

DRAFT
FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

DRAFT AS OF MARCH 11, 2009

With Prefatory Notes and Comments

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ON UNIFORM STATE LAWS

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UNIFORM STATUTORY TRUST ENTITY ACT

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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 enterprise that is not organized as a sole proprietorship makes 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. But the entity that arises under the more recent of these statutes is better understood as a “statutory business trust,” “statutory trust entity,” or “statutory trust” than as a common law business trust with statutory validation. See the Comment to Section 101.

A statutory trust differs from a common-law trust in several important respects. A common-law trust, whether its purpose is donative or commercial, arises from private action without the involvement of a public official. See Uniform Trust Code §401 (2000); Restatement (Third) of Trusts §10 (2003). Because a common-law trust is not a juridical entity, it must sue, be sued, and transact in the name of the trustee in the trustee’s capacity as such. By contrast, a statutory trust is formed by delivering a certificate of trust to a public official, typically the Secretary of State, for filing in the public record. See Section 201. Moreover, a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue, be sued, and transact in its own name. See Sections 302, 307-308.

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

Since the 1980s, statutory trust entities have thrived in a variety of niches, particularly in the organization of mutual funds and the practice of asset securitization. See 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, and James M. Storey, *The Massachusetts Business Trust and Registered Investment Companies*, 13 *Del. J. Corp. L.* 421 (1988). The statutory trust has also come to be used in various tax-advantaged real estate transactions. See, e.g., Rev. Rul. 2004-86, 2004-33 IRB 191.

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

understand the law governing statutory trusts. The case law on statutory trusts is sparse.

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

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

In choosing to take the Delaware Statutory Trust Act as its starting point, the drafting committee was strongly influenced by data collected by the reporter and later confirmed by [IACA] on the aggregate number of statutory trusts and the number of new statutory trust formations over the last several years. These data indicate that the Delaware Act dominates the field. *Id.* at __. For a general discussion of the Delaware Statutory Trust Act, see Wendell Fenton and Eric A. Mazie, *Delaware Statutory Trusts*, in 2 R. Franklin Balotti and Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* ch. 19 (3d ed. 2005 Supp.). [UPDATE CITE]

Following the Delaware model, Section 105 provides that ordinary trust law supplements this Act. However, several substantive provisions of this Act are drawn from corporate or unincorporated entity law rather than trust law. Looking variously to corporate and unincorporated entity law in addition to trust law is consistent with the hybrid nature of the Delaware Statutory Trust, which likewise includes provisions that draw variously on all three traditions.

In drafting the public filing and other procedural provisions not unique to the statutory trust form, the drafting committee took the Uniform Limited Partnership Act (2001) and the Revised Uniform Limited Liability Company Act (2006) as its starting points. For guidance on the common law of trusts, the drafting committee took the Uniform Trust Code (2000) as its starting point, referencing also the Restatement (Third) of Trusts (2003, 2007) and Restatement (Second) of Trusts (1959).

Innovative Provisions. Although much of the Uniform Statutory Trust Entity Act reflects a reorganization and refinement of provisions found in the Delaware Statutory Trust Act, the Uniform Act contains several innovations including: (1) specification of rules that are not subject to override in the statutory trust's governing instrument (§103(c)); (2) clearer guidance on the applicability of ordinary trust law to a statutory trust (§105); (3) prohibition against a statutory trust having a prevaillingly donative purpose (§302); (4) an entire article on series trusts (Article 4); (5) a charging order provision (§606); (6) systematic treatment of conversion and merger (Article 7), and of dissolution (Article 8); and (7) clearer guidance on the relationship between the common-law trust and statutory trust entities (§1005).

[**To come:** Further comment about the series provisions and charging order around here.]

Default and Mandatory Rules. Most of the Uniform Statutory Trust Entity Act consists of default rules that apply only if the governing instrument does not sufficiently address a particular issue. Under Section 103(a)-(b), the governing instrument may override a substantial majority of the Act's provisions. The exceptions are scheduled in Section 103(c). Section 104 collects various permissive rules regarding the scope of the governing instrument.

Relationship to Common-Law Trusts and the Uniform Trust Code. In the culture of American law the common-law trust is typically thought of 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); 1 Austin Wakeman Scott, William F. Fratcher, and Mark L. Ascher, 1 Scott and Ascher on Trusts §2.1.2 (5th ed. 2006); Restatement (Second) of Trusts §1 cmt. b (1959). The justification stated in the Restatement (Third) of Trusts is representative: “[T]he business trust is a business arrangement that is best dealt with in connection with business associations.”

There is, however, no separate body of general business law that applies to a common-law trust that has a business purpose. The common law of trusts applies to all trusts arising under the common law, even those that have a business purpose, to the extent that the common law is not displaced by the trust instrument or specialized legislation. For this reason, although the Uniform Trust Code “is directed primarily at trusts that arise in an estate planning or other donative context,” the Code also applies to trusts that have a business or commercial purpose to the extent that neither the trust instrument nor other legislation displace the Code's provisions. See the comment to Uniform Trust Code §102 (2000).

The Uniform Statutory Trust Entity Act is not therefore 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 1005(a) expressly confirms the continued applicability of the state's laws pertaining to trusts to a common law business trust.

The Uniform Statutory Trust Entity Act more closely resembles a generic corporate code or unincorporated entity law than the Uniform Trust Code. Like a corporation, limited liability company, and limited partnership, but unlike a common-law trust, a statutory trust is a juridical entity that may conduct transactions in its own name separate from that of the trustee and the beneficial owners. See Sections 302, 307-08. Like those entities, but unlike a common-law trust, a statutory trust is formed by delivering a certificate of trust to a public official for filing. Compare Section 201 with Uniform Trust Code §401 (2000) and Restatement (Third) of Trusts §10 (2003). Further, Section 105 provides that ordinary trust law supplements this Act, but only to the extent not modified or displaced by this Act or the governing instrument—and this Act modifies or displaces a host of ordinary trust law principles including those concerning fiduciary standards of conduct (Section 505) and termination of trusts (Section 306). Section 1005(b) allows an existing common-law trust that does not have a prevailingly donative purpose to convert into a statutory trust by delivering a certificate of trust for filing under Section 201.

Although the drafting committee contemplated that a statutory trust under this Act will be used primarily as a mode of business organization, Section 603(a) confirms that a person may become a beneficial owner of a statutory trust without an exchange of consideration. It is therefore possible that a statutory trust could be used as a substitute for the common-law trust in noncommercial contexts. However, to ensure that a statutory trust is not used to evade mandatory rules applicable to common-law trusts that enforce public policy limitations on donative transfers, Section 303 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 303.

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

1 **UNIFORM STATUTORY TRUST ENTITY ACT**

2
3 **[ARTICLE] 1**

4 **GENERAL PROVISIONS**

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

7 **Comment**

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

15
16 The drafting committee included the word “entity” in the title for two reasons. First, the
17 creature of this act is indeed a trust entity. It has the power to sue, be sued, and transact in its
18 own name. A common-law trust, by contrast, is not a juridical entity. Second, the word “entity”
19 in the title differentiates this act from the Uniform Trust Code, which is a codification of the
20 common law of trusts. However, to conform with prevailing usage under the Delaware Statutory
21 Trust Act, the entity that arises under this Act is called a “statutory trust,” not a “statutory trust
22 entity.” See Section 102(15). Further, because the drafting committee wanted a statutory trust
23 under this act to receive treatment under applicable regulatory law similar to that of a Delaware
24 statutory trust, the entity features of a statutory trust under this act closely resemble those of a
25 Delaware statutory trust.

26
27 The drafting committee had three reasons for eschewing the phrase “business trust.”
28 First, under this act a statutory trust need not have a business or commercial purpose. On the
29 contrary, Section 303 confirms that a statutory trust may have any lawful purpose other than a
30 prevailingly donative purpose.

31
32 Second, the drafting committee endeavored to avoid any implication on whether a
33 statutory trust would qualify as a “business trust” under the bankruptcy code. Under the
34 bankruptcy code, the definition of a “debtor” eligible for bankruptcy includes a “person,” 11
35 U.S.C. §101(13), the definition of “person” includes a “corporation,” id. §101(41), and the
36 definition of “corporation” includes a “business trust.” Id. §101(9). Bankruptcy eligibility is a
37 significant issue for trusts used as special purpose entities in structured finance transactions, a
38 principal use of the modern statutory trust in practice. Such trusts are often designed to be
39 “bankruptcy remote.” Thus, as in the leading case of *In re Secured Equipment Trust of Eastern*

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

3
4 Third, the drafting committee was influenced by the revealed preference for “statutory
5 trust” over “business trust” in practice as evidenced by the dominant position of the Delaware
6 Statutory Trust Act relative to the statutory or business trust acts of the other states. In 2002
7 Delaware recast the “Delaware Business Trust Act” as the “Delaware Statutory Trust Act,”
8 replacing nearly every reference to “business trust” with “statutory trust.” See 73 Del. Laws 329
9 (2002).

10
11 **SECTION 102. DEFINITIONS.**

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

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

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

22 (4) “Designated office” means:

23 (A) for a statutory trust, the mailing address that it is required to designate under
24 Section 201(b)(2); or

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

26 (5) “Foreign statutory trust” means a trust that is formed under the laws of a jurisdiction
27 other than this state that would be a statutory trust if formed under the laws of this state.

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

1 (7) "Jurisdiction" means a state, a foreign country, or a subdivision of a foreign country.

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

5 (9) "Property" means all property, whether real, personal, mixed, tangible, intangible, or
6 any interest therein.

7 (10) "Qualified foreign statutory trust" means a foreign statutory trust that is authorized
8 to do business in this state.

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

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

13 (A) the spouse of the person;

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

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

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

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

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

23 (13) "Series trust" means a statutory trust that has one or more series under Section 401.

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

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

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

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

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

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

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

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

15 **Comment**

16
17 **Principal Sources** – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
18 Act §34-501; Uniform Limited Partnership Act §102 (2001); SEC Rule 144(a)(1), 17 C.F.R.
19 §230.144(a)(1).

20
21 Paragraphs (2), (6), and (18) define “certificate of trust,” “governing instrument,” and
22 “trust instrument” respectively. The certificate of trust is the record that under Section 201 must
23 be delivered to a public official for filing to form a statutory trust. The trust instrument is the
24 transaction document that provides for the governance of the statutory trust and that need not be
25 made part of the public record. Together, the certificate of trust and the trust instrument
26 compose the governing instrument. The term “governing instrument” is in the singular to
27 conform with prevailing usage. Conflicts between the certificate of trust and the governing
28 instrument are resolved pursuant to Section 201(e). Although the term “trust instrument” is
29 phrased in the singular, consistent with current commercial practice the drafting committee
30 contemplated that there would often be more than one such instrument. Section 104(c) makes
31 authorization of multiple instruments explicit.
32

1 Paragraph (3) defines “common-law trust” consistently with Restatement (Third) of
2 Trusts §2 (2003), except that as defined herein the term expressly includes a common law
3 business trust. See also the Comment to Uniform Trust Code §102 (2000).
4

5 Paragraph (12) defines the term “related person,” which is used in Sections 507 and 607
6 concerning the legality of certain interested transactions. In using but not defining the term
7 “substantial” in Paragraph (12)(D), the drafting committee contemplated that a totality of the
8 circumstances test would apply. Section 512 defines the term “independent trustee” with respect
9 to a statutory trust that is an investment company under the Investment Company Act of 1940.
10

11 Paragraph (19) defines “trustee” as a person designated as such in accordance with the
12 governing instrument or applicable law. For discussion of trustee appointment, see the Comment
13 to Section 501.
14

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

16 (a) Except as otherwise provided in subsection (c) or the terms of the governing
17 instrument, this [act] governs the management, affairs, and conduct of the business of a statutory
18 trust and the rights, interests, duties, obligations, and powers of, and the relations among, the
19 trustees, the beneficial owners, the statutory trust, and other persons.

20 (b) Except as otherwise provided in subsection (c), a governing instrument may contain
21 any provision relating to:

22 (1) the management, affairs, and conduct of the business of the statutory trust; and

23 (2) the rights, interests, duties, obligations, powers of, and relations among, the
24 trustees, the beneficial owners, the statutory trust, and other persons.

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

26 (1) the provisions of [Articles] 2, 8 except for section 801(2), except for 703, 9,
27 and 10;

28 (2) the choice of governing law as provided in Section 301;

29 (3) the exclusion of a prevailingly donative purpose under Section 303;

30 (4) the provisions pertaining to series trusts in Sections 401(b), (c), and (d), 402,

1 403, and 405.

2 (5) the standards of conduct for trustees under Section 505, but the governing
3 instrument may prescribe the standards by which good faith, best interests of the statutory trust,
4 and care that a person in a similar position would reasonably believe appropriate under similar
5 circumstances are determined, if the standards are not manifestly unreasonable;

6 (6) the nonliability of a trustee or other person that relies in good faith on the
7 terms of the governing instrument, the records of the statutory trust, or the opinions, reports, or
8 statements of an expert, but the governing instrument may prescribe the standards for assessing
9 whether the reliance was in good faith, if the standards are not manifestly unreasonable.

10 (7) the right of a trustee to information under Section 508, but the governing
11 instrument may prescribe the standards for assessing whether information is reasonably related
12 to the trustee's discharge of the trustee's duties as trustee, if the standards are not manifestly
13 unreasonable;

14 (8) the prohibition under Section 509 of indemnification, advancement, or
15 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference;

16 (9) the obligations of a trustee in Section 510(c) not to follow a direction that is
17 manifestly contrary to the terms of the governing instrument or would constitute a serious breach
18 of trust;

19 (10) the right of a judgment creditor of a beneficial owner to seek a charging
20 order under Section 606;

21 (11) the right of a beneficial owner to information under Section 608, but the
22 governing instrument may prescribe the standards for assessing whether information is
23 reasonably related to the beneficial owner's ability to enforce its rights as a beneficial owner, if

1 the standards are not manifestly unreasonable; and

2 (12) the right of a beneficial owner to bring an action under Section 609, but the
3 governing instrument may subject the right to additional standards and restrictions including the
4 requirement that beneficial owners owning a specified amount or type of beneficial interest
5 including, in a series trust, an interest in the series, join in bringing the action, if the additional
6 standards and restrictions are not manifestly unreasonable.

7 (13) the provisions pertaining to conversion and merger stated in Sections 701,
8 704, 705, 708, and 709. **[FOR DISCUSSION: Bad mandatory rule decision in Chicago.]**

9 **Comment**

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

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

18
19 **Mandatory Rules.** Paragraph (c) schedules the provisions of this act that are not subject
20 to override in the governing instrument. The provisions included in this schedule are the only
21 rules that have mandatory application to a statutory trust.

22
23 Most of the provisions scheduled in paragraph (c) concern the rights of nonparties or
24 public filing and notice requirements. By contrast, with two exceptions all the provisions of this
25 Act concerning the powers and duties of a trustee, relations among trustees, and the rights and
26 interests of a beneficial owner may be overridden or at least altered by the terms of the
27 governing instrument.

28
29 The first exception is the mandatory prohibition of indemnification, advancement, or
30 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference in
31 paragraph (c)(8). This exception is familiar trust law. See Uniform Trust Code §1008 (2000);
32 Restatement (Second) of Trusts §222 (1959); 4 Austin Wakeman Scott, William Franklin
33 Fratcher, and Mark L. Ascher, Scott and Ascher on Trusts §24.27.3 (5th ed. 2007). For a general
34 discussion, see John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev.
35 1105, 1121-25 (2004); Melanie B. Leslie, Trusting Trustees: Fiduciary Duties and the Limits of
36 Default Rules, 94 Georgetown L.J. 67 (2005).

37

1 The Delaware Statutory Trust Act likewise limits the permissible scope of exoneration.
2 See Delaware Statutory Trust Act §3806(e), which provides that the “governing instrument may
3 provide for the limitation or elimination of any and all liabilities for breach of contract and
4 breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing
5 instrument may not eliminate the implied contractual covenant of good faith and fair dealing.”
6

7 Limitations on permissible exoneration are also familiar corporate and alternative entity
8 law. See, e.g., Delaware General Corporation Law §102(b)(7); Delaware Limited Liability
9 Company Act §18-1101; **[To come: Citation to MBCA 2.02(b)(4) and/or other uniform acts]**.
10

11 The second exception is paragraph (c)(9), which makes mandatory the invalidity under
12 Section 510(c) of a direction to a trustee or other person that is manifestly contrary to the terms
13 of the governing instrument or would constitute a serious breach of fiduciary duty. The
14 reference to serious breach of fiduciary duty is meant to exclude an inconsequential, immaterial,
15 or technical breach that does not harm the trust or a beneficial owner. For some purposes, trust
16 law distinguishes between serious and not serious breaches of trust. See, e.g., Uniform Trust
17 Code §706(b)(1) (2000); 2 Austin W. Scott, William F. Fratcher, and Mark L. Ascher, 2 Scott
18 and Ascher on Trusts §11.10, p. 661 (5th ed. 2006); Restatement (Second) of Trusts §107 cmt. b
19 (1959). However, the effect of paragraph (c)(8) is limited by paragraph (c)(5), which allows the
20 trustee’s fiduciary duty to be altered by the governing instrument if the alteration is not
21 manifestly unreasonable.
22

23 Paragraphs (c)(5), (c)(6), (c) (7), (c)(11), and (c)(12) allow the governing instrument to
24 alter the nature of the trustee’s fiduciary obligation; the nonliability of a trustee or another for
25 good faith reliance on the governing instrument, records of the statutory trust, or opinions of
26 experts; the right of a trustee to information, the right of a beneficial owner to information, and
27 the right of a beneficial owner to bring an action, but only if the alteration is not “manifestly
28 unreasonable.” In opting for the “manifestly unreasonable” standard instead of Delaware’s
29 “good faith and fair dealing” formulation, see Delaware Statutory Trust Act §3806(c) and (e), the
30 drafting committee took notice of the use of the term “manifestly unreasonable” in Revised
31 Uniform Limited Liability Company Act §110(d) (2006); Uniform Limited Partnership Act
32 §110(b) (2001), Revised Uniform Partnership Act §103(b) (1997), Uniform Limited Liability
33 Company Act §103(b) (1996), and intended a similar meaning here. See Mark J. Loewenstein,
34 Fiduciary Duties and Unincorporated Business Entities: In Defense of the “Manifestly
35 Unreasonable” Standard, 41 Tulsa L. Rev. 411 (2006).
36

37 **Relationship to Mandatory Rules and the Uniform Trust Code.** Section 105(a)
38 provides that the law of this state pertaining to common-law trusts supplements this act.
39 However, Section 105(b) provides that, except for the mandatory rules scheduled above in
40 Section 103(c), the governing instrument of a statutory trust may override or modify the
41 application to the statutory trust of any rule pertaining to common-law trusts. Accordingly, in a
42 jurisdiction that has also enacted the Uniform Trust Code (UTC), the UTC will apply to a
43 statutory trust, but only to the extent that the UTC’s provisions are not displaced by this act or
44 the governing instrument. No provision of the UTC, including the rules stated in UTC §105 that
45 are mandatory with respect to a common-law trust, is mandatory with respect to a statutory trust.
46 Likewise, any common law rule that is mandatory with respect to a common-law trust may

1 nonetheless be overridden with respect to a statutory trust by the governing instrument of the
2 statutory trust. In sum, the governing instrument of a statutory trust may override or alter any
3 rule of trust law other than those scheduled in §103(c) of this act.
4

5 To prevent evasion of the public policy limitations on donative transfers that underpin the
6 mandatory rules applicable to a common-law trust, see John H. Langbein, Mandatory Rules in
7 the Law of Trusts, 98 Nw. U.L. Rev. 1105 (2004), Section 302 of this Act provides that a
8 statutory trust may not have “a prevailingly donative purpose.” For further discussion of the
9 relationship between this Act, the common law, and the Uniform Trust Code, see the Prefatory
10 Note to this Act under the heading “Relationship to Common-law trusts and the Uniform Trust
11 Code” and the comments to Sections 105 and 303.
12

13 **Registered Investment Companies.** The Investment Company Act of 1940 (the “1940
14 Act”) supersedes this Act with respect to a statutory trust that registers as an investment
15 company. For such a statutory trust the 1940 Act imposes additional mandatory rules. See, e.g.,
16 the Comments to Sections 207 (name of statutory trust), 503 (action by trustees), 507 (interested
17 transactions), 509 (indemnification, advancement, and exoneration), and 511 (delegation by
18 trustee).
19

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

21 (a) The governing instrument may be amended with the consent of all the beneficial
22 owners.

23 (b) The governing instrument may include one or more instruments, agreements,
24 declarations, bylaws, or other records and refer to or incorporate any record.

25 (c) Except as otherwise provided in Section 103(c), a governing instrument may:

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

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

29 (3) provide for one or more series under [Article] 4;

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

32 (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, any form of communication that creates a record, telephone, or video
6 conference, or in any other manner; or

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

8 (5) provide for any action to be taken without the vote or approval of any
9 particular trustee or beneficial owner, or series of trustees, beneficial owners, or beneficial
10 interests, 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 property of the statutory trust or the property of any series thereof; and

16 (E) dissolution of the statutory trust;

17 (6) provide for the creation of a statutory trust, including the creation of a
18 statutory trust to which all or any part of the property, liabilities, profits, or losses of an existing
19 statutory trust may be transferred or exchanged, and for the conversion of beneficial interests in
20 an existing statutory trust, or series thereof, into beneficial interests in the new statutory trust, or
21 series thereof;

22 (7) provide for the appointment, election, or engagement of agents or independent
23 contractors of the statutory trust or delegates of the trustees, or agents, officers, employees,

1 managers, committees, or other persons that may manage the business and affairs of the statutory
2 trust, which may have such titles and such relative rights, powers, and duties as the governing
3 instrument provides;

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

6 (9) provide for the manner in which the governing instrument may be amended,
7 including:

8 (A) a condition that a person that is not a party to the instrument must
9 approve the amendment for it to be effective;

10 (B) a requirement that the governing instrument may be amended only as
11 provided in the governing instrument or as otherwise permitted by law.

12 Any condition or requirement under subsections (A) or (B) may be waived by all
13 persons for whose benefit the condition or requirement was intended.

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

18 (11) provide that a person may comply with paragraph (10) by a representative
19 authorized by the person orally, in a record, or by conduct;

20 (12) provide that the statutory trust or the trustees, acting for the statutory trust,
21 hold beneficial ownership of any income earned on securities held by the statutory trust that are
22 issued by any business entity formed, organized, or existing under the laws of any jurisdiction;

23 (13) provide for the establishment of record dates; and

1 (14) provide for the creation of one or more classes of trustees, beneficial owners,
2 or beneficial interests having separate rights, powers, or duties; and

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

6 **Comment**

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

9
10 Paragraph (a) provides a default rule that the governing instrument may be amended by
11 unanimous agreement of the beneficial owners. This paragraph therefore provides for an
12 amendment mechanism in circumstance where the governing instrument does not already do so.

13
14 **[Paragraph (b) note to come]**

15
16 The unusual principal sources citation reflects the drafting committee’s decision to
17 collect in a single section the various permissive rules regarding the scope of the governing
18 instrument that are scattered throughout the Delaware and Connecticut Statutory Trust Acts. The
19 main exception concerns the allowable remedies for a beneficial owner’s breach in Section
20 603(c).

21
22 Paragraph (c) collects various permissive rules regarding the scope of the governing
23 instrument. Most are based on scattered provisions of the Delaware and Connecticut Statutory
24 Trust Acts. The drafting committee concluded that the demand of third parties and transactional
25 planners to see language that expressly authorizes specific terms justified inclusion of a detailed
26 list in addition to the broad statement of freedom of contract in Sections 103(a)-(b) and 106.
27 Statutory confirmation reduces transaction costs by resolving doubts in practice over the
28 permissibility of such provisions. Similar reasoning underlies the provision of a detailed
29 schedule of powers in Uniform Trust Code §816 (2000) in addition to the broad general
30 statement in Uniform Trust Code §815.

31
32 **SECTION 105. APPLICABILITY OF TRUST LAW.**

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

34 (b) Except as otherwise provided in section 103(c), the governing instrument may
35 override or modify application to the statutory trust of any law of this state pertaining to

1 common-law trusts.

2 **Comment**

3 **Principal Sources** – Uniform Trust Code §106 (2000); Delaware Statutory Trust Act
4 §3809; Connecticut Statutory Trust Act §34-519.

5
6 **Trust Law Supplements this Act.** Paragraph (a) provides that state trust law
7 supplements this act and the terms of the governing instrument. In looking to trust law to
8 supplement this act and the governing instrument, the drafting committee was strongly
9 influenced by the popularity of the Delaware Statutory Trust Act, which likewise looks to trust
10 law, in comparison to the business trust acts (such as those in Arizona, Indiana, Kansas,
11 Mississippi, Montana, Oregon, Tennessee, Washington, and West Virginia) that look to
12 corporate law. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [in progress].
13

14 **No Mandatory Rules Other Than Those Scheduled in Section 103(c).** Paragraph (b)
15 confirms that, except for the mandatory rules scheduled in §103(c), the governing instrument
16 may override any rule or law pertaining to common-law trusts that would otherwise be
17 applicable to a statutory trust under paragraph (a).
18

19 **Relationship to the Uniform Trust Code.** In a jurisdiction that has also enacted the
20 Uniform Trust Code, the joint effect of paragraphs (a) and (b) is to make the UTC applicable to a
21 statutory trust, but only to the extent that the UTC’s provisions—including the mandatory rules
22 scheduled in UTC §105—are not displaced by this act or the trust’s governing instrument. For
23 further discussion, see the comment to Section 103 under the heading “Relationship to
24 Mandatory Rules and the Uniform Trust Code.”
25

26 **Remedies.** Under this Section, the law of remedies for breach of trust applies to a
27 statutory trust unless the governing instrument provides otherwise. See 4 Austin Wakeman
28 Scott, William F. Fratcher, and Mark L. Ascher, 2 Scott and Ascher on Trusts §24.9 (5th ed.
29 2006); Uniform Trust Code §1002 (2000). However, when a breach of trust injures the trust
30 rather than a beneficial owner directly, such remedies are properly sought in a derivative suit
31 under Section 609 rather than in a direct suit by the beneficiary because a statutory trust is itself
32 an entity. See generally ALI Principles of Corporate Governance §7.01 (1994).
33

34 **SECTION 106. RULES OF CONSTRUCTION.**

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

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

1 **Comment**

2
3 **Principal Sources** – Delaware Statutory Trust Act §3825; Connecticut Statutory Trust
4 Act §34-546; Uniform Statute and Rule Construction Act §18 (1995).

5
6 Paragraph (a) emphasizes the freedom of contract afforded to transactional planners by
7 the Uniform Statutory Trust Entity Act, which is primarily a default statute. The only mandatory
8 rules applicable to a statutory trust are those scheduled in section 103(c). The drafting
9 committee contemplated that section 106(a) would apply to the construction of section 103(c).

10
11 Paragraph (b) admonishes the courts not to apply to this act the canon of construction that
12 statutes in derogation of the common law are to be strictly construed. The drafting committee
13 included this admonition because several of this act’s provisions are designed specifically to
14 preclude the application to a statutory trust of one or more common-law trust principles. See,
15 e.g., Sections 203, 302, 304, 306, 502, 503, 504, 505, 506, 507, 511, **[to come]**. Those
16 provisions, which deliberately derogate the common law, should be interpreted in accord with
17 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 207;

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

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

11 (4) whether the trust may operate as a series trust.

12 (c) A certificate of trust may contain any provision in addition to that required by
13 subsection (b) except as otherwise provided in Section 103(c).

14 (d) Except as otherwise provided in Section 204(c), a statutory trust is formed when a
15 certificate of trust that complies with subsection (b) is filed by the [Secretary of State].

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

19 **Comment**

20
21 **Principal Sources** – Uniform Limited Partnership Act §201 (2001); Delaware Statutory
22 Trust Act §3810; Connecticut Statutory Trust Act §34-503.

23
24 Unlike a common-law trust, a statutory trust is a creature of statute. A statutory trust
25 comes into existence only if (1) a certificate of trust is prepared and delivered to the specified
26 public official for filing (see Section 204), and (2) the public official files the certificate. For
27 more on the meaning of “filing,” see Section 204 and the comment thereto. Filing rules are
28 typical of limited liability entities. Such rules serve a notice function, alerting interested parties

1 to the creation and existence of a new juridical entity with limited liability. The certificate of
2 trust also identifies the statutory trust's initial agent for service of process. And in connection
3 with Section 401, the certificate of trust puts third parties on notice if the statutory trust further
4 segregates its property and liabilities by creating one or more series.

5
6 **[Discussion of (b)(4) to come.]** Although formed by making a public filing, a statutory
7 trust is also a creature of contract. As such, it will be possible, though improper, for the trust
8 instrument to be inconsistent with the certificate of trust or other public filings relating to the
9 statutory trust. Paragraph (d) provides that in such circumstances the public filing controls.

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

13
14 **SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF**
15 **TRUST.**

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

18 (1) the name of the trust;

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

20 (3) the changes to the certificate.

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

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

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

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

28 (d) An amended or restated certificate is effective as provided in Section 204(c).

29 **Comment**

1 of the filed record to the person on whose behalf the record was filed.

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

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

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

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

13 (3) if the record specifies a delayed effective date but not an effective time, at
14 12:01 a.m. on the earlier of:

15 (A) the specified date; or

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

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

19 (A) the specified date; or

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

21 **Comment**

22

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

25

26 For a record prepared by a private person to become part of the public record under this

1 act, (1) someone must put a properly prepared version of the record into the possession of the
2 public official specified in the act as the appropriate filing officer, and (2) the filing officer must
3 determine that the record complies with the filing requirements of this act and then officially
4 make the record part of the public record. This Act refers to the first step as “delivery to the
5 [Secretary of State] for filing” and refers to the second step as “filing.” Thus, under this act
6 “filing” is an official act.
7

8 Under paragraph (a), the caption need only indicate the title of the record—for example,
9 “Certificate of Trust” or “Statement of Change for Statutory Trust.” Filing officers typically
10 note on a filed record the fact, date, and time of filing. Copies provided by the filing officer
11 under paragraph (a) should contain that notation. This Act does not provide a remedy if the
12 filing officer wrongfully fails or refuses to file a record.
13

14 Paragraph (c) allows most records to have a delayed effective date, up to 90 days after
15 the date the record is filed by the filing officer. A record specifying a longer delay will not be
16 rejected. Instead, under paragraphs (c)(3) and (4), the delayed effective date is adjusted by
17 operation of law to the “90th day after the record is filed.” This Act does not require the filing
18 officer to notify anyone of the adjustment.
19

20 Consistent with the existing statutory trust acts, but inconsistent with most corporate
21 codes, this Act makes no provision for collecting a franchise tax. See generally Marcel Kahan
22 and Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev.
23 1205, 1218-33 (2001).
24

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

28 **SECTION 205. CORRECTING FILED RECORD.**

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

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

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

36 (2) specify the incorrect information and the reason it is incorrect or the manner in

1 which the signing was defective or erroneous; and

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

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

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

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

9 **Comment**

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

11 A statement of correction is appropriate only to correct inaccuracies that existed or
12 signatures that were defective “at the time of filing.” A statement of correction may not be used
13 to amend or revise a record that was accurate when filed but has become inaccurate as a result of
14 subsequent events.
15

16 Under paragraph (c), a statement of correction relates back by way of retroactive
17 application except against persons that have relied on the uncorrected record and would be
18 adversely affected if the correction related back.
19

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

23 **SECTION 206. CERTIFICATE OF GOOD STANDING.**

24 (a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish
25 to the person making the request a certificate of good standing for a statutory trust if the records
26 filed in the [office of the Secretary of State] show that:
27

28 (1) the [Secretary of State] has filed a certificate of trust;

29 (2) all fees and penalties due under this [act] or other law to the [Secretary of
30 State] have been paid;
31

1 (3) the most recent annual report of the trust required by Section 213 has been
2 filed by the [Secretary of State];

3 (4) a statement of cancellation or dissolution has not be filed by the [Secretary of
4 State]; and

5 (5) the [Secretary of State] has not filed a notice of administrative dissolution
6 under Section 806 or, if the [Secretary of State] has filed such a notice, that the [Secretary of
7 State] has filed a declaration of reinstatement under Section 807.

8 (b) A certificate of good standing must state:

9 (1) the name of the trust;

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

11 and

12 (3) that the conditions stated in subsection (a) have been satisfied.

13 (c) Subject to any qualification stated in the certificate, a certificate of good standing
14 issued by the [Secretary of State] may be relied upon as conclusive evidence that the statutory
15 trust is in good standing as of the date of the certificate.

16 **Comment**

17
18 **Principal Source** – Uniform Limited Partnership Act §209 (2001).

19
20 A certificate of good standing can reveal only information present in the public record.
21 Under this Act significant information bearing on the status of a statutory trust may be outside
22 the public record.

23
24 Section 905 provides for the issuance of a certificate of registration for a qualified foreign
25 statutory trust.

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

29
30 **SECTION 207. NAME OF STATUTORY TRUST.**

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

3 (1) the name of any person that is already incorporated, organized, formed, or
4 authorized to do business in this state; and

5 (2) any name reserved under Section 208 [or other state laws allowing the
6 reservation or registration of business names, including fictitious or assumed name statutes].

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

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

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

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

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

23 (A) has merged with the applicant;

1 (B) has been converted into the applicant; or
2 (C) has transferred substantially all of its property, including the
3 conflicting name, to the applicant.

4 (d) Subject to Section 906, this section applies to any foreign statutory trust transacting
5 business in this state, having a certificate of qualification to do business in this state, or applying
6 for a certificate of qualification.

7 **Comment**

8
9 **Principal Sources** – Uniform Limited Partnership Act §108 (2001); Delaware Statutory
10 Trust Act §3814.

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

23
24 **[Cross – 903]**

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

28
29 **SECTION 208. RESERVATION OF NAME.**

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

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

34 (2) a statutory trust or a qualified foreign statutory trust intending to adopt the

1 name;

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

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

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

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

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

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

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

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

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

2 (e) A transfer or termination under subsection (d) is effective as provided in Section
3 204(c).

4 **Comment**

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

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

9
10 **SECTION 209. AGENT FOR SERVICE OF PROCESS.**

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

13 (b) An agent for service of process of a statutory trust or qualified foreign statutory trust
14 must be an individual who is a resident of this state or a person incorporated, organized, formed,
15 or authorized to do business in this state which maintains an office in this state.

16 **Comment**

17
18 **Principal Sources** – Uniform Limited Partnership Act §114 (2001); Delaware Statutory
19 Trust Act §3804; Connecticut Statutory Trust Act §34-507.

20
21 Under Section 201(b)(3), the initial designation of a statutory trust’s agent for service of
22 process is made in the original certificate of trust. Under Section 902(a)(4), the initial
23 designation of a foreign statutory trust’s agent for service of process is made in the original
24 application for a certificate of qualification. The initial designation may be changed pursuant to
25 a statement of change under Section 210, by an amendment to the certificate of trust under
26 Section 202, or by an annual report under Section 213.

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

30
31 **SECTION 210. CHANGE OF DESIGNATED OFFICE OR AGENT FOR**
32 **SERVICE OF PROCESS.** A statutory trust or qualified foreign statutory trust may change its

1 agent for service of process, the address of its agent for service of process, or its designated
2 office by delivering to the [Secretary of State] for filing a statement of change containing:
3 (1) the name of the trust;
4 (2) the street and mailing addresses of the current designated office of the trust;
5 (3) if the designated office is to be changed, the street and mailing addresses of the new
6 designated office;
7 (4) the name and street and mailing addresses of the current agent of the trust for service
8 of process; and
9 (5) if the current agent for service of process or an address of the agent is to be changed,
10 the new information.

11 **Comment**

12
13 **Principal Source** – Uniform Limited Partnership Act §115 (2001).
14

15 This section uses the term “may” rather than “must” in the first sentence because a
16 statutory trust may also change the information by an amendment to its certificate of trust under
17 Section 202. Further, if the information currently in the public record is accurate, a statutory
18 trust or qualified foreign statutory trust may change the information in an annual report under
19 Section 213.
20

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

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

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

28 (1) the name of the trust;

29 (2) the name of the agent;

1 (3) a statement that the agent resigns as agent for service of process.

2 (b) The resigning agent must transmit a copy of the statement of resignation to the
3 designated office of the statutory trust or qualified foreign statutory trust and another copy to the
4 principal office if the address of the office appears in the records of the [Secretary of State] and
5 is different from the address of the designated office.

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

8 **Comment**
9

10 **Principal Source** – Uniform Limited Partnership Act §116 (2001).
11

12 This section provides the exclusive means for an agent to resign without cooperation
13 from the statutory trust or qualified foreign statutory trust and the only way the agent, rather than
14 the statutory trust or foreign statutory trust, can effect a change in the public record.
15

16 Unlike most records authorized or required to be delivered to the filing officer for filing
17 under this act, a statement of resignation may not provide for a delayed effective date. Paragraph
18 (c) mandates the effective date of the agent’s resignation. An effective date included in a
19 statement of resignation is disregarded.
20

21 To satisfy Section 212(a), the statutory trust or qualified foreign statutory trust must
22 designate a new agent for service of process before the effective date of the current agent’s
23 resignation. If the statutory trust or foreign statutory trust fails to do so, under Section 212
24 service on the statutory trust or foreign statutory trust may be made on the Secretary of State.
25

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

29 **SECTION 212. SERVICE OF PROCESS.**

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

33 (b) If a statutory trust or qualified foreign statutory trust does not appoint or maintain an

1 agent for service of process in this state or the agent for service of process cannot with
2 reasonable diligence be found at the agent's address on file with the [Secretary of State], the
3 [Secretary of State] is an agent of the trust for service of process.

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

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

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

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

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

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

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

20 **Comment**

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

22 Paragraph (f) confirms that the authority of the Secretary of State to accept process under
23 a state long-arm statute exists independently of paragraphs (b) through (e) of this Section.
24

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

1 instrument.
2

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

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

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

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

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

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

11 (A) any alternate name adopted under Section 906;

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

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

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

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

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

1 each subsequent calendar year.

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

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

11 **Comment**

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

13
14 A statutory trust that fails to comply with this section is subject to administrative
15 dissolution. See Section 806.

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

1 [ARTICLE] 3

2 GOVERNING LAW; AUTHORIZATION; DURATION; POWERS

3 SECTION 301. GOVERNING LAW. The law of this state governs:

4 (1) the internal affairs of a statutory trust;

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

7 (3) the enforceability of a debt, obligation, or other liability of the statutory trust or a
8 series thereof against the property of the trust or any series thereof.

9 Comment

10
11 Principal Sources – Connecticut Statutory Trust Act §34-502; Uniform Limited
12 Partnership Act §106 (2001); Revised Uniform Limited Liability Company Act §106 (2006).

13
14 Under paragraph (1) the internal affairs of a statutory trust are governed by the law of this
15 state even if the trust operates in other states. Although the term “internal affairs” may be
16 indeterminate at its edges, the concept certainly includes interpretation and enforcement of the
17 governing instrument and relations among the trustees, beneficial owners, and the statutory trust.

18 See Restatement (Second) of Conflict of Laws §302, cmt. a (1971) (defining “internal affairs”
19 with reference to corporate law as “the relations inter se of the corporation, its shareholders,
20 directors, officers or agents”).

21
22 Paragraph (2) supports Sections 304 and 305 by confirming that the liability of a
23 beneficial owner or a trustee for the debts, obligations, or other liabilities of the statutory trust is
24 governed by the law of this state. This paragraph is stated separately from Paragraph (1) because
25 the liability of a beneficial owner or trustee to third parties is arguably not an internal affair. See
26 Restatement (Second) of Conflict of Laws §307 (1971) (treating shareholders’ liability
27 separately from the internal affairs doctrine).

28
29 Paragraph (3) [to come].

30
31 Section 901 states rules for qualified foreign statutory trusts that parallel and are
32 analogous in scope to those of this section.

33
34 Under Section 103(c)(3), this Section is not subject to override by the governing
35 instrument.

36
37
38 SECTION 302. STATUTORY TRUST AS ENTITY. A statutory trust is an entity

1 separate from its trustees and beneficial owners.

2 **Comment**

3
4 **Principal Sources** – Delaware Statutory Trust Act §§3810; Connecticut Statutory Trust
5 Act §§34-502.

6
7 Because this section implements an entity conception of the statutory trust, it confirms
8 that any prior judicial decision that holds that a common law business trust violates the state’s
9 corporate law, trust law, or public policy is not applicable to a statutory trust. Such decisions
10 reflect the now outmoded concern that a business trust could be used to evade regulatory
11 limitations on the corporate form. See, e.g., [To Come].
12

13 **SECTION 303. PERMISSIBLE PURPOSES.** A statutory trust may have any lawful
14 purpose except a prevailingly donative purpose.

15 **Comment**

16
17 **Principal Sources** – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
18 Act §34-502a.

19
20 Under this section, a statutory trust may be formed for “any lawful purpose except a
21 prevailingly donative purpose.” Thus, in addition to use in a commercial transaction, a statutory
22 trust may be used in a custodial or other context that might not be for profit. See Section 307.
23 The limitation to “lawful” activity addresses the concern that some states limit the type of
24 organizations that may be used in regulated industries such as banking and insurance.
25

26 The exclusion of “a prevailingly donative purpose” addresses the concern that a statutory
27 trust might be used in an estate planning or other donative context to evade public policy
28 limitations on donative transfers and common-law trusts. See, e.g., Uniform Trust Code §105
29 (2000); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U.L. Rev. 1105
30 (2004). The drafting committee declined the suggestion to prohibit a statutory trust from having
31 a charitable purpose on the ground that a statutory trust with a charitable purpose would be
32 covered by existing regulatory law applicable to charitable entities. See Marion R. Fremont-
33 Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* 187-427
34 (2004).
35

36 By prohibiting a statutory trust from having “a prevailingly donative purpose,” the
37 drafting committee avoided the necessity of designing a comprehensive schedule of mandatory
38 rules applicable only to statutory trusts with such a purpose, a task made more difficult by the
39 increasing differentiation among the states on these matters, particularly with respect to the
40 rights of the settlor’s creditors in a self-settled trust and the continued application of the Rule
41 Against Perpetuities to interests held in trust. See Robert H. Sitkoff and Max M. Schanzenbach,
42 *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*,

1 115 Yale L.J. 356 (2005).

2
3 Examples of mandatory rules applicable to common-law trusts that drafters might
4 otherwise try to avoid by using a statutory trust include the following:

- 5
6
- 7 • the duty of a trustee to act in good faith and in accordance with the terms and
 - 8 purposes of the trust and the interests of the beneficiaries;
 - 9 • the requirement that a trust and its terms be for the benefit of one or more
 - 10 ascertainable beneficiaries, and that the trust have a purpose that is lawful, not
 - 11 contrary to public policy, and possible to achieve;
 - 12 • the power of the court to modify or terminate a trust;
 - 13 • the effect of a spendthrift provision and the rights of the settlor's and the
 - 14 beneficiary's creditors and assignees to reach the property of a trust;
 - 15 • the power of the court to adjust a trustee's compensation specified in the terms of
 - 16 the trust which is unreasonably low or high;
 - 17 • the power of the court to remove a trustee for a serious breach of trust;
 - 18 • the duty of the trustee to give information and make reports concerning the
 - 19 administration of the trust to the beneficiary;
 - 20 • the effect of an exoneration clause that purports to limit or eliminate the duties or
 - 21 liabilities of a trustee to a beneficiary;
 - 22 • the rights of a party, other than a trustee or beneficiary, that transacts with the
 - 23 trustee in the trustee's capacity as such;
 - 24 • the rules against perpetuities, accumulations of income, and suspension of the
 - 25 power of alienation; and
 - 26 • the power of the court to take such action and exercise such jurisdiction as may be
 - 27 necessary in the interests of justice.

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

32
33 **[Possible discussion of series purpose provision and cross-reference to come.]**

34
35 Under Section 103(c)(2), this Section is not subject to override by the governing
36 instrument.

37
38 **SECTION 304. STATUTORY TRUST SOLELY LIABLE FOR DEBTS,**
39 **OBLIGATIONS, AND OTHER LIABILITIES OF STATUTORY TRUST.** A debt,
40 obligation, or other liability of a statutory trust or series thereof is solely a debt, obligation, or
41 other liability of the trust or series thereof. A beneficial owner, trustee, agent of the trust, or

1 agent of the trustee is not personally liable, directly or indirectly, by way of contribution or
2 otherwise, for a debt, obligation, or other liability of the trust solely by reason of being or acting
3 as a trustee, beneficial owner, agent of the trust, or agent of the trustee.

4 **Comment**

5 **Principal Sources** – Delaware Statutory Trust Act §3803; Connecticut Statutory trust
6 Act §34-523; Revised Uniform Partnership Act §306 (1994); Uniform Limited Liability
7 Company Act §303; Uniform Limited Partnership Act §§303, 404 (2001); Uniform Trust Code
8 §507 (2000).

9
10 This section implements the concept that the statutory trust is an entity separate from its
11 trustees and beneficial owners in three ways. First, this section confirms that a trustee, as a
12 manager of the statutory trust, is not liable for the debts, obligations, and liabilities of the
13 statutory trust. As such, this section overrides the outmoded common law rule that held the
14 trustee liable for the debts of the trust and then gave the trustee a right to indemnity out of the
15 trust fund. Compare Restatement (Second) of Trusts §§244, 261 (1959) (stating the old rule),
16 with Uniform Trust Code §1010 (2000) (eliminating the personal liability of the trustee for
17 debts, obligations, and liabilities arising in the trustee’s fiduciary capacity). However, nothing in
18 this Section limits the personal liability of the trustee to the statutory trust for breach of duty
19 under Section 505.

20
21 **[Cross-reference and/or discussion of series to come.]**

22
23 Second, this section confirms that the statutory trust is solely liable for the debts,
24 obligations, and liabilities of the trust.

25
26 Third, this section confirms the limited liability of a beneficial owner and trustee by
27 providing that neither a beneficial owner nor trustee of a statutory trust is liable for the debts,
28 obligations, or liabilities of the statutory trust. An agent of the beneficial owner or trustee is
29 likewise not liable for the debts, obligations, or liabilities of the statutory trust. This section
30 therefore confirms that the “control test” of *Williams v. Inhabitants of Milton*, 102 N.E. 355
31 (Mass. 1913), and Restatement (Second) of Agency §14B (1958), is not applicable to a statutory
32 trust. Under the control test, if a beneficiary of a common law business trust had a say in the
33 administration of the trust or the right to remove and replace the trustees, the beneficiary might
34 be held liable for the debts of the trust. By contrast, under this section a beneficial owner may
35 participate in the management of the statutory trust without exposure to liability for the debts of
36 the statutory trust. For discussion of a beneficial owner’s limited liability under the Delaware
37 Statutory Trust Act, see Wendell Fenton and Eric A. Mazie, *Delaware Statutory Trusts*, in 2 R.
38 Franklin Balotti and Jesse A. Finkelstein, *The Delaware Law of Corporations and Business*
39 *Organizations* §19.3 (3d ed. 2005 Supp.). **[Placeholder: Update cite.]**

40
41 **SECTION 305. NO CREDITOR RIGHTS IN TRUST PROPERTY.**

1 Except as provided otherwise in Section 606, a creditor of a beneficial owner or of a
2 trustee does not have the right to obtain possession of, or otherwise exercise legal or equitable
3 remedies with respect to, the property of the statutory trust.

4 **Comment**

5
6 **Principal Sources** - Delaware Statutory Trust Act §3805; Connecticut Statutory Trust
7 Act §34-516; Uniform Trust Code §507 (2000); Revised Uniform Partnership Act §203 (1994);
8 Uniform Limited Liability Company Act §501 (1996); Uniform Limited Partnership Act §701
9 (2001).

10
11 Paragraph (b) implements the concept that a statutory trust is an entity separate from its
12 trustees and beneficial owners by confirming that a creditor of a beneficial owner or a trustee has
13 no recourse against the property of the statutory trust.

14
15 With respect to trustees, the rule of this paragraph is familiar from the operation of
16 common-law trusts. See Uniform Trust Code §507 (2000); Restatement (Third) of Trusts §42,
17 cmt. c (2003); Restatement (Second) of Trusts §308 (1959). The rule of this section is also
18 consistent with bankruptcy law. Property in which the trustee holds legal title as trustee is not
19 part of the trustee's bankruptcy estate. See 11 U.S.C. §541(d).

20
21 With respect to beneficial owners, for discussion of the parallel provision in the Delaware
22 Statutory Trust Act, see Wendell Fenton and Eric A. Mazie, Delaware Statutory Trusts, in 2 R.
23 Franklin Balotti and Jesse A. Finkelstein, The Delaware Law of Corporations and Business
24 Organizations §19.4, at 19-9 – 19-10 (3d ed. 2005 Supp.). However, [**cross-reference to**
25 **charging order provision to come.**]

26
27 For a general discussion of asset partitioning rules in organizational law, see Henry
28 Hansmann and Reinier Kraakman, The Essential Role of Organizational Law, 110 Yale L.J. 387
29 (2000); Henry Hansmann and Ugo Mattei, The Functions of Trust Law: A Comparative Legal
30 and Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998). See also Henry Hansmann, Reinier
31 Kraakman, and Richard Squire, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333 (2006).

32 33 **SECTION 306. DURATION.**

34 (a) A statutory trust has perpetual existence.

35 (b) A statutory trust, or any series thereof, may not be terminated or revoked except in
36 accordance with this [act] or the terms of the governing instrument.

37 (c) The death, incapacity, dissolution, termination, or bankruptcy of a beneficial owner or

1 trustee does not result in the termination or dissolution of a statutory trust or any series thereof.

2 (d) A statutory trust or any series thereof does not terminate because the same person is
3 the sole trustee and sole beneficial owner.

4 **Comment**

5
6 **Principal Sources** – Delaware Statutory Trust Act §3808; Connecticut Statutory Trust
7 Act §34-518.

8
9 Paragraph (a) provides a default rule of perpetual existence for a statutory trust. See also
10 Section 801, which provides for dissolution of a statutory trust only upon the occurrence of an event
11 or circumstance stated in the governing instrument, and Section 806, which provides for
12 administrative dissolution. The duration of a common-law trust, by contrast, is curtailed by the Rule
13 Against Perpetuities. See Restatement (Second) of Property: Donative Transfers § 2.1 (1983).
14 Accordingly, unless the governing instrument provides otherwise, under this section a statutory trust
15 is exempt from the Rule Against Perpetuities. Without taking a position on the policy soundness of
16 the tax-driven movement to abolish the Rule Against Perpetuities with respect to donative trusts, see
17 **[RST3 prop cite to come]**, the drafting committee concluded that the dead-hand worries that
18 underpin the Rule do not apply to a statutory trust. Under Section 302, a statutory trust may not
19 have a prevailingly donative purpose.

20
21 Paragraph (b) confirms that a statutory trust may only be terminated in accordance with the
22 terms of this act or the governing instrument. Thus, paragraph (b) overrides the rules of common-
23 law trust termination that would otherwise be applicable to a statutory trust pursuant to Section 105.
24 Those rules are concerned with mediating the tension between the donor’s intent and subsequent
25 contrary preferences of the beneficiaries, see Robert H. Sitkoff, An Agency Costs Theory of Trust
26 Law, 89 Cornell L. Rev. 621, 658-63 (2004), an issue that is not applicable to a statutory trust
27 because a statutory trust may not have a prevailingly donative purpose. Instead, the drafting
28 committee contemplated that pursuant to Section 104(a)(9) the governing instrument would provide
29 for termination of the statutory trust or modification of the governing instrument if such provisions
30 are desirable.

31
32 Paragraph (c) confirms that the rule of partnership law under which a partnership is
33 dissolved upon the death or incapacity of one of the partners does not apply to a statutory trust.

34
35 Paragraph (d) overrides the application to a statutory trust under Section 105 of the
36 common law rule of merger whereby legal and equitable title to the trust property merge and the
37 trust terminates if the same person is the sole trustee and sole beneficiary. See Restatement
38 (Third) of Trusts §69 (2003); Restatement (Second) of Trusts §341 (1959); Comment, The
39 Doctrine of Merger as Applied to Commercial Trusts, 29 Yale L.J. 97 (1919).

40 41 **SECTION 307. POWER TO HOLD PROPERTY; TITLE TO TRUST**

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

4 **Comment**

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

7
8 This Section implements the concept that a statutory trust is an entity separate from its
9 trustees and beneficial owners by confirming that a statutory trust may transact in its own name.
10 The property of a common-law trust, by contrast, must be held in the name of the trustee as such.

11
12 However, this section also permits the statutory trust to take title to property in the name
13 of the trustee in the trustee’s capacity as such even though the trust can hold property in its own
14 name. The drafting committee reasoned that this provision would be useful for a statutory trust
15 that has dealings in a state that has not provided for a statutory trust entity. Property ownership
16 by a trustee in the trustee’s capacity as such is familiar from the use of common-law trusts.

17
18 To police the boundary of the trustee’s personal property and the property of the trust, the
19 common law imposes on the trustee duties to earmark trust property and not to commingle it
20 with the trustee’s own. See Uniform Trust Code §810 (2000); Restatement (Third) of Trusts §84
21 (2007); Restatement (Second) of Trusts §179 (1959). The drafting committee contemplated that
22 under appropriate circumstances Section 505(b) would be read to require similar conduct by a
23 trustee of a statutory trust that takes title to property of the statutory trust in the name of the
24 trustee in the trustee’s capacity as such.

25
26
27 **SECTION 308. POWER TO SUE AND BE SUED.**

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

29 (b) Except as otherwise provided in [Article] 4, property of a statutory trust held in the
30 name of the trust or by the trustee in the trustee’s capacity as trustee is subject to attachment and
31 execution to satisfy a debt, obligation, or other liability of the trust.

32 **Comment**

33
34 **Principal Sources** – Delaware Statutory Trust Act §§3803-3805; Connecticut Statutory
35 Trust Act §§34-518, 34-523; Uniform Limited Partnership Act §303 (2001).

36
37 Paragraph (a) implements the concept that a statutory trust is an entity separate from the

1 trustee and beneficial owner by confirming that a statutory trust has the power to sue and be sued
2 in its own name.

3

4 Paragraph (b) addresses the attachment and execution of a statutory trust's property
5 subject to the possibility that the statutory trust has formed one or more series under Article 4.

1 [ARTICLE 4]

2
3 SERIES TRUSTS

4
5
6 SECTION 401. SERIES OF STATUTORY TRUST.

7 (a) Subject to subsection (d), the governing instrument may provide for the creation by
8 the statutory trust of one or more series of trustees, beneficial owners, or beneficial interests
9 having separate rights, powers, or duties with respect to specified property of the statutory trust.

10 (b) A series of a statutory trust is not an entity separate from the statutory trust.

11 (c) A series of a statutory trust may have a separate purpose from the trust or any other
12 series thereof provided that the purpose of the series is lawful and not a prevailingly donative
13 purpose.

14 (d) Section (a) applies only if:

15 (1) records are maintained for the series that reasonably identify the property of
16 the series, including by specific listing, category, type, quantity, or computational or allocational
17 formula or procedure, including a percentage or share of any property, or by any other method
18 where the identity of the property of the series is objectively determinable; and

19 (2) notice that the trust might operate as a series trust is set forth in the certificate
20 of trust pursuant to Section 201(b)(4).

21 **Comment**

22
23 **Principal Sources** – Delaware Statutory Trust Act §3806.

24
25 Paragraph (a) of this section confirms that a statutory trust may be organized with one or
26 more series. **[To come: Commentary explaining that the inclusion of “trustees” in**
27 **paragraph (a) is meant to account for the possibility of a series-specific trustee. Such a**
28 **trustee might favor the series even to the detriment of the trust as a whole. Put otherwise,**
29 **inclusion of the term “trustees” is meant to address the problem of a conflict between the**
30 **best interests of a series and the best interests of the trust in a case where the governing**
31 **instrument provides that the trustee has duties only to a series of the trust. See also the**

1 changes to Sections 403 and 505.] [Comparison to classes under Section 104 (c) (15) to
2 come.]
3

4 Paragraph (b) [discussion of non-entity status to come, including the points that we
5 are making explicit what is implicit in the Delaware act, that we decided against specifying
6 entity type powers that are not granted (such as the power to sue and be sued in its own
7 name) to avoid a negative implication, and that entity status for tax purposes is a separate
8 question not addressed here (analogy is to common law trust, which is not an entity under
9 state trust law but is for federal tax purposes)].

10
11 Paragraph (c) [discussion and cross-reference to Section 302 to come.]
12

13 [Paragraph (d) discussion to come.]
14

15 The organization of a master statutory trust with several series is particularly
16 common among statutory trusts that are registered as investment companies under the
17 Investment Company Act of 1940, as amended, 15 U.S.C. Sections 80a-1 et seq. (the “1940
18 Act”). In such a case, any series of beneficial interests established by the governing instrument
19 of the trust is a series preferred in distribution of property or payment of dividends over all other
20 series with respect to property specifically allocated to the series under Section 18 of the
21 Investment Company Act of 1940. [For discussion: (1) Conversion of former Section 404 to
22 this comment. (2) Comparison with Delaware §3805(h): “Except to the extent otherwise
23 provided in the governing instrument of the statutory trust, where the statutory trust is a
24 registered investment company under the Investment Company Act of 1940, as amended
25 (15 U.S.C. § 80a-1 et seq.), any class, group or series of beneficial interests established by
26 the governing instrument with respect to such statutory trust shall be a class, group or
27 series preferred as to distribution of assets or payment of dividends over all other classes,
28 groups or series in respect to assets specifically allocated to the class, group or series as
29 contemplated by § 18 (or any amendment or successor provision) of the Investment
30 Company Act of 1940 [15 U.S.C. § 80a-18], as amended, and any regulations issued
31 thereunder, provided that this section is not intended to affect in any respect the provisions
32 of § 3804(a) of this title.”]

33
34
35 Under Section 103(c)(4), paragraphs (b), (c), and (d) of this Section are not subject to
36 override by the governing instrument.
37

38 SECTION 402. LIABILITY OF SERIES TRUST.

39 (a) If a statutory trust has one or more series as provided in Section 401:

40 (1) a debt, obligation, or other liability incurred or otherwise existing with respect
41 to the property of a particular series is enforceable against the property of the series only, and not

1 against the property of the trust generally or any other series thereof; and
2 (2) none of the debts, obligations, or other liabilities incurred or otherwise
3 existing with respect to the trust generally or the property of any other series thereof is
4 enforceable against the property of the series;

5 (b) The association, disassociation, or reassociation of property of the statutory trust or a
6 series thereof to the trust or a series thereof, including by conversion or merger under [article] 7
7 is deemed to be a transfer under [Uniform Fraudulent Transfers Act or other state fraudulent
8 transfer statute] as if the statutory trust and each series thereof were separate persons.

9 **Comment**

10 **Principal Sources** – Delaware Statutory Trust Act §3804; Delaware Limited Liability
11 Company Act §18-215.

12
13
14 Paragraph (a) provides that if a statutory trust creates one or more series under Section
15 401 and satisfies the conditions of paragraph (b), the debts, liabilities, and other obligations of a
16 particular series are enforceable against the property of that series only. In such circumstances,
17 the debts, liabilities, and other obligations of the trust generally and any other series thereof are
18 not enforceable against the property of the series. **[Possible discussion of the common creditor
19 problem and the idea of the trust as a separate bucket from each series to come.]**

20
21 Paragraph (b) sets forth two conditions that must be satisfied before the liability-limiting
22 rules of paragraph (a) may apply: (1) records must be maintained that reasonably identify the
23 property of the series, and (2) notice of the limitation on liabilities of a series must be set forth in
24 the certificate of trust.

25
26 The earmarking requirement of paragraph (b)(1) safeguards the separate interests of the
27 beneficial owners of each series by clarifying the boundaries between the property and liabilities
28 of each series. For similar reasons, the earmarking requirement also protects third parties that
29 deal with a series trust. Third parties are further protected by paragraph (b)(2), which conditions
30 limited liability across series on notice in the certificate of trust that the trust might have one or
31 more series.

32
33 Failure to satisfy paragraph (b) exposes the property of one series to the creditors of
34 another series and the creditors of the trust generally. In such a case, the failure to maintain
35 separate records would likely amount to a breach of trust under Section 505, remediable by a
36 beneficial owner in a derivative or direct suit against the trustee. **[Placeholder for possible
37 further discussion of trust versus series-level buckets to come.]**

1 Paragraph (b) addresses the concern that [to come, the basic idea is that we don't want
2 to allow transfer of property from series A to series B, thereby frustrating the creditors of
3 series A, if the transfer will leave series A insolvent or otherwise would have qualified as a
4 fraudulent transfer if A and B were separate entities].

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

8
9
10 **SECTION 403. DUTIES OF TRUSTEE IN SERIES TRUST.**

11 If there is at least one trustee that, in discharging its duties, must consider the interests of
12 the statutory trust and all series thereof, then the governing instrument may provide that one or
13 more other trustees, in discharging their duties, may consider only the interests of the trust or one
14 or more series thereof.

15 **Comment**

16
17 **[Comment to come]**

18
19 Under Section 103 (c) (4), this Section is not subject to override by the governing
20 instrument.

21
22
23
24 **SECTION 404. DISSOLUTION OF SERIES.**

25 (a) A series of a statutory trust may be dissolved or its property distributed without
26 causing the dissolution of the trust or any other series thereof.

27 (b) A series is dissolved, and its activities must be wound up, upon the occurrence of an
28 event or circumstance that the governing instrument states causes dissolution or upon the
29 dissolution of the statutory trust.

30 (c) Upon dissolution of a series, the persons that under the governing instrument are
31 responsible for winding up the affairs of the series may cause the statutory trust to take all
32 actions as are permitted under Section 803, and shall provide for the claims and obligations of

1 the series as provided in Sections 803 to 805.

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

6 **Comment**

7 **Principal Source** – Delaware Statutory Trust Act §3808; Revised Uniform Limited
8 Liability Company Act §§701-02 (2006).

9
10 **[Comment to explain that series dissolves as if it were a trust to come.]**

11
12 Under Section 103(c)(4), paragraph (c) of this Section is not subject to override by the
13 governing instrument.

14
15

1 [ARTICLE 5]

2 TRUSTEES AND TRUST MANAGEMENT

3 SECTION 501. MANAGEMENT OF STATUTORY TRUST. The business and
4 affairs of a statutory trust are managed by or under the authority of its trustees.

5 Comment

6 Principal Sources – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
7 Act §34-517; Uniform Limited Partnership Act §105 (2001); Delaware General Corporation Law
8 §141; Revised Model Business Corporation Act §8.01 (2005).

9
10 Section 102(19) defines the term “trustee” as a person designated as such in accordance
11 with the governing instrument or applicable law. Section 104(c)(5)(C) confirms that the
12 governing instrument may provide for trustee appointment. However, because no provision in
13 this Act provides default rules for trustee appointment, if the governing instrument does not
14 provide for trustee appointment, then under Section 105 the state’s law pertaining to trustee
15 appointment in common-law trusts controls.

16
17 For treatment of the default rules of trustee appointment, removal, and succession in
18 common-law trusts, see Restatement (Third) of Trusts §§31-37 (2003); Uniform Trust Code
19 §§701-02, 704-06 (2000). See also 2 Austin Wakeman Scott, William F. Fratcher, and Mark L.
20 Ascher, 1 Scott and Ascher on Trusts Ch. 2 (5th ed. 2006).

21
22 SECTION 502. TRUSTEE POWERS. A trustee may exercise:

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

27 Comment

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

29
30 This section is intended to grant trustees the broadest possible powers. Hence, this
31 section overrides the application to a statutory trust under Section 105 of the outmoded common-
32 law rule that a trustee has only those powers granted by the trust instrument. See Uniform Trust
33 Code §815 (2000); Restatement (Third) of Trusts §85, cmt. a (2007).

1 in-person meeting. See 15 U.S.C. §80a-15(c); 15 U.S.C. 80a-31(a).

2
3
4 **SECTION 504. PROTECTION OF PERSON DEALING WITH TRUSTEE.**

5 (a) A person that in good faith assists a trustee, or that in good faith and for value deals
6 with a trustee, without knowledge that the trustee is exceeding or improperly exercising the
7 trustee’s power, is protected from liability as if the trustee properly exercised the power.

8 (b) A person that in good faith deals with a trustee is not required to inquire into the
9 extent of a trustee’s power or the propriety of its exercise.

10 (c) A person that in good faith delivers property to a trustee need not ensure its proper
11 application.

12 (d) A person that in good faith assists a former trustee as if the former trustee were still
13 trustee, or that in good faith and for value deals with a former trustee as if the former trustee
14 were still trustee, without knowledge that the trusteeship has terminated is protected from
15 liability as if the former trustee were still a trustee.

16 **Comment**

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

18
19 Paragraph (a) protects two different classes of persons: (1) a person that assists a trustee
20 with a transaction, and (2) a person that deals with the trustee for value. As long as the
21 assistance was provided or the transaction was entered into in good faith and without knowledge
22 that the trustee was exceeding or improperly exercising the trustee’s powers, the person is
23 protected in the transaction.

24
25 Paragraph (b) confirms that a person that is acting in good faith is not charged with a
26 duty to inquire into the extent of a trustee’s power or the propriety of its exercise. The person
27 may assume that the trustee has the necessary power. Paragraph (b) therefore overrides the
28 application to a statutory trust under Section 105 of the outmoded common-law rule that a third
29 party is charged with constructive notice of the trust instrument and its contents. See Austin
30 Wakeman Scott, William F. Fratcher, and Mark L. Ascher, 5 Scott and Ascher on Trusts §29.2
31 (5th ed. 2008).

32
33 Paragraph (c) protects a person that in good faith delivers property to a trustee. The

1 standard of protection in Restatement (Second) of Trusts §321 (1959) is phrased differently, but
2 the result is similar. Under the Restatement, the person delivering property to a trustee is liable
3 if at the time of the delivery the person had notice that the trustee was misapplying or intending
4 to misapply the property.

5
6 Paragraph (d) extends the protections afforded by this section to assistance provided to or
7 dealings for value with a former trustee. The person is protected as if the former trustee still held
8 the office if the person acted in good faith.

9
10 **[To come: Discussion of differences with the UTC.]**

11
12 For discussion of the meaning of good faith, see the comment to Section 505.
13

14 **SECTION 505. STANDARDS OF CONDUCT FOR TRUSTEES.**

15 (a) Subject to Section 403, in exercising the powers of trusteeship, a trustee shall act in
16 good faith and in a manner that the trustee reasonably believes to be in the best interests of the
17 statutory trust.

18 (b) A trustee shall discharge its duties with the care that a person in a similar position
19 would reasonably believe appropriate under similar circumstances.

20 **Comment**

21
22 **Principal Source** – Revised Model Business Corporation Act §8.30 (2005).

23 To police the exercise of the trustee’s broad powers under Section 502, this section
24 subjects the trustee to fiduciary duties of loyalty and care akin to those of a corporate director.
25

26 The drafting committee opted to model the trustee’s duties on the corporate fiduciary
27 obligation as stated in Revised Model Business Corporation Act §8.30 (2005) rather than the
28 more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a
29 mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the
30 context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of
31 commercial actors. For a statement of the duties of loyalty and prudence in trust law, see
32 Restatement (Third) of Trusts §§77-78 (2007). For a comparison, see Robert H. Sitkoff, Trust
33 Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82 (2003). See
34 also the sources cited in the Comment to Section 507.
35

36 **[Discussion of Cargill, to come.]**
37

1 The drafting committee declined the suggestion to define the term good faith on the
2 ground that such a definition necessarily would be over- and under-inclusive. Instead, the
3 committee contemplated that the term would be interpreted in light of its evolving meaning in
4 the business and trust law cases.

5
6
7 **[To come:** Commentary explaining rationale for the “subject to Section 403” language.]
8

9 Under Section 103(c)(5), the trustee’s standards of conduct under this section are
10 mandatory rules that are not subject to override by the governing instrument. However, the
11 governing instrument may prescribe the standards by which good faith, best interests of the
12 statutory trust, and care that a person in a similar position would reasonably believe appropriate
13 under similar circumstances are determined provided that the standards are not manifestly
14 unreasonable.

15
16 Delaware Statutory Trust Act §3806(c) provides that a trustee’s fiduciary duties “may be
17 expanded or restricted or eliminated by provisions in the governing instrument; provided, that
18 the governing instrument may not eliminate the implied contractual covenant of good faith and
19 fair dealing,” and §3806(e), which provides that a “governing instrument may provide for the
20 limitation or elimination of any and all liabilities for . . . breach of duties (including fiduciary
21 duties) . . .; provided, that a governing instrument may not limit or eliminate liability for any act
22 or omission that constitutes a bad faith violation of the implied contractual covenant of good
23 faith and fair dealing.”
24
25

26 **SECTION 506. GOOD-FAITH RELIANCE.** A trustee, officer, employee, manager,
27 or committee of a statutory trust, or other person designated pursuant to Section 104(c)(7), is not
28 liable to the trust or to a beneficial owner for breach of any duty, including a fiduciary duty, to
29 the extent the breach resulted from the good-faith reliance on:

30 (1) the terms of the governing instrument;

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

32 (3) the opinions, reports, or statements of another person that the trustee reasonably
33 believes is in the other person’s professional or expert competence and are made or delivered to
34 the trustee, officer, employee, manager, or committee of a statutory trust, or other person
35 designated pursuant to Section 104(c)(7).

36 **Comment**

1 forbids self-dealing transactions even if the transaction is fair and in the best interests of the trust
2 and the beneficiaries. See Restatement (Third) of Trusts §78 (2007); Restatement (Second) of
3 Trusts §170 (1959); John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest
4 or Best Interest?, 114 Yale L.J. 929 (2005); Melanie B. Leslie, Trusting Trustees: Fiduciary
5 Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005).
6

7 Instead, this section follows the corporate model whereby an interested transaction is
8 voidable by the statutory trust unless the related party shows that the transaction is fair to the
9 trust. For discussion of the fairness test as applied in corporate law, see Steven M. Bainbridge,
10 Corporation Law and Economics §7.2, at pp. 315-16 (2002), citing *Marciano v. Nakash*, 535
11 A.2d 400 (Del. 1987). **[Change to/add ALI Principles? Explain best interest versus fairness.]**
12

13 **[To come: possible additional commentary on the point that this section is not**
14 **scheduled in 103(c), hence ratification and related ideas may be addressed/alterd in the**
15 **governing instrument; and that the purpose of this section is to override the no-further-**
16 **inquiry rule, not to validate all self-dealing transactions]**
17

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

24 **SECTION 508. TRUSTEE’S RIGHT TO INFORMATION.** A trustee has the right
25 to receive or to obtain by summary proceeding in the [appropriate court] information from the
26 statutory trust or another trustee relating to the affairs of the statutory trust reasonably related to
27 the trustee’s discharge of the trustee’s duties as trustee.

28 **Comment**

29 Under Section 103(c)(6), the trustee’s right to information under this section is not
30 subject to override by the governing instrument. However, the trustee’s right to information is
31 limited to information “reasonably related to the trustee’s discharge of the trustee’s duties as
32 trustee,” and under Section 103(c)(6) the governing instrument may prescribe the standards by
33 which reasonably related is determined provided that those standards are not manifestly
34 unreasonable.
35

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

1 trustee’s duties in connection with the trustee’s limited role.

2
3 Section 608 provides for a beneficial owner’s right to information.
4

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

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

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

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

19 **Comment**

20
21 **Principal Sources** – Delaware Statutory Trust Act §3817; Connecticut Statutory Trust
22 Act §34-524; Delaware General Corporation Law §145; Uniform Trust Code §§105, 1008
23 (2000).
24

25 This Section confirms that the governing instrument may provide for indemnification,
26 advancement, or exoneration, and it states limitations on any such provisions. This Section does
27 not, by itself, compel indemnification, advancement, or exoneration. Under Section 103(c)(8),
28 this section’s prohibition against indemnification, advancement, or exoneration for conduct
29 involving bad faith, willful misconduct, or reckless indifference is not subject to override by the
30 governing instrument. Prohibiting indemnification, advancement, or exoneration for such
31 conduct is consistent with traditional trust doctrine. See Uniform Trust Code §1008 (2000);

1 Restatement (Second) of Trusts §222 (1959); 4 Austin Wakeman Scott, William Franklin
2 Fratcher, and Mark L. Ascher, Scott and Ascher on Trusts §24.27.3 (5th ed. 2007). **[RST3 TO**
3 **CITE.]**
4

5 The Delaware Statutory Trust Act likewise limits the permissible scope of exoneration.
6 See Delaware Statutory Trust Act §3806(e), which provides that the “governing instrument may
7 provide for the limitation or elimination of any and all liabilities for breach of contract and
8 breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing
9 instrument may not eliminate the implied contractual covenant of good faith and fair dealing.”
10

11 In *Nakahara v. The NS 1991 American Trust*, 739 A.2d 770 (Del. Ch. 1998), the
12 Delaware Chancery Court held that a Delaware statutory trust had the power to advance
13 litigation expenses, but denied the trustees’ request for indemnification on the ground of unclean
14 hands.
15

16 Limitations on permissible exoneration are also familiar corporate and alternative entity
17 law. See, e.g., Delaware General Corporation Law §102(b)(7); Delaware Limited Liability
18 Company Act §18-1101; **[To come: Citation to MBCA 2.02(b)(4) and/or other uniform acts**
19 **to come].**
20

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

28 The SEC has taken the position that, before advancing legal fees to a trustee of a mutual
29 fund, the fund’s “board must either (1) obtain assurances, such as by obtaining insurance or
30 receiving collateral provided by the [trustee], that the advance will be repaid if the trustee is
31 found to have engaged in disabling conduct, or (2) have a reasonable belief that the [trustee] has
32 not engaged in disabling conduct and ultimately will be entitled to indemnification.” SEC
33 Interpretation: Matters Concerning Independent Directors of Investment Companies, Investment
34 Company Act Rel. No. 24083 (Oct. 14, 1999), 1999 WL 820629, *10. The SEC has also taken
35 the position that there is a rebuttable presumption that an independent trustee (see Section 512
36 has not engaged in disabling conduct. *Id.*
37
38

39 **SECTION 510. DIRECTION OF TRUSTEES.**

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

42 (b) The governing instrument may provide that neither the power to direct a trustee or

1 other person nor the exercise of the power by any person, including a beneficial owner, causes
2 the person to be a trustee or imposes on the person duties, including fiduciary duties, or
3 liabilities relating thereto, to a statutory trust or to a beneficial owner thereof.

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

9 **Comment**

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

12
13 Paragraph (a) ratifies the use of a directed trustee, meaning a trustee that must act in
14 accordance with the directions of another person. Under paragraph (b), however, the trustee
15 must not follow a direction that is manifestly contrary to the terms of the governing instrument
16 or that the trustee knows or has reason to know would constitute a serious breach of fiduciary
17 duty. For general discussion, see Restatement (Third) of Trusts §75 (2007); Restatement
18 (Second) of Trusts §185 (1959); Richard W. Nenno, Directed Trusts: Can Directed Trustees
19 Limit Their Liability?, 21 Prob. and Prop. 45 (Nov./Dec. 2007).

20
21 Paragraph (b) confirms that the governing instrument may provide that a person that has
22 the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to the
23 statutory trust or a beneficial owner.

24
25 The reference in paragraph (c) to “serious” breach of fiduciary duty is designed to
26 exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial
27 owner. For some purposes, such as trustee removal, trust law distinguishes between “serious”
28 and not serious breaches of trust. See Uniform Trust Code §706(b)(1) (2000); Austin Wakeman
29 Scott, William F. Fratcher, and Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, at 661 (5th
30 ed. 2006); Restatement (Second) of Trusts §107, cmt. b (1959).

31
32 The trustee’s determination whether a direction is “manifestly contrary to the terms of the
33 governing instrument” or “would constitute a serious breach of fiduciary duty by the trustee” is
34 subject to the trustee’s fiduciary obligations. The drafting committee contemplated that, in
35 accord with conventional trust practice, a trustee could seek judicial resolution of whether an
36 instruction falls within the exclusion of paragraph (b) by applying to the appropriate court for
37 instructions. See Restatement (Third) of Trusts §71 (2007).

1
2 Under Section 103(c)(9), the obligation of a trustee not to follow a direction that is
3 manifestly contrary to the terms of the governing instrument or that would constitute a serious
4 breach of trust is not subject to override by the governing instrument.
5

6 In conjunction with Section 511, this section facilitates the current practice in existing
7 statutory trusts of creating a limited purpose trustee—for example in a securitization transaction
8 with a person who is responsible for distribution computations or whose consent is required
9 before the statutory trust can petition for bankruptcy.
10

11
12 **SECTION 511. DELEGATION BY TRUSTEE.**

13 (a) A trustee may delegate duties and powers. The trustee must exercise the care a
14 person in a similar position would reasonably believe appropriate under similar circumstances in:

15 (1) selecting an agent;

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

17 (3) periodically reviewing the agent’s actions in order to monitor the agent’s
18 performance and compliance with the terms of the delegation.

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

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

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

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

27 **Comment**

28 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
29 Act §34-517; Uniform Trust Code §807 .
30

1 This section is intended to facilitate delegation to specialists. To that end, it reverses the
2 outmoded common law rule against delegation by a trustee. In authorizing delegation, this
3 section follows the Delaware Statutory Trust Act and the modern trend with respect to common-
4 law trusts. Most states have abrogated the common law nondelegation rule with legislation
5 based on the Uniform Prudent Investor Act, Uniform Trust Code, or the Restatement (Third) of
6 Trusts. See Uniform Trust Code §807 (2000); Uniform Prudent Investor Act §9 (1994);
7 Restatement (Third) of Trusts §80 (2007). See also John H. Langbein, Reversing the
8 Nondelegation Rule of Trust-Investment Law, 59 Mo. L. Rev. 105 (1994).

9
10 Paragraphs (a), (c), (d), and (e) are patterned on Uniform Trust Code §807 (2000), which
11 is derived from Uniform Prudent Investor Act §9 (1994). This section deviates from prior
12 uniform acts, however, on the issue of delegation to a co-trustee. Following the Delaware
13 Statutory Trust Act, paragraph (b) treats delegation to a co-trustee in the same manner as
14 delegation to another person. By contrast, traditional trust law disfavors delegation by one co-
15 trustee to another. See Restatement (Second) of Trusts §184 (1959). See also Uniform Trust
16 Code §703(e) (2000); Restatement (Third) of Trusts §81 cmt. c(1) (2007). The traditional rule is
17 based on the assumption that, if the donor named more than one trustee, the donor intended each
18 to be a check on the others. That policy does not fit commercial statutory trust practice, in which
19 limited purpose trustees are common.

20
21 There is an intrinsic tension in trust law between granting trustees broad powers that
22 facilitate flexible and efficient trust administration, on the one hand, and protecting trust
23 beneficiaries from the misuse of such powers on the other hand. Delegation, which is a species
24 of trustee power, raises the same tension. If the trustee delegates effectively, the beneficiaries
25 obtain the advantage of the agent's specialized skills or whatever other attributes induced the
26 trustee to delegate. But if the trustee delegates to a knave or an incompetent, the delegation can
27 work harm upon the beneficiaries.

28
29 This section is designed to strike the appropriate balance between the advantages and the
30 hazards of delegation. It authorizes delegation under the limitations of paragraphs (a) and (c).
31 Paragraph (a) requires the trustee to exercise the care a person in a similar position would
32 reasonably believe appropriate under similar circumstances in selecting the agent, in establishing
33 the terms of the delegation, and in reviewing the agent's compliance with the terms of the
34 delegation.

35
36 The trustee's duty of care in framing the terms of the delegation should protect the
37 beneficial owners against overbroad delegation. For example, a trustee could not prudently agree
38 to a delegation agreement containing an exculpation clause that leaves the statutory trust without
39 recourse against reckless action or bad faith by the agent. Leaving the trust without a remedy for
40 willful wrongdoing is inconsistent with the trustee's duty of care in formulating the terms of the
41 delegation.

42
43 Although paragraph (d) exonerates the trustee from personal responsibility for the agent's
44 conduct when the delegation satisfies the standards of paragraph (a), paragraph (c) makes the
45 agent responsible to the statutory trust. The beneficial owners can, therefore, rely upon the
46 trustee to enforce the terms of the delegation.

1
2 Mutual funds often receive a common set of services from an organization that
3 specializes in operating mutual funds, which is typically the investment adviser or an affiliate.
4 The trustees monitor the service providers and the Investment Company Act of 1940 requires the
5 trustees to approve the contracts with the adviser and distributor. See 15 U.S.C. § 80a-15.
6

7 **SECTION 512. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT**
8 **COMPANY.**

9 (a) In this section, the terms “affiliated person” and “interested person” have the
10 meanings set forth in the Investment Company Act of 1940, [as amended,] 15 U.S.C. Section
11 80a-1 et seq., [and any regulations issued thereunder].

12 (b) If a statutory trust is registered as an investment company under the Investment
13 Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [or any successor statute
14 thereto,] [and any regulations issued thereunder,] a trustee is an independent trustee for all
15 purposes under this [act] if the trustee is not an interested person of the trust. The receipt of
16 compensation both for service as an independent trustee of the trust and for service as an
17 independent trustee of one or more other investment companies managed by a single investment
18 adviser or an affiliated person of an investment adviser, does not affect the status of the trustee as
19 an independent trustee under this section.

20 **Comment**

21
22 **Principal Source** – Delaware Statutory Trust Act §3801.
23

24 It is not uncommon for a director of a mutual fund to serve on multiple mutual fund
25 boards. This section addresses the question of trustee independence in such circumstances,
26 rejecting *Strougo v. Scudder, Stevens and Clark*, 964 F. Supp. 783 (S.D.N.Y. 1997) (applying
27 Maryland law). In *Strougo* the plaintiffs claimed that directors serving on multiple boards within
28 a mutual fund complex became “interested” by virtue of their close financial relationship with
29 the investment advisor. The plaintiffs brought a derivative suit against a fund’s investment
30 advisor alleging excessive fees. The plaintiffs did not, however, make a demand on the directors
31 prior to filing suit. The court excused the plaintiffs from the demand requirement because the
32 fund’s directors served on multiple boards within the same fund complex, receiving “substantial

1 remuneration,” and hence were not independent from the adviser. *Id.* at 793-95.

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

1 [ARTICLE] 6

2 BENEFICIARIES AND BENEFICIAL RIGHTS

3
4 SECTION 601. BENEFICIAL INTEREST.

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

6 (b) A beneficial owner’s interest in the statutory trust is personal property regardless of
7 the nature of the property of the trust.

8 (c) A beneficial owner’s interest is not an interest in specific property of the trust.

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

11 Comment

12
13 Principal Source – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust
14 Act §34-516; Revised Uniform Limited Liability Company Act §404 (2006).

15
16 Paragraph (a) provides as a default rule that a beneficial owner’s interest in the statutory
17 trust is freely transferable. This paragraph therefore overrides the rule in some states, which
18 would otherwise be applicable to a statutory trust pursuant to Section 105, that makes a common-law
19 trust spendthrift by default. See Jeffrey A. Schoenblum, 2009 Multistate Guide to Estate Planning
20 Table 9.05, Part 1, Column 2 (collecting authority). However, because the rule stated in paragraph
21 (a) is not scheduled in Section 103(c), it is subject to override by the governing instrument. Section
22 104(c)(2) confirms that the governing instrument may limit a beneficial owner’s right to transfer
23 its beneficial interest. Section 606 provides for a charging order against a beneficial owner’s
24 rights to distributions in the event that the beneficial owner’s beneficial interest is not freely
25 transferable.

26
27
28 SECTION 602. VOTING OR CONSENT BY BENEFICIAL OWNERS.

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

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

31 (2) The beneficial owners may take the action without a meeting, without notice,
32 and without a vote, if a consent, or consents, in a record, setting forth the action so taken, are

1 signed by beneficial owners having at least the minimum number of votes necessary to authorize
2 or take the action at a meeting at which all beneficial owners entitled to vote thereon were
3 present and voted, but prompt notice of the action must be given to those beneficial owners that
4 did not consent.

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

7 **Comment**

8
9 **Principal Source** – Delaware Statutory Trust Act §3806; Delaware General Corporation
10 Law §228.

11
12 Except for a conversion, merger, or dissolution under Article 6, nothing in this act
13 provides for the beneficial owners to act on any matter. However, because the beneficial owners
14 may be given such a right by the terms of the governing instrument, paragraph (a) supplies a
15 default rule requiring a majority of the number of beneficial owners. The drafting committee
16 contemplated that the governing instrument typically will address voting rules by providing a per
17 capital or other share-based allocation of voting rights. However, the drafting committee
18 declined the suggestion to try to incorporate such a rule as a default. Such rules are necessarily
19 transaction-specific and hence infeasible to specify in a one-size-fits-all default. Compare
20 Revised Uniform Partnership Act §401(f) (1997), which provides that “[e]ach partner has equal
21 rights in the management and conduct of the partnership business.”
22

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

36 Section 104(c)(4) confirms that the rules stated in this Section are subject to override by
37 the governing instrument.
38

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

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

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

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

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

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

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

1 (4) imposition of an obligation to repay a loan to the statutory trust by another
2 beneficial owner of the amount necessary to meet the defaulting beneficial owner’s commitment;
3 and

4 (5) redemption or sale of the defaulting beneficial owner’s beneficial interest at a
5 value fixed by appraisal or by formula.

6 **Comment**
7

8 **Principal Sources** – Delaware Statutory Trust Act §3802; Connecticut Statutory Trust
9 Act §34-515.
10

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

18 Paragraph (c) repudiates the hostility of traditional law to penalties, thereby resolving the
19 doubts that arose prior to statutory confirmation about the validity of particular remedies for a
20 beneficial owner’s breach.
21

22 Under Section 104(c)(1), the governing instrument may provide the means by which
23 beneficial ownership is determined and evidenced. Under Section 104(c)(10)-(11), the
24 governing instrument may specify the conditions under which a person becomes a beneficial
25 owner.
26

27 **SECTION 604. DISTRIBUTION TO BENEFICIAL OWNER.**

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

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

33 (c) The trust may distribute an asset in-kind if each part of the asset is fungible with each

1 other part and each beneficial owner receives a percentage of the asset equal in value to the
2 beneficial owner's share of the distribution.

3 **Comment**

4
5 **Principal Source** – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust
6 Act §34-516; Revised Uniform Limited Liability Company Act §404 (2006).

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

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

23 **SECTION 605. REDEMPTION OF BENEFICIAL INTEREST.** A statutory trust
24 may acquire, by purchase, redemption, or otherwise, any beneficial interest in the trust or series
25 thereof. A beneficial interest so acquired is canceled.

26 **Comment**

27
28 **Principal Source** – Delaware Statutory Trust Act §3818.

29
30 A registered investment company organized as an open-end mutual fund generally is
31 obligated to honor redemption requests by its shareholders at the net asset value per share next
32 calculated after receipt of the request, with payment to be made in cash (or, in some cases, in
33 kind) within seven days of the request. See 15 U.S.C. §80a-22(e); 17 CFR §270.22c-1. In
34 narrowly defined circumstances, this redemption right and obligation may be postponed. See 15
35 U.S.C. §80a-22(e). The redemption proceeds may be reduced by various fees retained by the
36 fund and/or its selling agent (i.e., sales loads and redemption fees). See 17 CFR §§270.22c-2;
37 270.6c-10.
38
39

40 **SECTION 606. CHARGING ORDER.**

1 (a) If a beneficial interest is not freely transferable by a beneficial owner such that the
2 transferee has all rights of the transferor, a judgment creditor of a beneficial owner may satisfy
3 the judgment against the beneficial owner's beneficial interest only as provided in this section.

4 (b) On application by a judgment creditor of a beneficial owner, the [appropriate court]
5 may issue a charging order against the beneficial owner's right to distributions from the trust for
6 the unsatisfied portion of the judgment.

7 (c) A charging order issued under subsection (b) constitutes a lien on the beneficial
8 owner's right to distributions and requires the statutory trust to pay over to the judgment creditor
9 any distribution that would otherwise be paid to the beneficial owner until the unsatisfied amount
10 of the judgment has been satisfied.

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

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

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

16 (e) A statutory trust or beneficial owner that is not subject to the charging order may pay
17 to the judgment creditor the full amount due under the judgment lien and thereby succeed to the
18 rights of the judgment creditor, including the charging order.

19 (f) This [act] does not deprive a beneficial owner or a transferee of the beneficial interest
20 of any exemption laws applicable to the beneficial interest.

21 **Comment**

22
23 **Principal Source** - Revised Uniform Limited Liability Company Act §503 (2006).

24 **[Comment to come.]**
25
26

1 Under Section 103(c)(10), the right of a judgment creditor of a beneficial owner to seek a
2 charging order may not be eliminated by the governing instrument.
3

4 **SECTION 607. TRANSACTION WITH BENEFICIAL OWNER.** A beneficial
5 owner or related person of a beneficial owner may lend money to, borrow money from, act as a
6 surety, guarantor or endorser for, guarantee or assume one or more obligations of, provide
7 collateral for, or do other business with the statutory trust and, subject to law other than this
8 [act], has the same rights and obligations with respect to those matters as a person that is not a
9 beneficial owner.

10 **Comment**
11

12 **Principal Source** – Delaware Statutory Trust Act §3806.
13

14 **SECTION 608. BENEFICIAL OWNER’S RIGHT TO INFORMATION.** A
15 beneficial owner has the right to receive or to obtain by summary proceeding in the [appropriate
16 court] information from the statutory trust or a trustee relating to the affairs of the statutory trust
17 reasonably related to the beneficial owner’s interest.

18 **Comment**

19 **Principal Source** – Delaware Statutory Trust Act §3819; Delaware Limited Liability
20 Company Act §18-305.
21

22 Under Section 103(c)(10), a beneficial owner’s right to information under this section is
23 not subject to override by the governing instrument. However, a beneficial owner’s right to
24 information under this section is limited to information “reasonably related to the beneficial
25 owner’s ability to enforce its rights as a beneficial owner,” and under Section 103(c)(8) the
26 governing instrument may prescribe the standards by which reasonably related is determined if
27 those standards are not manifestly unreasonable.
28

29 Imposing a mandatory, minimum right to information critical to the beneficiary’s ability
30 to enforce the trust is familiar law. For example, Restatement (Third) of Trusts §82, cmt. a(2)
31 (2007), provides that “a beneficiary is always entitled . . . to request such information as is
32 reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and
33 otherwise to enforce his or her rights under the trust.” See also 3 Austin Wakeman Scott,

1 William F. Fratcher, and Mark L. Ascher, 1 Scott and Ascher on Trusts §17.5, at p. 1202 (5th ed.
2 2006); Restatement (Second) of Trusts §173, cmt. c (1959); T.P. Gallanis, The Trustee’s Duty to
3 Inform, 85 N.C. L. Rev. 1595 (2007).

4
5 The drafting committee declined the suggestion to include in this section a schedule of
6 accessible information on the ground that such a rule-based schedule necessarily would be over-
7 and under-inclusive. Instead, the committee contemplated that the term “reasonably related”
8 would provide a more robust and flexible right to information by allowing the beneficiary to
9 obtain a court order in a summary proceeding for the release of any type of information that
10 bears on enforcement of the beneficial owner’s beneficial interest.

11
12 Section 508 provides for a trustee’s right to information.
13

14 **SECTION 609. ACTION BY BENEFICIAL OWNER.**

15 (a) A beneficial owner may maintain a direct action against a statutory trust to redress an
16 injury sustained by, or to enforce a duty owed to, the beneficial owner if the beneficial owner
17 can prevail without showing an injury or breach of duty to the trust.

18 (b) A beneficial owner may maintain a derivative action in the [appropriate court] to
19 redress an injury sustained by, or enforce a duty owed to, a statutory trust if:

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

23 (2) a demand would be futile.

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

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

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

1 (d) In a derivative action on behalf of the statutory trust, the complaint must state with
2 particularity:

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

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

6 (e) Except as otherwise provided in subsection (f):

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

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

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

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

17 **Comment**

18
19 **Principal Sources** - Uniform Limited Partnership Act §§1002-1005 (2001); ALI
20 Principles of Corporate Governance §7.01 (1994); Delaware Statutory Trust Act §3816;
21 Connecticut Statutory Trust Act §34-522.

22
23 Under Section 103(c)(11), the right of a beneficial owner to bring an action under this
24 Section may not be eliminated by the governing instrument. However, Section 103(c)(11)
25 permits the governing instrument to subject the right to additional standards and restrictions,
26 including the requirement that beneficial owners owning a specified amount or type of beneficial
27 interest join in bringing the action, provided that the additional standards and restrictions are not
28 manifestly unreasonable.

29
30 In preserving a mandatory right to bring suit, but allowing that right to be subjected to

1 additional standards and restrictions that are not manifestly unreasonable, this section balances
2 two policy aims that are in tension. On the one hand, without the right to bring an action, a
3 beneficial owner might have no recourse in the event of trustee misconduct. On the other hand,
4 without appropriate safeguards, a meritless action might be brought with the aim of extracting a
5 quick settlement. See, e.g., Reinier Kraakman, Hyun Park, and Steven Shavell, *When Are*
6 *Shareholder Suits in Shareholder Interests?*, 82 *Georgetown L.J.* 1733 (1994).

7

8 For a discussion of remedies, see the comment to Section 105.

1 [ARTICLE] 7

2 CONVERSION AND MERGER

3 SECTION 701. 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 702 through 705.

8 (4) “Converting organization” means an organization that converts into another
9 organization pursuant to Section 702.

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

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

12 (7) “Organization” means a common-law trust that does not have a prevailingly donative
13 purpose; general partnership, including a limited liability partnership; limited partnership,
14 including a limited liability limited partnership; limited liability company; corporation; or
15 foreign statutory trust. The term includes a domestic or foreign organization whether or not
16 organized for profit.

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

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

23 **Comment**

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

2
3 This section contains definitions specific to this Article.

4
5 Paragraph (7) includes a common-law trust that does not have a prevailingly donative
6 purpose within the definition of organization. Hence, such a common-law trust may convert to
7 or merge with a statutory trust under this Article if such a conversion or merger is permitted by
8 the trust’s governing law. Unlike the formation of a new statutory trust by filing a certificate of
9 trust under Section 201, an option expressly afforded to a common-law trust under Section 1005,
10 conversion or merger under this Article preserves continuity in the organization’s relationships
11 with third parties. See Sections 705 and 709 and the comments thereto.

12
13 **[Discussion/cross-reference re exclusion of prevailingly donative purpose to come].**

14
15 Under Section 103(c)(12), this definitions stated in this Section are not subject to
16 override by the governing instrument.

17
18 **SECTION 702. CONVERSION.**

19 (a) An organization other than a statutory trust may convert to a statutory trust, and a
20 statutory trust may convert to another organization pursuant to this section and Sections 703
21 through 705 and a plan of conversion, if:

22 (1) the conversion is not prohibited by the governing law of the other
23 organization; and

24 (2) the other organization complies with its governing law in effecting the
25 conversion.

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

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

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

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

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

2 **Comment**

3 **Principal Sources** – Uniform Limited Partnership Act §1102 (2001).
4

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

10 In contrast to a merger, which involves at least two entities, a conversion involves only
11 one. The converting and converted organization are the same organization. See Section 705(a).
12 For this Act to apply to a conversion, either the converting or converted organization must be a
13 statutory trust subject to this Act.
14

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

20 For a general discussion of conversion and its effect, see Model Entity Transactions Act
21 §406 (2006) and comment 1 thereto.
22

23 **SECTION 703. ACTION ON PLAN OF CONVERSION BY CONVERTING**
24 **STATUTORY TRUST.**

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

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

29 (1) as provided in the plan; and

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

32 **Comment**

33 **Principal Source** – Uniform Limited Partnership Act §1103 (2001).
34

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

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

23 **SECTION 704. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.**

24 (a) After a conversion is approved:

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

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

28 (B) the name and form of the converting organization and the jurisdiction
29 of its governing law;

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

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

33 (E) if the converted organization is a foreign organization not authorized
34 to do business in this state, the street and mailing addresses of an office that the [Secretary of

1 State] may use for the purposes of Section 705(c); and

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

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

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

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

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

12 **Comment**

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

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

16 Under Section 103(c)(13), this Section is not subject to override by the governing
17 instrument.

18 **SECTION 705. EFFECT OF CONVERSION.**

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

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

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

24 (2) all debts, obligations, and other liabilities of the converting organization,

1 including those existing with respect to the property of a series thereof, continue as debts,
2 obligations, or other liabilities of the converted organization limited to the property of any series
3 thereof as provided for by the plan of conversion;

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

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

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

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

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

21 **Comment**

22
23 Principal Source – Uniform Limited Partnership Act §1105 (2001).

24
25 Paragraph (a) confirms that conversion changes an organization’s legal type, but does not
26 create a new organization. Unlike a merger, a conversion involves a single organization.

1 Therefore under paragraph (b) a conversion does not transfer any of the organization’s rights or
2 obligations. For further discussion, see Model Entity Transactions Act §406 (2006) and
3 comment 1 thereto.

4
5 Under Section 103(c)(13), this Section is not subject to override by the governing
6 instrument.

7
8 **SECTION 706. MERGER.**

9 (a) A statutory trust may merge with one or more other constituent organizations
10 pursuant to this section and Sections 707 through 709 and a plan of merger if:

11 (1) the merger is not prohibited by the governing law of any constituent
12 organization; and

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

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

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

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

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

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

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

26 **Comment**

1 under this Act.

2

3 For the reasons discussed in the comment to Section 703, a mutual fund generally does
4 not afford dissenting rights to its shareholders because any shareholder of an acquired mutual
5 fund may redeem acquired fund shares at net asset value prior to the closing date of the proposed
6 reorganization of the acquired fund.

7

8 **SECTION 708. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.**

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

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

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

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

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

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

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

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

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

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

26 (5) a statement as to each constituent organization that the merger was approved

1 as required by the organization’s governing law;

2 (6) if the surviving organization is a foreign organization not authorized to do
3 business in this state, the street and mailing addresses of an office that the [Secretary of State]
4 may use for the purposes of Section 709(b); and

5 (7) any additional information required by the governing law of any constituent
6 organization.

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

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

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

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

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

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

16 **Comment**

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

18 Under Section 103(c)(13), this Section is not subject to override by the governing
19 instrument.
20
21

22 **SECTION 709. EFFECT OF MERGER.**

23 (a) When a merger becomes effective:

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

25 (2) each constituent organization that merges with the surviving organization

1 ceases to exist as a separate organization;

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

4 (4) all debts, obligations, and other liabilities of each constituent organization that
5 ceases to exist, including those existing with respect to the property of a series thereof, continue
6 as debts, obligations, or other liabilities of the surviving organization limited to the property
7 thereof as provided for by the plan of merger;

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

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

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

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

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

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

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

22 (b) A surviving organization that is a foreign organization consents to the jurisdiction of
23 the courts of this state to enforce any debt, obligation, or other liability owed by a constituent

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

7 **Comment**

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

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

12
13 **SECTION 710. [ARTICLE] NOT EXCLUSIVE.** This [article] does not preclude an
14 organization from being converted or merged under law other than this [act].

15 **Comment**

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

1 [ARTICLE] 8

2
3 DISSOLUTION AND WINDING UP

4
5 SECTION 801. EVENTS CAUSING DISSOLUTION. A statutory trust shall only be

6 dissolved by an administrative dissolution under Section 806 or by the filing of articles of
7 dissolution under Section 802 upon the occurrence of:

- 8 (1) an event or circumstance that the governing instrument states causes dissolution; or
9 (2) consent by all the beneficial owners.

10 Comment

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

12
13 This Section provides that a statutory trust may be dissolved only by administrative
14 dissolution under Statute 806, or by the filing of articles of dissolution under Section 802 upon
15 either the occurrence of an event or circumstance stated in the governing instrument or the
16 unanimous consent of the beneficial owners. However, as confirmed by Section 306, the
17 governing instrument need not provide for an event or circumstance that causes dissolution, or
18 may provide that the trust is not dissolved even with the consent of all the beneficial owners.

19
20 Under Section 103(c)(1), the provisions of this section other than paragraph (2) are not
21 subject to override by the governing instrument.

22
23
24 SECTION 802. ARTICLES OF DISSOLUTION.

25 (a) If dissolution of a statutory trust is authorized under paragraphs (1) or (2) of Section
26 801, the trust must deliver to the [Secretary of State] for filing articles of dissolution setting
27 forth:

- 28 (1) the name of the trust; and
29 (2) the date of the dissolution.

30 (b) Except as otherwise provided in Section 204(c), a statutory trust is dissolved when
31 articles of dissolution that comply with subsection (b) are filed by the [Secretary of State].

32 Comment

1 **Principal Source** – Revised Model Business Corporation Act §14.03 (2005).
2

3 **SECTION 803. WINDING UP.**

4 (a) A dissolved statutory trust shall wind up its activities, and the trust and each series
5 thereof continues after dissolution only for the purpose of winding up.

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

7 (1) discharge the trust’s debts, obligations, and other liabilities, settle and close
8 the trust’s activities, and marshal and distribute the property of the trust; and

9 (2) distribute any surplus property after complying with subsection (b)(1) to the
10 beneficial owners in proportion to their beneficial interests.

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

12 (1) preserve the trust’s activities and property as a going concern for a reasonable
13 time;

14 (2) institute, maintain, and defend actions and proceedings, whether civil,
15 criminal, or administrative;

16 (3) transfer the trust’s property;

17 (4) settle disputes;

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

19 (c) Trustees of a dissolved statutory trust that has disposed of claims under Sections 804
20 or 805 shall not be liable for breach of duty with respect to claims against the trust that are
21 barred or satisfied under Sections 804 or 805.

22 (d) The administrative dissolution of a statutory trust does not terminate the authority of
23 its agent for service of process.

24 (e) On application of any person that shows good cause, the [appropriate court] may

1 appoint a person to be a receiver for a dissolved statutory trust with the power to undertake any
2 action that might have been done by the trust during its winding up if the action is necessary for
3 final settlement of the trust.

4 **Comment**

5 **Principal Source** – Revised Uniform Limited Liability Company Act §§702, 708 (2006);
6 Revised Model Business Corporation Act §14.09 (2005); Delaware Limited Liability Company
7 Act §18-805.

8
9 If the governing instrument of a statutory trust provides for the dissolution of the trust,
10 then upon the event or circumstance that triggers dissolution, the statutory trust may continue
11 only for the purpose of winding up.

12
13 In winding up the statutory trust within a reasonable time, the trustees are neither
14 required to undertake a fire sale of the property of the statutory trust on unfavorable terms nor
15 permitted to continue the trust endlessly under the guise of winding down. The question of what
16 period of time is “reasonable” under paragraph (c)(1) turns on the totality of the circumstances.

17
18 Paragraph (e) provides for the possibility that after dissolution additional unfinished
19 business of the statutory trust is discovered. **[Search RST for property that comes in after**
20 **termination.]**

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

24 25 **SECTION 804. ACTUAL NOTICE TO CLAIMANT.**

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

28 (b) A dissolved statutory trust may dispose of a known claim against it by notifying the
29 claimant in a record of the dissolution of the trust. The notice must:

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

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

32 (3) state the deadline for receipt of the claim, which may not be less than 120 days
33 after the date the notice is received by the claimant; and

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

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

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

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

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

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

11 (d) This section does not apply to a claim based:

12 (1) on an event occurring after the effective date of dissolution; or

13 (2) a liability that on that date is unmatured or contingent.

14 **Comment**

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

16
17 **[To come: Excerpt/paraphrase of the commentary from the RMBCA, on which the**
18 **RULLCA provision was based.]**

19
20 Under Section 103(c)(1), the provisions of this section are not subject to override by the
21 governing instrument.
22

23 **SECTION 805. PUBLICATION NOTICE.**

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

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

27 (1) be published at least once in a newspaper of general circulation in the [county]

1 in this state in which the dissolved statutory trust’s principal office is located or, if it has none in
2 this state, in the [county] in which the trust’s designated office is or was last located;

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

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

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

11 (1) a claimant that did not receive notice in a record under Section 804;

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

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

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

16 (1) against undistributed property; and

17 (2) if property of the trust has been distributed after dissolution, against a
18 beneficial owner to the extent of that beneficial owner’s proportionate share of the property
19 distributed to the beneficial owner after dissolution, but a beneficial owner’s total liability for all
20 claims under this paragraph does not exceed the total amount of property distributed to the
21 beneficial owner after dissolution.

22 **Comment**

23 **Principal Source** – Revised Uniform Limited Liability Company Act §704 (2006).
24

1 **[To come: Excerpt of the commentary from the RMBCA, on which the RULLCA**
2 **provision was based. Commentary to include discussion of the three year bracketed limit.]**

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

7 **SECTION 806. ADMINISTRATIVE DISSOLUTION.**

8 (a) The [Secretary of State] may dissolve a statutory trust administratively if:

9 (1) the trust is without an agent for service of process in this state for 30 days;

10 (2) the trust does not file an annual report within 60 days after it is due; or

11 (3) the trust does not pay, within [60] days after the due date, any fee, tax, or
12 penalty due to the [Secretary of State].

13 (b) If the [Secretary of State] determines that a ground exists for administratively
14 dissolving a statutory trust, the [Secretary of State] must file a notice of dissolution and send a
15 copy to the trust’s agent for service of process, or if the trust does not have an agent for service
16 of process in this state, to the trust’s designated office. The notice must state:

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

19 (2) the basis for the revocation.

20 (c) Unless a statutory trust cures the failures to comply with subsection (a) stated in the
21 notice of dissolution before the date stated in the notice, the [Secretary of State] shall dissolve
22 the trust administratively by preparing, signing, and filing a declaration of dissolution that states
23 the grounds for dissolution. The [Secretary of State] shall file a notice of dissolution and send a
24 copy to the trust’s agent for service of process, or if the trust does not have an agent for service
25 of process in this state, to the trust’s designated office.

26 **Comment**

1 [ARTICLE] 9

2 FOREIGN STATUTORY TRUSTS

3
4 SECTION 901. GOVERNING LAW.

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

7 (1) the internal affairs of the trust;

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

10 (3) the enforceability of a debt, obligation, or other liability of the foreign
11 statutory trust or a series thereof against the property of the trust or any series thereof.

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

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

18 Comment

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

23
24 Paragraph (a) parallels and is analogous in scope and effect to Section 301 for a domestic
25 statutory trust. Paragraph (b) allows for a foreign statutory trust to operate domestically even if
26 the law governing it is different from the laws governing domestic statutory trusts, but under
27 paragraph (c) a foreign statutory trust cannot engage in any business or exercise any power that a
28 domestic statutory trust could not.

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

1 instrument.
2

3 **SECTION 902. APPLICATION FOR CERTIFICATE OF QUALIFICATION.**

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

7 (1) the name of the trust and, if the name does not comply with Section 207, an
8 alternate name adopted pursuant to Section 906(a).

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

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

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

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

19 **Comment**
20

21 **Principal Source** – Uniform Limited Partnership Act §902 (2001).
22

23 A certificate of qualification applied for under this section is different than a certificate of
24 registration under Section 905. A certificate of qualification confirms that a foreign statutory
25 trust may do business in the state. A certificate of registration provides conclusive evidence that
26 a foreign statutory trust has a valid certificate of qualification on file as of the date of the
27 certificate of registration. A certificate of registration for a foreign statutory trust is akin to a
28 certificate of good standing for a statutory trust under Section 206. **[Further commentary to**
29 **come.]**

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

5 **SECTION 903. ACTIVITIES NOT CONSTITUTING TRANSACTING**

6 **BUSINESS.**

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

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

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

12 (3) maintaining accounts or depositing assets in financial institutions;

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

16 (5) selling through independent contractors;

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

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

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

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

1 (10) transacting business in interstate commerce.

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

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

7 **Comment**

8
9 **Principal Sources** – Uniform Limited Partnership Act §903 (2001).

10
11 The schedule of activities that in paragraph (a) that do not constitute transacting business in
12 the state are illustrative and not exhaustive. As revised in 2006, the Delaware Statutory Trust Act
13 contains a similar schedule. See 2006 Delaware Laws Ch. 418 §20 (H.B. 445), adding Delaware
14 Statutory Trust Act §3863.

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

18
19 **SECTION 904. FILING OF CERTIFICATE OF QUALIFICATION.** Unless the
20 [Secretary of State] determines that an application for a certificate of qualification does not comply
21 with the filing requirements of this [Act], the [Secretary of State], upon payment of all filing fees,
22 shall file the application, prepare, sign and file a certificate of qualification to transact business in
23 this State, and send a copy of the filed certificate, together with a receipt for the fees, to the foreign
24 statutory trust or its representative.

25 **Comment**

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

28
29 For discussion of the certificate of qualification and its differences from a certificate of
30 registration, see the comment to Section 902.

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

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SECTION 905. CERTIFICATE OF REGISTRATION.

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

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

Comment

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

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

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

SECTION 906. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.

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

1 state under another name.

2 (b) If a qualified foreign statutory trust changes its name to one that does not comply with
3 Section 207, it may not thereafter transact business in this state until it complies with subsection
4 (a) and obtains an amended certificate of qualification.

5 **Comment**

6
7 **Principal Source** – Uniform Limited Partnership Act §905 (2001).

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

12 **SECTION 907. REVOCATION OF CERTIFICATE OF QUALIFICATION.**

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

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

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

19 (3) file an annual report pursuant to Section 213 within 60 days after it is due; or

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

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

26 (1) the effective date of the revocation, which must be at least 60 days after the date

1 the [Secretary of State] sends the copy; and

2 (2) the basis for the revocation.

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

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

9 **Comment**

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

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

16 **SECTION 908. CANCELLATION OF CERTIFICATE OF QUALIFICATION.**

17 (a) To cancel its certificate of qualification to transact business in this state, a qualified
18 foreign statutory trust must deliver to the [Secretary of State] for filing a notice of cancellation that
19 states:

20 (1) the name of the trust;

21 (2) the date of filing of its initial certificate of qualification;

22 (3) that the certificate of qualification is being canceled; and

23 (4) any other information as determined by the trustee filing the statement.

24 (b) A certificate of qualification under subsection (a) is canceled when the notice of
25 cancellation becomes effective under Section 204.

26 **Comment**
27

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

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

4

1 [ARTICLE] 10

2 MISCELLANEOUS PROVISIONS

3 SECTION 1001. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In

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

6 Comment

7
8 Principal Source – Uniform Limited Partnership Act §1201 (2001).

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

13 SECTION 1002. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND

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

18 Comment

19
20 Principal Source – Uniform Limited Partnership Act §1203 (2001).

21
22 Under Section 103(c)(1), this Section is not subject to override by the governing
23 instrument.
24

25
26 SECTION 1003. SAVING CLAUSE. This [act] does not affect an action commenced,

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

28 Comment

29
30 Principal Source – Uniform Limited Partnership Act §1207 (2001).

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

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

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

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

11 [(d) On [two years] after [the effective date of this [act]], this [act] governs the organization
12 and internal affairs of all trusts created pursuant to a statute of this state that was required by that
13 statute to file a certificate of trust with the [Secretary of State] before the effective date of this
14 [act].]

15 **Comment**

16 **Principal Source** – Uniform Limited Partnership Act §1206 (2001).
17

18 This Act governs all statutory trusts formed on or after the Act’s effective date. For pre-
19 existing statutory trusts, this section establishes an optional “elect in” period and a mandatory, all-
20 inclusive date of two years following the effective date. Beginning on the all-inclusive date, each
21 pre-existing statutory trust that has not previously elected in becomes subject to this Act—
22 including the schedule of mandatory rules in Section 103(c)—by operation of law.
23

24 Paragraphs (a) and (b) confirm that this act does not govern a common-law trust unless the
25 trust forms a statutory trust by filing a certificate of trust under Section 201. However, consistent
26 with Section 302, paragraph (b) of this Section prohibits a common-law trust with a prevailingly
27 donative purpose from becoming a statutory trust. An alternative mode for a common-law trust to
28 become a statutory trust is provided by the conversion provisions of Article 6. Unlike the
29 formation of a new statutory trust by filing a certificate of trust under Section 201, the conversion
30 provisions of Article 6 allow for the conversion of another organization into the statutory trust
31 form while preserving continuity in the converting organization’s relationships with third parties.

1 See the Comments to Sections 701 and 705.

2
3 The drafting committee contemplated that some enacting jurisdictions might modify this
4 section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not
5 expected—to address other transition problems arising from differences between this Act and prior
6 law. For example, an enacting jurisdiction might choose to allow trusts formed under a prior
7 statute to remain governed by the prior statute for longer than the two years suggested in paragraph
8 (d).

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

12
13 **SECTION 1006. REPEALS.** On [all-inclusive date], the following acts are repealed:

14 (1) [the state Statutory Trust Act as amended and in effect immediately before [the
15 effective date of this [act]]];

16 (2) [the state Business Trust Act as amended and in effect immediately before [the effective
17 date of this [act]]]; and

18 (3) [the state Real Estate Investment Trust Act as amended and in effect immediately
19 before [the effective date of this [act]]].

20 **Comment**

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

22
23 Paragraphs (1) and (2) supply model language for enacting jurisdictions that have
24 previously enacted a Statutory Trust Act or a Business Trust Act.

25
26 Paragraph (3) supplies model language for enacting jurisdictions that have previously
27 enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a
28 REIT, is not a type of trust but rather is a tax status awarded to any entity that qualifies under 26
29 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under 26 U.S.C.
30 §860D. Although the Internal Revenue Code at one time favored the trust form for the
31 organization of a REIT, the code today does not regulate the form of entity. **[Article cite.**
32 Accordingly, there is no longer any reason why a REIT must be organized as a trust, whether
33 statutory or common law. Indeed, data assembled by the reporter shows that in contemporary
34 practice most publicly-traded REITs are organized as Maryland corporations, not as trusts.
35 Nonetheless, prior to the liberalization of the tax code, a number of states enacted REIT statutes
36 that authorize the creation of a trust entity designed to qualify as a REIT under the code. Because
37 a statutory trust under this Act could serve the same purpose, the drafting committee contemplated

1 that enacting jurisdictions might take the occasion of enacting this act to repeal their REIT statutes.

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

5
6 **SECTION 1007. EFFECTIVE DATE.** This [act] takes effect

7 **Comment**

8
9 **Principal Source** – Uniform Limited Partnership Act §1204 (2001).

10
11 Section 1005 specifies how this Act affects statutory trusts, with special provisions
12 pertaining to statutory trusts formed before the Act’s effective date. There are no comparable
13 provisions for foreign statutory trusts. Therefore, once this Act is effective, it applies immediately
14 to all foreign statutory trusts, whether formed before or after the Act’s effective date.

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