

DRAFT
FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For December 2005 Drafting Committee Meeting

With Prefatory Notes and Comments

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ON UNIFORM STATE LAWS

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UNIFORM STATUTORY TRUST ACT

TABLE OF CONTENTS

| | |
|----------------------|---|
| Prefatory Note | 1 |
|----------------------|---|

ARTICLE 1

GENERAL PROVISIONS AND DEFINITIONS

| | |
|---|----|
| §101. SHORT TITLE | 5 |
| §102. DEFINITIONS. | 6 |
| §103. DEFAULT AND MANDATORY RULES. | 11 |
| §104. SCOPE OF GOVERNING INSTRUMENT. | 13 |
| §105. APPLICABILITY OF TRUST LAW. | 18 |
| §106. RULES OF CONSTRUCTION. | 19 |
| §107. NAME OF STATUTORY TRUST. | 20 |

ARTICLE 2

FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS

| | |
|---|----|
| §201. CERTIFICATE OF TRUST. | 22 |
| §202. AMENDMENT OR RESTATEMENT OF CERTIFICATE. | 23 |
| §203. STATEMENT OF CANCELLATION. | 24 |
| §204. SIGNING OF RECORDS. | 25 |
| §205. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY OF STATE]; EFFECTIVE TIME AND DATE. | 26 |
| §206. CORRECTING FILED RECORD. | 28 |
| §207. LIABILITY FOR FALSE INFORMATION IN FILED RECORD. | 29 |
| §208. CERTIFICATE OF EXISTENCE OR AUTHORIZATION. | 30 |
| §209. RESERVATION OF NAME. | 31 |

ARTICLE 3

STATUTORY TRUSTS

| | |
|--|----|
| §301. STATUTORY TRUSTS VALIDATED. | 33 |
| §302. LAW OF INTERNAL AFFAIRS. | 33 |
| §303. DURATION OF STATUTORY TRUST. | 34 |
| §304. POWER TO SUE AND BE SUED. | 35 |
| §305. OFFICE AND AGENT FOR SERVICE OF PROCESS. | 37 |
| §306. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF PROCESS. | 38 |
| §307. RESIGNATION OF AGENT FOR SERVICE OF PROCESS. | 39 |

| | |
|--------------------------------|----|
| §308. SERVICE OF PROCESS. | 39 |
|--------------------------------|----|

ARTICLE 4

TRUSTEES AND TRUST MANAGEMENT

| | |
|---|----|
| §401. MANAGEMENT OF STATUTORY TRUSTS. | 42 |
| §402. STATUTORY TRUST LIABLE FOR TRUSTEE’S ACTIONABLE CONDUCT. | 43 |
| §403. NONLIABILITY OF TRUSTEES; RIGHTS OF TRUSTEES IN TRUST PROPERTY. | 43 |
| §404. TRUSTEE’S RIGHT TO INFORMATION. | 44 |
| §405. DIRECTED TRUSTEES AUTHORIZED. | 45 |
| §406. DELEGATION BY TRUSTEE. | 46 |
| §407. VOTING BY TRUSTEES. | 47 |
| §408. NONLIABILITY OF OFFICERS, EMPLOYEES, MANAGERS, AND AGENTS. | 48 |
| §409. NONLIABILITY FOR GOOD FAITH RELIANCE ON GOVERNING INSTRUMENT. | 48 |
| §410. INTERESTED TRANSACTIONS. | 50 |
| §411. INDEMNIFICATION AND EXCLUPATION. | 51 |

ARTICLE 5

BENEFICIARIES AND BENEFICIAL RIGHTS

| | |
|--|----|
| §501. CONTRIBUTIONS BY BENEFICIAL OWNERS. | 52 |
| §502. REDEMPTION OF BENEFICIAL INTERESTS. | 53 |
| §503. RIGHTS OF BENEFICIAL OWNERS IN TRUST PROPERTY. | 53 |
| §504. TRANSACTIONS WITH BENEFICIAL OWNERS. | 55 |
| §505. LIMITED LIABILITY OF BENEFICIAL OWNERS. | 55 |
| §506. VOTING BY BENEFICIAL OWNERS. | 56 |
| §507. DERIVATIVE ACTIONS. | 57 |
| §508. ACCESS TO, AND CONFIDENTIALITY OF, INFORMATION AND RECORDS | 58 |
| §509. LIMITATIONS ON DISTRIBUTIONS TO A BENEFICIAL OWNER. | 59 |

ARTICLE 6

MERGER, CONSOLIDATION, CONVERSION, AND DISSOLUTION

| | |
|--|----|
| §601. MERGER OR CONSOLIDATION. | 63 |
| §602. CONVERSION FROM ANOTHER ENTITY. | 63 |
| §603. CONVERSION TO ANOTHER ENTITY. | 63 |
| §604. DISSOLUTION OF A STATUTORY TRUST. | 63 |

| | |
|-------------------------------------|----|
| §605. DISSOLUTION OF A SERIES. | 64 |
|-------------------------------------|----|

ARTICLE 7

FOREIGN STATUTORY TRUSTS

| | |
|--|----|
| §701. GOVERNING LAW. | 66 |
| §702. APPLICATION FOR CERTIFICATE OF AUTHORITY. | 66 |
| §703. AMENDMENT OR RESTATEMENT OF CERTIFICATE. | 67 |
| §704. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS. | 68 |
| §705. FILING OF CERTIFICATE OF AUTHORITY. | 70 |
| §706. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST. | 70 |
| §707. REVOCATION OF CERTIFICATE OF AUTHORITY. | 71 |
| §708. CANCELLATION OF CERTIFICATE OF AUTHORITY; EFFECT OF FAILURE TO HAVE CERTIFICATE. | 72 |
| §709. ACTION BY [ATTORNEY GENERAL]. | 73 |

ARTICLE 8

MISCELLANEOUS PROVISIONS

| | |
|--|----|
| §801. UNIFORMITY OF APPLICATION AND CONSTRUCTION. | 74 |
| §802. SEVERABILITY CLAUSE. | 74 |
| §803. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. | 74 |
| §804. EFFECTIVE DATE. | 75 |
| §805. REPEALS. | 75 |
| §806. APPLICATION TO EXISTING COMMON LAW TRUSTS. | 75 |
| §807. TAX CLASSIFICATION. | 76 |
| §808. SAVING CLAUSE. | 76 |

UNIFORM STATUTORY TRUST ACT

Prefatory Note

Owing to uncertainty over limited liability for the beneficial owners, spotty judicial recognition, and the rise of permissive and enabling corporate codes, use of the common law trust as a form of business organization for operating enterprises declined over the course of the twentieth century. Today, most commercial enterprise that is not organized as a sole proprietorship makes use of a species of partnership (general, limited, or limited liability), the corporation, or the limited liability company. Nonetheless, as a mode of business organization the trust has continued thrive in a handful of niches, particularly in the mutual fund, structured finance, and pension industries (the Employee Retirement Income Security Act of 1974 imposes a mandatory trust paradigm on employee pension funds). See, e.g., Sheldon A. Jones, Laura M. Moret, & James M. Storey, *The Massachusetts Business Trust and Registered Investment Companies*, 13 Del. J. Corp. L. 421 (1988); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997); Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 Bus. Law. 559 (2003).

Having in mind the legal uncertainty over the status of the business trust at common law, legislatures in at least twenty-nine states enacted legislation to validate the trust as a permissible form of business organization. But the entity that arises under such legislation is better understood as the “statutory business trust.” It is useful to distinguish the common law business trust from the statutory business trust for two reasons.

First, the statutory business trust differs from the common law business trust in several important respects. For example, unlike a common law business trust, which arises from private agreement, a statutory business trust requires a filing with a state registry office to come into being. In a related vein, unlike a common law business trust, which is not a juridical entity and must sue or be sued in the name of the trustee in the trustee’s capacity as such, under most business trust statutes a statutory business trust is a separate juridical entity with capacity to sue and be sued in its own name.

Second, most existing business trust statutes do not foreclose the use of the common law trust as a business entity. Instead, they offer transactional planners an additional option, the statutory business trust, which is governed by the state’s business trust act. The common law trust, by contrast, remains subject to the principles of law and equity applicable to ordinary private trusts. An analogy to the evolution of partnership law is illuminating. The relationship between the common law business trust and the statutory business trust is akin to that of the general partnership and the limited partnership.

The primary stimulus for the Commissioners’ drafting of the Uniform Statutory Trust Act is the increasing popularity of the statutory business trust, 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 the status of such trusts in many states is unclear and much of the existing legislation is out of date or incomplete. Practitioners, entrepreneurs, and scholars struggle to understand the law governing statutory trusts; simple questions concerning where to organize are often difficult to answer; and the case law on statutory trusts is surprisingly sparse. See Robert H. Sitkoff, Trust as “Uncorporation”: A Research Agenda, 2005 U. Ill. L. Rev. 31.

The Uniform Statutory Trust Act will provide the states with a functional statute for validating the statutory trust as a permissible form of business organization and to bring the disparate (and often inadequate) existing approaches into uniformity.

Models for Drafting. Although the Uniform Statutory Trust Act is the first Uniform Act on the subject of business trusts, twenty-nine states have already enacted some form of business trust legislation. In Robert H. Sitkoff, *The Rise of The Statutory Business Trust* [in progress], the author surveyed the existing statutes, classifying each as falling within one of four generations, and reporting data culled from filings to state registry offices on the number of active trusts under each of the existing statutes. According to this study, statutory trusts organized under the most recent fourth-generation statutes vastly outnumber all others; within the fourth-generation, the Delaware and Connecticut Statutory Trust Acts are the most popular; and as between Delaware and Connecticut, growth in the number of Delaware statutory trusts has outpaced that of Connecticut by a factor of ten to one. For a comprehensive treatment of the Delaware Act, see Wendell Fenton & Eric A. Mazie, *Delaware Statutory Trusts*, in *The Delaware Law of Corporations & Business Organizations* ch. 19 (3d ed. 2005 Supp.).

In view of the foregoing empirical findings, in drafting the substantive provisions of the Uniform Statutory Trust Act the drafting committee was heavily influenced by the Delaware and Connecticut Acts with a preference for the Delaware model. In drafting the public filing and other nonsubstantive technical provisions of the Uniform Statutory Trust Act, however, the drafting committee referred chiefly to the Uniform Limited Partnership Act (2001).

Innovative Provisions. Although much of the Uniform Statutory Trust Act reflects a reorganization to, and a tightened statement of, the Delaware Statutory Trust Act, the Uniform Act is more than a mere repackaging of the Delaware Act. Among the more significant of the Uniform Statutory Trust Act’s innovations are: (1) specification of the statutory provisions that are not subject to override in the statutory trust’s governing instrument (§103); (2) clearer guidance on the relationship of ordinary trust law to statutory business trusts (§105); (3) clearer guidance on the status of the common law business trust and its relationship the statutory trust (§806); and systematic treatment of mergers, consolidations, and dissolutions (integrated with the Model Entity Transactions Act) (Article 6). **[For discussion:** What other provisions, if any, should be included in this listing?]

Default Rules. Most of the Uniform Statutory Trust Act consists of default rules that apply only if the governing instrument fails to address or insufficiently covers a particular issue. Thus, pursuant to §103(a), the governing instrument may override a substantial majority of the Act’s provisions. The exceptions are scheduled in §103(b).

Existing Uniform Laws. [For discussion: The commentary that will go here depends on the results of our discussion regarding the intersection of this Act and the Uniform Trust Code. In short, where the UTC codifies the common law of trusts, this Act provides for the creation of a business entity that looks to the common law of trusts (and hence would look to the UTC) to answer questions not otherwise covered by the entity's governing instrument and this Act. But what of the UTC's mandatory provisions? Shouldn't a statutory trust under this Act be exempt from those, on the theory that mandatory policies applicable to statutory trusts are covered by the mandatory rules of this Act? By contrast, other Uniform Laws dealing with trusts, such as the Uniform Prudent Investor Act and the Uniform Principal and Income Act, are default laws.]

Relationship to Common Law Trusts. [For discussion: The commentary that will go here depends on the results of our discussion of Section 806 and resolution of the intersection of this Act and the Uniform Trust Code. Still a further problem that should be discussed is the potential for a statutory trust to be used as a substitute for a donative common law trust to evade mandatory rules in ordinary trust law that were designed with donative trusts in mind.]

Relationship to Real Estate Investment Trusts and state Real Estate Investment Trust Acts. A "real estate investment trust," also known as a REIT, is not a type of trust but rather refers to a tax status awarded to any business entity that qualifies under I.R.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under I.R.C. §860D. See [cite to REIT law review article to be added here]. In spite of the use of the word "trust" in its title, there is no reason why a REIT must be organized as a trust, statutory or common law. Indeed, based on data culled from filings with the SEC, a recent study found that nearly all new, publicly-traded REITs formed between 1998 and 2004 were organized as Maryland corporations, not as trusts. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [in progress].

Nonetheless, although infrequently used, at least 12 states have enacted some form of specialized REIT-entity legislation. Because a statutory trust created under this Act can be structured to qualify as a REIT under the federal tax laws, the drafting committee contemplated that the Uniform Statutory Trust Act would supersede such legislation (see Section 805). [For discussion: Whether this commentary should explicitly address the second-generation business trust statutes, which are really little-more than dressed up REIT statutes.]

Overview of Uniform Statutory Trust Act

The Uniform Statutory Trust Act consists of 8 articles. [For discussion: Should there be an overview of the Act here?]

Article 1—General Provisions and Definitions. [Summary to come]

Article 2—Formation; Certificate of Trust and Other Filings. [Summary to come]

Article 3—Statutory Trusts. [Summary to come]

Article 4—Trustees and Trust Management. [Summary to come]

Article 5—Beneficiaries and Beneficial Rights. [Summary to come]

Article 6—Merger, Consolidation, Conversion, and Dissolution. [Summary to come]

Article 7—Foreign Statutory trusts. [Summary to come]

Article 8—Miscellaneous Provisions. This Article primarily contains transition rules.
[Further summary to come]

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1 **§102. DEFINITIONS.**

2 (a) “Statutory trust” or “domestic statutory trust” means an unincorporated
3 association created pursuant to this Act that:

4 (1) is governed by a trust instrument under which property is or will be
5 held by one or more trustees for the benefit of one or more beneficial owners; and

6 (2) files a certificate of trust pursuant to Section 201.

7 (b) “Common law trust” means:

8 (1) a fiduciary relationship with respect to property,

9 (2) arising from a manifestation of intention to create that relationship, and

10 (3) subjecting the person who holds title to the property to duties to deal
11 with it for the benefit of one or more persons, at least one of whom is not the sole trustee,
12 irrespective of whether the trust’s purpose is donative or commercial, including the type of trust
13 known at common law as a “business trust” or “Massachusetts trust.” **[Note:** There is ambiguity
14 about common law trusts under the Delaware Act that we should ventilate in connection with
15 proposed Section 806. Related are two further problems: (1) correcting mismatch between a
16 trust law default and the exigencies of business enterprise, and (2) the potential for use of
17 statutory trusts in a donative context to evade mandatory rules in the common law of trusts
18 designed for donative trusts (see, e.g., §303).]

19 (c) With respect to all statutory trusts:

20 (1) “Beneficial owner” means any owner of a beneficial interest in a
21 statutory trust.

22 (2) “Designated office” means:

1 (A) with respect to a statutory trust, the office that the statutory
2 trust is required to designate and maintain under Section 201(a)(2); and

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

4 (3) “Certificate of trust” means the record that under Section 201 must be
5 delivered to the [Secretary of State] for filing in order to create a statutory trust and that, together
6 with the trust instrument, constitutes the governing instrument.

7 (4) “Electronic transmission” means any form of communication not
8 directly involving the physical transmission of paper that creates a record that may be retained,
9 retrieved and reviewed by a recipient thereof and that may be directly reproduced in paper form
10 by such a recipient through an automated process. **[Query:** Is this provision in conflict with the
11 Electronic Records and Signatures provision in Section 803, and if so, how should this provision
12 and all subsequent references to electronic transmission should be amended?]

13 (5) “Foreign statutory trust” means any statutory trust, business trust,
14 association, or similar entity that is organized under the statutes of another state and that files a
15 record with a registry office in that state. **[Query:** Should this definition be one level higher,
16 meaning (c), to put it in parity with the definition of “statutory trust” in (a)? Note that this
17 definition excludes a foreign common law trust, which would fall under the general common law
18 trust definition above.]

19 (6) “Governing instrument” means the trust instrument and the certificate
20 of trust, conflicts between which shall be resolved pursuant to Section 201(d). **[Note:** Per the
21 prior meeting, we know have three terms—the certificate of trust, which is presented to the
22 Secretary of State; the trust instrument, which is the deal document (trust instrument is defined

below); and the governing instrument, which is made up of both. Query whether this should be explained in the comment.]

(7) “Other business entity” means a corporation, limited liability company, partnership, limited partnership, limited liability partnership, common law trust, cooperative or any other unincorporated business association excluding a statutory trust.

(8) “Person” means an individual, corporation, statutory trust, common law trust, estate, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity; custodian, nominee or any other individual or entity in its own or any representative capacity.

(9) “Real estate investment trust” means a statutory trust qualifying as a real estate investment trust under Section 856 et seq., of the United States Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended, or a trust qualifying as a real estate mortgage investment conduit under Section 860D of the United States Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended.

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

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

(A) the spouse (or a parent or sibling thereof) of a trustee, officer, employee, manager, or beneficial owner;

1 (B) a child, grandchild, sibling, parent (or spouse of any thereof) of
2 a trustee, officer, employee, manager, or beneficial owner;

3 (C) an individual having the same home of a trustee, officer,
4 employee, manager, or beneficial owner;

5 (D) a trust or estate of which an individual specified in this clause
6 (A), (B), or (C) is a substantial beneficiary; or

7 (E) a trust, estate, incompetent, conservatee, or minor of which the
8 trustee, officer, employee, manager or beneficial owner is a fiduciary.

9 (12) "Sign" means:

10 (A) to execute or adopt a tangible symbol with the present intent to
11 authenticate a record; or

12 (B) to attach or logically associate an electronic symbol, sound, or
13 process to or with a record with the present intent to authenticate the record.

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

17 (14) "Trust instrument" means any instrument (whether referred to as a
18 trust agreement, trust instrument, declaration of trust, or otherwise) not made part of the public
19 record that, together with the certificate of trust, constitutes the governing instrument that
20 provides for the governance of the affairs of the statutory trust and the conduct of its business.

21 (15) "Trustee" means a person appointed as a trustee in accordance with
22 the governing instrument of a statutory trust and may include a beneficial owner.

1 (d) Solely with respect to a statutory trust that is registered as an investment
2 company under the Investment Company Act of 1940, as amended (15 U.S.C. § 80a-1 et seq.), or
3 any successor statute thereto (the “1940 Act”):

4 (1) “Independent trustee” means any trustee who is not an “interested
5 person” of the statutory trust; provided that the receipt of compensation for service as an
6 independent trustee of the statutory trust and also for service as an independent trustee of one or
7 more other investment companies managed by a single investment adviser (or an “affiliated
8 person” of such investment adviser) shall not affect the status of a trustee as an independent
9 trustee under this chapter. Independent trustee as defined hereunder shall be deemed to be
10 independent and disinterested for all purposes. [Query: What is the purpose of this last
11 sentence, and if it is necessary, is it appropriately located in a definition?]

12 (2) “Affiliated person” and “interested person” have the meanings set
13 forth in the 1940 Act or any rule adopted thereunder.

14 **Comment**

15
16 **Principal Sources** – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
17 Act §34-501; Uniform Limited Partnership Act §102.

18
19 Paragraph (a) defines a statutory trust as the entity created under this Act, which requires
20 a filing with the state pursuant to Section 201. A statutory trust created under this Act is a
21 juridical entity, in contrast with the common law trust, which is defined in paragraph (b)
22 consistently with Restatement (Third) of Trusts §2 (2003), except that as defined herein the term
23 “common law trust” also includes common law business trusts, a subject otherwise ignored by
24 the Restatement. See Restatement (Third) of Trusts §1 cmt b.

25
26 Paragraph (c) contains definitions applicable to all statutory trusts. Paragraph (d) isolates
27 definitions that are applicable only to statutory trusts that qualify as investment companies under
28 federal law.

1 **§103. DEFAULT AND MANDATORY RULES.**

2 (a) Except as otherwise provided in the governing instrument, this [act] governs
3 the duties and powers of a trustee, relations among trustees, and the rights and interests of a
4 beneficial owner.

5 (b) The terms of a governing instrument prevail over any provision of this [act]
6 except:

7 (1) the filing requirements for a domestic statutory trust stated in Article 2
8 **[Query: Or all of article 2?];**

9 (2) the filing requirements for a foreign statutory trust state in Article 7
10 **[Query: Or all of article 7?];**

11 (3) the obligation of a trustee to act in good faith, but the governing
12 instrument may prescribe the standards by which the performance of the obligation is to be
13 measured, if the standards are not manifestly unreasonable;

14 (4) the regulation of names under Section 107;

15 (5) the law governing internal affairs under Sections 302 and 701;

16 (6) the rules for service of process and naming an agent for service of
17 process in Sections 305, 306, 307, and 308.

18 (7) the proscription of indemnification for bad faith or reckless
19 indifference under Section 412(a);

20 (8) the invalidity of an exculpation clause under Section 412(b) for the
21 trustee's failure to act in good faith.

22 **Comment**
23

1 Paragraph (a) emphasizes that the Uniform Statutory Trust Act is primarily a default
2 statute. Nearly all of its provisions may be overridden by the terms of the governing instrument.
3

4 Paragraph (b) lists the items not subject to override in the governing instrument. Most
5 concern the rights of nonparties or nonsubstantive filing and other such provisions. These
6 provisions are mandatory because they go to the very nature of a statutory trust, distinguishing it
7 from other forms of business organization and property ownership, and concern the rights of
8 nonparties to the statutory trust.
9

10 **[For discussion:** Other possible mandatory terms such as the beneficial owners'
11 information rights (Section 508) and the provision that limits distributions in the case of
12 insolvency (Section 509). Note also that part of the text of current Section 409 should probably
13 be located here instead of in that section. Still another possibility would be terms that can only
14 be overridden by the certificate of trust, but not a trust instrument, on the theory that the former
15 is publicly filed. Cf. Section 304(d).]
16

17 By contrast, consistent with the freedom of contract normally associated with the
18 common law of trusts and the existing statutory trust acts, nearly all the provisions of this Act
19 concerning the duties and powers of a trustee, relations among trustees, and the rights and
20 interests of a beneficiary may be overridden by the terms of the governing instrument. The main
21 exception is that under paragraph (b)(3) the trustee's obligation to act in good faith is mandatory
22 (a requirement that is further implemented by paragraphs (b)(6), (7), and (8)), though good faith
23 can be defined in the governing instrument, provided that the definition is not manifestly
24 unreasonable. Cf. Uniform Limited Partnership Act §110(b)(7). Informed by traditional trust
25 law principles, the drafting committee contemplated that a definition of good faith that would
26 allow the trustee to act in bad faith, with reckless indifference, or with intentional or willful
27 neglect would be "manifestly unreasonable." See George G. Bogert & George T. Bogert, *The*
28 *Law of Trusts and Trustees* §542 (rev. 2d ed. 1993).
29

30 **[Note:** Per the discussion at the last meeting, this section uses the "manifestly
31 unreasonable" formulation of ULPA to state the mandatory irreducible core of the trustee's
32 fiduciary obligation, and this comment gives content to manifest unreasonableness by drawing
33 on the common law of trusts. It was also requested, however, that that Delaware Limited
34 Liability Company Act §18-1101 be presented as an alternative model. Thus (the comment
35 continues after the excerpt):
36

37 . . . (c) To the extent that, at law or in equity, a member or manager or other person has
38 duties (including fiduciary duties) to a limited liability company or to another member or
39 manager or to another person that is a party to or is otherwise bound by a limited liability
40 company agreement, the member's or manager's or other person's duties may be
41 expanded or restricted or eliminated by provisions in the limited liability company
42 agreement; provided, that the limited liability company agreement may not eliminate the
43 implied contractual covenant of good faith and fair dealing.
44

1 (d) Unless otherwise provided in a limited liability company agreement, a member or
2 manager or other person shall not be liable to a limited liability company or to another
3 member or manager or to another person that is a party to or is otherwise bound by a
4 limited liability company agreement for breach of fiduciary duty for the member's or
5 manager's or other person's good faith reliance on the provisions of the limited liability
6 company agreement.

7
8 (e) A limited liability company agreement may provide for the limitation or elimination
9 of any and all liabilities for breach of contract and breach of duties (including fiduciary
10 duties) of a member, manager or other person to a limited liability company or to another
11 member or manager or to another person that is a party to or is otherwise bound by a
12 limited liability company agreement; provided, that a limited liability company
13 agreement may not limit or eliminate liability for any act or omission that constitutes a
14 bad faith violation of the implied contractual covenant of good faith and fair dealing.

15
16 (f) Unless the context otherwise requires, as used herein, the singular shall include the
17 plural and the plural may refer to only the singular. The use of any gender shall be
18 applicable to all genders. The captions contained herein are for purposes of convenience
19 only and shall not control or affect the construction of this chapter.]

20
21 The trustee's mandatory obligation to act in good faith, like the limitation on the scope of
22 permissible exculpation and indemnification of the trustee under Section 412, reflects both a
23 protective function and the need to ensure that those who transact with trustee can easily
24 ascertain whether property in the possession of the trustee belongs to the trustee personally, is
25 held in trust, or is held in some other representative or other limited capacity. Thus, in *McNeil v.*
26 *McNeil*, 798 A.2d 503 (Del. 2002), the court reviewed the trustees' actions in spite of a clause
27 in the trust instrument that provided that the trustees' decisions were "not subject to review by
28 any court." Observing that courts "flatly refuse to enforce provisions relieving a trustee of all
29 liability," the court explained: "A trust in which there is no legally binding obligation on a
30 trustee is a trust in name only and more in the nature of an absolute estate or fee simple grant of
31 property." *Id.* at 509. See also John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98
32 *Nw. U.L. Rev.* 1105, 1123-1125 (2004); Robert H. Sitkoff, *An Agency Costs Theory of Trust*
33 *Law*, 89 *Cornell L. Rev.* 621, 641-43 (2004).

34
35 Because paragraph (b) refers specifically to other sections of the Act, enacting
36 jurisdictions modifying these other sections may also need to modify paragraph (b).
37

38 **§104. SCOPE OF GOVERNING INSTRUMENT.**

39 (a) Subject to Section 103, a governing instrument may contain any provision
40 relating to the management of the business and affairs of the statutory trust, and the rights, duties

1 and obligations of the trustees, beneficial owners, and other persons, or any other provision that
2 is not inconsistent with this [act], other applicable law, or the information contained in the
3 certificate of trust.

4 (b) Subject to Section 103, without limitation a governing instrument:

5 (1) May provide the means by which beneficial ownership shall be
6 determined and evidenced, whether by means of registration, the issuance of certificates, or
7 otherwise.

8 (2) May subject a beneficial owner's right to bring a derivative action
9 under Section 507 to additional standards and restrictions including, without limitation, the
10 requirement that beneficial owners owning a specified beneficial interest in the statutory trust
11 join in the bringing of the derivative action.

12 (3) May provide for classes, groups or series of trustees or beneficial
13 owners, or classes, groups or series of beneficial interests, having such relative rights, powers
14 and duties as the governing instrument may provide, and may make provision for the future
15 creation in the manner provided in the governing instrument of additional classes, groups or
16 series of trustees, beneficial owners or beneficial interests, having such relative rights, powers
17 and duties as may from time to time be established, including rights, powers and duties senior or
18 subordinate to existing classes, groups or series of trustees, beneficial owners or beneficial
19 interests;

20 (4) May establish or provide for the establishment of designated series of
21 trustees, beneficial owners or beneficial interests having separate rights, powers or duties with
22 respect to specified property or obligations of the statutory trust or profits and losses associated

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

3 (5) May grant to, or withhold from, all or certain trustees or beneficial
4 owners, or a specified class, group or series of trustees or beneficial owners, the right to vote,
5 separately or with any or all other classes, groups or series of the trustees or beneficial owners,
6 on any matter, such voting being on a per capita, number, financial interest, class group, series or
7 any other basis;

8 (6) May, if and to the extent that voting rights are granted under the
9 governing instrument, set forth provisions relating to notice of the time, place or purpose of any
10 meeting at which any matter is to be voted on, waiver of any such notice, action by consent
11 without a meeting, the establishment of record dates, quorum requirements, voting in person, by
12 proxy, by electronic transmission, by telephone, by video conference, or in any other manner, or
13 any other matter with respect to the exercise of any such right to vote;

14 (7) May provide for the taking of any action, including the amendment of
15 the governing instrument, the accomplishment of a merger, consolidation, or reorganization the
16 appointment of one or more trustees, the sale, lease, exchange, transfer, pledge or other
17 disposition of all or any part of the assets of the statutory trust or the assets of any series, or the
18 dissolution of the statutory trust, or may provide for the taking of any action to create under the
19 provisions of the governing instrument a class, group or series of beneficial interests that was not
20 previously outstanding, in any such case without the vote or approval of any particular trustee or
21 beneficial owner, or class, group or series of trustees or beneficial owners;

22 (8) May provide for the present or future creation of more than one

1 statutory trust, including the creation of a future statutory trust to which all or any part of the
2 assets, liabilities, profits or losses of any existing statutory trust will be transferred or exchanged,
3 and for the conversion of beneficial interests in an existing statutory trust, or series thereof, into
4 beneficial interests in the separate statutory trust, or series thereof;

5 (9) May provide for the appointment, election or engagement, either as
6 agents or independent contractors of the statutory trust or as delegates of the trustees, as
7 officers, employees, managers or other persons who may manage the business and affairs of the
8 statutory trust and may have such titles and such relative rights, powers and duties as the
9 governing instrument shall provide. Except to the extent otherwise provided in the governing
10 instrument of a statutory trust, the trustees shall choose and supervise such officers, managers,
11 employees and other persons [**Note:** Is there a less clunky way to put this?];

12 (10) May provide rights to any person, including a person who is not a
13 party to the governing instrument, to the extent set forth therein;

14 (11) May provide for the manner in which it may be amended, including
15 by requiring the approval of a person who is not a party to the governing instrument or the
16 satisfaction of conditions, and to the extent the governing instrument provides for the manner in
17 which it may be amended such governing instrument may be amended only in that manner or as
18 otherwise permitted by law, provided that the approval of any person may be waived by such
19 person and that any such conditions may be waived by all persons for whose benefit such
20 conditions were intended;

21 (12) May provide that a person shall become a beneficial owner and shall
22 become bound by the governing instrument if such person, or a representative authorized by

1 such person orally, in writing or by other action such as payment for a beneficial interest,
2 complies with the conditions for becoming a beneficial owner set forth in the governing
3 instrument or any other writing and acquires a beneficial interest;

4 (13) May consist of one or more agreements, instruments or other writings
5 and may refer to or incorporate bylaws containing provisions relating to the business of the
6 statutory trust, the conduct of its affairs and its rights or powers or the rights or powers of its
7 trustees, beneficial owners, agents or employees;

8 (14) May provide that the statutory trust or the trustees, acting for and on
9 behalf of the statutory trust, shall be deemed to hold beneficial ownership of any income earned
10 on securities of the statutory trust issued by any business entities formed, organized, or existing
11 under the laws of any jurisdiction, including the laws of any foreign country;

12 (15) May provide for the establishment of record dates with respect to
13 allocations and distributions by a statutory trust; and

14 (16) May provide that the interest of any beneficial owner who fails to
15 make any contribution that such beneficial owner is obligated to make, or who fails to perform in
16 accordance with, or to comply with the terms and conditions of, the governing instrument, shall
17 be subject to specified penalties or consequences of, such failure. Such penalty or consequence
18 may include:

19 (A) reducing or eliminating the defaulting beneficial owner's
20 proportionate interest in the statutory trust;

21 (B) subordinating the defaulting beneficial owner's beneficial
22 interest to that of nondefaulting beneficial owners;

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

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

(E) the lending by other beneficial owners of the amount necessary to meet the defaulting beneficial owner's commitment; or

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

Comment

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

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

Paragraph (b) enumerates a nonexhaustive list of the sort of provisions that may validly be included in a statutory trust's governing instrument. Although this enumeration adds little of substance to the rest of the Act, the drafting committee concluded that the demand of third parties and transactional planners to see language expressly authorizing specific terms justified inclusion of a detailed list. Cf. Uniform Trust Code §§815-16. The main exception is paragraph (b)(16), which repudiates the hostility to penalties of traditional law.

§105. APPLICABILITY OF TRUST LAW. The laws of this State pertaining to trusts supplement this [act], except to the extent modified by this [act] or another statute of this State.

Comment

Principal Sources – Delaware Statutory Trust Act §3809; Connecticut Statutory Trust Act §34-519; Uniform Trust Code §106.

Consistent with the leading fourth-generation statutory trust acts in Delaware and

1 Connecticut (as well as the acts in Maryland, Nevada, New Hampshire, South Dakota, and
2 Wyoming), the Uniform Statutory Trust Act provides that state trust law, not corporate law,
3 supplements this Act and the terms of the governing instrument. Although some commentators
4 have identified multiple instances of mismatch between traditional trust law, which evolved in
5 the context of donative transfers, and the law of corporations and other business organizations,
6 see, e.g., Robert H. Sitkoff, Trust as “Uncorporation”: A Research Agenda, 2005 U. Ill. L. Rev.
7 31, 36-37; **[For discussion:** (1) correcting mismatch between a trust law default and the
8 exigencies of business enterprise; (2) the potential for use of statutory trusts in a donative context
9 to evade mandatory rules in the common law of trusts designed for donative trusts (see, e.g.,
10 §303); and care/loyalty difference in trust law and corporate law.], other commentators have
11 identified specific features of trust law that are desirable for in particular transactional contexts.
12 See Steven L. Schwarcz, Commercial Trusts as Business Organizations: Unraveling the Mystery,
13 58 Bus. Law. 559, 557 (2003). See also Wendell Fenton & Eric A. Mazie, Delaware Statutory
14 Trusts, in The Delaware Law of Corporations & Business Organizations §19.1 (3d ed. 2005
15 Supp.). In resolving in favor of trust law, the drafting committee was strongly influenced by the
16 revealed preference of existing users of statutory trusts as evidenced by the popularity of the
17 Delaware Act, which provides looks to trust law to fill gaps, as compared to other business trust
18 acts (such as those in Arizona, Indiana, Kansas, Mississippi, Montana, Oregon, Tennessee,
19 Washington, and West Virginia) that look to corporate law. See Robert H. Sitkoff, The Rise of
20 the Statutory Trust [in progress].
21

22 **§106. RULES OF CONSTRUCTION.**

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

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

27 **Comment**

28
29 **Principal Sources** – Delaware Statutory Trust Act §3825; Connecticut Statutory Trust
30 Act §34-546.
31

32 This section emphasizes the freedom of contract afforded to transactional planners by the
33 Uniform Statutory Trust Act, which is primarily a default statute, and directs courts to interpret
34 the Act accordingly.
35
36

1 **§107. NAME OF STATUTORY TRUST.**

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

4 (1) the name of each person, other than an individual, incorporated,
5 organized, or authorized to transact business in this State; and

6 (2) each name reserved under subsection 209 [or other state laws allowing
7 the reservation or registration of business names, including fictitious name statutes].

8 (b) The name of each statutory trust set forth in its certificate of trust may contain
9 the following words: “company,” “association,” “club,” “foundation,” “fund,” “institute,”
10 “society,” “union,” “syndicate,” “limited” or “trust” (or abbreviations of like import), and may
11 contain the name of a beneficial owner, a trustee, or any other person.

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

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

18 (a) and is distinguishable in the records of the [Secretary of State] from the name applied for;

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

22 (3) the applicant delivers to the [Secretary of State] proof satisfactory to

1 the [Secretary of State] that the present user, registrant, or owner of the conflicting name:

2 (A) has merged into the applicant;

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

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

6 (d) Subject to Section 706, this section applies to any foreign statutory trust
7 transacting business in this State, having a certificate of authority to transact business in this
8 State, or applying for a certificate of authority.

9 **Comment**

10
11 **Principal Sources** – Uniform Limited Partnership Act §108, except paragraph (b), which
12 reflects the influence of Delaware Statutory Trust Act §3814.

13
14 **[Questions:** (1) Should this section be located in Article 1 or 2? It was initially located
15 in Article 1 for consistency with ULPA. (2) In prior meetings there was discussion about the
16 potential for deception if the statutory trust’s name did not indicate that it was a limited liability
17 entity. The question thus arose whether (a) to require such an indication, (b) to deal with deceit
18 through a veil-piercing doctrine (see comment to section 505), (c) to prohibit deceptive names
19 (but the question how to police such a prohibition was not answered), or (d) to leave the section
20 as is. Note that §35(d) of the Investment Company Act of 1940 (applicable to mutual funds)
21 says, “Deceptive or misleading names. It shall be unlawful for any registered investment
22 company to adopt as a part of the name or title of such company, or of any securities of which it
23 is the issuer, any word or words that the Commission finds are materially deceptive or
24 misleading. The Commission is authorized, by rule, regulation, or order, to define such names or
25 titles as are materially deceptive or misleading.”]

1 **ARTICLE 2**

2 **FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS**

3
4
5 **§201. CERTIFICATE OF TRUST.**

6 (a) In order for a statutory trust to be formed, a certificate of trust must be
7 delivered to the [Secretary of State] for filing. The certificate must state:

- 8 (1) the name of the statutory trust, which must comply with Section 107;
9 (2) the street and mailing address of its current designated office;
10 (3) the name and street and mailing address of the initial agent for service
11 of process under Section 305;

12 (b) A certificate of trust may also contain any other matters but may not vary or
13 otherwise affect the provisions specified in Section 103(b) in a manner inconsistent with that
14 section.

15 (c) Subject to Section 205(c) a statutory trust is formed when the [Secretary of
16 State] files the certificate of statutory trust.

17 (d) Subject to subsection (b), if any provision of the trust instrument is
18 inconsistent with the filed certificate of statutory trust or with a filed statement of cancellation,
19 or change or filed articles of conversion or merger:

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

22 (2) the filed certificate of trust, statement of cancellation, or change or
23 articles of conversion or merger prevail as to persons other than trustees and beneficial owners
24 that reasonably rely on the filed record to their detriment.

1 **Comment**

2
3 **Principal Sources** – Uniform Limited Partnership Act §201; Delaware Statutory Trust
4 Act §3810; Connecticut Statutory Trust Act §34-503.
5

6 A statutory trust, like all other limited liability forms of business organization, but unlike
7 a common law trust, is a creature of statute that requires a filing with the state to come into
8 existence. (For more on the meaning of “filing,” see Section 205 and the comment thereto.)
9 Once created, the statutory trust is a juridical entity with capacity to contract, sue, and be sued in
10 its own name. See, e.g., Sections 301, 304. The statutory trust is an entity independent from its
11 trustees and beneficial owners, and the debts, liabilities, and other obligations of the statutory
12 trust cannot normally be enforced against the trustees or beneficial owners. See, e.g., Sections
13 403 and 505.
14

15 Accordingly, a statutory trust comes into existence only if (i) a certificate of trust is
16 prepared and delivered to the specified public official for filing, and (ii) the public official files
17 the certificate. The certificate of trust provides notice to interested third parties of the limited
18 liability associated with the statutory trust and the identification of the statutory trust’s initial
19 agent for service of process. Pursuant to Section 304(d), the certificate of trust also puts third
20 parties on notice if the statutory trust further segregates its assets and liabilities by creating one
21 or more series.
22

23 A statutory trust is also a creature of contract. As such, it will be possible, though
24 improper, for the trust instrument to be inconsistent with the certificate of trust or other specified
25 public filings relating to the statutory trust. Paragraph (d) provides the rule for determining
26 which source of information prevails in such circumstances. Under paragraph (d)(1), the
27 inconsistent provision of the trust instrument prevails as to trustees and beneficial owners. By
28 contrast, other parties are entitled to rely on the public record. Hence, under paragraph (d)(2),
29 for all other parties the terms of the publicly-filed certificate of trust prevail.
30

31 **§202. AMENDMENT OR RESTATEMENT OF CERTIFICATE.**

32 (a) In order to amend its certificate of trust, a statutory trust must deliver to the
33 [Secretary of State] for filing an amendment or, pursuant to [Article] 6, articles of merger stating:
34 (1) the name of the statutory trust;
35 (2) the date of filing of its initial certificate; and
36 (3) the changes that the amendment makes to the certificate as most
37 recently amended or restated.

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

(1) cause the certificate to be amended; or
(2) if appropriate, deliver to the [Secretary of State] for filing a statement of correction pursuant to Section 206.

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

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

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

Comment

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

Paragraph (a) provides a mechanism for updating a statutory trust's filed certificate of trust. Paragraph (b) imposes an obligation directly on the trustee rather than on the statutory trust. A trustee's failure to meet that responsibility can expose the trustee to liability to third parties under Section 207 and might constitute a breach of trust.

§203. STATEMENT OF CANCELLATION.

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

- (1) the name of the statutory trust;
(2) the date of filing of its initial certificate of trust; and

1 (3) any other information as determined by the trustees filing the
2 statement.

3 (b) Subject to Section 205(c), a statement of cancellation is effective when filed
4 by the [Secretary of State].

5 **Comment**

6
7 **Principal Sources** – Uniform Limited Partnership Act §203; Delaware Statutory Trust
8 Act §3810; Connecticut Statutory Trust Act §34-503.

9
10 Unlike Uniform Limited Partnership Act §203, this section requires the filing of a
11 statement of cancellation when a statutory trust is terminated.
12

13 **§204. SIGNING OF RECORDS.**

14 (a) Each record delivered to the [Secretary of State] for filing pursuant to this
15 [act] must be signed in the following manner:

16 (1) An initial certificate of trust must be signed by all trustees.

17 (2) A statement of cancellation must be signed by all of the trustees.

18 (3) Articles of conversion must be signed by all of the trustees [**Note:** To
19 be revised in light of Article 6].

20 (4) Articles of merger must be signed as provided in Section [**Note:** To be
21 revised in light of Article 6].

22 (5) Any other record delivered on behalf of a statutory trust to the
23 [Secretary of State] for filing must be signed by at least one of the trustees.

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

1 **Comment**

2
3 **Principal Sources** – Uniform Limited Partnership Act §204; Delaware Statutory Trust
4 Act §3811; Connecticut Statutory Trust Act §34-504.
5

6 **§205. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY OF**
7 **STATE]; EFFECTIVE TIME AND DATE.**

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

15 (b) Upon request and payment of a fee, the [Secretary of State] shall send to the
16 requester a certified copy of the requested record.

17 (c) Except as otherwise provided in Sections 206 and 307, a record delivered to
18 the [Secretary of State] for filing under this [act] may specify an effective time and a delayed
19 effective date. Except as otherwise provided in this [act], a record filed by the [Secretary of
20 State] is effective:

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

24 (2) if the record specifies an effective time but not a delayed effective

1 date, on the date the record is filed at the time specified in the record;

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

4 (A) the specified date; or

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

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

8 (A) the specified date; or

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

10 **Comment**

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

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

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

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

34
35 **[For discussion: Filing fees and the lack of a franchise tax.]**

1

2 **§206. CORRECTING FILED RECORD.**

3 (a) A statutory trust or foreign statutory trust may deliver to the [Secretary of
4 State] for filing a statement of correction to correct a record previously delivered by the statutory
5 trust or foreign statutory trust to the [Secretary of State] and filed by the [Secretary of State], if at
6 the time of filing the record contained false or erroneous information or was defectively or
7 erroneously signed.

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

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

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

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

14 (c) When filed by the [Secretary of State], a statement of correction is effective
15 retroactively as of the effective date of the record the statement corrects, but the statement is
16 effective when filed as to persons relying on the uncorrected record and adversely affected by
17 the correction.

18 **Comment**

19
20 **Principal Source** – Uniform Limited Partnership Act §207.

21
22 A statement of correction is appropriate only to correct inaccuracies that existed or
23 signatures that were defective “at the time of filing.” A statement of correction may not be used
24 to correct a record that was accurate when filed but has become inaccurate as a result of
25 subsequent events.

26
27 Under paragraph (c), a statement of correction “relates back” by way of retroactive

1 application except against persons who have relied on the uncorrected record and would be
2 adversely affected if the correction related back.
3

4 **§207. LIABILITY FOR FALSE INFORMATION IN FILED RECORD.**

5 (a) If a record delivered to the [Secretary of State] for filing under this [act] and
6 filed by the [Secretary of State] contains false information, a person that suffers loss by reliance
7 on the information may recover damages for the loss from:

8 (1) a person that signed the record, or caused another to sign it on the
9 person's behalf, and knew the information to be false at the time the record was signed; and

10 (2) a trustee that has notice that the information was false when the record
11 was filed or has become false because of changed circumstances, if the trustee has notice for a
12 reasonably sufficient time before the information is relied upon to enable the trustee to effect an
13 amendment under Section 202 or deliver to the [Secretary of State] for filing a statement of
14 correction pursuant to Section 206.

15 (b) Signing a record authorized or required to be filed under this [act] constitutes
16 an affirmation under the penalties of perjury that the facts stated in the record are true.

17 **Comment**

18 **Principal Source** – Uniform Limited Partnership Act §208.

19 The liability rules of paragraph (a) apply only to records that are (i) created by private
20 persons (“delivered to the [Secretary of State] for filing”), and that (ii) actually become part of
21 the public record (“filed by the [Secretary of State]”). Paragraph (a) does not preempt other law,
22 which might provide remedies for misleading information contained, for example, in a record
23 that is delivered to the filing officer for filing but is withdrawn before the filing officer takes the
24 official action of filing the record.
25
26

27 Under paragraph (b) records filed under this Act are signed subject to the penalties for
28 perjury. Hence, this section does not require a party who relies on a record to demonstrate that
29 reliance was reasonable. Contrast Section 201(d)(2), which provides that, if a trust instrument is
30

1 inconsistent with the public record, the public record prevails in favor of a person that is neither
2 a trustee nor beneficial owner and that reasonably relied on the record.
3

4 **§208. CERTIFICATE OF EXISTENCE OR AUTHORIZATION.**

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

9 (1) the statutory trust's name;

10 (2) that it was duly formed under the laws of this State and the date of
11 formation;

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

14 (4) that a statement of cancellation has not been filed by the [Secretary of
15 State].

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

21 (1) the foreign statutory trust's name and any alternate name adopted
22 under Section 706 for use in this State;

23 (2) that it is authorized to transact business in this State;

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

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

5 (c) Subject to any qualification stated in the certificate, a certificate of existence
6 or authorization issued by the [Secretary of State] may be relied upon as conclusive evidence
7 that the statutory trust or foreign statutory trust is in existence or is authorized to transact
8 business in this State.

9 **Comment**

10 **Principal Source** – Uniform Limited Partnership Act §209.

11 A certificate of existence can reveal only information present in the public record, and
12 under this Act significant information bearing on the status of a statutory trust may be outside the
13 public record.

14 Section 205(b) provides a mechanism for obtaining a certified copy of a certificate of
15 trust even if the trust has been terminated.

16 A certificate of authorization furnished under this section is different than a certificate of
17 authority filed under Section 705.

18 **§209. RESERVATION OF NAME.**

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

24 (b) A person that has reserved a name under this section may deliver to the

1 [Secretary of State] for filing a notice of transfer that states the reserved name and the name and
2 street and mailing address of some other person to which the reservation is to be transferred.
3 Subject to Section 205(c), the transfer is effective when the [Secretary of State] files the notice
4 of transfer.

5 **Comment**

6
7 **Principal sources** – Uniform Limited Partnership Act §109; Delaware Statutory Trust
8 Act §3814; Connecticut Statutory Trust Act §34-506; Model Business Corporation Act §4.02.

9
10 **[Query:** Does this section belongs here in Article 2, or in Article 1?]

1 **ARTICLE 3**

2 **STATUTORY TRUSTS**

3
4 **§301. STATUTORY TRUSTS VALIDATED.**

5 (a) A statutory trust is hereby declared to be a separate legal entity and a
6 permitted form of association for the conduct of business in this state.

7 (b) A statutory trust may be organized to carry on any lawful business or activity,
8 whether or not conducted for profit, and for any lawful purpose, including, without limitation,
9 holding or otherwise taking title to property, whether in an active, passive or custodial capacity.

10 **Comment**

11
12 **Principal Sources** – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
13 Act §§34-502, 34-502a.

14
15 Paragraph (a) confirms that any prior judicial decision that holds that a business trust
16 violates the state’s corporate law, trust law, or public policy is not applicable to a statutory trust
17 created under this Act. Examples of such decisions, which reflect the concern that a business
18 trust could be used to evade regulatory limitations on the corporate form, are collected in Robert
19 H. Sitkoff, *The Rise of the Statutory Business Trust* [in progress]. [See also Leland S. Duxbury,
20 *Business Trusts and Blue Sky Laws*, 8 Minn. L. Rev. 465, 473-76 (1923); Robert C. Brown,
21 *Common Law Trusts as Business Enterprises*, 3 Ind. L.J. 595, 597-98 (1928); Note, *The*
22 *Massachusetts Trust Act of 1959*, 34 Wash. L. Rev. & St. B. J. 305, 305-06 (1959).]

23
24 Paragraph (b) permits the formation of a statutory trust for any lawful purpose,
25 paralleling the similar trend in modern corporate law. See, e.g., Model Business Corporation
26 Act §3.01; Delaware General Corporation Law §101. The limitation for any “lawful” purpose
27 allows for the possibility that the State has specifically limited the type of entity that may engage
28 in a particular line of business. For example, many States require that certain regulated
29 industries, such as banking and insurance, be conducted only by organizations that meet special
30 requirements.

31
32 **§302. LAW OF INTERNAL AFFAIRS.** The laws of this state shall govern the
33 organization, internal affairs, and the liability of the trustees and beneficial owners all domestic

1 statutory trusts.

2 **Comment**

3
4 **Principal Source** – Connecticut Statutory Trust Act §34-502.

5
6 Under this section, the internal organization and governance of the statutory trust—
7 including the rights inter se of the trustees and the beneficial owners—are governed by the laws
8 of this state. Hence, this section in effect provides an “internal affairs doctrine” for statutory
9 trusts akin to that in corporate law. See Note, The Internal Affairs Doctrine: Theoretical
10 Justifications and Tentative Explanations for its Continued Primacy, 115 Harv. L. Rev. 1480
11 (2002).

12
13 With respect to a third person, the drafting committee contemplated that the rights and
14 liabilities of the statutory trust for an act of the statutory trust of a sort that could be done by an
15 individual would determined by the same choice-of-law principles that are applicable to
16 individuals. See Restatement (Second) of Conflicts of Laws §301 (1971).

17
18 **[For discussion:** There is no such a provision in the Delaware Act. The question thus
19 arises, would the Delaware Act would allow for choice of another state’s law to govern the
20 internal affairs of a Delaware statutory trust, and, if so, is the Delaware approach is preferable?
21 In prior meetings the consensus was against such an approach and against the (fee-capturing)
22 requirement in the Delaware Act that at least one trustee be located in-state. Assuming the
23 current approach is maintained, should the deviation from Delaware be discussed in the
24 comment? Note also that, as presently drafted, Section 104 makes this section mandatory.]

25
26
27 **§303. DURATION OF STATUTORY TRUST.**

28 (a) A statutory trust shall have perpetual existence.

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

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

34 **Comment**

35
36 **Principal Sources** – Delaware Statutory Trust Act §3808; Connecticut Statutory Trust

1 Act §34-518.

2
3 Consistent with corporate law, but not trust law, paragraphs (a) and (b) authorizes perpetual
4 existence for a statutory trust. Hence, if the governing instrument so provides, paragraph (a)
5 exempts statutory trusts from the Rule Against Perpetuities and paragraph (b) exempts statutory
6 trusts from judicial modification or termination. **[For discussion:** (1) The problem of inviting
7 evasion of mandatory rules in the common law of trusts by use of a statutory trust for estate planning
8 purposes; (2) the rules against suspension of the power of alienation and against accumulations; (3)
9 the oddball phenomenon of the Kennedy clause in commercial documents.]

10
11 Under the Rule Against Perpetuities, all interests in a private trust must vest or fail within
12 twenty-one years of the death of a life in being at the time the trust became irrevocable. Hence,
13 in a jurisdiction that has retained the Rule Against Perpetuities, the identity of all persons with a
14 claim to the underlying trust property will be ascertained within the perpetuities period. Once all
15 the beneficiaries are ascertained, they can terminate the trust when the perpetuities period
16 expires. The settlor cannot prevent this. See Restatement (Second) of Property: Donative
17 Transfers § 2.1 (1981); 1A Austin Wakeman Scott & William Franklin Fratcher, The Law of
18 Trusts § 62.10, at 336 (4th ed. 1987).

19
20 Given the typically commercial nature of statutory trusts in practice, the drafting
21 committee concluded that the corporate model of perpetual existence was a better fit. A
22 statutory business trust implicates neither of the two policies that underpin the Rule Against
23 Perpetuities: (1) promoting alienability of the trust property, and (2) limiting “dead hand”
24 control. The drafting committee also took notice of the fact that nearly half the states have
25 abolished the Rule Against Perpetuities to authorize perpetual private trusts, see Robert H.
26 Sitkoff & Max Schanzenbach, Jurisdictional Competition for Trust Funds: An Empirical
27 Analysis of Perpetuities and Taxes, 115 Yale L.J. 356, 430-33 tbl.5 (2005), which has rendered
28 the Rule irrelevant with respect to intangible personal property because such property is easily
29 portable. *Id.* at 414.

30
31 **[For discussion:** The connection, if any, of paragraph (b) to paragraph (c), and of both
32 to bankruptcy remoteness.]

33
34 Paragraph (c) confirms that the rule of partnership law under which a partnership is
35 dissolved upon the death or incapacity of one of the partners has no application to a statutory
36 trust or any series thereof.

37 38 **§304. POWER TO SUE AND BE SUED.**

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

40 (b) A statutory trust may be sued for debts and other obligations or liabilities

1 contracted or incurred by the trustees, or by the duly authorized agents of such trustees, in the
2 performance of their respective duties under the governing instrument of the statutory trust, and
3 for any damages to persons or property resulting from the negligence of such trustees or agents
4 acting in the performance of such respective duties.

5 (c) The property of a statutory trust shall be subject to attachment and execution
6 as if it were a domestic corporation.

7 (d) Notwithstanding the foregoing provisions of this section, in the event that the
8 governing instrument of a statutory trust, including a statutory trust that is a registered
9 investment company under the Investment Company Act of 1940, as amended, 15 USC Sections
10 80a-1 et seq., creates one or more series as provided in Section 104(b)(3)-(5), and

11 (1) if the governing instrument so provides,
12 (2) if separate and distinct records are maintained for any such series and
13 the assets associated with any such series are held in such separate and distinct records (directly
14 or indirectly, including through a nominee or otherwise) and accounted for in such separate and
15 distinct records separately from the other assets of the statutory trust, or any other series thereof,
16 and

17 (3) if notice of the limitation on liabilities of a series as referenced in this
18 Section is set forth in the certificate of trust of the statutory trust, then the debts, liabilities,
19 obligations and expenses incurred, contracted for or otherwise existing with respect to a
20 particular series shall be enforceable against the assets of such series only, and not against the
21 assets of the statutory trust generally or any other series thereof, and none of the debts, liabilities,
22 obligations and expenses incurred, contracted for or otherwise existing with respect to the

1 statutory trust generally or any other series thereof shall be enforceable against the assets of such
2 series.

3 **Comment**

4
5 **Principal Sources** – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust
6 Act §34-518.

7
8 Paragraphs (a), (b), and (c) implement the concept that the statutory trust is a separate
9 juridical entity with the power to contract, sue, and be sued in its own name.

10
11 Paragraph (d) confirms that for a statutory trust that has created separate series under
12 Section 104(b)(3)-(5), the debts, liabilities, and other obligations of a particular series shall be
13 enforceable against the assets of that series only, but only if (1) the governing instrument so
14 provides, (2) for each series separate records are maintained, and (3) notice of the limitation on
15 liabilities of a series is set forth in the certificate of trust. **[Note:** The certificate of trust, unlike a
16 trust instrument, is a public record.] Structuring a statutory trust with multiple series has proved
17 popular for investment companies organized under the Investment Company Act of 1940. See
18 Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in The Delaware Law of
19 Corporations & Business Organizations §19.4 (3d ed. 2005 Supp.) (“Investment companies often
20 structure themselves in the form [of] a master trust with several series of sub-trusts. The sub-
21 trusts may have different investment objectives or marketing and distribution plans that are
22 designed to appeal to different institutional and retail markets. Because the multiple series
23 structure involves only a single investment company, it may be more economical to operate than
24 creating a separate trust for each series. Such separate series may not share all costs of operating
25 the statutory trust equally or may use varying amounts of leverage to finance their
26 investments.”).

27 28 **§305. OFFICE AND AGENT FOR SERVICE OF PROCESS.**

29 (a) A statutory trust shall designate and continuously maintain in this State an
30 agent for service of process.

31 (b) An agent for service of process of a statutory trust or foreign statutory trust
32 must be an individual who is a resident of this State or other person authorized to do business in
33 this State.

34 (c) Subject to subsection (b), a statutory trust may designate one of its trustees as

1 its agent for service of process.

2 **Comment**

3
4 **Principal Sources** – Uniform Limited Partnership Act §114; Delaware Statutory Trust
5 Act §3804; Connecticut Statutory Trust Act §34-507.

6
7 Under section 201(a)(3), the initial designation of an agent for service of process is made
8 in the original certificate of trust. The initial designation may be changed pursuant to a
9 statement of change under Section 306 or by an amendment to the certificate of trust under
10 Section 202.
11

12 **§306. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF**
13 **PROCESS.**

14 (a) In order to change its agent for service of process, or the address of its agent
15 for service of process, a statutory trust or a foreign statutory trust may deliver to the [Secretary of
16 State] for filing a statement of change containing:

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

25 (b) Subject to Section 205(c), a statement of change is effective when filed by the
26 [Secretary of State].

27 **Comment**

1
2 **Principal Source** – Uniform Limited Partnership Act §115.
3

4 Paragraph (a) uses “may” rather than “shall” because a statutory trust may also change
5 the information by an amendment to its certificate of trust under Section 202.
6

7 **§307. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

8 (a) In order to resign as an agent for service of process of a statutory trust or
9 foreign statutory trust, the agent must deliver to the [Secretary of State] for filing a statement of
10 resignation containing the name of the statutory trust or foreign statutory trust.

11 (b) After receiving a statement of resignation, the [Secretary of State] shall file it
12 and mail a copy to the designated office of the statutory trust or foreign statutory trust and
13 another copy to the principal office if the address of the office appears in the records of the
14 [Secretary of State] and is different from the address of the designated office.

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

17 **Comment**
18

19 **Principal Source** – Uniform Limited Partnership Act §116.
20

21 This section provides the exclusive means for an agent to resign without cooperation
22 from the statutory trust or foreign statutory trust and the only way the agent, rather than the
23 statutory trust or foreign statutory trust, can effect a change in the public record. In contrast to
24 most records authorized or required to be delivered to the filing officer for filing under this Act,
25 a statement of resignation may not provide for a delayed effective date. Paragraph (c) mandates
26 the effective date, and an effective date included in a statement of resignation is disregarded.
27

28 **§308. SERVICE OF PROCESS.**

29 (a) An agent for service of process appointed by a statutory trust or foreign
30 statutory trust is an agent of the statutory trust or foreign statutory trust for service of any

1 process, notice, or demand required or permitted by law to be served upon the statutory trust or
2 foreign statutory trust.

3 (b) If a statutory trust or foreign statutory trust does not appoint or maintain an
4 agent for service of process in this State or the agent for service of process cannot with
5 reasonable diligence be found at the agent's address, the [Secretary of State] is an agent of the
6 statutory trust or foreign statutory trust upon whom process, notice, or demand may be served.

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

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

13 (1) the date the statutory trust or foreign statutory trust receives the
14 process, notice, or demand;

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

17 (3) five days after the process, notice, or demand is deposited in the mail,
18 if mailed postpaid and correctly addressed.

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

22 (f) This section does not affect the right to serve process, notice, or demand in any

1 other manner provided by law.

2 **Comment**

3

4 **Principal Source** – Uniform Limited Partnership Act §117.

5

6 **[For discussion:** Should service on a trustee be a sufficient alternative to service on the
7 agent for service?]

ARTICLE 4

TRUSTEES AND TRUST MANAGEMENT

§401. MANAGEMENT OF STATUTORY TRUSTS.

(a) The business and affairs of a statutory trust shall be managed by or under the direction of its trustees.

(b) A trustee, without authorization by the court, may exercise:

(1) powers conferred by the terms of the trust; and

(2) except as limited by the terms of the trust:

(A) all powers over the trust property that an unmarried competent owner has over individually owned property;

(B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and

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

Comment

Principal Sources – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust Act §34-517; Uniform Trust Code §815.

Paragraph (a) confirms that the trustees are charged with the management of the statutory trust.

By granting the trustees the broadest possible powers, paragraph (b) is intended to overcome the common law rule that trustees have only those powers granted by the trust instrument. This broad authority is denoted by granting the trustees the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on such property by marriage, disability, or cotenancy. Note, however, that the existence of a power, regardless of the source of the power, does not speak to the question whether in a particular case it is consistent with the trustees' obligation of good faith to exercise the power. Cf. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 640-43, 656-57 (1995).

§402. STATUTORY TRUST LIABLE FOR TRUSTEE'S ACTIONABLE

CONDUCT. A statutory trust is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a trustee acting in the ordinary course of business of the statutory trust or with authority of the statutory trust.

Comment

Principal Source – Uniform Limited Liability Company §302.

The actions of the trustee are imputed to the statutory trust if the trustee is acting with actual or apparent authority or in the ordinary course of business.

§403. NONLIABILITY OF TRUSTEES; RIGHTS OF TRUSTEES IN TRUST

PROPERTY.

(a) An obligation of a statutory trust, whether arising in contract, tort, or otherwise, is not the obligation of a trustee. A trustee, by reason of being a trustee, shall not be personally liable to any person other than the statutory trust or a beneficial owner for any act, omission or obligation of the statutory trust or any trustee thereof.

(b) No creditor of a trustee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the statutory trust with respect to any claim against, or obligation of, such trustee in its individual capacity and not related to the statutory trust.

(c) Legal title to the property of the statutory trust or any part thereof may be held in the name of any trustee of the statutory trust, in its capacity as such, with the same effect as if such property were held in the name of the statutory trust.

1 **Comment**

2
3 **Principal Sources** – Delaware Statutory Trust Act §§3803, 3805; Connecticut Statutory
4 Trust Act §34-523; Uniform Limited Partnership Act §303.
5

6 Although a common law trust is not a juridical entity, like other organizational forms that
7 are juridical entities the trust provides for separation with respect to creditors of assets belonging
8 to the trustee personally and the assets of the trust. In general, the trustee has no personal
9 liability to the trust's outside creditors unless the trustee personally guaranteed the obligation,
10 and creditors of the trustee personally have no recourse against the assets of the trust. Hence, the
11 trustee is in effect split into "two distinct legal persons: a natural person contracting on behalf of
12 himself, and an artificial person acting on behalf of the beneficiaries." Henry Hansmann &
13 Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387, 416 (2000).
14 As a result, creditors of the trustee personally need not worry about the solvency of the trust, and
15 creditors of the trust need not worry about the solvency of the trustee personally. See Henry
16 Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic*
17 *Analysis*, 73 N.Y.U. L. Rev. 434 (1998); Robert H. Sitkoff, *An Agency Costs Theory of Trust*
18 *Law*, 89 Cornell L. Rev. 621, 641-43 (2004). To police the boundary of the trustee's personal
19 assets and the assets of the trust, the common law imposes on the trustee duties to earmark trust
20 property and not to commingle it with the trustee's own. See Restatement (Second) of Trusts
21 §179 (1959).
22

23 This section implements the foregoing asset partitioning principles with respect to a
24 statutory trust in three ways. First, paragraph (a) confirms that the trustee has no personal
25 liability to the trust's outside creditors unless the trustee personally guaranteed the obligation, in
26 which case the trustee's liability arises from the trustee's personal guarantee, not by reason of
27 being a trustee. Second, paragraph (b) confirms that the personal creditors of a trustee have no
28 recourse against the assets of the statutory trust. Together, paragraphs (a) and (b) confirm the
29 separateness with respect to creditors of the statutory trust from its trustees. Third, because a
30 statutory trust, unlike a common law trust, is itself a juridical entity, the question arises whether
31 a trustee may hold trust property in the name of the trustee in the trustee's capacity as such, or if
32 instead trust property must be held only in the name of the statutory trust. Paragraph (c)
33 provides the more permissive answer, giving the trustee the option of holding property in the
34 name of the trustee in the trustee's capacity as such.
35

36 **§404. TRUSTEE'S RIGHT TO INFORMATION.** Each trustee shall have the right to
37 examine all information relating to the affairs of the business trust for any purpose reasonably
38 related to the trustee's position as a trustee.

39 **Comment**

Principal Source – Delaware Statutory Trust Act §3819.

[For discussion: At the last meeting some argued that this provision should be included in the schedule of mandatory rules. No consensus was reached.]

§405. DIRECTED TRUSTEES AUTHORIZED. The governing instrument may authorize any person, including a beneficial owner, to direct the trustees or other persons in the management of the statutory trust. Neither the power to give direction to a trustee or other persons nor the exercise thereof by any person, including a beneficial owner, shall cause such person to be a trustee. Neither the power to give direction to a trustee or other persons nor the exercise thereof by any person, including a beneficial owner, shall cause such person to have duties, including fiduciary duties, or liabilities relating thereto to the statutory trust to a beneficial owner thereof.

Comment

Principal Sources – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust Act §34-517.

This section ratifies the use of directed trustees, meaning a trustee that must act in accord with the directions of another person. Unless the governing instrument provides otherwise, by reason of having the power to direct the trustee such other person is not a trustee and owes no duties, fiduciary or otherwise, to the statutory trust or the beneficial owners. Such other person may be a beneficial owner.

[For discussion: (1) Investment advisors for mutual funds; (2) the common law control test (see § 505); (2) beneficial owners with control blocks (see §504); and (3) Uniform Trust Code §808, which provides:

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

1 (c) The terms of a trust may confer upon a trustee or other person a power to
2 direct the modification or termination of the trust.

3
4 (d) A person, other than a beneficiary, who holds a power to direct is
5 presumptively a fiduciary who, as such, is required to act in good faith with regard to the
6 purposes of the trust and the interests of the beneficiaries. The holder of a power to
7 direct is liable for any loss that results from breach of a fiduciary duty.]
8

9 **§406. DELEGATION BY TRUSTEE.** A trustee of a statutory trust has the power and
10 authority to delegate to one or more other persons the trustee's rights and powers to manage and
11 control the business and affairs of the statutory trust, including to delegate to agents, officers, of
12 employees of the trustee or the statutory trust, and to delegate by management agreement or
13 other agreement with, or otherwise to, other persons, including to another trustee. Such
14 delegation by a trustee of a statutory trust shall not cause the trustee to cease to be a trustee of
15 the statutory trust or cause the person to whom any such rights and powers have been delegated
16 to be a trustee of the statutory trust by reason of the delegation.

17 **Comment**

18 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
19 Act §34-517.
20

21 Consistent not only with the Delaware and Connecticut Statutory Trust Acts, but also the
22 principal trust law reform projects of recent vintage, this section reverses the traditional common
23 law rule against delegation by a trustee. See Uniform Trust Code §807 (2000); Uniform Prudent
24 Investor Act §9; Restatement (Third) of Trusts: Prudent Investor Rule §171 (1992); John H.
25 Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Mo. L. Rev. 105
26 (1994). Most states have abrogated the nondelegation rule with legislation based on the Uniform
27 Prudent Investor Act, Uniform Trust Code, or the Restatement (Third) of Trusts.
28

29 However, following the lead of the Delaware and Connecticut Statutory Trust Act, this
30 Section's abrogation of the nondelegation doctrine deviates from prior Uniform Acts and the
31 Restatement (Third) of Trusts in two important respects. First, this section does not explicitly
32 require the trustee to exercise reasonable care, skill, and caution, in selecting, instructing, and
33 monitoring the agent. Instead, the drafting committee contemplated that delegation under this
34 section would be subject to the trustee's obligation under Section 103(b)(3) to act in good faith.

1 Second, this section treats delegation to a co-trustee in the same manner as delegation to another
2 agent. Compare Uniform Trust Code §703(e) (2000); Restatement (Second) of Trusts §184
3 (1959).
4

5 In choosing to follow the model of the Delaware and Connecticut Statutory Trust Acts
6 rather than the modern trend in ordinary trust law, the drafting committee was influenced by the
7 current practice in existing statutory trusts of creating a trusteeship with respect to some, but not
8 all, aspects of the trust—for example, in the use of a statutory trust for the organization of a
9 mutual fund with an investment advisor, or in the use of a statutory trust in a securitization
10 transaction with a person whose consent is required before the statutory trust can petition for
11 bankruptcy. **[For discussion:** This section, and the reasoning for its deviations from ordinary
12 trust law, were not fully ventilated in the prior meeting.]
13

14 **§407. VOTING BY TRUSTEES.**

15 (a) On any matter that is to be voted on by the trustees:

16 (1) the trustees may act by majority decision unless the governing
17 instrument, this [act], or other applicable law requires the matter being voted on to be decided by
18 more than a majority;

19 (2) the trustees may take such action without a meeting, without a prior
20 notice and without a vote if a consent or consents in writing, setting forth the action so taken,
21 shall be signed by the trustees having not less than the minimum number of votes that would be
22 necessary to authorize or take such action at a meeting at which all trustees entitled to vote
23 thereon were present and voted, and

24 (3) the trustee may vote in person or by proxy, and such proxy may be
25 granted in writing, by means of electronic transmission, or as otherwise permitted by applicable
26 law.

27 (b) A consent transmitted by electronic transmission by a trustee or by a person or
28 persons authorized to act for a trustee shall be deemed to be written and signed for purposes of

1 this subsection.

2 **Comment**

3
4 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
5 Act § 34-517; Uniform Trust Code §703.
6

7 In accord with Uniform Trust Code §703(a) (2000) and Restatement (Third) of Trusts
8 §39 (2003), paragraph (a)(1) rejects the common law rule requiring unanimity among the
9 trustees of a private trust, replacing it with a default rule requiring a majority.
10

11 The remainder of this section allows for maximum flexibility in the mechanics of
12 aggregating the trustees' votes.
13

14 **§408. NONLIABILITY OF OFFICERS, EMPLOYEES, MANAGERS, AND**

15 **AGENTS.** An officer, employee, manager or other person acting pursuant to Section 104(b)(9)
16 of this [act], by reason of being an officer, employee, manager, or other person acting pursuant to
17 Section 104(b)(9), shall not be personally liable to any person other than the statutory trust or a
18 beneficial owner for any act, omission or obligation of the statutory trust or any trustee thereof.

19 **Comment**

20
21 **Principal Sources** – Delaware Statutory Trust Act §3803; Connecticut Statutory Trust
22 Act §34-523.
23

24 As an artificial person, a statutory trust must act through agents. This section confirms
25 that the statutory trust, not the statutory trust's agents, are liable for the acts, omissions, and
26 obligations of agents acting on the statutory trust's behalf. **[For discussion:** Is it
27 necessary/desirable in this comment to get into agency principals of authority, respondeat
28 superior, and the like?]
29

30 **§409. NONLIABILITY FOR GOOD FAITH RELIANCE ON GOVERNING**

31 **INSTRUMENT.**

32 (a) Subject to Section 103(b), to the extent that, at law or in equity, a trustee has
33 duties, including fiduciary duties, and liabilities relating thereto to a statutory trust or to a

beneficial owner:

(1) The trustee’s duties and liabilities may be expanded, restricted, or eliminated by provisions in a governing instrument; and **[For discussion:** Should not this provision be integrated with Section 103(b), rather than located here, leaving this Section to deal with good faith reliance?]

(2) Any such trustee acting under a governing instrument shall not be liable to the statutory trust or to any such beneficial owner for the trustee's good faith reliance on the provisions of such governing instrument.

(b) Subject to Section 103(b) to the extent that, at law or in equity, an officer, employee, manager or other person designated pursuant to Section 104(b)(9) has duties, including fiduciary duties, and liabilities relating thereto to a statutory trust, a beneficial owner or a trustee:

(1) The duties and liabilities of an officer, employee, manager or other person acting pursuant Section 104(b)(9) may be expanded, restricted, or eliminated by provisions in a governing instrument; and **[For discussion:** Should not this provision be integrated with Section 103(b), rather than located here, leaving this Section to deal with good faith reliance?]

(2) Any such officer, employee, manager or other person acting under a governing instrument shall not be liable to the statutory trust, any beneficial owner or any trustee for such person's good faith reliance on the provisions of such governing instrument.

Comment

Principal Source – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust Act §34-517.

[Note: Assuming that this section is converted to one of good faith reliance, another model is Uniform Trust Code §1006: “A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.”]

§410. INTERESTED TRANSACTIONS. A trustee, officer, employee, manager, or a related person of a trustee, officer, employee, or manager, may lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or assume one or more obligations of, provide collateral for, and transact other business with a statutory trust and, subject to the trustee's obligation of good faith under Section 103(b)(3), has the same rights and obligations with respect to any such matter as a person who is not a trustee, officer, employee, manager, or related person of a trustee, officer, employee, or manager.

Comment

Principal Sources – Delaware Statutory Trust Act §3806; Model Business Corporation Act §8.60.

This section abrogates the no-further-inquiry rule of traditional trust law, opting instead to for the model of corporate law whereby a self-dealing or other interested transaction is permitted if its terms are fair and reasonable. See Stephen M. Bainbridge, *Corporation Law and Economics* §7.2 (2002). See also John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 *Yale L.J.* 929 (2005); Melanie Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 *Georgetown L.J.* ____ (2005); Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 *J. Corp. L.* 565, 572-74 (2003).

[Note: At common law, if a trustee engages in self-dealing, meaning a transaction with the trustee or a related party involving trust property, the trustee's good faith and the fairness of the transaction to the beneficiary is irrelevant. The only defenses are that in the trust instrument the settlor authorized the self-dealing transaction or that the beneficiaries consented to it after full disclosure. See Restatement (Second) of Trusts §§170(1) cmt. t, 216(1) (1959). Even then, the trustee must have acted in good faith and the self-dealing transaction must be objectively fair and reasonable. See *id.* §§170(2) cmt. t, 216(3).]

[For discussion: Differences in the duty of care in trust law and corporate law.]

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(b) A term in the governing instrument relieving any trustee from liability is to the extent that it relieves the trustee from liability for failing to act in good faith. Section 103(b) allows the governing instrument to define good faith, provided that such definition is not manifestly unreasonable.]

Principal Sources - Delaware Statutory Trust Act §3817; Connecticut Statutory Trust Act §34-524; Uniform Trust Code §105.

[Note: In *Nakahara v. The NS 1991 American Trust*, 739 A.2d 770 (Del. Ch. 1998), the only reported decision under the Delaware Statutory Trust Act, the court denied the trustees' claim for indemnification on the ground of unclean hands.]

1 **ARTICLE 5**

2 **BENEFICIARIES AND BENEFICIAL RIGHTS**

3
4 **§501. CONTRIBUTIONS BY BENEFICIAL OWNERS.**

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

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

19 **Comment**

20
21 **Principal Sources** – Delaware Statutory Trust Act §3802; Connecticut Statutory Trust
22 Act §34-515.

23
24 **[For discussion:** The last clause of paragraph (a) raises the issue of inviting evasion of
25 mandatory rules in ordinary trust law by a disguising a donative trust as a statutory trust.
26 Paragraph (b) connects to Section 104(b)(16). The question here is whether to cross-reference

that section in the main text, or the comment.]

§502. REDEMPTION OF BENEFICIAL INTERESTS. A statutory trust may acquire, by purchase, redemption or otherwise, any beneficial interest in the statutory trust. Any such interest so acquired by a statutory trust shall be deemed canceled.

Comment

Principal Source – Delaware Statutory Trust Act §3818.

[Note: In the prior meeting we were told that this provision, which is lacking in the Connecticut Act, is important for mutual funds because such funds must be able to cancel and then reissue shares (in accordance with the 1940 Act). However, it raises the question of whether to limit redemption of beneficial interests in the case of the statutory trust's insolvency. See Section 509, below, with which this section should be integrated.]

§503. RIGHTS OF BENEFICIAL OWNERS IN TRUST PROPERTY.

(a) A beneficial owner shall have an undivided beneficial interest in the property of the statutory trust and shall share pro rata in the profits and losses of the statutory trust.

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

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

(d) A beneficial owner's beneficial interest in the statutory trust is freely transferable.

(e) At the time a beneficial owner becomes entitled to receive a distribution, the

beneficial owner has the status of, and is entitled to all remedies available to, a creditor of the statutory trust with respect to the distribution.

(f) A beneficial owner shall have no preemptive right to subscribe to any additional issue of beneficial interests or any other interest.

(g) Where the statutory trust is a registered investment company under the Investment Company Act of 1940, as amended (15 U.S.C. §80a-1 et seq.), any class, group or series of beneficial interests established by the governing instrument with respect to such statutory trust shall be a class, group or series preferred as to distribution of assets or payment of dividends over all other classes, groups or series in respect to assets specifically allocated to the class, group or series as contemplated by §18 (or any amendment or successor provision) of the Investment Company Act of 1940 [15 U.S.C. §80a-18], as amended, and any regulations issued thereunder, provided that this section is not intended to affect in any respect the provisions of Section 304(d).

Comment

Principal Source – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust Act §34-516.

[Note: These provisions are designed to ensure that creditors of the beneficial owners cannot seize trust property. See generally Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in *The Delaware Law of Corporations & Business Organizations* §19.4 (3d ed. 2005 Supp.). A useful analogy is to the creditors of a corporate shareholder, who normally can seize only the shareholders stock, not the company’s underlying assets. Further discussion of the operation of each of the paragraphs of this section would be helpful for crafting a comment, if one is appropriate. For example, paragraph (a) might be useful to qualify a statutory trust for grantor trust tax treatment (desirable for an I.R.C. 1031 transaction), paragraph (b) appears to resolve the problem with respect to creditors created by (a), and paragraph (c) avoids the need to record deeds that would arise if the beneficial rights were not personal property.]

§504. TRANSACTIONS WITH BENEFICIAL OWNERS. A beneficial owner or a related person of a beneficial owner may lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or assume one or more obligations of, provide collateral for, and transact other business with a statutory trust and, subject to other applicable law, has the same rights and obligations with respect to any such matter as a person who is not a beneficial owner.

Comment

Principal Source – Delaware Statutory Trust Act §3806.

[For discussion: The purpose of this section, which parallels and is analogous in scope to Section 411, should be ventilated. In the course of that discussion we should address the problem of a controlling beneficial owner and whether to say anything about that issue in the comment.]

§505. LIMITED LIABILITY OF BENEFICIAL OWNERS. The beneficial owners of a statutory trust shall be entitled to the same limitation of personal liability extended to shareholders of domestic corporations.

Comment

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

By providing as a default rule that the beneficial owners of a statutory trust enjoy the same limited liability as shareholders of domestic corporations, this section overrules the common law “control test” of *Williams v. Inhabitants of Milton*, 102 N.E. 355 (Mass. 1913). See also Restatement (Second) of Agency §14B (1958). Under the control test, if the beneficial owners had a say in the administration of the trust or the right to remove and replace the trustees, the beneficial owners might be held liable for the debts of the trust. Hence, under this Section a beneficial owner may participate in the management of the statutory trust without exposure to personal liability for the debts of the statutory trust.

[Note: See Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in *The Delaware Law of Corporations & Business Organizations* §19.3 (3d ed. 2005 Supp.): “Courts

1 applying the ‘control test’ have often come to inconsistent results under seemingly similar
2 circumstances. These results are often explicable on the basis of the state’s policy of prohibiting
3 the litigants from achieving limited liability without having to comply with the state’s corporate
4 franchise laws.” There probably will be a cite-able further collecting of authorities and
5 discussion in Robert H. Sitkoff, The Rise of the Statutory Business Trust [in progress].]
6

7 **[For discussion:** (1) whether this comment should reference or take a position on the
8 possibility of veil-piercing, and (2) how to connect this provision with Section 405, which
9 authorizes directed trusteeships with a beneficial owner providing the direction.]
10

11 **§506. VOTING BY BENEFICIAL OWNERS.** On any matter that is to be voted on by
12 the beneficial owners:

13 (1) the beneficial owners may take such action without a meeting, without a prior
14 notice and without a vote if a consent or consents in writing, setting forth the action so taken,
15 shall be signed by the beneficial owners having not less than the minimum number of votes that
16 would be necessary to authorize or take such action at a meeting at which all interests in the
17 statutory trust entitled to vote thereon were present and voted, and

18 (2) the beneficial owners may vote in person or by proxy, and such proxy may be
19 granted in writing, by means of electronic transmission, or as otherwise permitted by applicable
20 law.

21 A consent transmitted by electronic transmission by a beneficial owner or by a person or persons
22 authorized to act for a beneficial owner shall be deemed to be written and signed for purposes of
23 this subsection.

24 **Comment**

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

27
28 **[See Section 104(b)(6).]**
29

1 **§507. DERIVATIVE ACTIONS.**

2 (a) A beneficial owner may maintain a derivative action in the [court of general
3 jurisdiction] to enforce a right of a statutory trust if:

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

7 (2) a demand would be futile.

8 (b) A derivative action may be maintained only by a person that is a beneficial at
9 the time the action is commenced and:

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

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

15 (c) In a derivative action, the complaint must state with particularity:

16 (1) the date and content of plaintiff's demand and the trustees' response to
17 the demand; or

18 (2) why demand should be excused as futile.

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

20 (1) any proceeds or other benefits of a derivative action, whether by
21 judgment, compromise, or settlement, belong to the statutory trust and not to the derivative
22 plaintiff;

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

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

(f) A derivative action may not be discontinued or settled without the court's approval.

Comment

Principal Sources - Uniform Limited Partnership Act §§1002-1005; Delaware Statutory Trust Act §3816; Connecticut Statutory Trust Act §34-522.

[For discussion: (1) Section 104(b)(2) explicitly authorizes the addition in the governing instrument of further limits on derivative actions; (2) Should this section be mandatory—that is, could a governing instrument prohibit all derivative actions?; and (3) Should paragraph (f) be retained?]

§508. ACCESS TO, AND CONFIDENTIALITY OF, INFORMATION AND RECORDS.

(a) Each beneficial owner of a statutory trust has the right, subject to such reasonable standards (including standards governing what information and documents are to be furnished at what time and location and at whose expense) as may be established by the trustees

[Question: Use the same “manifestly unreasonable” test as in Section 103(b)?], to obtain from the statutory trust from time to time upon reasonable demand for any purpose reasonably related to the beneficial owner's interest as a beneficial owner of the statutory trust:

(1) a copy of the governing instrument and certificate of trust and all amendments thereto, together with copies of any written powers of attorney pursuant to which

1 the governing instrument and any certificate and any amendments thereto have been executed;

2 (2) a current list of the name and last known mailing address of each
3 trustee; and

4 (3) financial statements or other information regarding the business and
5 financial condition of the statutory trust over the prior three years.

6 (b) A statutory trust may maintain its records in other than a written form if such
7 form is capable of conversion into a written form within a reasonable time.

8 (c) Any demand by a beneficial owner under this section shall be in writing and
9 shall state the purpose of such demand.

10 **Comment**

11
12 **Principal Source** – Delaware Statutory Trust Act §3819.

13
14 **[For discussion:** Neither (1) the scope of the beneficial owner’s information rights nor
15 (2) whether they should be mandatory was resolved at the prior meeting. In addition to
16 Delaware Statutory Trust Act §3819, for other models see ULLCA §408; RMBCA §16.02; and
17 UTC §813.]
18

19 **§509. LIMITATIONS ON DISTRIBUTIONS TO A BENEFICIAL OWNER.**

20 (a) A statutory trust may not make a distribution in violation of the governing
21 instrument.

22 (b) A statutory trust may not make a distribution if after the distribution:

23 (1) the statutory trust would not be able to pay its debts as they become
24 due in the ordinary course of the statutory trust’s activities; or

25 (2) the statutory trust’s total assets would be less than the sum of its total
26 liabilities plus the amount that would be needed, if the statutory trust were to be dissolved,

wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of beneficial owners whose preferential rights are superior to those of persons receiving the distribution.

(c) A statutory trust may base a determination that a distribution is not prohibited under subsection (b) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(d) Except as otherwise provided in subsection (g), the effect of a distribution under subsection (b) is measured:

(1) in the case of distribution by purchase, redemption, or other acquisition of a transferable interest in the statutory trust, as of the date money or other property is transferred or debt incurred by the statutory trust; and

(2) in all other cases, as of the date:

(A) the distribution is authorized, if the payment occurs within 120 days after that date; or

(B) the payment is made, if payment occurs more than 120 days after the distribution is authorized.

(e) A statutory trust's indebtedness to a beneficial owner incurred by reason of a distribution made in accordance with this section is at parity with the statutory trust's indebtedness to its general, unsecured creditors.

Comment

Principal Source – Uniform Limited Partnership Act §508.

1 **[For discussion:** Whether to add a Section prohibiting distributions to the beneficial
2 owners when the entity is insolvent or otherwise unable to pay its debts as they arise in the
3 ordinary course of business. Proposed Section 509, which is based on the corresponding
4 provision in ULPA, is such a provision. Note, however, that this provision is in tension with
5 Section 502. For another model, see RMBCA §6.40 (Distributions to Shareholders):

6
7 (a) A board of directors may authorize and the corporation may make
8 distributions to its shareholders subject to restriction by the articles of incorporation and
9 the limitation in subsection (c).

10
11 (b) If the board of directors does not fix the record date for determining
12 shareholders entitled to a distribution (other than one involving a purchase, redemption,
13 or other acquisition of the corporation's shares), it is the date the board of directors
14 authorizes the distribution.

15
16 (c) No distribution may be made if, after giving it effect:

17
18 (1) the corporation would not be able to pay its debts as they become due
19 in the usual course of business; or

20
21 (2) the corporation's total assets would be less than the sum of its total
22 liabilities plus (unless the articles of incorporation permit otherwise) the amount that
23 would be needed, if the corporation were to be dissolved at the time of the distribution, to
24 satisfy the preferential rights upon dissolution of shareholders whose preferential rights
25 are superior to those receiving the distribution.

26
27 (d) The board of directors may base a determination that a distribution is not
28 prohibited under subsection (c) either on financial statements prepared on the basis of
29 accounting practices and principles that are reasonable in the circumstances or on a fair
30 valuation or other method that is reasonable in the circumstances.

31
32 (e) Except as provided in subsection (g), the effect of a distribution under
33 subsection (c) is measured:

34
35 (1) in the case of distribution by purchase, redemption, or other
36 acquisition of the corporation's shares, as of the earlier of (i) the date money or other
37 property is transferred or debt incurred by the corporation or (ii) the date the shareholder
38 ceases to be a shareholder with respect to the acquired shares;

39
40 (2) in the case of any other distribution of indebtedness, as of the date the
41 indebtedness is distributed; and
42

1 (3) in all other cases, as of (i) the date the distribution is authorized if the
2 payment occurs within 120 days after the date of authorization or (ii) the date the
3 payment is made if it occurs more than 120 days after the date of authorization.
4

5 (f) A corporation's indebtedness to a shareholder incurred by reason of a
6 distribution made in accordance with this section is at parity with the corporation's
7 indebtedness to its general, unsecured creditors except to the extent subordinated by
8 agreement.]
9

1 **ARTICLE 6**

2 **MERGER, CONSOLIDATION, CONVERSION, AND DISSOLUTION**

3 **[For discussion:** In the previous meeting it was decided to add to this Article a
4 dissolution provision based on Delaware Statutory Trust Act §3808. Sections 604 and 605
5 implement this decision. It was also decided to base the merger, consolidation, and conversion
6 provisions of Article 6 on the Model Entity Transaction Act, augmenting META with provisions
7 for mergers, consolidations, and conversions between statutory trusts under this Act. Hence, in
8 this meeting further attention should be given to the specifics of how to integrate META with
9 this Act, and the rules that should govern merger or consolidation between statutory trusts.
10 Among other issues for discussion are: (1) What percentage of the beneficiaries must approve a
11 merger? (2) If less than all, will there be an appraisal or other form of dissenters' rights? For
12 convenience, the corresponding Delaware Statutory Trust Act provisions are cited below.]
13

14 **§601. MERGER OR CONSOLIDATION.** See Delaware Statutory Trust Act §3815.

15 **§602. CONVERSION FROM ANOTHER ENTITY.** See Delaware Statutory Trust
16 Act §3820.

17 **§603. CONVERSION TO ANOTHER ENTITY.** See Delaware Statutory Trust Act
18 §3821.

19 **§604. DISSOLUTION OF A STATUTORY TRUST.**

20 (a) Upon dissolution of a statutory trust and until the filing of a statement of
21 cancellation as provided in Section 203, the trustees or other persons who under the governing
22 instrument are responsible for winding up the statutory trust's affairs may, in the name of and for
23 and on behalf of the statutory trust:

24 (1) prosecute and defend suits, whether civil, criminal or administrative,

25 (2) gradually settle and close the statutory trust business,

26 (3) dispose of and convey the statutory trust property,

1 (4) discharge or make reasonable provision for the statutory trust
2 liabilities, and
3 (5) distribute to the beneficial owners any remaining assets of the statutory
4 trust.

5 (b) A statutory trust that has dissolved shall pay or make reasonable provision to
6 pay all claims and obligations, including all contingent, conditional or unmatured claims and
7 obligations, known to the statutory trust and all claims and obligations that are known to the
8 statutory trust but for which the identity of the claimant is unknown.

9 (1) If there are sufficient assets, such claims and obligations shall be paid
10 in full and any such provision for payment shall be made in full.

11 (2) If there are insufficient assets, such claims and obligations shall be
12 paid or provided for according to their priority and, among claims and obligations of equal
13 priority, ratably to the extent of assets available therefor.

14 (3) Any remaining assets shall be distributed to the beneficial owners.

15 (c) Any person, including any trustee, who under the governing instrument is
16 responsible for winding up a statutory trust's affairs who has complied with this Section shall not
17 be personally liable to the claimants of the dissolved statutory trust by reason of such person's
18 actions in winding up the statutory trust.

19 **Comment**

20 **Principal Source** – Delaware Statutory Trust Act §3808.
21
22

23 **§605. DISSOLUTION OF A SERIES.**

1 (a) A series established in accordance with Section 104(b)(3)-(5) may be
2 dissolved and its affairs wound up without causing the dissolution of the statutory trust or any
3 other series thereof.

4 (1) The dissolution, winding up, liquidation or termination of the statutory
5 trust or any series thereof shall not affect the limitation of liability with respect to a series
6 established in accordance with Section 304(d).

7 (2) A series established in accordance with Section 104(b)(3)-(5) is
8 dissolved and its affairs shall be wound up at the time or upon the happening of events specified
9 in the governing instrument of the statutory trust.

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

16 (b) Any person, including any trustee, who under the governing instrument is
17 responsible for winding up such series's affairs who has complied with this Section shall not be
18 personally liable to the claimants of the dissolved series by reason of such person's actions in
19 winding up the series.

20 **Comment**

21 **Principal Source** – Delaware Statutory Trust Act §3808.

22
23 This section parallels and is analogous in scope and effect to Section 604, except that it
24 applies to a series rather than the entire statutory trust.

1 **ARTICLE 7**

2 **FOREIGN STATUTORY TRUSTS**

3
4 **§701. GOVERNING LAW.**

5 (a) The laws of the State or other jurisdiction under which a foreign statutory trust
6 is organized shall govern its organization and internal affairs and the liability of its beneficial
7 owners and trustees.

8 (b) A foreign statutory trust may not be denied a certificate of authority by reason
9 of any difference between the laws of the jurisdiction under which the foreign statutory trust is
10 organized and the laws of this State.

11 (c) A certificate of authority does not authorize a foreign statutory trust to engage
12 in any business or exercise any power that a domestic statutory trust may not engage in or
13 exercise in this State.

14 **Comment**

15
16 **Principal Sources** – Uniform Limited Partnership Act §901; Delaware Statutory Trust
17 Act §3851; Connecticut Statutory Trust Act §34-530.

18
19 Paragraph (a) parallels and is analogous in scope and effect to Section 302 (internal
20 affairs rule for domestic statutory trusts). Paragraph (b) allows for a foreign statutory trust to
21 operate domestically even if the law governing it is different from the laws governing domestic
22 statutory trusts, but under paragraph (c) a foreign statutory trust cannot engage in any business or
23 exercise any power that a domestic statutory trust could not.
24

25 **§702. APPLICATION FOR CERTIFICATE OF AUTHORITY.**

26 (a) A foreign statutory trust may apply for a certificate of authority to transact
27 business in this State by delivering an application to the [Secretary of State] for filing. The

1 application must state:

2 (1) the name of the foreign statutory trust and, if the name does not
3 comply with Section 107, an alternate name adopted pursuant to Section 706(a).

4 (2) the name of the State or other jurisdiction under whose law the foreign
5 statutory trust is organized;

6 (3) the street and mailing address of the foreign statutory trust's principal
7 office and, if the laws of the jurisdiction under which the foreign statutory trust is organized
8 require the foreign statutory trust to maintain an office in that jurisdiction, the street and mailing
9 address of the required office; and

10 (4) the name and street and mailing address of the foreign statutory trust's
11 initial agent for service of process in this State;

12 (b) A foreign statutory trust shall deliver with the completed application a
13 certificate of existence or a record of similar import signed by the [Secretary of State] or other
14 official having custody of the foreign statutory trust's publicly filed records in the State or other
15 jurisdiction under whose law the foreign statutory trust is organized.

16 **Comment**

17
18 **Principal Source** – Uniform Limited Partnership Act §902.

19
20 A certificate of authority applied for under this section is different than a certificate of
21 authorization furnished under Section 208.

22
23
24 **§703. AMENDMENT OR RESTATEMENT OF CERTIFICATE.**

25 (a) In order to amend its certificate of authority, a foreign statutory trust must
26 deliver to the [Secretary of State] for filing an amendment or, pursuant to [Article 6], articles of

merger stating:

(1) the name of the foreign statutory trust;

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

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

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

(1) cause the certificate to be amended; or

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

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

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

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

Comment

Principal Source – Uniform Limited Partnership Act §202.

[For discussion: There is no parallel to this section in Article 9 of ULPA, which deals with foreign limited partnerships. Instead, per a suggestion at the prior drafting session, this section was based on ULPA 202, which is the comparable section for domestic statutory trusts.]

§704. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS.

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

3 (1) maintaining, defending, and settling an action or proceeding;
4 (2) holding meetings of its trustees or carrying on any other activity
5 concerning its internal affairs;
6 (3) maintaining accounts in financial institutions;
7 (4) maintaining offices or agencies for the transfer, exchange, and
8 registration of the foreign statutory trust's own securities or maintaining trustees or depositories
9 with respect to those securities;
10 (5) selling through independent contractors;
11 (6) soliciting or obtaining orders, whether by mail or electronic means or
12 through employees or agents or otherwise, if the orders require acceptance outside this State
13 before they become contracts;
14 (7) creating or acquiring indebtedness, mortgages, or security interests in
15 real or personal property;
16 (8) securing or collecting debts or enforcing mortgages or other security
17 interests in property securing the debts, and holding, protecting, and maintaining property so
18 acquired;
19 (9) conducting an isolated transaction that is completed within 30 days
20 and is not one in the course of similar transactions of a like manner; and
21 (10) transacting business in interstate commerce.

22 (b) For purposes of this [article], the ownership in this State of income-producing

1 real property or tangible personal property, other than property excluded under subsection (a),
2 constitutes transacting business in this State.

3 (c) This section does not apply in determining the contacts or activities that may
4 subject a foreign statutory trust to service of process, taxation, or regulation under any other law
5 of this State.

6 (d) A person shall not be deemed to be doing business in the State solely by
7 reason of being a trustee or a beneficial owner of a foreign statutory trust.

8 **Comment**

9
10 **Principal Sources** – Uniform Limited Partnership Act §903; Delaware Statutory Trust
11 Act §3852.
12

13 **§705. FILING OF CERTIFICATE OF AUTHORITY.** Unless the [Secretary of
14 State] determines that an application for a certificate of authority does not comply with the filing
15 requirements of this [act], the [Secretary of State], upon payment of all filing fees, shall file the
16 application, prepare, sign and file a certificate of authority to transact business in this State, and
17 send a copy of the filed certificate, together with a receipt for the fees, to the foreign statutory
18 trust or its representative.

19 **Comment**

20
21 **Principal Source** – Based on Uniform Limited Partnership Act §904.

22
23 A certificate of authority filed under this section is different than a certificate of
24 authorization filed under Section 208.
25

26 **§706. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.**

27 (a) A foreign statutory trust whose name does not comply with Section 107 may

1 not obtain a certificate of authority until it adopts, for the purpose of transacting business in this
2 State, an alternate name that complies with Section 107. A foreign statutory trust that adopts an
3 alternate name under this subsection and then obtains a certificate of authority with the name
4 need not comply with [fictitious name statute]. After obtaining a certificate of authority with an
5 alternate name, a foreign statutory trust shall transact business in this State under the name
6 unless the foreign statutory trust is authorized under [fictitious name statute] to transact business
7 in this State under another name.

8 (b) If a foreign statutory trust authorized to transact business in this State changes
9 its name to one that does not comply with Section 107, it may not thereafter transact business in
10 this State until it complies with subsection (a) and obtains an amended certificate of authority.

11 **Comment**

12 **Principal Source** – Uniform Limited Partnership Act §905.
13
14

15 **§707. REVOCATION OF CERTIFICATE OF AUTHORITY.**

16 (a) A certificate of authority of a foreign statutory trust to transact business in this
17 State may be revoked by the [Secretary of State] in the manner provided in subsections (b) and
18 (c) if the foreign statutory trust does not:

19 (1) pay, within 60 days after the due date, any fee, tax or penalty due to
20 the [Secretary of State] under this [act] or other law;

21 (2) appoint and maintain an agent for service of process as required by
22 Section 305; or

23 (3) deliver for filing a statement of a change under Section 307 within 30
24 days after a change has occurred in the name or address of the agent.

1 (b) In order to revoke a certificate of authority, the [Secretary of State] must
2 prepare, sign, and file a notice of revocation and send a copy to the foreign statutory trust's agent
3 for service of process in this State, or if the foreign statutory trust does not appoint and maintain
4 a proper agent in this State, to the foreign statutory trust's designated office. The notice must
5 state:

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

8 (2) the foreign statutory trust's failures to comply with subsection (a)
9 which are the reason for the revocation.

10 (c) The authority of the foreign statutory trust to transact business in this State
11 ceases on the effective date of the notice of revocation unless before that date the foreign
12 statutory trust cures each failure to comply with subsection (a) stated in the notice. If the foreign
13 statutory trust cures the failures, the [Secretary of State] shall so indicate on the filed notice.

14 **Comment**

15
16 **Principal Source** – Uniform Limited Partnership Act §906.

17
18 **[Note:** There is no comparable section in article 2, but presumably for a domestic
19 statutory trust this issue will be covered by a provision in Article 6.]
20

21 **§708. CANCELLATION OF CERTIFICATE OF AUTHORITY; EFFECT OF** 22 **FAILURE TO HAVE CERTIFICATE.**

23 (a) In order to cancel its certificate of authority to transact business in this State, a
24 foreign statutory trust must deliver to the [Secretary of State] for filing a notice of cancellation
25 that states:

1 (1) the name of the foreign statutory trust;
2 (2) the date of filing of its initial certificate of trust; and
3 (3) any other information as determined by the trustees filing the
4 statement.

5 The certificate is canceled when the notice becomes effective under Section 205.

6 (b) A foreign statutory trust transacting business in this State may not maintain an
7 action or proceeding in this State unless it has a certificate of authority to transact business in
8 this State.

9 (c) The failure of a foreign statutory trust to have a certificate of authority to
10 transact business in this State does not impair the validity of a contract or act of the foreign
11 statutory trust or prevent the foreign statutory trust from defending an action or proceeding in
12 this State.

13 (d) If a foreign statutory trust transacts business in this State without a certificate
14 of authority or cancels its certificate of authority, it appoints the [Secretary of State] as its agent
15 for service of process for rights of action arising out of the transaction of business in this State.

16 **Comment**

17 **Principal Source** – Uniform Limited Partnership Act §907.
18
19

20 **§709. ACTION BY [ATTORNEY GENERAL].** The [Attorney General] may
21 maintain an action to restrain a foreign statutory trust from transacting business in this State in
22 violation of this [article].

23 **Comment**

24 **Principal Source** – Uniform Limited Partnership Act §908.
25

1 **ARTICLE 8**

2 **MISCELLANEOUS PROVISIONS**

3
4 **§801. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying
5 and construing this Uniform Act, consideration must be given to the need to promote uniformity
6 of the law with respect to its subject matter among States that enact it.

7 **Comment**

8
9 **Principal Source** – Uniform Limited Partnership Act §1201.
10

11 **§802. SEVERABILITY CLAUSE.** If any provision of this [act] or its application to
12 any person or circumstance is held invalid, the invalidity does not affect other provisions or
13 applications of this [act] which can be given effect without the invalid provision or application,
14 and to this end the provisions of this [act] are severable.

15 **Comment**

16
17 **Principal Source** – Uniform Limited Partnership Act §1202.
18

19 **§803. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
20 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the federal
21 Electronic Signatures in Global and National Commerce Act[, 15 U.S.C. Section 7001 et seq.],
22 but this [act] does not modify, limit, or supersede Section 101(c) of that Act or authorize
23 electronic delivery of any of the notices described in Section 103(b) of that Act.

24 **Comment**
25

Principal Source – Uniform Limited Partnership Act §1203.

§804. EFFECTIVE DATE. This [act] takes effect [effective date].

Comment

Principal Source – Uniform Limited Partnership Act §1204.

§805. REPEALS.

(a) Effective [all-inclusive date], the following acts and parts of acts are repealed:

(1) [the State Statutory Trust Act as amended and in effect immediately

before the effective date of this [act]];

(2) [the State Business Trust Act as amended and in effect immediately

before the effective date of this [act]];

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

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

(b) All provisions of this [act] may be altered from time to time or repealed and

all rights of statutory trusts, trustees, beneficial owners and other persons are subject to this

reservation.

Comment

Principal Sources – Uniform Limited Partnership Act §1205; Delaware Statutory Trust Act §3824; Connecticut Statutory Trust Act §34-545.

[Query: Should the discussion of REITs in the prefatory note be repeated/moved here?]

§806. APPLICATION TO EXISTING COMMON LAW TRUSTS.

(a) Nothing contained in this [act] shall be construed to limit, prohibit or

1 invalidate the existence, acts, or obligations of any common law trust created or doing business
2 in this state before or after [effective date]. The laws of this State pertaining to trusts other than
3 this [act] shall continue to apply to such trusts.

4 (b) A common law trust created before or after [effective date] may elect to be
5 governed by the provisions of this [act] upon the filing of a certificate of trust under Section 201.

6 (c) **[Query:** Don't we need a transition rule for existing statutory trusts?]

7 **Comment**

8
9 **Principal Sources** – Connecticut Statutory Trust Act §34-502.

10 **[For discussion:** (1) ambiguity over common law trusts under the Delaware Act; (2) the
11 problem of inviting evasion of mandatory rules in the common law of trusts by use of a statutory
12 trust for estate planning purposes; (3) suggested amendments, if any, to the Uniform Trust Code
13 for consistency with this Act; (4) transition rule for existing statutory trusts; (5) whether this
14 section belongs in this Article or in Article 1.]

15
16
17 **[§807. TAX CLASSIFICATION.** For purposes of any tax imposed by this State or any
18 instrumentality, agency or political subdivision of this State, a statutory trust shall be classified
19 as a corporation, an association, a partnership, a trust or otherwise, as shall be determined under
20 the United States Internal Revenue Code of 1986 [26 U.S.C. §§1 et seq.], as amended, or under
21 any successor provision.]

22 **Comment**

23
24 **Principal Sources** – Delaware Statutory Trust Act §3809; Connecticut Statutory Trust
25 Act §34-519.

26
27 This provision supplies a transitional rule to deal with questions of state and local
28 taxation of statutory trusts created under this Act.
29

30 **§808. SAVING CLAUSE.** This [act] does not affect an action commenced, proceeding

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

2 **Comment**

3

4 **Principal Source** – Uniform Limited Partnership Act §1207.