it must sue, be sued, and transact over property in the name of the trustee in the trustee’s capacity as such. By contrast, a statutory trust is ~~created~~formed ~~by making a filing with~~by delivering a certificate of trust to a public official, typically the Secretary of State, for filing in the public record. See Section 201. Moreover, a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue, be sued, and transact over property in its own name. See Sections 301, ~~305~~307-08.

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

The primary stimulus for the drafting of the Uniform Statutory Trust Entity Act is the increasing popularity of statutory trust entities, chiefly in the structured finance and mutual fund

industries. Increasing use of statutory trusts as a mode of business organization has led to a recognition that in many states the status of such trusts is unclear and that much of the existing legislation is out of date or incomplete. Practitioners, entrepreneurs, and scholars struggle to understand the law governing statutory trusts. The case law on statutory trusts is surprisingly sparse.

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

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

In choosing to follow Delaware, the drafting committee relied on a recent study that presents state-level data on the aggregate number of statutory trusts formed in each state. See Sitkoff, *supra*, at \_\_\_\_\_. According to this study, and the number of new 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 over the last several years. See Sitkoff, *supra*, at \_\_\_\_\_. These data show indicate that the Delaware statutory trust has come also to dominate the Massachusetts business trust for Act dominates the organization of business trusts more generally field. *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(~~bc~~)); (2) exclusion of trusts with a prevailingly donative purpose (§302); (3) clearer guidance on the ~~relationship of~~ applicability of ordinary trust law to statutory trust entities (§105); (4) clearer guidance on the relationship between the common law trust and statutory trust entities (~~§804905~~); and (5) systematic treatment of conversion, and merger (Article 6), and of dissolution (Article 6-7).

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

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

There is, however, no separate body of general business law that rivals ordinary trust law for application to a common law trust that has a business purpose. The common law of trusts applies to all trusts ~~created arising~~ 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~~ with that have a business or commercial purpose to the extent that the ~~Code's provisions are not displaced by the~~ Code's provisions are not displaced by the trust instrument or other legislation do not displace the Code's provisions. UTC §102 cmt.

Accordingly, the Uniform Statutory Trust Entity Act is not a codification of general business law principles applicable to common law business trusts. Nothing in this Act displaces the common law of trusts, or the Uniform Trust Code, with respect to such trusts. On the contrary, Section ~~804905~~(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~~ 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 a~~ 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.

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

# 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). Moreover~~ 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~~ 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.

Second, the drafting committee endeavored to avoid any implication ~~that whether a~~ that whether a statutory trust would ~~necessarily~~ qualify as a “business trust” under the bankruptcy code. ~~[For~~

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

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

## **SECTION 102. DEFINITIONS.**

(1) "Beneficial owner" means the owner of a beneficial interest in a statutory trust or foreign statutory trust.

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

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

(4) “Designated office” means:

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

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

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

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

~~\_\_\_\_\_ (7) “Person” means an individual, corporation, statutory trust, foreign statutory trust, common law trust, estate, partnership, limited partnership, limited liability company, association, joint venture, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity. [For discussion: Style objects to our not using the boilerplate definition of “person.” Here is a tracked-changes version of this section edited to match the boilerplate: \_\_\_\_\_ (7) “Jurisdiction” means a state or a foreign country [For Discussion: Question from style about whether we do indeed mean to include “a foreign country.”].~~

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

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

(910) “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;~~

~~[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 \_\_\_\_\_ (F) a person that is directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.~~

~~(2) The term of, the 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 parts) 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).

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

Paragraphs (2), (6), and ~~(15)~~ (16) define “certificate of trust,” “governing instrument,” and “trust instrument” respectively. The certificate of trust is the record that must be filed with a public official under Section 201 to form a statutory trust. The trust instrument is the transaction document that provides for the governance of the affairs of the statutory trust and that need not



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

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

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

18  
19 ~~—— [Depending on how we resolve the discussion question in the comment to Section~~  
20 ~~101, commentary on 102(14) and the 2004 revenue ruling might go here.]~~

21  
22 Paragraph (1617) defines “trustee” as a person designated as such in accordance with the  
23 governing instrument or applicable law. For discussion of trustee appointment, see the Comment  
24 to Section 401.

### 25 26 27 **SECTION 103. DEFAULT AND MANDATORY RULES.**

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

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

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

34 (2) any provision relating to the rights, interests, duties, obligations, and powers  
35 of the trustees, beneficial owners, and other persons; and

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

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

2             (1) ~~the provisions of~~ [Articles] 2, 7, ~~and 8 and 9~~;

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

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

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

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

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

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

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

22            (9) the right of a beneficial owner to bring a derivative action under Section  
23 ~~508~~507, but the governing instrument may modify the terms of Section ~~508~~507 to subject the

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

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

6 ~~———— (11) the rules under Section 611 for dissolution of a statutory trust.~~

### 7 **Comment**

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

12  
13 ~~———— Paragraph (a)~~ **Default Rules.** Paragraphs (a) and (b) emphasizes that the Uniform  
14 Statutory Trust Entity Act is primarily a default statute. Most of the Act’s provisions may be  
15 overridden by the terms of the governing instrument.

16  
17 **Mandatory Rules.** Paragraph (b) ~~lists~~ schedules the provisions of this act that are not  
18 subject to override in the governing instrument of a statutory trust. Most concern the rights of  
19 nonparties or public filing and notice requirements. By contrast, with two exceptions all the  
20 provisions of this Act concerning the duties and powers of a trustee, relations among trustees,  
21 and the rights and interests of a beneficial owner may be overridden or at least altered by the  
22 terms of the governing instrument. The first exception is the mandatory prohibition of  
23 indemnification, advancement, or exoneration for conduct involving bad faith, willful  
24 misconduct, or reckless indifference in paragraph (b)(7). This exception is familiar trust law.  
25 See Restatement (Second) of Trusts §222 (1959); George G. Bogert & George T. Bogert, The  
26 Law of Trusts and Trustees §542 (rev. 2d ed. 1993); Uniform Trust Code §1008 (2000). See  
27 also John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1121-25  
28 (2004). ~~In 2006, the The Delaware Statutory Trust Act was revised in a similar vein. likewise~~  
29 limits the permissible scope of exoneration. See ~~2006 Delaware Laws Ch. 418 §7, revising~~  
30 ~~Delaware Statutory Trust Act §3806(e). As revised, §3806(e), which~~ provides that the  
31 “governing instrument may provide for the limitation or elimination of any and all liabilities for  
32 breach of contract and breach of duty (including fiduciary duties) of a trustee . . . ; provided, that  
33 the governing instrument may not eliminate the implied contractual covenant of good faith and  
34 fair dealing.” Limitations on permissible exoneration are also familiar corporate and alternative  
35 entity law. See, e.g., Delaware General Corporation Law §102(b)(7); Delaware Limited  
36 Liability Company Act §18-1101.

37  
38 ~~———— [This paragraph was moved up from later in this comment, but with tracking off so~~  
39 ~~that changes within the paragraph would be indicated.] There~~ The second exception is

1 | contained in paragraph (b)(5), which makes mandatory the invalidity under Section 405(b) of a  
2 | direction to a trustee or other person that is manifestly contrary to the terms of the governing  
3 | instrument or would constitute a serious breach of fiduciary duty. The reference to serious  
4 | breach of fiduciary duty is designed to exclude an inconsequential, immaterial, or technical  
5 | breach that does not harm a beneficial owner. For some purposes, trust law distinguishes  
6 | between serious and not serious breaches of trust. See, e.g., Uniform Trust Code §706(b)(1)  
7 | (2000); Austin W. Scott, William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts  
8 | §11.10, p. 661 (5th ed. 2006); Restatement (Second) of Trusts §107 cmt. b (1959). However, the  
9 | effect of paragraph (b)(5) is limited by paragraph (b)(4), which allows the trustee's fiduciary  
10 | duty to be altered by the governing instrument if the alteration is not manifestly unreasonable.

11 |  
12 | Paragraphs (b)(4), (b)(6), (b)(8), and (b)(9) allow the governing instrument to alter  
13 | the nature of the trustee's fiduciary obligation, the right of a trustee to information, the right of a  
14 | beneficial owner to information, and the right of a beneficial owner to bring a derivative action,  
15 | but only if the alteration is not "manifestly unreasonable." In opting for a the "manifestly  
16 | unreasonable" standard instead of Delaware's "good faith and fair dealing" formulation, see  
17 | ~~2006 Delaware Laws Ch. 418 §5, revising Delaware Statutory Trust Act §3806(c) and (e), the~~  
18 | drafting committee took notice of the use of the term "manifestly unreasonable" in Revised  
19 | Uniform Limited Liability Company Act §110(d) (2006); Uniform Limited Partnership Act  
20 | §110(b) (2001), Revised Uniform Partnership Act §103(b) (1997), Uniform Limited Liability  
21 | Company Act §103(b) (1996), and intended a similar meaning here. See ~~generally also~~ Mark J.  
22 | Loewenstein, Fiduciary Duties and Unincorporated Business Entities: In Defense of the  
23 | "Manifestly Unreasonable" Standard, ~~41~~ Tulsa L. Rev. ~~411~~ (2006). ~~The term is also used~~  
24 | ~~variously in Uniform Commercial Code §§1-201(28); 1-302(b); 2A-103(u); 4-103(a); 8-~~  
25 | ~~402(e)(1); 8-403(e); 9-603(a).~~

26 |  
27 | ~~[This paragraph has been moved up.]~~ — Because paragraph (c) refers specifically to  
28 | other sections of the Act, enacting jurisdictions that modify those other sections may also need to  
29 | modify paragraph (c).

30 |  
31 | **Relationship to Mandatory Rules Under the Uniform Trust Code.** Under Section  
32 | 105 of this act, the law pertaining to common law trusts supplements this act to the extent that  
33 | such law is not displaced by this act or the governing instrument. Hence, in an enacting  
34 | jurisdiction that has also enacted the Uniform Trust Code (UTC), the UTC will apply to a  
35 | statutory trust to the extent that the Code's provisions are not displaced by this act or the  
36 | governing instrument. However, because paragraph (c) of this section does not make Section 105  
37 | of this act mandatory, the rules stated in UTC §105 that are mandatory with respect to a common  
38 | law trust are not mandatory with respect to a statutory trust. The governing instrument of a  
39 | statutory trust may override or alter any rule other than those scheduled in §103(c) of this act.

40 |  
41 | To prevent evasion of the UTC's mandatory rules, which enforce public policy  
42 | limitations on donative transfers, Section 302 of this Act provides that a statutory trust may not  
43 | have "a prevailingly donative purpose." For further discussion of the relationship between this  
44 | Act, the common law, and the Uniform Trust Code, see the Prefatory Note to this Act under the  
45 | heading "Relationship to Common Law Trusts and the Uniform Trust Code" and the comments  
46 | to Sections 105 and 302.

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

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

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

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

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

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

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

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

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

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

~~———— [The series provisions have been moved to Section 306.]~~

~~———— (3) (3) provide for one or more series under [To be updated after series provisions are set];~~

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

~~(A) notice of the time, place, or purpose of any meeting at which any~~

1 matter is to be voted on;

2 (B) waiver of notice;

3 (C) action by consent without a meeting;

4 (D) establishment of record dates, quorum requirements, or voting in

5 person, by proxy, ~~recorded transmission~~ any form of communication that creates a record,

6 telephone, or video conference, or in any other manner; or

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

8 (45) provide for any action to be taken without the vote or approval of any

9 particular trustee or beneficial owner, or any class, group, or series of trustees or beneficial

10 owners, including:

11 (A) amendment of the governing instrument;

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

13 (C) appointment of one or more trustees;

14 (D) sale, lease, exchange, transfer, pledge or other disposition of all or any

15 part of the assets of the statutory trust or the assets of any series; [To be updated after series

16 provisions are set]; and

17 (E) dissolution of the statutory trust. ~~[For discussion: This provision is~~

18 ~~in tension with Section 103(b)(11), which makes Section 612 mandatory.];~~

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

20 ~~\_\_\_\_\_ (5) \_\_\_\_\_ (6) provide for the present or future creation of more than one~~

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

22 assets, liabilities, profits, or losses of any existing statutory trust may be transferred or

23 exchanged, and for the conversion of beneficial interests in an existing statutory trust, or series

1 | thereof [To be updated after series provisions are set], into beneficial interests in the separate  
2 | statutory trust, or series thereof [To be updated after series provisions are set];

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

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

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

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

20 |           (1011) provide that a person may comply under paragraph (910) by a  
21 | representative authorized by the person orally, in a record, or by conduct, ~~such as payment by the~~  
22 | ~~representative for a beneficial interest~~ **[For discussion: “by” the representative versus “to”**  
23 | **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 306(a), 309 **To be updated after series provisions are set**, and the permissive rules regarding the allowable remedies for a beneficial owner's breach in Section 501(c).

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

—— Paragraph (b) enumerates 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. Prior in addition to statutory confirmation, doubts sometimes arose in opinion letters the broad statement of freedom of contract in Sections 103(a)-(b) and 106. Statutory confirmation reduces transaction costs by resolving doubts in practice over the permissibility of such provisions. Similar reasoning underlies the provision of a detailed schedule of powers in Uniform Trust Code §816 (2000) ~~notwithstanding the~~ in addition to the



1 broad general statement in Uniform Trust Code §815.

2  
3  
4 **SECTION 105. APPLICABILITY OF TRUST LAW.** The law of this state pertaining  
5 to common-law trusts supplements this [act], except to the extent modified or displaced by this  
6 [act] or, subject only to section 103(c), the governing instrument. **[For Discussion: (1)**  
7 **Whether this edit is sufficient to address the question from the floor about the**  
8 **nonapplicability of the UTC/common law mandatory rules. (2) Question from the floor**  
9 **about “supplements.”]**

10 **Comment**

11  
12 **Principal Sources** – Uniform Trust Code §106 (2000); Delaware Statutory Trust Act  
13 §3809; Connecticut Statutory Trust Act §34-519.

14  
15 Consistent with the Delaware Statutory Trust Act, the Uniform Statutory Trust Entity Act  
16 provides that state trust law, not corporate law, supplements this Act and the terms of the  
17 governing instrument. Thus, in an enacting jurisdiction that has also enacted the Uniform Trust  
18 Code, the Code will apply to a statutory trust to the extent that the Code’s provisions—including  
19 the mandatory rules scheduled in UTC §105—are not displaced by this act or the governing  
20 instrument. ~~However, because this Act’s schedule of mandatory rules in Section 103 does not~~  
21 ~~include this Section, the rules scheduled in Uniform Trust Code §105 that are mandatory with~~  
22 ~~respect to a common law trust are not mandatory with respect to a statutory trust. [For~~  
23 ~~discussion: This statement warrants discussion.] To prevent evasion of the mandatory rules~~  
24 ~~in the Uniform Trust Code, which enforce public policy limitations on donative transfers,~~  
25 ~~Section 302 of this Act provides that a statutory trust may not have “a prevailingly donative~~  
26 ~~purpose.” Under this act, the governing instrument of a statutory trust may override any~~  
27 ~~otherwise applicable rule except for those scheduled in §103(c).~~ For further discussion of the  
28 ~~relationship between this Act and the common law and the Uniform Trust Code, see the~~  
29 ~~Prefatory Note to this Act comment to Section 103 under the heading “Relationship to Common~~  
30 ~~Law Trusts and Mandatory Rules Under the Uniform Trust Code.”~~

31  
32 In looking to trust law to supply defaults to fill gaps in this act and the governing  
33 instrument, the drafting committee was strongly influenced by the revealed preference for trust  
34 law among existing users of statutory trusts as evidenced by the popularity of the Delaware Act  
35 as compared to the business trust acts (such as those in Arizona, Indiana, Kansas, Mississippi,  
36 Montana, Oregon, Tennessee, Washington, and West Virginia) that look to corporate law. See  
37 Robert H. Sitkoff, The Rise of the Statutory Business Trust [in progress].

38  
39 **[For Discussion: We received a suggestion from the floor to the effect that in this**

comment or elsewhere we should schedule important trust law rules that are absorbed by this section—for example, election of remedies. An alternative suggestion was that we draft explicitly on some of those issues, particularly election of remedies and release of liability for trustees. Election of remedies may indeed warrant a section, as it is complicated by the entitization of the trust. Routine breaches of trust by the trustee will likely cause damage to the trust rather than to an individual beneficiary, hence a suit for redress would be derivative. But a derivative suit is a procedural mechanism unknown in the common law of trusts, and the derivative nature of the suit bears on the available remedies.]

## SECTION 106. RULES OF CONSTRUCTION.

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

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

### Comment

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

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

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

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

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

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

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

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

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

#### Comment

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

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

A statutory trust comes into existence only if (1) a certificate of trust is prepared and delivered to the specified public official for filing, and (2) the public official files the certificate. (For more on the meaning of “filing,” see Section ~~205~~204 and the comment thereto.) The certificate of trust provides notice to interested third parties of the existence of the statutory trust and the identification of the statutory trust’s initial agent for service of process. Pursuant to Section ~~304(d)~~309(b)(2), the certificate of trust also puts third parties on notice if the statutory trust further segregates its assets and liabilities by creating one or more series [To be updated after series provisions are set].

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

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

## **SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF TRUST.**

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

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

(1) the name of the ~~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. **[For Discussion: That the obligation is on the trustee, not the trust.]**

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

1  
2 ~~SECTION 203. STATEMENT OF CANCELLATION.~~

3 ~~(a) A terminated statutory trust that has completed winding up shall deliver to the~~  
4 ~~[Secretary of State] for filing a statement of cancellation that states:~~

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

6 ~~(2) the date of filing of its initial certificate of trust;~~

7 ~~(3) that the statutory trust has completed winding up; and~~

8 ~~(4) any other information as determined by the trustees filing the statement.~~

9 ~~(b) Subject to Section 205(c), a statement of cancellation is effective when filed by the~~  
10 ~~[Secretary of State]. [This paragraph was moved to Section 611.]~~

11 **Comment**

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

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

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

21  
22 **SECTION 204~~203~~. SIGNING OF RECORDS.**

23 ~~(a) A record delivered to the [Secretary of State] for filing pursuant to this [act] must be~~  
24 ~~signed by at least one of the trustees. [For discussion: Style says that “This is redundant of~~  
25 ~~the law of agency.”]~~

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

27 **Comment**

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

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

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

5  
6             **SECTION ~~205.204.~~ DELIVERY TO AND FILING OF RECORDS BY**  
7 **[SECRETARY OF STATE]; EFFECTIVE TIME AND DATE.**

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

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

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

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

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

25                   (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  
23 note on a filed record the fact, date, and time of filing. Copies provided by the filing officer  
24 under paragraph (a) should contain that notation. This Act does not provide a remedy if the  
25 filing 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

38 | Under Section 103(b)(1), this Section is not subject to override by the governing  
39 instrument.



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

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

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

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

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

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

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

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

### Comment

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

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

Under paragraph (c), a statement of correction “relates back” by way of retroactive

1 application except against persons that have relied on the uncorrected record and would be  
2 adversely affected if the correction related back.

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

6  
7 **SECTION ~~207.206.~~ CERTIFICATE OF EXISTENCE OR REGISTRATION.**

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

12 (1) the name of the ~~statutory~~-trust;

13 (2) that the ~~statutory~~-trust was formed under the laws of this state and the date of  
14 formation;

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

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

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

21 (b) ~~The [Secretary of State], upon request and payment of the requisite fee, shall furnish a~~  
22 ~~certificate of registration for a foreign statutory trust if the records filed in the [office of the~~  
23 ~~Secretary of State] show that the [Secretary of State] has filed a certificate of authority, has not~~  
24 ~~revoked the certificate of authority, and has not filed a notice of cancellation. A certificate of~~  
25 ~~registration must state: [For Discussion: Because Style believes that (b) and part of (c)~~  
26 ~~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) 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 [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(b) provides a mechanism for obtaining a certified copy of a certificate of trust even if the trust has been terminated.~~

~~\_\_\_\_\_ A certificate of registration furnished under paragraph (b) is different than a certificate of authority under Section 705.~~

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

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

4 **SECTION 208. ADMINISTRATIVE DISSOLUTION.**

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

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

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

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

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

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

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

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

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

23 ~~—— (d) If a statutory trust cures the failures stated in the notice of cancellation under~~  
24 ~~subsection (c), the [Secretary of State] shall indicate that the statutory trust is reinstated on the~~

1 | filed notice. The reinstatement of the statutory trust relates back for all purposes to the date of  
2 | the notice of cancellation. ~~[For discussion: (1) Rutledge’s letter to Sitkoff of April 2, 2007~~  
3 | ~~regarding administrative dissolution, and (2) ReULLCA §§705-707. Both were circulated~~  
4 | ~~with this draft.]~~

5 | **Comment**

6 |  
7 | ~~—— Principal Source —~~ Uniform Limited Partnership Act §906 (2001).  
8 |

9 | ~~—— Under Section 103(b)(1), this Section is not subject to override by the governing~~  
10 | ~~instrument.~~  
11 |

12 | ~~—— SECTION 209.207. NAME OF STATUTORY TRUST.~~

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

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

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

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

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

26 | (1) the present user, registrant, or owner of the conflicting name consents in a

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

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

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

(A) has merged ~~into~~with the applicant;

(B) has been converted into the applicant; or

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

(d) Subject to Section ~~706~~807, this section applies to any foreign statutory trust transacting business in this state, having a certificate of ~~authority~~qualification to transact business in this state, or applying for a certificate of ~~authority~~qualification.

### Comment

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

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

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

5 | **SECTION ~~210,208.~~ RESERVATION OF NAME.**

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

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

10 (2) a statutory trust or a qualified foreign statutory trust intending to adopt the  
11 name;

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

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

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

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

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

25 (c) An applicant that has reserved a name pursuant to subsection (b) may reserve the

1 same name for additional 120-day periods. A person having a current reservation for a name  
2 may not apply for another 120-day period for the same name until 90 days have elapsed ~~in~~under  
3 the current reservation.

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

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

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

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

#### 12 **Comment**

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

14  
15 Under Section 103(~~b~~c)(1), this Section is not subject to override by the governing  
16 instrument.  
17

#### 18 **SECTION ~~211~~209. AGENT FOR SERVICE OF PROCESS.**

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

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

#### 24 **Comment**

25  
26 **Principal Sources** – Uniform Limited Partnership Act §114 (2001); Delaware Statutory  
27 Trust Act §3804; Connecticut Statutory Trust Act §34-507.



1  
2 Under Section 201(a)(3), the initial designation of a statutory trust's agent for service of  
3 process is made in the original certificate of trust. Under Section ~~702802~~(a)(3), the initial  
4 designation of a foreign statutory trust's agent for service of process is made in the original  
5 application for a certificate of ~~authority~~qualification. The initial designation may be changed  
6 pursuant to a statement of change under Section ~~213210~~, by an amendment to the certificate of  
7 trust under Section 202, or by an annual report under Section ~~215213~~(e) ~~if the jurisdiction has~~  
8 ~~adopted Section 215~~). **[Placeholder: Cross-reference to article 7?]**

9  
10 Under Section 103(~~b~~c)(1), this Section is not subject to override by the governing  
11 instrument.  
12

13 **SECTION ~~212.210~~. CHANGE OF DESIGNATED OFFICE OR AGENT FOR**  
14 **SERVICE OF PROCESS.**

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

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

27 (b) A statement of change is effective as provided in Section ~~205204~~(c).

28 **Comment**

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

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~~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~~213(e) ~~if the jurisdiction has enacted Section 215~~.

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

### **SECTION ~~213.211~~ 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(a), the statutory trust or qualified foreign statutory trust must designate a new

1 agent for service of process before the effective date. If the statutory trust or foreign statutory  
2 trust fails to do so, under Section ~~214.212~~ service on the statutory trust or foreign statutory trust  
3 may be made on the [Secretary of State].  
4

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

## 8 **SECTION ~~214.212~~ SERVICE OF PROCESS.**

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

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

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

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

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

26 (2) the date shown on the return receipt, if signed on behalf of the ~~statutory~~ trust

1 | ~~or qualified foreign statutory trust; or~~

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

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

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

9 | **Comment**

10 |  
11 | **Principal Source** – Uniform Limited Partnership Act §117 (2001).

12 |  
13 | Paragraph (f) confirms that the authority of the Secretary of State to accept process under  
14 | a state long-arm statute exists independently of paragraphs (b) through (e) of this Section.

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

18 |  
19 | **{SECTION 215-213. ANNUAL REPORT FOR [SECRETARY OF STATE].**

20 | ~~{NOTE: This Section, which was 211 in the prior draft, has been moved here and bracketed per~~  
21 | ~~our last drafting session. The move was made without the tracking on, so that changes within~~  
22 | ~~the section since last time would be indicated.}~~

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

26 | (1) in the case of a statutory trust:

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

28 | (B) the name and street and mailing addresses of its agent for service of

process; or

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

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

(B) the name of the state or other jurisdiction under whose law the  
~~qualified foreign statutory~~ trust is formed; and

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

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

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

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

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

(d) If an annual report does not contain the information required in subsection (a), the  
[Secretary of State] shall promptly notify the reporting ~~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

1 name or address of an agent for service of process which differs from the information shown in  
2 the records of the [Secretary of State] immediately before the filing, the differing information in  
3 the annual report is considered a statement of change under Section ~~212.~~210.

4 **Comment**

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

6  
7 ~~\_\_\_\_\_ This \_\_\_\_\_ A statutory trust that fails to comply with this section is subject to administrative~~  
8 ~~dissolution. See Section is in brackets in recognition of the diversity of practice among the states~~  
9 ~~regarding annual reports. Uniformity is not expected. If adopted, under 701.~~

10  
11 ~~\_\_\_\_\_ Under Section 103(b)(1), this Section would~~is ~~not be~~ subject to override by the  
12 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~~Under this Section provides that, a statutory trust may be formed for “any lawful  
25 purpose except for a prevailingly donative purpose.” Thus, in addition to use in a commercial  
26 transaction, a statutory trust may be used in a custodial or other context that ~~need~~might not be for  
27 profit. See Section 307. The limitation to “lawful” activity addresses the concern that some  
28 states limit the type of organizations that may be used in regulated industries such as banking  
29 and insurance.  
30

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

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

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

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

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

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

37  
38 The drafting committee declined the suggestion to exclude statutory trusts from having a  
39 charitable purpose on the ground that a statutory trust with a charitable purpose would be  
40 covered by existing regulatory law applicable to charitable entities. See ~~generally~~ Marion R.  
41 Fremont-Smith, Governing Nonprofit Organizations: Federal and State Law and Regulation 187-  
42 427 (2004).

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



**OBLIGATIONS, AND LIABILITIES OF STATUTORY TRUST.** A debt, obligation, or

**[For Discussion: This section implements Rutledge’s suggestion, approved at the Salt Lake City meeting, to combine the disparate limited liability and asset partitioning rules from articles 3 and 4 into this and the following section here in article 3. Although we read this and the following section at the summer meeting, they have not yet been vetted in a drafting session.]**

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

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

43

Inhabitants of Milton, 102 N.E. 355 (Mass. 1913), and Restatement (Second) of Agency §14B (1958), is not applicable to a statutory trust. Under the control test, if a beneficial owner of a common law business trust had a say in the administration of the trust or the right to remove and replace the trustees, the beneficial owner might be held liable for the debts of the trust. By contrast, under this section a beneficial owner may participate in the management of the statutory trust without exposure to liability for the debts of the statutory trust. For discussion of a beneficial owner's limited liability under the Delaware Statutory Trust Act, see Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations §19.3 (3d ed. 2005 Supp.).

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

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

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

### **Comment**

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

Paragraph (b) implements the concept that a statutory trust is an entity separate from its trustee and beneficial owners by confirming that a creditor of a trustee or a beneficial owner has no recourse against the property of the statutory trust. With respect to trustees, the rule of this paragraph is familiar from the operation of common law trusts. See Uniform Trust Code §507 (2000); Restatement (Third) of Trusts §42 cmt. c (2003); Restatement (Second) of Trusts §308 (1959). The protection afforded by this section is also consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. See 11 U.S.C. §541(d). With respect to beneficial owners, for discussion of the parallel provision in the Delaware Statutory Trust Act, see Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations §19.4, at 19-9 – 19-10 (3d ed. 2005

1 | Supp.). For a general discussion of asset partitioning rules in organizational law, see Henry  
2 | Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 Yale L.J. 387  
3 | (2000); Henry Hansmann & Ugo Mattei, The Functions of Trust Law: A Comparative Legal and  
4 | Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998). See also Henry Hansmann, Reinier  
5 | Kraakman, & Richard Squire, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333 (2006).  
6 |

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

8 | (1) the internal affairs of a statutory trust;

9 | (2) the liability of a beneficial owner as beneficial owner and a trustee as trustee for ~~the~~  
10 | ~~debts, obligations~~ a debt, obligation, or other ~~liabilities~~ liability of a statutory trust; and

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

13 | **Comment**

14 |  
15 | **Principal Sources** – Connecticut Statutory Trust Act §34-502; Uniform Limited  
16 | Partnership Act §106 (2001); Revised Uniform Limited Liability Company Act §106 (2006).  
17 |

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

26 | Paragraph (2) supports Sections ~~413303~~ and ~~506304~~ by confirming that the liability of a  
27 | beneficial owner or a trustee for the debts, obligations, or other liabilities of the statutory trust is  
28 | governed by the law of this state. This paragraph is stated separately from Paragraph (1) because  
29 | the ~~liabilities~~ liability of a beneficial owner or trustee to third parties is arguably not an internal  
30 | affair. See, e.g., Restatement (Second) of Conflict of Laws §307 (1971) (treating shareholders’  
31 | liability separately from the internal affairs doctrine).  
32 |

33 | Section ~~704~~ 801(a) states rules for qualified foreign statutory trusts that parallel and are  
34 | analogous in scope to those of this section.  
35 |

36 | Under Section 103(~~b~~)(3), this Section is not subject to override by the governing  
37 | instrument.  
38 |

**SECTION ~~304.304.~~306. DURATION.**

(a) A statutory trust has perpetual existence.

(b) A statutory trust, or any series thereof **[To be updated after series provisions are set]**, may not be terminated or revoked by a beneficial owner or other person except in accordance with this [act] or the terms of the governing instrument of the statutory trust.

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

**[To be updated after series provisions are set].**

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

### Comment

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

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

Paragraph (b) confirms that a statutory trust may only be terminated in accordance with the terms of this Act or the governing instrument. Thus, paragraph (b) overrides the rules of common law of trust termination that would otherwise be applicable to a statutory trust pursuant to Section 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 because a statutory trust under this Act may not have a prevailingly donative purpose. Instead, the drafting committee contemplated that pursuant to Section 104(b)(89)

1 the governing instrument would provide for termination of the statutory trust or modification of the  
2 governing instrument if such provisions are desirable.

3  
4 Paragraph (c) confirms that the rule of partnership law under which a partnership is  
5 dissolved upon the death or incapacity of one of the partners does not apply to a statutory trust or  
6 any series thereof [To be updated after series provisions are set].

7  
8 ~~—— [For discussion, whether~~ Paragraph (d) overrides the application to ~~override a~~  
9 ~~statutory trust under Section 105 of the common law rule of merger doctrine. See, e.g.,~~  
10 ~~Restatement (Third) of Trusts §69, which says “If~~ whereby the legal and equitable title to the  
11 trust property ~~merge and the entire beneficial interest become untied in one person,~~ the trust  
12 ~~terminates.”]~~ if the same person is the sole trustee and sole beneficiary. See Restatement (Third)  
13 of Trusts §69 (2003); Restatement (Second) of Trusts §341 (1959); Comment, The Doctrine of  
14 Merger as Applied to Commercial Trusts, 29 Yale L.J. 97 (1919).  
15

16 **SECTION 305.307. POWER TO SUE AND BE SUED; TITLE TO TRUST**  
17 **PROPERTY.**

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

19 (b) Except as otherwise provided in Section 306[article] 3A [To be updated after the  
20 series provisions are set], the property of a statutory trust is subject to attachment and execution  
21 as if it were ~~for~~ a domestic ~~[“business”?] corporation.~~

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

26 **Comment**

27  
28 **Principal Sources** – Delaware Statutory Trust Act §§3803-3805; Connecticut Statutory  
29 Trust Act §§34-518, 34-523; Uniform Limited Partnership Act §303 (2001).  
30

31 Paragraph (a) implements the concept that a statutory trust is an entity separate juridical  
32 entity from the trustee and beneficial owner by confirming that a statutory trust has the power to  
33 sue and be sued in its own name.  
34

35 Paragraph (b) addresses the attachment and execution of a statutory trust’s property by

1 ~~absorbing the rules applicable~~subject to a domestic corporation in like circumstances.

2  
3 ~~Paragraph (c) gives the trustee the option of holding property of the possibility that the~~  
4 ~~statutory trust~~ has formed one or more series under Section 309[To be updated after series  
5 provisions are set].  
6

## 7 **SECTION 308. POWER TO HOLD PROPERTY; TITLE TO TRUST**

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

### 11 **Comment**

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

14  
15 This Section implements the concept that a statutory trust is an entity separate from its  
16 trustee and beneficial owners by confirming that a statutory trust may transact over property in  
17 its own name. The property of a common law trust, by contrast, must be held in the name of the  
18 trustee as such.  
19

20 However, this section also permits the statutory trust to take title to property in the name  
21 of the trustee in the trustee's capacity as such even though the statutory trust is a juridical  
22 entityan entity separate from the trustee and beneficial owner that can hold property in its  
23 ownthe name of the trust. The drafting committee reasoned that this provision would be useful  
24 for a statutory trust that has dealings in a state that has not provided for a statutory trust entity  
25 ~~because property.~~ Property ownership by a trustee in the trustee's capacity as such is familiar  
26 from the use of common law trusts. ~~Indeed, because a common law trust is not an entity separate~~  
27 ~~from its trustee, property held in a common law trust must be held by the trustee in its capacity~~  
28 ~~as such.~~ To police the boundary of the trustee's personal assets and the assets of the trust, the  
29 common law imposes on the trustee duties to earmark trust property and not to commingle it  
30 with the trustee's own. See Uniform Trust Code §810 (2000); Restatement (Third) of Trusts §84  
31 ~~(T.D. No. 4, 2005)~~2007); Restatement (Second) of Trusts §179 (1959). The drafting committee  
32 contemplated that under appropriate circumstances Section 404(b) would be read to require  
33 similar conduct by a trustee of a statutory trust that takes title to property of the statutory trust in  
34 the name of the trustee in the trustee's capacity as such.

1 [Article] 3A

2 SERIES TRUSTS

3  
4  
5  
6 INITIAL ISSUES FOR DISCUSSION

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

21  
22 TENTATIVE OUTLINE OF SECTIONS WITH SUGGESTED CONTENT  
23

24 **SECTION ~~306~~301A. SERIES OF STATUTORY TRUST.**

25 (a) The governing instrument may: ~~[The subsections to this section were moved from~~  
26 **Section 104.]**

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

33 (2) provide for designated series of trustees, beneficial owners, or beneficial  
34 interests having separate rights, powers, or duties with respect to ~~[For discussion: This change~~  
35 **came from style on the ground that the original was “unnecessary repetition.”]** profits and

1 losses associated with specified property or obligations, and permit the series to have a separate  
2 business purpose or investment objective; and

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

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

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

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

20 ~~————(c) If a statutory trust is a registered investment company under the Investment Company~~  
21 ~~Act of 1940, as amended, 15 U.S.C. Section 80a-1 et seq., any class, group, or series of~~  
22 ~~beneficial interests established by the governing instrument of the statutory trust is a class,~~  
23 ~~group, or series preferred as to distribution of assets or payment of dividends over all other~~



1 | ~~classes, groups, or series in respect to assets specifically allocated to the class, group, or series~~  
2 | ~~under Section 18, or any amendment or successor provision, of the Investment Company Act of~~  
3 | ~~1940[, 15 U.S.C. Section 80a-18], as amended, and any regulations issued thereunder.~~

#### 4 | **Comment**

5 |  
6 | **Principal Sources** – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust  
7 | Act §34-518.

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

20 |  
21 | ~~Paragraph (b)~~

#### 22 | **SECTION 302A. SERIES NOT SEPARATE ENTITY.**

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

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

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

### 7 Comment

#### 8 Principal Source –

9  
10  
11 [Assuming a series is not a separate entity, the next question is whether to make this  
12 section mandatory. Allowing a separate entity series—that is, making this section  
13 default—would require considerable additional statutory infrastructure.]  
14

#### 15 SECTION 303A. NAME OF SERIES.

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

### 22 Comment

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

#### 24 [Commentary here.]

#### 25 SECTION 304A. APPORTIONMENT AMONG SERIES.

26  
27  
28  
29 [(a) Default rule to the effect that each series is charged fully for the expenses (including  
30 taxes?) traceable to each series.]

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

3 **Comment**

4 **Principal Source =**  
5 **[Commentary here.]**  
6  
7  
8

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

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

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

26 \_\_\_\_\_ (2) notice of the limitation on liabilities of a series is set forth in the certificate of

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

5 **Comment**

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

9  
10 This section provides that if a statutory trust ~~that has created~~creates separate series under  
11 ~~paragraph (a)~~Section 301A, the debts, liabilities, and other obligations of a particular series are  
12 enforceable against the assets of that series only, but only if (1) separate records are maintained  
13 for each series and (2) notice of the limitation on liabilities of a series is set forth in the  
14 certificate of trust. Under Section 201 the certificate of trust is made part of the public record  
15 and must indicate whether the statutory trust might create one or more series.

16  
17 ~~Paragraph (c) [Assistance on this portion of the comment is invited, particularly from~~  
18 ~~Bibb and Victor.]~~ **SECTION 306A. [CAPTION] [For Discussion: What would be an**  
19 **appropriate caption?].**

20  
21 ~~Section 612 provides for the dissolution of a series.~~

22  
23 ~~**SECTION 307. POWER TO HOLD PROPERTY.** A statutory trust has the power to~~  
24 ~~hold or take title to property its own name whether in an active, passive, or custodial capacity.~~

25 **Comment**

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

28  
29 ~~This Section implements the concept that a statutory trust is an entity separate from its~~  
30 ~~trustee and beneficial owners by confirming that a statutory trust may transact over property in~~  
31 ~~its own name. The property of a common law trust, by contrast, must be held in the name of the~~  
32 ~~trustee as such. See also Section 408.~~

33 If a statutory trust is a registered investment company under the Investment Company

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

### 8 **Comment**

9  
10 **Principal Sources** – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust  
11 Act §34-518.

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

### 22 23 **SECTION 307A. DISSOLUTION OF SERIES.**

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

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

30 (1) The dissolution, winding up, liquidation, or termination of any series does not

1 affect the limitation of liability with respect to a series established in accordance with Section  
2 304(d)[requires updating].

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

6 (3) Upon dissolution of a series of a statutory trust, the persons that under the  
7 governing instrument of the statutory trust are responsible for winding up the series's affairs, in  
8 the name of the statutory trust and for and on behalf of the statutory trust and the series, may take  
9 all actions with respect to the series as are permitted under Section 604(a)[now ]Article] 7] and  
10 shall provide for the claims and obligations of the series and distribute the assets of the series as  
11 provided Section 604(b) [now ]Article] 7].

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

#### 16 Comment

17 Principal Source – Delaware Statutory Trust Act §3808.

18 [Commentary here.]  
19  
20

#### 21 SECTION 308A. FOREIGN SERIES TRUSTS.

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

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

If a foreign limited liability company, as permitted in the jurisdiction of its organization, has established a series having separate rights, powers or duties and has limited the liabilities of such series so that the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series are enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof, or so that the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof are not enforceable against the assets of such series, then the limited liability company, on behalf of itself or any of its series, or any of its series on their own behalf may register to do business in the State in accordance with Section 45-5 of this Act. The limitation of liability shall be so stated on the application for admission as a foreign limited liability company and a certificate of designation shall be filed for each series being registered to do business in the State by the limited liability company. Unless otherwise provided in the operating agreement, the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series of such a foreign limited liability company shall be enforceable against the assets of such series only, and not against the assets of the foreign limited liability company generally or any other series thereof and none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to such a foreign limited liability company generally or any other series thereof shall be enforceable against the assets of such series.]

**Comment**

**Principal Source – ???.**

**[Commentary here.]**

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

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

1  
2  
3  
4

**Comment**

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



1 [ARTICLE 4]

2 TRUSTEES AND TRUST MANAGEMENT

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

6  
7 **SECTION 401. MANAGEMENT OF STATUTORY TRUST.** The business and  
8 affairs of a statutory trust must be managed by or under the authority of its trustees.

9 **Comment**

10 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust  
11 Act §34-517; Uniform Trust Code §815 (2000); Uniform Limited Partnership Act §105 (2001);  
12 Delaware General Corporation Law §141; Revised Model Business Corporation Act §8.01  
13 (2002).

14  
15 Section 102(4617) defines trustee as a person designated as such in accordance with the  
16 governing instrument or applicable law. Section 104(b)(45)(C) confirms that the governing  
17 instrument may provide for trustee appointment. However, because no provision in this Act  
18 provides default rules for trustee appointment, if the governing instrument does not provide for  
19 trustee appointment, then under Section 105 the applicable law is the state's law pertaining to  
20 trustee appointment in common law trusts. For treatment of the default rules of trustee  
21 appointment, removal, and succession in common law trusts, see Restatement (Third) of Trusts  
22 §§31-37 (2003); Uniform Trust Code §§701-02, 704-06 (2000); Restatement (Second) of Trusts  
23 §§101, 106-08 (1959).  
24

25 **SECTION 402. TRUSTEE POWERS.**

26 ~~\_\_\_\_\_ (a)~~ A trustee may exercise:

27 ~~\_\_\_\_\_ (1)~~ powers conferred by the governing instrument;

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

30 ~~\_\_\_\_\_ (3)~~ any other powers conferred by this [act].

31 ~~\_\_\_\_\_ (b)~~ The trustee's exercise of a power is subject to the fiduciary duties prescribed  
32 by Section 404 ~~[An alternative: this [article]].~~

## 1

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## 3

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8

1 ———(e) 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 who~~ beneficial owner, that in good faith assists a  
4 former trustee as if the former trustee were still trustee, or ~~who~~ that in good faith and for value  
5 deals 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~~  
8 ~~transactions or transfer of securities by fiduciaries prevail over the protection provided by~~  
9 ~~this section.]~~

## 10 Comment

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

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

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

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

30  
31 ———~~Subsection~~ Paragraph (b) confirms that a third party ~~who~~ that is acting in good faith is  
32 not charged with a duty to inquire into the extent of a trustee’s powers or the propriety of ~~their~~ its  
33 exercise. The third party may assume that the trustee has the necessary power. ~~Consequently,~~  
34 ~~there is no need to request or examine a copy of the~~ Paragraph (b) therefore overrides the  
35 application to a statutory trust instrument. ~~A third party who wishes assurance that the trustee~~  
36 ~~has the necessary authority instead should request a certification of trust as provided in Section~~

1013. Subsection (b), and the comparable provisions enacted in numerous States, are intended to negate the under Section 105 of the common law rule, followed by some courts, 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 4 Austin W. Scott & William F. Fratcher, The Law of Trusts Section §297 (4th ed. 1989).

—— Subsection Paragraph (c) protects any person, including a beneficiary, who beneficial owner, that in good faith delivers property to a trustee. The standard of protection in the Restatement is phrased differently although the result is similar. Under Restatement (Second) of Trusts Section §321 (1959) is phrased differently, but the result is similar. Under the Restatement (Second) of Trusts, 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.] [For Discussion: Whether to indicate that “good faith” in this section is a trust law term of art, and that in interpretation we contemplated resort to trust law precedent (including the UTC section from which this section derives). Contrast the next section, which uses “good faith” in a corporate formulation, and for that reason should probably be interpreted in view of corporate precedents.]

#### 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 similar position~~ similarly situated would reasonably believe appropriate under similar circumstances.

1 **Comment**

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

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

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

20  
21 The drafting committee opted to model the trustee’s duties on the corporate fiduciary  
22 obligation as stated in Revised Model Business Corporation Act §8.30 (2002) rather than the  
23 more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a  
24 mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the  
25 context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of  
26 commercial actors. For a statement of the duties of loyalty and prudence in trust law, see  
27 Restatement (Third) of Trusts §§77-78 (T.D. No. 4, 2005~~2007~~). For a comparison, see Robert H.  
28 Sitkoff, Trust Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82  
29 (2003). See also the sources cited in the Comment to Section 408.

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

- 35  
36 ~~(a) A director shall not be liable to the corporation or its shareholders for any decision~~  
37 ~~to take or not to take action, or any failure to take any action, as a director, unless the~~  
38 ~~party asserting liability in a proceeding establishes that:~~  
39 ~~(1) any provision in the articles of incorporation authorized by section 2.02(b)(4) or~~  
40 ~~the protection afforded by section 8.61 for action taken in compliance with section~~  
41 ~~8.62 or 8.63, if interposed as a bar to the proceeding by the director, does not~~  
42 ~~preclude liability; and~~  
43 ~~(2) the challenged conduct consisted or was the result of:~~  
44 ~~(i) action not in good faith; or~~  
45 ~~(ii) a decision~~

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

44  
45  
46  
47                  SECTION 405. DIRECTION OF TRUSTEES. ~~[NOTE: In the prior draft this was~~

1 ~~section 409, but per our last meeting it has been moved here, right after the section on~~  
2 ~~fiduciary duties. The cut and past was made with the tracking off so that the changes~~  
3 ~~made within the section and its comment would be indicated differently from the language~~  
4 ~~that was not changed.]~~

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

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

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

### 17 **Comment**

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

20  
21 Paragraph (a) ratifies the use of a directed trustee, meaning a trustee that must act in  
22 accordance with the directions of another person. Under paragraph (b), however, the trustee  
23 must not follow a direction that is manifestly contrary to the terms of the governing instrument  
24 or that the trustee knows or has reason to know would constitute a serious breach of fiduciary  
25 duty. Cf. Restatement (Third) of Trusts §75 (~~T.D. No. 4, 2005~~2007); Restatement (Second) of  
26 Trusts §185 (1959). [For Discussion: Increasing divergence in state trust laws respecting  
27 direction of trustees.]  
28

29 The reference in paragraph (b) to “serious” breach of fiduciary duty is designed to

1 exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial  
2 owner. For some purposes, such as trustee removal, trust law distinguishes between “serious”  
3 and not serious breaches of trust. See, e.g., Uniform Trust Code §706(b)(1) (2000); Austin  
4 Wakeman Scott, William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10,  
5 p. 661 (5th ed. 2006); Restatement (Second) of Trusts §107 cmt. b (1959).

6  
7 The trustee’s determination whether a direction is “manifestly contrary to the terms of the  
8 governing instrument” or “would constitute a serious breach of fiduciary duty by the trustee” is  
9 subject to the trustee’s fiduciary ~~obligation under Section 404~~ obligations. The drafting  
10 committee contemplated that, in accord with conventional trust practice, a trustee could seek  
11 judicial resolution of whether an instruction falls within the exclusion of paragraph (b) by  
12 applying to the appropriate court for instructions. See Restatement (Second) of Trusts §259  
13 (1959); Restatement (Third) of Trusts §71 (~~T.D. No. 4, 2005~~ 2007).

14  
15 Under Section 103(~~bc~~)(5), the limitation on direction of trustees stated in paragraph (b) is  
16 not subject to override by the governing instrument.

17  
18 Under paragraph (c), unless the governing instrument provides otherwise, a person that  
19 has the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to  
20 the statutory trust or ~~the~~ a beneficial owners. **[For Discussion: Paragraph (c), which comes**  
21 **from the Delaware statute, is convoluted (compare how much cleaner is the comment).**  
22 **Can’t we do better?]**

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

## 28 29 **SECTION 406. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT** 30 **COMPANY.**

31 (a) In this section, the terms “affiliated person” and “interested person” have the  
32 meanings set forth in the Investment Company Act of 1940, [as amended,] 15 U.S.C. -Section  
33 80a-1 et seq., ~~or~~ [and any rule adopted regulations issued thereunder].

34 (b) If a statutory trust is registered as an investment company under the Investment  
35 Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., ~~..~~ [and any regulations  
36 issued thereunder,] [or any successor statute thereto,] **[Discussion/Style Issue: Brackets and**  
37 **Investment Company Act consistency throughout.]** a trustee is an independent trustee for all



purposes under this [act] if the trustee is not an interested person of the ~~statutory~~ trust. The receipt of compensation for service as an independent trustee of the ~~statutory~~ trust and for service as an independent trustee of one or more other investment companies managed by a single investment adviser or an affiliated person of an investment adviser, does not affect the status of the trustee as an independent trustee under this section.

## Comment

### Principal Source – Delaware Statutory Trust Act §3801.

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

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

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

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

## Comment

Under Section 103(~~bc~~)(6), the trustee's right to information under this section is not subject to override by the governing instrument. However, the trustee's right to information is limited to information "reasonably related to" the trustee's discharge of its duties as trustee, and under Section 103(~~bc~~)(6) the governing instrument may prescribe the standards by which "reasonably related" is determined provided that those standards are not "manifestly unreasonable."

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

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

### SECTION 408. INTERESTED TRANSACTIONS.

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

(b) ~~No contract or~~ A transaction between under subsection (a) ~~statutory trust and a trustee, officer, employee, or manager of the statutory trust, or between a statutory trust and any other person in which a trustee, officer, employee, or manager of the statutory trust) is a trustee, officer, employee, or manager or has a financial interest, shall be void or voidable solely for this reason, or solely because the trustee, officer, employee, or manager is present at or participates in the decision of the statutory trust to authorize the contract or transaction, or solely because the trustee, officer, employee, or manager's votes are counted for such purpose, if the contract or by~~

1 the statutory trust unless the related party shows that the transaction is fair to the statutory trust  
2 as of the time it is authorized, approved or ratified, by the trustees or beneficial owners. [For  
3 **discussion: (1) Whether to require disclosure of the interested person's interest. (2)**  
4 **Whether to include related persons. This draft of paragraph (b) is based on DGCL**  
5 **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~~2007~~);  
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 [For Discussion: By “voidable,” do we mean to adopt the “entire fairness” test  
18 familiar from corporate law, and if so, shouldn't we say so in the comment? And do we  
19 need to explain what happens when the trust voids a loan? Presumably we mean that the  
20 trust is freed from the obligation though perhaps the lender is entitled to restitution.]  
21

22 The application of this section to a statutory trust that is registered as an investment  
23 company is preempted by the Investment Company Act of 1940, which generally prohibits a  
24 trustee, officer, employee, manager, and their related persons from lending money to, borrowing  
25 money from, and engaging in other transactions with the mutual fund without exemptive relief  
26 from the Securities and Exchange Commission. See 15 U.S.C. §80a-17(a), (d).  
27

## 28 **SECTION 409. GOOD-FAITH RELIANCE-ON-GOVERNING INSTRUMENT.**

29 ~~——(a). A trustee that acts in good faith reliance on the terms of the governing instrument,~~  
30 officer, employee, manager, or committee of a statutory trust, or other person designated  
31 pursuant to Section 104(b)(7) is not liable to the statutory trust or to a beneficial owner for  
32 breach of any duty, including a fiduciary duty, to the extent the breach resulted from the good-  
33 faith reliance- on:

~~(b) A trustee~~ (1) the terms of the governing instrument;  
(2) the records of the statutory trust; or  
(3) the opinions, reports, or statements of another person that are in the other person's  
professional or expert competence and are made or delivered to the trustee, officer, employee,  
manager, or committee of a statutory trust, or other person designated pursuant to Section  
104(b)(6) ~~that acts in good faith reliance on the terms of the governing instrument is not liable to~~  
~~the statutory trust or to a beneficial owner for breach of any duty, including a fiduciary duty, to~~  
~~the extent the breach resulted from the reliance.~~ 7).

### Comment

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

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

~~The drafting committee contemplated that a trustee's good faith reliance on the records of the statutory trust, or on a report made by a person that is within the person's professional or expert competence, would be protected from liability under Section 404(b) by the business judgment rule. [For discussion: Delaware Statutory Trust Act §3806(k), which as revised in 2006 now says, "A trustee, beneficial owner or an officer, employee, manager or other person designated in accordance with paragraph (b)(7) of this section shall be fully protected in relying in good faith upon the records of the statutory trust and upon information, opinions, reports or statements presented by another trustee, beneficial owner or officer, employee, manager or other person designated in accordance with paragraph (b)(7) of this section, or by any other person as to matters the trustee, beneficial owner or officer, employee, manager or other person designated in accordance with paragraph (b)(7) of this section reasonably believes are within such other person's professional or expert competence, including information, opinions, reports or statements as to the value and amount of the assets, liabilities, profits or losses of the statutory trust, or the value and amount of assets or reserves or contracts, agreements or other undertakings that would be~~

1 | ~~sufficient to pay claims and obligations of the statutory trust or to make reasonable~~  
2 | ~~provision to pay such claims and obligations, or any other facts pertinent to the existence~~  
3 | ~~and amount of assets from which distributions to beneficial owners or creditors might~~  
4 | ~~properly be paid.”]~~  
5 |

6 |         **SECTION 410. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.**

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

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

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

21 |                                 **Comment**  
22 |

23 |         **Principal Sources** – Delaware Statutory Trust Act §3817; Connecticut Statutory Trust  
24 | Act §34-524; Delaware General Corporation Law §145; Uniform Trust Code §§105, 1008  
25 | (2000).  
26 |

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

Under Section 103(b)(7), this section’s prohibition of indemnification, advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless indifference is not subject to override by the governing instrument. Prohibiting indemnification, advancement, or exoneration for such conduct is consistent with traditional trust doctrine [For Discussion, addition of “and the drafting committee contemplated that this section would be interpreted in accordance with existing trust law precedent” or something in that vein.]. See Restatement (Second) of Trusts §222 (1959); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees §542 (rev. 2d ed. 1993); Uniform Trust Code §1008. See also John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1121-25 (2004). It is also consistent with the Delaware Statutory Trust Act. ~~As revised in 2006, See Delaware Statutory Trust Act §3806(e)-), which~~ provides that the “governing instrument may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing instrument may not eliminate the implied contractual covenant of good faith and fair dealing.” Limitations on permissible exoneration are also familiar business entity law. See 2006, e.g., Delaware Laws Ch. 418 §General Corporation Law §102(b)(7).

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

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

———~~[Moved to paragraph (c) of Section 305.]~~

———~~[Now Section 405.]~~

## SECTION 411. DELEGATION BY TRUSTEE.

(a) A trustee may delegate duties and powers ~~that a prudent trustee of comparable skills could properly delegate under the circumstances.~~ The trustee ~~shall~~must exercise ~~reasonable the~~

care, skill that a person similarly situated would reasonably believe appropriate under similar circumstances in**[For Discussion: (1) The move from trust language to corporate language, paralleling Section 404, and caution in (2) the interaction of this Section with Section 409.]**

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
- (b) Subject to subsection (a), a trustee may delegate duties and powers to a co-trustee.
- (c) In performing a delegated function, an agent owes a duty to the statutory trust to exercise reasonable care to comply with the terms of the delegation.
- (d) A trustee that complies with subsection (a) is not liable to the beneficial owners or to the statutory trust for an action of the agent to ~~whom~~which the function was delegated.
- (e) ~~By~~An agent submits to the jurisdiction of the courts of this State by accepting a delegation of powers or duties from the trustee of a statutory trust that is subject to the law of this State, ~~an agent submits to the jurisdiction of the courts of this State~~state.

### Comment

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

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

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

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

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

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

### Comment

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

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



1  
2 The remainder of this section allows for maximum flexibility in the mechanics of  
3 allowing the trustees to act or vote on actions. Section 104(b)(34) confirms that the rules stated  
4 in this Section are subject to override by the governing instrument.  
5

6 The Investment Company Act of 1940 requires a mutual fund's investment advisory  
7 contract, underwriting contract, fidelity bond, independent public accountants, and other such  
8 matters to be approved by the trustees of the mutual fund. See 15 U.S.C. § 80a-15(a); 15 U.S.C.  
9 80a-31(a); 17 C.F.R. § 270.17g-1. Investment advisory and underwriting contracts, and  
10 selection of independent public accountants, must be approved by the noninterested trustees at an  
11 in-person meeting. See 15 U.S.C. §80a-15(c); 15 U.S.C. 80a-31(a).  
12

13 ~~SECTION 413. NO RIGHTS OF TRUSTEE'S CREDITORS IN TRUST~~

14 ~~PROPERTY.~~ Property of a statutory trust is not subject to personal obligations of the trustee.  
15 In the event that the trustee becomes insolvent or bankrupt, the trustee's creditors have no claim  
16 upon the assets of the statutory trust.

17 **Comment**

18 ~~Principal Sources~~ Uniform Trust Code §507 (2000); Delaware Statutory Trust Act  
19 §3805.  
20

21 ~~This section confirms that the personal creditors of a trustee have no recourse against the~~  
22 ~~assets of the statutory trust. The rule of this section is familiar from the operation of common~~  
23 ~~law trusts. See Uniform Trust Code Restatement §507 (2000); Restatement (Third) of Trusts~~  
24 ~~§42 cmt. c (2003); Restatement (Second) of Trusts §308 (1959). The protection afforded by this~~  
25 ~~section is also consistent with that provided by the Bankruptcy Code. Property in which the~~  
26 ~~trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. See 11 U.S.C.~~  
27 ~~§541(d). For a general discussion of asset partitioning rules in organizational law, see Henry~~  
28 ~~Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 Yale L.J. 387~~  
29 ~~(2000); Henry Hansmann & Ugo Mattei, The Functions of Trust Law: A Comparative Legal and~~  
30 ~~Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998). See also Henry Hansmann, Reinier~~  
31 ~~Kraakman, & Richard Squire, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333 (2006).~~  
32

33 ~~SECTION 414. TRUSTEE NOT LIABLE FOR ACTS, OMISSIONS, OR~~

34 ~~OBLIGATIONS OF STATUTORY TRUST.~~ An obligation of a statutory trust, whether  
35 arising in contract or tort or otherwise, is not an obligation of a trustee. A trustee, by reason of  
36 being a trustee, is not liable to any person other than the statutory trust or a beneficial owner for

any act, omission, or obligation of the statutory trust or any series thereof.

#### **Comment**

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

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

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

~~SECTION 415. AGENTS, OFFICERS, EMPLOYEES, MANAGERS,~~

~~COMMITTEES AND AGENTS NOT LIABLE FOR ACTS, OMISSIONS, OR~~

~~OBLIGATIONS OF STATUTORY TRUST. Any person acting pursuant to Section 104(b)(6) is not liable, by reason of acting in that capacity, to any person other than the statutory trust or a beneficial owner for any act, omission, or obligation of the statutory trust or any series thereof.~~

#### **Comment**

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

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

1 [ARTICLE] 5

2 BENEFICIARIES AND BENEFICIAL RIGHTS

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

7 SECTION 501. CONTRIBUTIONS BY BENEFICIAL OWNERS.

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

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

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

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

1 interest in the statutory trust;

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

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

5 ~~\_\_\_\_\_ (4) or~~ forfeiture of the defaulting beneficial owner's beneficial interest;

6 ~~\_\_\_\_\_ (5) imposing \_\_\_\_\_~~ (4) imposition of an obligation to repay a  
7 loan to the statutory trust by another beneficial owner of the amount necessary to meet the

8 defaulting beneficial owner's commitment; ~~or~~ and

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

## 12 Comment

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

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

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

27  
28 Under Section 104(b)(1), the governing instrument may provide the means by which  
29 beneficial ownership is determined and evidenced. Under Section 104(b)(9)-(10)-(11), the  
30 governing instrument may specify the conditions under which a person becomes a beneficial  
31 owner.

32  
33 **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 [For Discussion: (1) Is this section exclusive—that is, does a common law right to  
20 information survive the act? (2) What happens in the event of disagreement—that is,  
21 should we provide for a summary proceeding as in other business law? (3) Should the  
22 comment observe that in this area a standard “reasonably related” in fact provides  
23 broader information rights than the rule-based, scheduling of accessible information?]  
24

### 25 **Comment**

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

27  
28 Under Section 103(b)(8), a beneficial owner’s right to information under this section is  
29 not subject to override by the governing instrument. However, a beneficial owner’s right to  
30 information under this section is limited to information “necessary” for the beneficial owner to  
31 enforce its rights as such, and under Section 103(b)(8) the governing instrument may prescribe  
32 the standards by which “necessary” is determined if those standards are not “manifestly  
33 unreasonable.” Imposing a mandatory right to information critical to the beneficiary’s ability to  
34 enforce the trust is familiar law. See Restatement (Second) of Trusts §173 cmt. c (1959); T.P.  
35 Gallanis, The Trustee’s Duty to Inform, 85 N.C. L. Rev. 1595 (2007).  
36

37 Section 404 provides a comparable rule for a trustee’s right to information.  
38

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

2        **PROPERTY INTERESTS.**

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

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

8        ~~—— (c) A beneficial interest in the statutory trust is freely transferable.~~

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

12            (~~ec~~) Unless the statutory trust is a registered investment company under the Investment  
13 Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [and any regulations  
14 issued thereunder,] a beneficial owner does not have a right to demand or to receive a  
15 distribution from the trust in any form other than money [For Discussion: Section 501 uses  
16 “cash,” but here we use “money.” Reasoned difference?], except that the trust may distribute  
17 an asset in-kind if each part of the asset is fungible with each other part and each beneficial  
18 owner receives a percentage of the asset equal in value to the beneficial owner’s share of the  
19 distribution.

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

22                            **[Moved to article 3’s new section on series.]**

23                            **Comment**

24                            **Principal Source** – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust  
25

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—19-10 (3d ed. 2005 Supp.).

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

Under Section 104(b)(12), the governing instrument may provide for the establishment of record dates for allocations and distributions. For Discussion: The possibility of a self-settled spendthrift statutory trust. Assuming that the Committee does not want to allow for such a trust, we will need to consider a charging order provision for trusts that opt out of 504(a) (that is, for trusts without freely transferable beneficial interests). Two sample charging order models follow.

### 1. ReULLCA 305 (2006)

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

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

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

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

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

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

(e) At any time before foreclosure under subsection (c), a limited liability company

1 or one or more members whose transferable interests are not subject to the charging order  
2 may pay to the judgment creditor the full amount due under the judgment and thereby  
3 succeed to the rights of the judgment creditor, including the charging order.

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

6 (g) This section provides the exclusive remedy by which a person seeking to enforce  
7 a judgment against a member or transferee may, in the capacity of judgment creditor,  
8 satisfy the judgment from the judgment debtor's transferable interest.  
9

## 10 **2. Rutledge's Unified Kentucky Model**

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

14 (b) On application to a court of competent jurisdiction by a judgment creditor of a  
15 member or a member's assignee, a court may charge the judgment debtor's interest in the  
16 limited liability company with payment of the unsatisfied amount of the judgment. To the  
17 extent so charged, the judgment creditor has only the rights of a assignee and shall have no  
18 right to participate in the management or to cause the dissolution of the limited liability  
19 company. The court may appoint a receiver of the share of the distributions due or to  
20 become due to the judgment debtor in respect of the limited liability company interest and  
21 make all other orders, directions, accounts, and inquiries the judgment creditor might have  
22 made or which the circumstances of the case may require to give effect to the charging  
23 order.

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

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

31 (1) By the judgment debtor;

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

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

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

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

39 Under Section 104(b)(13), the governing instrument may provide for the establishment of  
40 record dates for distributions.  
41

42 **SECTION 505. TRANSACTION WITH BENEFICIAL OWNER.** A beneficial  
43 owner or related person of a beneficial owner may lend money **[For Discussion: Section 501**



1 uses “cash,” but here we use “money.” Reasoned?] to, borrow money from, act as a surety,  
2 guarantor or endorser for, guarantee or assume one or more obligations of, provide collateral for,  
3 or transact other business with the statutory trust and, subject to ~~other law~~ other than this [act],  
4 has the same rights and obligations with respect to those matters as a person that is not a  
5 beneficial owner.

6 **Comment**  
7

8 **Principal Source** – Delaware Statutory Trust Act §3806.  
9

10 **SECTION 506. ~~LIMITED LIABILITY OF BENEFICIAL OWNERS.~~** A beneficial  
11 ~~owner has the same limitation of liability accorded to a shareholder of a domestic business~~  
12 ~~corporation.~~

13 **Comment**  
14

15 ~~Principal Sources~~ Delaware Statutory Trust Act §3803; Connecticut Statutory Trust  
16 Act §34-523.

17  
18 ~~By providing as a default rule that the beneficial owners of a statutory trust enjoy the~~  
19 ~~same limited liability as shareholders of a domestic corporation, this section confirms that the~~  
20 ~~“control test” of Williams v. Inhabitants of Milton, 102 N.E. 355 (Mass. 1913), and Restatement~~  
21 ~~(Second) of Agency §14B (1958), is not applicable to a statutory trust. Under the control test, if~~  
22 ~~a beneficial owner of a common law business trust had a say in the administration of the trust or~~  
23 ~~the right to remove and replace the trustees, the beneficial owner might be held liable for the~~  
24 ~~debts of the trust. By contrast, under this section a beneficial owner may participate in the~~  
25 ~~management of the statutory trust without exposure to liability for the debts of the statutory trust.~~  
26 ~~For discussion of the parallel provision in the Delaware Statutory Trust Act, see Wendell Fenton~~  
27 ~~& Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A. Finkelstein, The~~  
28 ~~Delaware Law of Corporations & Business Organizations §19.3 (3d ed. 2005 Supp.).~~  
29

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

32 (1) The beneficial ~~owners~~owners may act by majority of their vote. ~~[For discussion:~~  
33 ~~“majority of their vote” is unclear. What “vote” rights do the beneficial owners have? Per~~

1 ~~capita?~~ Per capital? ~~number.~~

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

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

#### 10 **Comment**

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

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

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

1  
2 Section 104(b)(34) confirms that the rules stated in this Section are subject to override by  
3 the governing instrument.  
4

5 ~~—— [For discussion: Is there a '40 Act section relevant for statutory trusts that are~~  
6 ~~mutual funds? If so, assistance on explanatory commentary is invited, particularly from~~  
7 ~~Bibb and Victor.]~~  
8

9 **SECTION ~~508.507.~~ DERIVATIVE ACTION.**

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

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

15 (2) a demand would be futile.

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

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

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

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

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

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

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

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

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

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

9 (f) A derivative action on behalf of a statutory trust may not be voluntarily dismissed or  
10 settled without the court's approval. **[For Discussion: The intersection of the collusive**  
11 **settlement problem and the limited mandatory nature of this provision under Section**  
12 **103(c)(9).]**

### 13 Comment

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

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

24  
25 In preserving a mandatory right to bring a derivative action, but allowing that right to be  
26 subjected to additional standards and restrictions that are not manifestly unreasonable, the  
27 ~~drafting committee endeavored to strike an honorable compromise between~~ **this section balances**  
28 **two policy aims that are in tension.** On the one hand, without the right to bring a derivative  
29 action, a beneficial owner might have no recourse in the event of trustee misconduct. On the  
30 other hand, without appropriate safeguards, a meritless derivative action might be brought with  
31 the aim of extracting a quick settlement. See, e.g., Reinier Kraakman, Hyun Park, & Steven  
32 Shavell, When Are Shareholder Suits in Shareholder Interests?, 82 Georgetown L.J. 1733  
33 (1994).

1 | ~~————[Further suggestions for this comment are welcome, particularly from Bibb and~~  
2 | ~~Victor concerning Section 16(c) 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 **[For discussion: This definition of “organization” excludes a common law trust and**  
18 **hence excludes a Massachusetts business trust. This issue was flagged in Salt Lake City,**  
19 **but we did not have time for discussion about how to address it. The issue was also raised**  
20 **independently from the floor at the summer reading. It appears that we have at least three**  
21 **options:**

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

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

27 **(3) add a domestication provision.**

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

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

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

### Comment

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

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

## SECTION 602. CONVERSION.

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

(1) ~~the other organization’s governing statute authorizes the conversion;~~  
~~(2) the conversion is not prohibited by the law of the jurisdiction that enacted the other organization’s governing statute~~  
Note “governing statute”; here is a nice example of the problem with absorbing Massachusetts trusts into the existing conversion infrastructure.];  
and

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

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

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

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

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

(4) the organizational documents of the converted organization.

### **Comment**

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

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

**Principal Source** – Uniform Limited Partnership Act §1103 (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 different approval mechanism. Varying this subsection’s rule means that a beneficial owner might be subject to a conversion (including a “squeeze out” conversion) without consent and with no appraisal remedy. If the converting organization is a statutory trust subject to this Act, the trustee of the converting organization is subject to the duties and obligations stated in this Act. Those duties would apply to the process and terms under which the conversion occurs. However, if the governing instrument allows for a conversion with less than unanimous consent, the mere fact that a beneficial owner objects to a conversion does not mean that a trustee that is favoring, arranging, consenting to, or effecting the conversation has breached a duty under this Act.

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

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

(a) After a conversion is approved:

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

1 (A) a statement that the ~~statutory~~ trust has been converted into another  
2 organization;

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

5 \_\_\_\_\_

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

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

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

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

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

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

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

21 (b) A conversion becomes effective:

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

1 | ~~\_\_\_\_\_ (2) if the converted organization is a statutory trust, when the certificate of trust~~  
2 | ~~takes effect~~ conversion is effective as provided in Section 204(c).

3 | **Comment**

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

5 |  
6 | Under paragraph (b) the effective date of a conversion is determined under the governing  
7 | statute of the converted organization.

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

11 |  
12 | **SECTION 605. EFFECT OF CONVERSION.**

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

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

16 | (1) all property owned by the converting organization remains vested in the  
17 | converted organization;

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

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

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

25 | (5) except as otherwise provided in the plan of conversion, the terms and  
26 | conditions of the plan of conversion take effect; and

27 | (6) except as otherwise agreed, the conversion does not dissolve a converting

1 | statutory trust or any series thereof for the purposes of ~~Sections 611 and 612~~Section 701.

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

#### 10 | **Comment**

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

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

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

#### 20 | **SECTION 606. MERGER.**

21 |  
22 | (a) A statutory trust may merge with one or more other constituent organizations  
23 | pursuant to this section and Sections 607 through 609 and a plan of merger if:

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

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

27 | (3) each of the other organizations complies with its governing statute in effecting  
28 | the merger.

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

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

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

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

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

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

## 12 **Comment**

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

14  
15 For this Act to apply to a merger, at least one of the constituent organizations must be a  
16 statutory trust subject to this Act.

17  
18 A plan of merger may provide that some persons with interests in a constituent  
19 organization will receive interests in the surviving organization, while other persons with  
20 interests in the same constituent organization will receive some other form of consideration.  
21 Thus, a "squeeze out" merger is possible. As noted in the comment to Section 603, the duties  
22 and obligations stated in this Act apply to a trustee of a constituent organization that is a  
23 statutory trust subject to this Act. Those duties would apply to the process and terms under  
24 which a "squeeze out" merger occurs.

## 25 26 **SECTION 607. ACTION ON PLAN OF MERGER BY CONSTITUENT** 27 **STATUTORY TRUST.**

28 (a) A plan of merger must be consented to by all trustees and all beneficial owners of a  
29 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 governing statute;

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

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

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

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

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

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

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

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

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

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

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

(A) compliance with subsection (c); or

(B) subject to Section ~~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 103(~~b~~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~~with the surviving organization ceases to exist as a separate entity;

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

(4) all debts, obligations, ~~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~~becomes effective.

(b) A surviving organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability owed by a constituent organization; if, before the merger, the constituent organization was subject to suit in this state 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 provided in Section ~~2452~~213(c) and (d).

#### **Comment**

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

Under Section 103(~~b~~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].

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

~~(2) If there are insufficient assets, the claims and obligations must be paid or~~

provided for according to their priority and, among claims and obligations of equal priority, ratably to the extent of assets available therefor.

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

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

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

~~Section 203.]~~

#### **Comment**

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

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

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

~~———— Under Section 103(b)(11), this Section is not subject to override by the governing instrument.~~

~~[As noted above, we have four discussion issues on this section that were circulated with this draft on a separate page styled “discussion notes regarding USTEA Section 611 (Dissolution of Statutory Trust).”]~~

~~———— **SECTION 612. DISSOLUTION OF SERIES.**~~

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

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

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

5 ~~\_\_\_\_\_ (3) Upon dissolution of a series of a statutory trust, the persons that under the~~  
6 ~~governing instrument of the statutory trust are responsible for winding up the series's affairs, in~~  
7 ~~the name of the statutory trust and for and on behalf of the statutory trust and the series, may take~~  
8 ~~all actions with respect to the series as are permitted under Section 604(a) and shall provide for~~  
9 ~~the claims and obligations of the series and distribute the assets of the series as provided Section~~  
10 ~~604(b).~~

11 ~~\_\_\_\_\_ (b) Any person, including a trustee, that under the governing instrument is responsible for~~  
12 ~~winding up the affairs of a series under subsection (a) which has complied with this section is~~  
13 ~~not liable to the claimants of the series by reason of the person's actions in winding up the series.~~

14 ~~\_\_\_\_\_ [For discussion: (1) The omission in this Section of several paragraphs in the~~  
15 ~~comparable Section 611. (2) Whether this section should be moved into Section 306 on~~  
16 ~~series.]~~

#### 17 **Comment**

18 ~~\_\_\_\_\_ **Principal Source** Delaware Statutory Trust Act §3808.~~

19 ~~\_\_\_\_\_ This section parallels and is analogous in scope and effect to Section 604, except that it~~  
20 ~~applies to a series rather than the entire statutory trust. On the series concept, see the Comment~~  
21 ~~to Section 306.~~  
22

1 [ARTICLE] 7

2 DISSOLUTION AND WINDING UP

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

9  
10 SECTION 701. EVENTS CAUSING DISSOLUTION. A statutory trust is dissolved,  
11 and its activities must be wound up, upon the occurrence of:

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

19 Comment

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

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

27  
28 Under Section 103(c)(1), the provisions of this section are not subject to override by the  
29 governing instrument. However, the governing instrument need not provide for an event or  
30 circumstance that causes dissolution. See Section 306.

31  
32 SECTION 702. WINDING UP.

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

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

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

6 (2) may:

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

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

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

13 (D) transfer the trust's property;

14 (E) settle disputes by mediation or arbitration[For Discussion, two

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

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

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

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

final settlement of unfinished business of the trust.

### **Comment**

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

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

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

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

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

## **SECTION 703. KNOWN CLAIMS AGAINST DISSOLVED STATUTORY TRUST.**

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

(b) A dissolved statutory trust may **[For Discussion: Because 703(b) is permissive, the  
question arose in the summer meeting whether a trust could opt instead to use newspaper  
notice under 704 to kill off a known claim.]** 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

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

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

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

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

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

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

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

11 days. [For Discussion: The rationale for why this section—section 703—does not have an  
12 analogue to Section 704(d).]

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

### 17 Comment

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

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

## 28 SECTION 704. OTHER CLAIMS AGAINST DISSOLVED STATUTORY



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

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

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

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

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

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

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

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

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

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

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

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

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

6 **Comment**

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

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

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

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

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

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

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

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

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

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

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

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

#### 14 **Comment**

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

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

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

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

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

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

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

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

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

13 **Comment**

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

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

17 =====  
18 **SECTION 707. APPEAL FROM REJECTION OF REINSTATEMENT.**

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

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

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

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

#### 6 **Comment**

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

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

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

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

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

#### 23 **Comment**

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

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

1 **[ARTICLE] 8**

2 **FOREIGN STATUTORY TRUSTS**

3 **SECTION ~~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 qualification by reason of any difference between the laws of the jurisdiction under  
13 which the foreign statutory trust is formed and the laws of this state.

14 (c) A certificate of authority qualification does not authorize a foreign statutory trust to  
15 engage in any business or exercise any power that a statutory trust may not engage in or exercise  
16 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  
29 Under Section 103(~~b~~c)(1), this Section is not subject to override by the governing  
30 instrument.

**QUALIFICATION.**

The application must contain:

\_\_\_\_\_ (2) the name of the state or other jurisdiction under whose law the foreign statutory trust is formed;

\_\_\_\_\_ (4) the name and street and mailing addresses of the foreign statutory trust's  
initial agent for service of process in this state.

### Comment

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

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

3  
4 **SECTION ~~703.803~~. AMENDMENT OR RESTATEMENT OF CERTIFICATE.**

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

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

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

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

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

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

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

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

19 (d) An amendment or restated certificate of authority qualification of a foreign statutory  
20 trust is effective as provided in Section ~~205~~204(c).

21 **Comment**

22  
23 **Principal Source** – Uniform Limited Partnership Act §202 (2001).

24  
25 Paragraph (a) provides a mechanism for updating a statutory trust's certificate of  
26 authority qualification. Paragraph (b) imposes an obligation directly on the trustee rather than on  
27 the statutory trust.  
28



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

3 |  
4 | **SECTION ~~704.804~~. ACTIVITIES NOT CONSTITUTING TRANSACTING**  
5 | **BUSINESS.**

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

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

9 | (2) holding meetings of its trustees or carrying on any other activity concerning  
10 | its internal affairs;

11 | (3) maintaining accounts in financial institutions;

12 | (4) maintaining offices or agencies for the transfer, exchange, and registration of  
13 | ~~the foreign statutory trust's~~ own beneficial interests or securities or maintaining trustees or  
14 | depositories with respect to those beneficial interests or securities;

15 | (5) selling through independent contractors;

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

19 | (7) creating or acquiring indebtedness, mortgages, or security interests in real or  
20 | personal property;

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

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

(10) transacting business in interstate commerce. [For Discussion: What about ownership of property that is not income producing, or doing business as a member of an LLC or a limited partner in a LLP?]

(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~~does not ~~deemed to be doing~~do business in the state solely by reason of being a trustee or a beneficial owner of a foreign statutory trust that does do business in this state.

#### 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 103(~~bc~~)(1), this Section is not subject to override by the governing instrument.

**~~SECTION 705. FILING OF~~805. APPLICATION FOR CERTIFICATE OF AUTHORITY-QUALIFICATION.** If all filing fees have been paid, unless the [Secretary of State] determines that an application for a certificate of ~~authority~~authority 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 certificate to the foreign statutory trust or its representative.~~

#### Comment

1  
2 **Principal Source** —~~Based on~~ Uniform Limited Partnership Act §904 (2001).

3  
4 A certificate of ~~authority~~qualification filed under this section is different than a certificate  
5 of registration under Section ~~207~~806.

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

9  
10 **SECTION 706.806. CERTIFICATE OF REGISTRATION.**

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

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

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

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

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

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

26 **Comment**

27 **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 807. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.**

(a) A foreign statutory trust whose name does not comply with Section ~~107-207~~107-207 may not obtain a certificate of ~~authority~~authority qualification until it adopts, for the purpose of transacting business in this state, an alternate name that complies with Section ~~107-207~~107-207. A foreign statutory trust that adopts an alternate name under this subsection and obtains a certificate of ~~authority~~authority qualification with the name need not comply with [fictitious or assumed name statute]. After obtaining a certificate of ~~authority~~authority 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 qualification.

### Comment

**Principal Source** – Uniform Limited Partnership Act §905 (2001).

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

**SECTION ~~707~~808. REVOCATION OF CERTIFICATE OF  
AUTHORITY/QUALIFICATION.**

1 (a) A certificate of ~~authority~~qualification of a qualified foreign statutory trust to transact  
2 business in this state may be revoked by the [Secretary of State] in the manner provided in  
3 subsections (b) and (c) if the ~~foreign statutory~~ trust does not:

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

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

- 15 (1) the effective date of the revocation, which must be at least 60 days after the  
16 date the [Secretary of State] sends the copy; and
- 17 (2) the basis for the revocation.

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

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

1 date of the notice of revocation.

2 **Comment**

3  
4 **Principal Source** – Uniform Limited Partnership Act §906 (2001).

5  
6 ~~Paragraph (a)(3) (4) is bracketed in recognition of the diversity of approaches among the~~  
7 ~~states with respect to annual reports ((a)(3)) and taxes and other fees ((a)(4)). Uniformity is not~~  
8 ~~expected.~~

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

12  
13 **SECTION ~~708.809~~ CANCELLATION OF CERTIFICATE OF AUTHORITY;**  
14 **EFFECT OF FAILURE TO HAVE CERTIFICATE QUALIFICATION.**

15 (a) To cancel its certificate of ~~authority~~qualification to transact business in this state, a  
16 qualified foreign statutory trust must deliver to the [Secretary of State] for filing a notice of  
17 cancellation that states:

18 (1) the name of the ~~foreign statutory~~ trust;

19 (2) the date of filing of its initial certificate of ~~authority~~qualification;

20 (3) that the certificate of ~~authority~~qualification is being canceled; and

21 (4) any other information as determined by the trustees filing the statement.

22 (b) A certificate of ~~authority~~qualification under subsection (a) is canceled when the  
23 notice of cancellation becomes effective under Section 205. ~~[For discussion, whether to split~~  
24 ~~this section into two, with (a) and (b) as cancellation of certificate of authority, and the rest~~  
25 ~~as effect of failure to have a certificate.]~~204.

26 ~~—— (c) A foreign statutory trust transacting business in this state may not maintain an action~~  
27 ~~or proceeding in this state unless it has a certificate of authority to transact business in this state.~~

28 ~~—— (d) The failure of a foreign statutory trust to have a certificate of authority to transact~~

1 business in this state does not impair the validity of a contract or act of the foreign statutory trust  
2 or prevent the foreign statutory trust from defending an action or proceeding in this state.

3 ~~—— [For discussion, whether to add a provision based on ReULLCA 808(c), which says~~  
4 ~~“A member or manager of a foreign limited liability company is not liable for the debts,~~  
5 ~~obligations, or other liabilities of the company solely because the company transacted~~  
6 ~~business in this state without a certificate of authority.”]~~

7 ~~—— (e) If a foreign statutory trust transacts business in this state without a certificate of~~  
8 ~~authority or cancels its certificate of authority, it appoints the [Secretary of State] as its agent for~~  
9 ~~service of process for actions arising out of the transaction of business in this state.~~

#### 10 Comment

11  
12 **Principal Source** – Uniform Limited Partnership Act §907 (2001).

13  
14 Under Section 103(b)(1), this Section is not subject to override by the governing  
15 instrument.  
16

#### 17 **SECTION 709.810. EFFECT OF FAILURE TO HAVE CERTIFICATE.**

18 (a) A foreign statutory trust transacting business in this state may not maintain an action  
19 or proceeding in this state unless it has a certificate of qualification to transact business in this  
20 state.

21 (b) The failure of a foreign statutory trust to have a certificate of qualification to transact  
22 business in this state does not impair the validity of a contract or act of the trust or prevent the  
23 trust from defending an action or proceeding in this state.

24 (c) A trustee or beneficial owner of a statutory trust is not liable for the debts,  
25 obligations, or other liabilities of the trust solely because the trust transacted business in this  
26 state without a certificate of qualification.

(d) If a foreign statutory trust transacts business in this state without a certificate of qualification or cancels its certificate of qualification, 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

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

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

**SECTION 811. 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~~c)(1), this Section is not subject to override by the governing instrument.



1 [ARTICLE] 89

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 103(~~b~~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 103(~~b~~c) of that act.

21 Comment

22  
23 Principal Source – Uniform Limited Partnership Act §1203 (2001).

24  
25 Under Section 103(~~b~~c)(1), this Section is not subject to override by the governing  
26 instrument.  
27

28  
29 SECTION ~~803.~~903. SAVING CLAUSE. This [act] does not affect an action

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

### **Comment**

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

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

### **SECTION 804. APPLICATION TO EXISTING RELATIONSHIPS. 904.**

**RESERVATION OF POWER TO AMEND OR REPEAL.** The [name of state legislature] has power to amend or repeal all or part of this [act] at any time and all statutory trusts and foreign statutory trusts subject to this [act] are governed by the amendment or repeal.

### **Comment**

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

**[For Discussion: (1) Necessity of an explanatory comment, and (2) other models besides the RMBCA. At the summer reading we were urged to look at Section 103 of the new Uniform Cooperative Association Act, which says “A limited cooperative association governed by this [act] is subject to any amendment or repeal of this [act].”]**

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

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

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

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

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

5 [(d) On [two years] after [the effective date of this [act]], this [act] governs the  
6 organization and internal affairs of all trusts created pursuant to a statute of this state that was  
7 required by that statute to file a certificate of trust with the [Secretary of State] -before the  
8 effective date of this [act].]

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

## 11 12 **Comment**

13  
14 **Principal Source** – Uniform Limited Partnership Act §1206 (2001).

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

20  
21 ~~Consistent~~ Paragraph (a) confirms that this act does not govern a common law trust  
22 unless the trust elects to be governed by the terms of this act by filing a certificate of trust under  
23 Section 201. However, consistent with Section 302, paragraph (b) of this Section prohibits a  
24 common law trust with a prevailingly donative purpose from ~~converting to becoming~~ a statutory  
25 trust.

26  
27 The drafting committee contemplated that some enacting jurisdictions might modify this  
28 section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not  
29 expected—to address other transition problems arising from differences between this Act and  
30 prior law. ~~[For discussion: States that lack a reserved power clause. Perhaps the answer is~~  
31 ~~simply to remark the problem in this comment?]~~For example, an enacting jurisdiction might  
32 choose to allow trusts formed under a prior statute to remain governed by the prior statute for  
33 longer than the two years suggested in paragraph (d).

34  
35 ~~Under Section 103(c)(1), this Section is not subject to override by the governing~~  
36 ~~instrument.~~

**SECTION ~~805.906~~. REPEALS.** On [all-inclusive date], the following acts are

repealed:

(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~~ and in effect immediately before [the effective date of this [act]]].

#### **Comment**

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

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

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

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

**SECTION ~~806.907~~. EFFECTIVE DATE.** This [act] takes effect . . . .

#### **Comment**

1  
2       **Principal Source** – Uniform Limited Partnership Act §1204 (2001).  
3

4 |       Section ~~804~~905 specifies how this Act affects statutory trusts, with special provisions  
5 pertaining to statutory trusts formed before the Act's effective date. Section 804 contains no  
6 comparable provisions for foreign statutory trusts. Therefore, once this Act is effective, it  
7 applies immediately to all foreign statutory trusts, whether formed before or after the Act's  
8 effective date.  
9

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