

D R A F T

FOR APPROVAL

UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-EIGHTEENTH YEAR
SANTA FE, NEW MEXICO
JULY 9 - JULY 16, 2009

UNIFORM STATUTORY TRUST ENTITY ACT

WITH PREFATORY NOTE AND COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 3, 2009

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TABLE OF CONTENTS

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

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE	5
SECTION 102. DEFINITIONS	6
SECTION 103. GOVERNING INSTRUMENT: SCOPE, LIMITATIONS, AND AMENDMENT	9
SECTION 104. APPLICABILITY OF TRUST LAW	16
SECTION 105. RULE OF CONSTRUCTION	17

[ARTICLE] 2

FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

SECTION 201. CERTIFICATE OF TRUST	19
SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF TRUST	20
SECTION 203. SIGNING OF RECORDS	21
SECTION 204. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY OF STATE]; EFFECTIVE TIME AND DATE	21
SECTION 205. CORRECTING FILED RECORD	23
SECTION 206. CERTIFICATE OF GOOD STANDING	24
SECTION 207. NAME OF STATUTORY TRUST	25
SECTION 208. RESERVATION OF NAME	27
SECTION 209. AGENT FOR SERVICE OF PROCESS	29
SECTION 210. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF PROCESS	29
SECTION 211. RESIGNATION OF AGENT FOR SERVICE OF PROCESS	30
SECTION 212. SERVICE OF PROCESS	31
SECTION 213. [ANNUAL] [BIENNIAL] REPORT FOR [SECRETARY OF STATE]	32

[ARTICLE] 3

GOVERNING LAW; AUTHORIZATION; DURATION; POWERS

SECTION 301. GOVERNING LAW	35
SECTION 302. STATUTORY TRUST AS ENTITY	36
SECTION 303. PERMISSIBLE PURPOSES	36
SECTION 304. STATUTORY TRUST SOLELY LIABLE FOR DEBTS, OBLIGATIONS, OR OTHER LIABILITIES OF STATUTORY TRUST	37
SECTION 305. NO CREDITOR RIGHTS IN TRUST PROPERTY	39

SECTION 306. DURATION	39
SECTION 307. POWER TO HOLD PROPERTY; TITLE TO TRUST PROPERTY	41
SECTION 308. POWER TO SUE AND BE SUED	41

[ARTICLE 4]

SERIES TRUSTS

SECTION 401. STATUTORY TRUST HAVING SERIES	43
SECTION 402. LIABILITY OF SERIES TRUST	44
SECTION 403. DUTIES OF TRUSTEE IN SERIES TRUST	45
SECTION 404. DISSOLUTION OF SERIES	46

[ARTICLE 5]

TRUSTEES AND TRUST MANAGEMENT

SECTION 501. MANAGEMENT OF STATUTORY TRUST	47
SECTION 502. TRUSTEE POWERS	47
SECTION 503. ACTION BY TRUSTEES	48
SECTION 504. PROTECTION OF PERSON DEALING WITH TRUSTEE	49
SECTION 505. STANDARDS OF CONDUCT FOR TRUSTEES	50
SECTION 506. GOOD-FAITH RELIANCE	51
SECTION 507. INTERESTED TRANSACTIONS	52
SECTION 508. TRUSTEE'S RIGHT TO INFORMATION	53
SECTION 509. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION	53
SECTION 510. DIRECTION OF TRUSTEES	55
SECTION 511. DELEGATION BY TRUSTEE	56
SECTION 512. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT COMPANY	58

[ARTICLE] 6

BENEFICIARIES AND BENEFICIAL RIGHTS

SECTION 601. BENEFICIAL INTEREST	60
SECTION 602. VOTING OR CONSENT BY BENEFICIAL OWNERS	60
SECTION 603. CONTRIBUTION BY BENEFICIAL OWNER	61
SECTION 604. DISTRIBUTION TO BENEFICIAL OWNER	63
SECTION 605. REDEMPTION OF BENEFICIAL INTEREST	64
SECTION 606. CHARGING ORDER	64
SECTION 607. TRANSACTION WITH BENEFICIAL OWNER	65
SECTION 608. BENEFICIAL OWNER'S RIGHT TO INFORMATION	66
SECTION 609. ACTION BY BENEFICIAL OWNER	66

[ARTICLE] 7

CONVERSION AND MERGER

SECTION 701. DEFINITIONS	69
SECTION 702. CONVERSION	70
SECTION 703. ACTION ON PLAN OF CONVERSION BY CONVERTING STATUTORY TRUST	71
SECTION 704. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE	72
SECTION 705. EFFECT OF CONVERSION	73
SECTION 706. MERGER	75
SECTION 707. ACTION ON PLAN OF MERGER BY CONSTITUENT STATUTORY TRUST	76
SECTION 708. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE	77
SECTION 709. EFFECT OF MERGER	78
SECTION 710. [ARTICLE] NOT EXCLUSIVE	80

[ARTICLE] 8

DISSOLUTION AND WINDING UP

SECTION 801. EVENTS CAUSING DISSOLUTION	81
SECTION 802. ARTICLES OF DISSOLUTION	81
SECTION 803. WINDING UP	82
SECTION 804. NOTICE TO CLAIMANT	83
SECTION 805. PUBLICATION OF NOTICE	84
SECTION 806. ADMINISTRATIVE DISSOLUTION	86
SECTION 807. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION	87
SECTION 808. APPEAL FROM REJECTION OF REINSTATEMENT	87

[ARTICLE] 9

FOREIGN STATUTORY TRUSTS

SECTION 901. GOVERNING LAW	89
SECTION 902. APPLICATION FOR CERTIFICATE OF REGISTRATION	90
SECTION 903. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS	90
SECTION 904. FILING OF CERTIFICATE OF REGISTRATION	92
SECTION 905. CERTIFIED COPY OF CERTIFICATE OF REGISTRATION	92
SECTION 906. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST	93
SECTION 907. REVOCATION OF CERTIFICATE OF REGISTRATION	94
SECTION 908. CANCELLATION OF CERTIFICATE OF REGISTRATION	95
SECTION 909. EFFECT OF FAILURE TO HAVE CERTIFICATE OF REGISTRATION	95
SECTION 910. ACTION BY [ATTORNEY GENERAL]	96

[ARTICLE] 10

MISCELLANEOUS PROVISIONS

SECTION 1001. UNIFORMITY OF APPLICATION AND CONSTRUCTION	97
SECTION 1002. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT	97
SECTION 1003. SAVING CLAUSE	97
SECTION 1004. RESERVATION OF POWER TO AMEND OR REPEAL	98
SECTION 1005. APPLICATION TO EXISTING RELATIONSHIPS	99
SECTION 1006. REPEALS	100
SECTION 1007. EFFECTIVE DATE	101

UNIFORM STATUTORY TRUST ENTITY ACT

Prefatory Note

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

To address the legal uncertainty surrounding the common law business trust, at least thirty states have enacted legislation that validates the trust as a permissible form of business organization. But the entity that arises under the more recent of these statutes is better understood as a “statutory business trust,” “statutory trust entity,” or “statutory trust” than as a common law business trust with statutory validation.

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

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

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

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

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

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

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

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

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

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

Innovative Provisions. Although much of the Uniform Statutory Trust Entity Act reflects a reorganization and refinement of provisions found in the Delaware Statutory Trust Act, the Uniform Act contains several innovations including: (1) specification of rules that are not subject to override in the statutory trust's governing instrument (§103(f)); (2) clearer guidance on the applicability of ordinary trust law to a statutory trust (§104); (3) prohibition against a statutory trust having a predominantly donative purpose (§303); (4) an entire article on series trusts (Article 4); (5) a charging order provision (§606); (6) systematic treatment of conversion and merger (Article 7), and of dissolution (Article 8); and (7) clearer guidance on the relationship between the common-law trust and statutory trust entities (§1005).

Series Trusts. [Discussion to come.]

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

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

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

The Uniform Statutory Trust Entity Act is not a codification of general business law principles applicable to common law business trusts. Nothing in this Act displaces the common law of trusts, or the UTC, with respect to such trusts. On the contrary, Section 1005(a) expressly confirms the continued applicability of the state's laws pertaining to trusts to a common law business trust.

The Uniform Statutory Trust Entity Act more closely resembles a generic corporate code or unincorporated entity law than it does the UTC. Like a corporation, limited liability company, and limited partnership, but unlike a common-law trust, a statutory trust is a juridical entity that may conduct transactions in its own name separate from that of the trustee and the beneficial owners. See Sections 302, 307-08. Like those entities, but unlike a common-law trust, a statutory trust is formed by delivering a certificate of trust to a public official for filing. Compare Section 201 with UTC §401 (2000) and Restatement (Third) of Trusts §10 (2003). Further, Section 104 provides that ordinary trust law supplements this Act, but only to the extent not modified or displaced by this Act or the governing instrument — and this Act modifies or displaces a host of ordinary trust law principles including those concerning fiduciary standards of conduct (Section 505) and termination of trusts (Section 306). Section 1005(b) allows an existing common-law trust that does not have a predominantly donative purpose to convert into a statutory trust by delivering a certificate of trust for filing under Section 201.

Although the drafting committee contemplated that a statutory trust under this Act will be used primarily as a mode of business organization, Section 603(a) confirms that a person may become a beneficial owner of a statutory trust without an exchange of consideration. It is therefore possible that a statutory trust could be used as a substitute for the common-law trust in noncommercial contexts. To ensure that a statutory trust is not used to evade mandatory rules applicable to common-law trusts that enforce public policy limitations on donative transfers, Section 303 provides that a statutory trust may not have a predominantly donative purpose. For discussion of the nonapplicability to a statutory trust of the mandatory rules applicable to common-law trusts (including UTC §105), see the comment to Section 103 under the heading “Relationship to Mandatory Rules Under the Uniform Trust Code” and the comments to Sections 104 and 303.

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

1 **UNIFORM STATUTORY TRUST ENTITY ACT**

2

3 **[ARTICLE] 1**

4 **GENERAL PROVISIONS**

5

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

7 Entity Act.

8 **Comment**

9

10 Because this Act provides for the creation and use of a statutory trust as a form of business

11 organization, it might seem that “Uniform Business Trust Act,” “Uniform Statutory Business Trust

12 Act,” or “Uniform Statutory Trust Act” would be a better title. However, after consultation with

13 experts in the structured finance, bankruptcy, mutual fund, and estate planning industries, the

14 drafting committee rejected those and other such titles in favor of “Uniform Statutory Trust Entity

15 Act.”

16

17 The drafting committee included the word “entity” in the Act’s title for two reasons. First,

18 the creature of this act is indeed a trust entity. It has the power to sue, be sued, and transact in its

19 own name. See Sections 307-308. A common-law trust, by contrast, is not a juridical entity, but

20 rather a fiduciary relationship whereby the trustee acts in a fiduciary capacity with respect to the

21 trust property. Second, the word “entity” in the title differentiates this act from the Uniform Trust

22 Code, which is a codification of the common law of trusts. However, to conform with prevailing

23 usage under the Delaware Statutory Trust Act, the entity that arises under this Act is called a

24 “statutory trust,” not a “statutory trust entity.” See Section 102(16). Further, because the drafting

25 committee wanted a statutory trust under this act to receive treatment under applicable regulatory

26 law similar to that of a Delaware statutory trust, the entity features of a statutory trust under this

27 act closely resemble those of a Delaware statutory trust.

28

29 The drafting committee had three reasons for eschewing the phrase “business trust.” First,

30 under this act a statutory trust need not have a business or commercial purpose. On the contrary,

31 Section 303 confirms that a statutory trust may have any lawful purpose other than a

32 predominantly donative purpose.

33

34 Second, the drafting committee endeavored to avoid any implication on whether a statutory

35 trust would qualify as a “business trust” under the bankruptcy code. Under the bankruptcy code,

36 the definition of a “debtor” eligible for bankruptcy includes a “person,” 11 U.S.C. §101(13), the

37 definition of “person” includes a “corporation,” id. §101(41), and the definition of “corporation”

38 includes a “business trust.” Id. §101(9). Bankruptcy eligibility is a significant issue for trusts used

39 as special purpose entities in structured finance transactions, a principal use of the modern

1 statutory trust in practice. Such trusts are often designed to be “bankruptcy remote.” Thus, as in
2 the leading case of *In re Secured Equipment Trust of Eastern Airlines, Inc.*, 38 F.3d 86 (2d Cir.
3 1994), in certain configurations trusts used in securitization transactions have indeed been held not
4 to be “business trusts” under the bankruptcy code.

5
6 Third, the drafting committee was influenced by the revealed preference for “statutory
7 trust” over “business trust” in practice as evidenced by the dominant position of the Delaware
8 Statutory Trust Act relative to the statutory or business trust acts of the other states. In 2002
9 Delaware recast the “Delaware Business Trust Act” as the “Delaware Statutory Trust Act,”
10 replacing nearly every reference to “business trust” with “statutory trust.” See 73 Del. Laws 329
11 (2002).

12
13 **SECTION 102. DEFINITIONS.** In this [act]:

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

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

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

24 (4) “Designated office” means:

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

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

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

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

2 (7) “Jurisdiction”, used to refer to a political entity, means a state, foreign country, or
3 subdivision of a foreign country.

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

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

9 (10) “Qualified foreign statutory trust” means a foreign statutory trust that is authorized to
10 do business in this state.

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

13 (12) “Related person”, with respect to a person that is a trustee, officer, employee,
14 manager, or beneficial owner, means:

15 (A) the spouse of the person;

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

18 (C) an individual having the same residence as the person;

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

21 (E) a trust, estate, legally incapacitated person, conservatee, or minor for which the
22 person is a fiduciary; or

23 (F) a person that directly or indirectly controls, is controlled by, or is under

1 common control with, the person.

2 (13) “Series trust” means a statutory trust that has one or more series created under Section
3 401.

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

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

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

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

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

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

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

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

18 **Comment**

19
20 **Principal Sources** – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust Act
21 §34-501; Uniform Limited Partnership Act §102 (2001); SEC Rule 144(a)(1), 17 C.F.R.
22 §230.144(a)(1).

23
24 Paragraphs (2), (6), and (18) define “certificate of trust,” “governing instrument,” and
25 “trust instrument” respectively. The certificate of trust is the record that under Section 201 must
26 be delivered to a public official for filing to form a statutory trust. The trust instrument is the
27 transaction document that typically provides for the governance of the statutory trust. Unlike the
28 certificate of trust, the trust instrument need not be made part of the public record, and typically it
29 is not. Together, the certificate of trust and the trust instrument compose the governing

1 instrument. The terms “governing instrument” and “trust instrument” are in the singular to
2 conform with prevailing usage even though there may be more than one document that qualifies as
3 a trust instrument. Section 103(c) makes authorization of multiple instruments explicit. Conflicts
4 between the certificate of trust and the governing instrument are resolved pursuant to Section
5 201(e).

6
7 Paragraph (3) defines “common-law trust” in accordance with Restatement (Third) of
8 Trusts §2 (2003), except that as defined herein the term expressly includes a common law business
9 trust. See also Uniform Trust Code §102, cmt. (2000).

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

16
17 Paragraph (13) defines the term “series trust” [to come].
18

19 Paragraph (19) defines “trustee” as a person designated as such in accordance with the
20 governing instrument or applicable law. For discussion of trustee appointment, see the Comment
21 to Section 501.
22

23 **SECTION 103. GOVERNING INSTRUMENT: SCOPE, LIMITATIONS, AND** 24 **AMENDMENT.**

25 (a) Except as otherwise provided in subsection (b) or (f), the governing instrument governs:

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

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

29 (b) To the extent the governing instrument does not otherwise provide for a matter
30 described in subsection (a), this [act] governs the matter.

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

33 (d) The governing instrument may be amended with the approval of all the beneficial
34 owners.

1 (e) Subject to subsection (f), without limiting the terms that may be included in a governing
2 instrument, the governing instrument may:

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

4 (2) limit a beneficial owner's right to transfer its beneficial interest;

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

6 (4) to the extent that voting rights are granted under the governing instrument,
7 include terms relating to:

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

10 (B) waiver of notice;

11 (C) action by consent without a meeting;

12 (D) establishment of record dates, quorum requirements, or voting in
13 person, by proxy, any form of communication that creates a record, telephone, or video
14 conference, or in any other manner; or

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

16 (5) provide for the creation of one or more classes of trustees, beneficial owners, or
17 beneficial interests having separate rights, powers, or duties;

18 (6) provide for any action to be taken without the vote or approval of any particular
19 trustee or beneficial owner, or classes of trustees, beneficial owners, or beneficial interests,
20 including:

21 (A) amendment of the governing instrument;

22 (B) merger, conversion, or reorganization;

23 (C) appointment of trustees;

1 (D) sale, lease, exchange, transfer, pledge, or other disposition of all or any
2 part of the property of the statutory trust or the property of any series thereof; and

3 (E) dissolution of the statutory trust;

4 (7) provide for the creation of a statutory trust, including the creation of a statutory
5 trust to which all or any part of the property, liabilities, profits, or losses of a statutory trust may be
6 transferred or exchanged, and for the conversion of beneficial interests in a statutory trust, or series
7 thereof, into beneficial interests in the new statutory trust or series thereof;

8 (8) provide for the appointment, election, or engagement of agents or independent
9 contractors of the statutory trust or delegates of the trustees, or agents, officers, employees,
10 managers, committees, or other persons that may manage the business and affairs of the statutory
11 trust, designate their titles, and specify their rights, powers, and duties;

12 (9) provide rights to any person, including a person that is not a party to the
13 governing instrument;

14 (10) subject to paragraph (11), specify the manner in which the governing
15 instrument may be amended, including, unless waived by all persons for whose benefit the
16 condition or requirement was intended:

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

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

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

23 (12) provide that a person becomes a beneficial owner, acquires a beneficial

1 interest, and is bound by the governing instrument if the person complies with the conditions for
2 becoming a beneficial owner set forth in the governing instrument, such as payment to the
3 statutory trust or to a previous beneficial owner;

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

7 (14) provide for the establishment of record dates; and

8 (15) grant to, or withhold from, a trustee or beneficial owner, or class of trustees or
9 beneficial owners, the right to vote, separately or with any or all other trustees or beneficial
10 owners, or class of trustees or beneficial owners, on any matter.

11 (f) The governing instrument may not:

12 (1) vary the requirements of [Article] 2;

13 (2) vary the choice of governing law under Section 301;

14 (3) negate the exclusion of a predominantly donative purpose under Section 303;

15 (4) vary the provisions pertaining series trusts in Sections 401, 402(b), 403, and
16 404(c);

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

21 (6) restrict the nonliability under Section 506 of a trustee or other person that relies
22 in good faith on the terms of the governing instrument, the records of the statutory trust, or the
23 opinions, reports, or statements of an expert, but the governing instrument may prescribe the

standards for assessing whether the reliance was in good faith, if the standards are not manifestly unreasonable;

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

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

(9) vary the obligation of a trustee under Section 510(c) not to follow a direction that is manifestly contrary to the terms of the governing instrument or would constitute a serious breach of fiduciary duty by the trustee;

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

(11) restrict the right of a beneficial owner to information under Section 608, but the governing instrument may prescribe the standards for assessing whether information is reasonably related to the beneficial owner's ability to enforce its rights as a beneficial owner, if the standards are not manifestly unreasonable;

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

(13) vary the provisions pertaining to conversion and merger in Sections 701, 704, 705, 708, and 709;

(14) vary the provisions pertaining to dissolution in Sections 801(1) and 802 through 808;

(15) vary the provisions relating to foreign statutory trusts in [Article] 9; or

(16) vary the miscellaneous provisions in [Article] 10.

Comment

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

Default rules. Paragraphs (a) and (b) emphasize that the Act primarily states default rules. Most of the Act’s provisions may be overridden by the terms of the governing instrument (paragraph (a)), but if the governing instrument does not provide for a matter, then the Act applies (paragraph (b)).

Governing instrument(s). [discussion of paragraph (c) to come.]

Amending the governing instrument. Paragraph (d) provides for a mechanism to amend the governing instrument in circumstances where the governing instrument does not already do so. In such a case, paragraph (d) provides that the governing instrument may be amended by unanimous agreement of the beneficial owners. Consistent with prevailing commercial practice, the drafting committee assumed that in most instances the governing instrument will provide for amendments, a possibility expressly contemplated by paragraphs (e)(6)(A) and (e)(10). In such a case the amendment mechanisms stated in the governing instrument prevail over paragraph (d).

Illustrative statement of permissive terms. The purpose of paragraph (e) is to collect in a single provision the various permissive rules regarding the scope of the governing instrument that are scattered throughout the Delaware and Connecticut Statutory Trust Acts. The main exception concerns the allowable remedies for a beneficial owner’s breach in Section 603(c).

The list of permissive rules stated in paragraph (e) is meant to be illustrative and not to limit the generality of paragraph (a). The drafting committee concluded that the demand of third parties and transactional planners to see language that expressly authorizes specific terms justified inclusion of a detailed list in addition to the broad statement of freedom of contract in paragraph (a) and Section 105. Statutory confirmation reduces transaction costs by resolving doubts in practice over the permissibility of such provisions. Similar reasoning underlies the provision of a detailed schedule of powers in Uniform Trust Code §816 (2000) in addition to the broad general

1 statement in UTC §815.

2
3 **Mandatory Rules.** Paragraph (f) schedules the provisions of this act that are not subject to
4 override in the governing instrument. The provisions included in this schedule are the only rules
5 that have mandatory application to a statutory trust.
6

7 Most of the provisions scheduled in paragraph (f) concern the rights of nonparties or public
8 filing and notice requirements. By contrast, with two exceptions all the provisions of this Act
9 concerning the powers and duties of a trustee, relations among trustees, and the rights and interests
10 of a beneficial owner may be overridden or at least altered by the terms of the governing
11 instrument.
12

13 The first exception is the mandatory prohibition of indemnification, advancement, or
14 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference in
15 paragraph (f)(8). This exception is familiar trust law. See Uniform Trust Code §1008 (2000);
16 Restatement (Third) of Trusts §96 (T.D. No. 5, 2009); 4 Austin Wakeman Scott, William Franklin
17 Fratcher, and Mark L. Ascher, Scott and Ascher on Trusts §24.27.3 (5th ed. 2007). For a general
18 discussion, see John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105,
19 1121-25 (2004); Melanie B. Leslie, Trusting Trustees: Fiduciary Duties and the Limits of Default
20 Rules, 94 Georgetown L.J. 67 (2005).
21

22 The Delaware Statutory Trust Act likewise limits the permissible scope of exoneration.
23 Delaware Statutory Trust Act §3806(e) provides that the “governing instrument may provide for
24 the limitation or elimination of any and all liabilities for breach of contract and breach of duty
25 (including fiduciary duties) of a trustee ... ; provided, that the governing instrument may not
26 eliminate the implied contractual covenant of good faith and fair dealing.”
27

28 Limitations on permissible exoneration are also familiar corporate and alternative entity
29 law. See, e.g., Delaware General Corporation Law §102(b)(7); Delaware Limited Liability
30 Company Act §18-1101; [to come: citation to MBCA 2.02(b)(4) and/or other uniform acts].
31

32 The second exception is paragraph (f)(9), which makes mandatory the invalidity under
33 Section 510(c) of a direction to a trustee or other person that is manifestly contrary to the terms of
34 the governing instrument or would constitute a serious breach of fiduciary duty. The reference to
35 serious breach of fiduciary duty is meant to exclude an inconsequential, immaterial, or technical
36 breach that does not harm the trust or a beneficial owner. For some purposes, trust law
37 distinguishes between serious and not serious breaches of trust. See, e.g., UTC §706(b)(1); 2 Scott
38 and Ascher on Trusts, supra, §11.10, at p. 661. However, the effect of paragraph (f)(8) is limited
39 by paragraph (f)(5), which allows the trustee’s fiduciary duty to be altered by the governing
40 instrument if the alteration is not manifestly unreasonable.
41

42 Paragraphs (f)(5), (f)(6), (f)(7), (f)(11), and (f)(12) allow the governing instrument to alter
43 the nature of the trustee’s fiduciary obligation; the nonliability of a trustee or another for good
44 faith reliance on the governing instrument, records of the statutory trust, or opinions of experts; the
45 right of a trustee to information; the right of a beneficial owner to information; and the right of a
46 beneficial owner to bring an action, but only if the alteration is not “manifestly unreasonable.” In

1 opting for the “manifestly unreasonable” standard instead of Delaware’s “good faith and fair
2 dealing” formulation, see Delaware Statutory Trust Act §3806(c) and (e), the drafting committee
3 took notice of the use of the term “manifestly unreasonable” in Revised Uniform Limited Liability
4 Company Act §110(d) (2006); Uniform Limited Partnership Act §110(b) (2001), Revised Uniform
5 Partnership Act §103(b) (1997), Uniform Limited Liability Company Act §103(b) (1996), and
6 intended a similar meaning here. See Mark J. Loewenstein, Fiduciary Duties and Unincorporated
7 Business Entities: In Defense of the “Manifestly Unreasonable” Standard, 41 Tulsa L. Rev. 411
8 (2006).

9
10 **Relationship to Mandatory Rules and the Uniform Trust Code.** Section 104 provides
11 that the law of this state pertaining to common-law trusts supplements this act. However, it also
12 provides that the governing instrument of a statutory trust may override or modify the application
13 to the statutory trust of any rule pertaining to common-law trusts. Accordingly, in a jurisdiction
14 that has also enacted the Uniform Trust Code, the UTC will apply to a statutory trust only to the
15 extent that the UTC’s provisions are not displaced by this act or the governing instrument. No
16 provision of the UTC, including the rules stated in UTC §105 that are mandatory with respect to a
17 common-law trust, is mandatory with respect to a statutory trust. Likewise, any common-law rule
18 that is mandatory with respect to a common-law trust may nonetheless be overridden with respect
19 to a statutory trust by the governing instrument of the statutory trust. The governing instrument of
20 a statutory trust may override or alter any rule of trust law other than those scheduled in paragraph
21 (f) of this section.

22
23 To prevent evasion of the public policy limitations on donative transfers that underpin the
24 mandatory rules applicable to a common-law trust, see John H. Langbein, Mandatory Rules in the
25 Law of Trusts, 98 Nw. U.L. Rev. 1105 (2004), Section 302 of this Act provides that a statutory
26 trust may not have “a predominantly donative purpose.” For further discussion of the relationship
27 between this Act, the common law, and the Uniform Trust Code, see the Prefatory Note to this Act
28 under the heading “Relationship to Common-Law trusts and the Uniform Trust Code” and the
29 comments to Sections 104 and 303.

30
31 **Registered Investment Companies.** The Investment Company Act of 1940 (the “1940
32 Act”) supersedes this Act with respect to a statutory trust that registers as an investment company.
33 For such a statutory trust the 1940 Act imposes additional mandatory rules. See, e.g., the
34 Comments to Sections 207 (name of statutory trust), 503 (action by trustees), 507 (interested
35 transactions), 509 (indemnification, advancement, and exoneration), and 511 (delegation by
36 trustee).

37
38 **SECTION 104. APPLICABILITY OF TRUST LAW.** The law of this state pertaining
39 to common-law trusts supplements this [act]. However, the governing instrument may supersede
40 or modify application to the statutory trust of any law of this state pertaining to common-law
41 trusts.

1 **Comment**

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

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

12 **No Mandatory Rules Other Than Those Scheduled in Section 103(f).** This Section also
13 confirms that, except for the mandatory rules scheduled in Section 103(f), the governing
14 instrument may override any rule or law pertaining to common-law trusts that would otherwise be
15 applicable to a statutory trust under this Section.
16

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

24 **Remedies.** Under this Section, the law of remedies for breach of trust applies to a statutory
25 trust unless the governing instrument provides otherwise. See 4 Austin Wakeman Scott, William
26 F. Fratcher, and Mark L. Ascher, Scott and Ascher on Trusts §24.9 (5th ed. 2006); UTC §§1001-
27 1003 (2000). However, when a breach of trust injures the trust rather than a beneficial owner
28 directly, such remedies are properly sought in a derivative suit under Section 609 rather than in a
29 direct suit by the beneficiary because a statutory trust is itself an entity. See ALI Principles of
30 Corporate Governance §7.01 (1994).
31

32 **SECTION 105. RULE OF CONSTRUCTION.**

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

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

37 **Comment**

38 **Principal Sources** – Delaware Statutory Trust Act §3825; Connecticut Statutory Trust Act
39

1 §34-546; Uniform Statute and Rule Construction Act §18 (1995).

2
3 Paragraph (a) emphasizes the freedom of contract afforded to transactional planners by the
4 Uniform Statutory Trust Entity Act, which is primarily a default statute. The only mandatory rules
5 applicable to a statutory trust are those scheduled in Section 103(f). The drafting committee
6 contemplated that section 105(a) would apply to the construction of Section 103(f).

7
8 Paragraph (b) admonishes the courts not to apply to this act the canon of construction that
9 statutes in derogation of the common law are to be strictly construed. The drafting committee
10 included this admonition because several of this act's provisions are designed specifically to
11 preclude the application to a statutory trust of one or more common-law trust principles. See, e.g.,
12 Sections 203, 302, 304, 306, 502, 503, 504, 505, 506, 507, 511, [list to be confirmed/expanded].
13 Those provisions, which deliberately derogate the common law, should be interpreted in accord
14 with that purpose.
15

1 [ARTICLE] 2

2 FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

3
4 SECTION 201. CERTIFICATE OF TRUST.

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

7 (b) A certificate of trust must state:

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

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

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

12 (4) whether the trust may have one or more series.

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

14 (b).

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

17 (e) A filed certificate of trust, a filed statement of cancellation or change, or filed articles of
18 conversion or merger prevail over inconsistent terms of a trust instrument.

19 **Comment**

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

23
24 Unlike a common-law trust, a statutory trust is a creature of statute. A statutory trust
25 comes into existence only if (1) a certificate of trust is prepared and delivered to the specified
26 public official for filing, and (2) the public official files the certificate. See Section 204. Filing
27 rules are typical of limited liability entities. Such rules serve a notice function, alerting interested
28 parties to the creation and existence of a new juridical entity with limited liability. The certificate
29 of trust also identifies the statutory trust's initial agent for service of process and, in connection

1 with Section 401, the certificate of trust puts third parties on notice if the statutory trust might
2 further segregates its property and liabilities by creating one or more series.

3
4 Although formed by making a public filing, a statutory trust is also a creature of contract.
5 As such, it will be possible, though improper, for the trust instrument to be inconsistent with the
6 certificate of trust or other public filings relating to the statutory trust. Paragraph (d) provides that
7 in such circumstances the public filing controls.

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

11
12 **SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF**
13 **TRUST.**

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

16 (1) the name of the trust;

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

18 (3) the changes to the certificate.

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

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

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

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

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

27 **Comment**

28
29 **Principal Sources** – Uniform Limited Partnership Act §202 (2001); Delaware Statutory
30 Trust Act §3810; Connecticut Statutory Trust Act §34-503.

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

3
4 Under Section 103(f)(1), this Section is not subject to override by the governing
5 instrument.
6

7 **SECTION 203. SIGNING OF RECORDS.**

8 (a) A record delivered by the statutory trust to the [Secretary of State] for filing pursuant to
9 this [act] must be signed by at least one of the trustees.

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

11 **Comment**

12
13 **Principal Sources** – Uniform Limited Partnership Act §204 (2001); Delaware Statutory
14 Trust Act §3811; Connecticut Statutory Trust Act §34-504.

15
16 Paragraph (b) confirms that the signing of a public record by a trustee is a delegable act,
17 ensuring that the discredited common law nondelegation rule will not apply. See Uniform Trust
18 Code §807 (2000); Restatement (Third) of Trusts §80 (2007).

19
20 Under Section 103(f)(1), this Section is not subject to override by the governing
21 instrument.
22

23 **SECTION 204. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY** 24 **OF STATE]; EFFECTIVE TIME AND DATE.**

25 (a) A record authorized or required to be delivered to the [Secretary of State] for filing
26 under this [act] must be captioned to describe the subject of the record and be in a medium
27 permitted by the [Secretary of State]. If all filing fees have been paid, unless the [Secretary of
28 State] determines that the record does not comply with the filing requirements of this [act], the
29 [Secretary of State] shall file the record and make available a copy of the filed record to the person
30 on whose behalf the record was filed.

31 (b) On request and payment of the required fee, the [Secretary of State] shall send to any

1 person a certified copy of a record filed in the office of the [Secretary of State] pursuant to this
2 [act].

3 (c) Except as otherwise provided in Sections 205 and 211, a record delivered to the
4 [Secretary of State] for filing under this [act] may specify an effective time and a delayed effective
5 date. Except as otherwise provided in this [act], a record filed by the [Secretary of State] is
6 effective:

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

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

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

14 (A) the specified date; or

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

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

18 (A) the specified date; or

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

20 **Comment**

21
22 **Principal Sources** – Uniform Limited Partnership Act §206 (2001); Delaware Statutory
23 Trust Act §3812; Connecticut Statutory Trust Act §34-505.

24
25 For a record prepared by a private person to become part of the public record under this
26 act, (1) someone must put a properly prepared version of the record into the possession of the
27 public official specified in the act as the appropriate filing officer, and (2) the filing officer must

1 determine that the record complies with the filing requirements of this act and then officially make
2 the record part of the public record. This Act refers to the first step as “delivery to the [Secretary
3 of State] for filing” and refers to the second step as “filing.” Hence, “filing” is an official action.
4

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

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

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

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

25 **SECTION 205. CORRECTING FILED RECORD.**

26 (a) If at the time of filing a record contained incorrect information or was defectively or
27 erroneously signed, a statutory trust or qualified foreign statutory trust shall delivery to the
28 [Secretary of State] for filing a statement of correction to correct the record.

29 (b) A statement of correction under subsection (a):

30 (1) may not state a delayed effective date;

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

33 (3) must specify the incorrect information and the reason it is incorrect or the
34 manner in which the signing was defective or erroneous; and

35 (4) must correct the incorrect information or defective or erroneous signature.

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

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

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

Comment

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

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

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

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

SECTION 206. CERTIFICATE OF GOOD STANDING.

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

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

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

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

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

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

(b) A certificate of good standing must state:

(1) the name of the trust;

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

and

(3) that subsection (a) has been satisfied.

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

Comment

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

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

Section 905 provides for the issuance of a certified copy of the certificate of registration for a qualified foreign statutory trust.

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

SECTION 207. NAME OF STATUTORY TRUST.

(a) Except as otherwise provided in subsection (c), the name of a statutory trust must be distinguishable in the records of the [Secretary of State] from:

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

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

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

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

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

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

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

21 (A) has merged with the applicant;

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

23 (C) has transferred substantially all of its property, including the conflicting

1 name, to the applicant.

2 (d) Subject to Section 906, this section applies to any foreign statutory trust that does
3 business in this state, that has a certificate of registration to do business in this state, or that has
4 applied for a certificate of registration.

5 **Comment**

6
7 **Principal Sources** – Uniform Limited Partnership Act §108 (2001); Delaware Statutory
8 Trust Act §3814.

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

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

24 25 **SECTION 208. RESERVATION OF NAME.**

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

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

30 (2) a statutory trust or a qualified foreign statutory trust intending to adopt the
31 name;

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

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

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

4 (6) a foreign statutory trust formed under a name that does not comply with Section
5 207, but the name reserved under this paragraph may differ from the foreign statutory trust's name
6 only to the extent necessary to comply with Section 207.

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

12 (c) A person that has reserved a name pursuant to subsection (b) may reserve the same
13 name for additional 120-day periods. A person having a current reservation for a name may not
14 apply for an additional 120-day period for the same name until 90 days have elapsed under the
15 current reservation.

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

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

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

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

23 **Comment**

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

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

SECTION 209. AGENT FOR SERVICE OF PROCESS.

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

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

Comment

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

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

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

SECTION 210. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF PROCESS. A statutory trust or qualified foreign statutory trust may change its agent for

service of process, the address of its agent for service of process, or its designated office by delivering to the [Secretary of State] for filing a statement of change containing:

(1) the name of the trust;

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

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

3 (4) the name and street and mailing address of the current agent of the trust for service of
4 process; and

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

7 **Comment**

8
9 **Principal Source** – Uniform Limited Partnership Act §115 (2001).

10
11 This section uses the term “may” rather than “must” in the first sentence because a
12 statutory trust may also change the information by an amendment to its certificate of trust under
13 Section 202. Further, if the information currently in the public record is accurate, a statutory trust
14 or qualified foreign statutory trust may change the information in an annual report under Section
15 213.

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

19
20 **SECTION 211. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

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

24 (1) the name of the trust;

25 (2) the name of the agent; and

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

27 (b) A resigning agent shall transmit a copy of a statement of resignation to the designated
28 office of the statutory trust or qualified foreign statutory trust and another copy to the principal
29 office if the address of the office appears in the records of the [Secretary of State] and is different

1 from the address of the designated office.

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

4 **Comment**

5
6 **Principal Source** – Uniform Limited Partnership Act §116 (2001).

7
8 This section provides the exclusive means for an agent to resign without cooperation from
9 the statutory trust or qualified foreign statutory trust and the only way the agent, rather than the
10 statutory trust or foreign statutory trust, can effect a change in the public record.

11
12 Unlike most records authorized or required to be delivered to the filing officer for filing
13 under this act, a statement of resignation may not provide for a delayed effective date. Paragraph
14 (c) mandates the effective date of the agent's resignation. An effective date included in a statement
15 of resignation is disregarded.

16
17 To satisfy Section 209(a), the statutory trust or qualified foreign statutory trust must
18 designate a new agent for service of process before the effective date of the current agent's
19 resignation. If the statutory trust or foreign statutory trust fails to do so, under Section 212(b)
20 service on the statutory trust or foreign statutory trust may be made on the Secretary of State.

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

25 **SECTION 212. SERVICE OF PROCESS.**

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

29 (b) If a statutory trust or qualified foreign statutory trust no longer has a registered agent, or
30 if its registered agent cannot with reasonable diligence be served, the trust may be served by
31 registered or certified mail, return receipt requested, at its principal office in accordance with any
32 applicable rules and procedures. Service is effected under this subsection at the earliest of:

33 (1) the date the agent for the statutory trust or qualified foreign statutory trust

1 receives the process, notice, or demand;

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

3 (3) five days after the process, notice, or demand is deposited with the United States
4 Postal Service, if correctly addressed and with sufficient postage.

5 (c) If process, notice, or demand cannot be served on a statutory trust or qualified foreign
6 statutory trust pursuant to subsection (b), service may be made by handing a copy to the manager,
7 clerk, or other individual in charge of any regular place of business or activity of the trust if the
8 individual served is not a plaintiff in the action.

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

11 **Comment**

12
13 **Principal Source** – Uniform Limited Partnership Act §117 (2001); Model Registered
14 Entity Act §13 ([year]).

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

18
19 **SECTION 213. [ANNUAL] [BIENNIAL] REPORT FOR [SECRETARY OF**
20 **STATE].**

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

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

24 (A) the street and mailing address of its designated office; and

25 (B) the name and street and mailing address of its agent for service of
26 process; or

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

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

2 (B) the name of the state or other jurisdiction of formation of the trust;

3 (C) the street and mailing address of its principal office and, if the laws of
4 the jurisdiction of formation of the trust require it to maintain an office in that jurisdiction, the
5 street and mailing address of that office; and

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

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

10 (c) The first [annual] [biennial] report under this section must be delivered to the [Secretary
11 of State] after [January 1] and before [April 1] of the year following the calendar year in which a
12 statutory trust was formed or a qualified foreign statutory trust was authorized to do business in
13 this state. The report must be delivered to the [Secretary of State] after [January 1] and before
14 [April 1] of each subsequent [second] calendar year.

15 (d) If [an annual] [a biennial] report does not contain the information required in subsection
16 (a), the [Secretary of State] shall notify the trust promptly and return the report to it for correction.
17 If the report is corrected to contain the information required in subsection (a) and is delivered to
18 the [Secretary of State] by the 30th day after the date of the notice, it is timely delivered.

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

23 **Comment**

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

2
3 A statutory trust that fails to comply with this section is subject to administrative
4 dissolution. See Section 806.

5
6 [Comment on bracketed options to come.]

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

10

1 [ARTICLE] 3

2 GOVERNING LAW; AUTHORIZATION; DURATION; POWERS

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

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

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

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

10 Comment

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

14
15 Under paragraph (1) the internal affairs of a statutory trust are governed by the law of this
16 state even if the trust operates in other states. Although the term “internal affairs” may be
17 indeterminate at its edges, the concept certainly includes interpretation and enforcement of the
18 governing instrument and relations among the trustees, beneficial owners, and the statutory trust.
19 See Restatement (Second) of Conflict of Laws §302, cmt. a (1971) (defining “internal affairs” with
20 reference to corporate law as “the relations inter se of the corporation, its shareholders, directors,
21 officers or agents”).

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

29
30 Paragraph (3) [discussion to come].

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

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

SECTION 302. STATUTORY TRUST AS ENTITY. A statutory trust is an entity separate from its trustees and beneficial owners.

Comment

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

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

SECTION 303. PERMISSIBLE PURPOSES.

(a) Except as otherwise provided in subsection (b), a statutory trust may have any lawful purpose.

(b) A statutory trust may not have a predominantly donative purpose.

Comment

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

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

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

By prohibiting a statutory trust from having a predominantly donative purpose, the drafting committee avoided the necessity of designing a comprehensive schedule of mandatory rules

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

7
8 Examples of mandatory rules applicable to common-law trusts that drafters might
9 otherwise try to avoid by using a statutory trust include the following:

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

33 Most of the foregoing rules are referenced in UTC §105, the UTC's schedule of mandatory rules.
34 For discussion of why the rules that are mandatory with respect to a common-law trust are not
35 mandatory with respect to a statutory trust, see the comments to Sections 103 and 105.

36
37 Section 401(c) states a similar rule for the series of a statutory trust.

38
39 Under Section 103(f)(2), this Section is not subject to override by the governing
40 instrument.

41
42 **SECTION 304. STATUTORY TRUST SOLELY LIABLE FOR DEBTS,**
43 **OBLIGATIONS, OR OTHER LIABILITIES OF STATUTORY TRUST.** A debt, obligation,

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

6 **Comment**

7 **Principal Sources** – Delaware Statutory Trust Act §3803; Connecticut Statutory trust Act
8 §34-523; Revised Uniform Partnership Act §306 (1994); Uniform Limited Liability Company Act
9 §303; Uniform Limited Partnership Act §§303, 404 (2001); Uniform Trust Code §507 (2000).
10

11 This section implements the concept that the statutory trust is an entity separate from its
12 trustees and beneficial owners in three ways. First, this section confirms that a trustee, as a
13 manager of the statutory trust, is not liable for the debts, obligations, and liabilities of the statutory
14 trust or a series thereof. As such, this section overrides the outmoded common law rule that held
15 the trustee liable for the debts of the trust and then gave the trustee a right to indemnity out of the
16 trust fund. Compare Restatement (Second) of Trusts §§244, 261 (1959) (stating the old rule), with
17 Uniform Trust Code §1010 (2000) (eliminating the personal liability of the trustee for debts,
18 obligations, and liabilities arising in the trustee’s fiduciary capacity). However, nothing in this
19 Section limits the personal liability of the trustee to the statutory trust for breach of duty under
20 Section 505.
21

22 [Further discussion, cross-reference to series, to come.]
23

24 Second, this section confirms that the statutory trust is solely liable for the debts,
25 obligations, and liabilities of the trust.
26

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

SECTION 305. NO CREDITOR RIGHTS IN TRUST PROPERTY. Except as

otherwise provided in Section 606, a creditor of a beneficial owner or trustee may not obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of a statutory trust.

Comment

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

This Section implements the concept that a statutory trust is an entity separate from its trustees and beneficial owners by confirming that a creditor of a beneficial owner or a trustee has no recourse against the property of the statutory trust.

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

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

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

SECTION 306. DURATION.

(a) A statutory trust has perpetual existence.

(b) A statutory trust, or any series thereof, may not be terminated or revoked except in

1 accordance with this [act] or the terms of the governing instrument.

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

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

6 **Comment**

7
8 **Principal Sources** – Delaware Statutory Trust Act §3808; Connecticut Statutory Trust Act
9 §34-518.

10
11 Paragraph (a) provides a default rule of perpetual existence for a statutory trust. See also
12 Section 801 and Section 806. The duration of a common-law trust, by contrast, is curtailed by the
13 Rule Against Perpetuities. See Restatement (Third) of Trusts §29, cmt. h(1) (2003); Restatement
14 (Second) of Property: Donative Transfers §2.1 (1981). Accordingly, unless the governing instrument
15 provides otherwise, under this section a statutory trust is exempt from the Rule Against Perpetuities.
16 Without taking a position on the policy soundness of the tax-driven movement to abolish the Rule
17 Against Perpetuities with respect to donative trusts, see [citation to come], the drafting committee
18 concluded that the dead-hand worries that underpin the Rule do not apply to a statutory trust.
19 Under Section 302, a statutory trust may not have a predominantly donative purpose.

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

30
31 Paragraph (c) confirms that the rule of partnership law under which a partnership is
32 dissolved upon the death or incapacity of one of the partners does not apply to a statutory trust.

33
34 Paragraph (d) overrides the application to a statutory trust under Section 105 of the
35 common law rule of merger whereby legal and equitable title to the trust property merge and the
36 trust terminates if the same person is the sole trustee and sole beneficiary. See Restatement (Third)
37 of Trusts §69 (2003); Restatement (Second) of Trusts §341 (1959); Comment, The Doctrine of
38 Merger as Applied to Commercial Trusts, 29 Yale L.J. 97 (1919).

1 **SECTION 307. POWER TO HOLD PROPERTY; TITLE TO TRUST PROPERTY.**

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

4 **Comment**

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

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

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

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

24
25 **SECTION 308. POWER TO SUE AND BE SUED.**

26 (a) A statutory trust may sue and be sued in its own name.

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

30 **Comment**

31
32 **Principal Sources** – Delaware Statutory Trust Act §§3803-3805; Connecticut Statutory
33 Trust Act §§34-518, 34-523; Uniform Limited Partnership Act §303 (2001).

34
35 Paragraph (a) implements the concept that a statutory trust is an entity separate from the
36 trustee and beneficial owner by confirming that a statutory trust has the power to sue and be sued

1 in its own name.

2
3 Paragraph (b) addresses the attachment and execution of a statutory trust's property subject
4 to the possibility that the statutory trust has formed one or more series under Article 4.

5

1 [ARTICLE 4]

2 SERIES TRUSTS

3
4 SECTION 401. STATUTORY TRUST HAVING SERIES.

5 (a) The governing instrument may provide for the creation by the statutory trust of one or
6 more series with respect to specified property of the statutory trust if:

7 (1) records are maintained for the series that reasonably identify the property of the
8 series, including by specific listing, category, type, quantity, or computational or allocational
9 formula or procedure, such as a percentage or share of any property, or by any other method by
10 which the identity of the property of the series is objectively determinable; and

11 (2) notice that the trust having one or more series is set forth in the certificate of
12 trust as required by Section 201(b)(4).

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

14 (c) A series of a statutory trust may have a separate purpose from the trust or any other
15 series thereof if the purpose of the series is lawful and not a predominantly donative purpose.

16 Comment

17
18 **Principal Sources** – Delaware Statutory Trust Act §3806; Delaware Limited Liability
19 Company Act §18-215.

20
21 Paragraph (a) of this section provides that a statutory trust may be organized with one or
22 more series, subject to two conditions: (1) records must be maintained that reasonably identify the
23 property of the series, and (2) notice of the limitation on liabilities of a series must be set forth in
24 the certificate of trust.

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

1
2 [Comparison of asset partitioning series to governance classes under Section 104(e)(5) to
3 come.]
4

5 Paragraph (b) [discussion of non-entity status to come, including the point that this
6 provision makes explicit what is implicit in the Delaware act, and that entity status for tax
7 purposes is a separate question not addressed here (analogy is to common law trust, which is not
8 an entity under state trust law but is for federal tax purposes)].
9

10 Paragraph (c) [discussion and cross-reference to Section 303 to come.]
11

12 The organization of a master statutory trust with several series is particularly common
13 among statutory trusts that are registered as investment companies under the Investment Company
14 Act of 1940, as amended, 15 U.S.C. Sections 80a-1 et seq. (the “1940 Act”). In such a case, any
15 series of beneficial interests established by the governing instrument of the trust is a series
16 preferred in distribution of property or payment of dividends over all other series with respect to
17 property specifically allocated to the series under Section 18 of the Investment Company Act of
18 1940.
19

20 [To come, discussion of Delaware Statutory Trust Act §3805(h): “Except to the extent
21 otherwise provided in the governing instrument of the statutory trust, where the statutory trust is a
22 registered investment company under the Investment Company Act of 1940, as amended (15
23 U.S.C. § 80a-1 et seq.), any class, group or series of beneficial interests established by the
24 governing instrument with respect to such statutory trust shall be a class, group or series preferred
25 as to distribution of assets or payment of dividends over all other classes, groups or series in
26 respect to assets specifically allocated to the class, group or series as contemplated by § 18 (or any
27 amendment or successor provision) of the Investment Company Act of 1940 [15 U.S.C. § 80a-18],
28 as amended, and any regulations issued thereunder, provided that this section is not intended to
29 affect in any respect the provisions of § 3804(a) of this title.”]
30

31 Under Section 103(f)(4), this Section is not subject to override by the governing
32 instrument.
33

34 **SECTION 402. LIABILITY OF SERIES TRUST.**

35 (a) In a series trust:

36 (1) a debt, obligation, or other liability incurred or otherwise existing with respect
37 to the property of a particular series is enforceable against the property of the series only, and not
38 against the property of the trust generally or any other series thereof; and

39 (2) none of the debts, obligations, or other liabilities incurred or otherwise existing

1 with respect to the trust generally or the property of any other series thereof is enforceable against
2 the property of the series;.

3 (b) The association, disassociation, or reassociation of property of a statutory trust or a
4 series thereof to or with the trust or a series thereof, including by conversion or merger under
5 [Article] 7 is deemed to be a transfer between separate persons under [Uniform Fraudulent
6 Transfers Act or other state fraudulent transfer statute].

7 **Comment**

8
9 **Principal Sources** – Delaware Statutory Trust Act §3804; Delaware Limited Liability
10 Company Act §18-215.

11
12 Paragraph (a) provides that if a statutory trust creates one or more series under Section 401,
13 the debts, liabilities, and other obligations of a particular series are enforceable against the
14 property of that series only. In such circumstances, the debts, liabilities, and other obligations of
15 the trust generally and any other series thereof are not enforceable against the property of the
16 series. [Discussion of the common creditor problem and the idea of the trust as a separate bucket
17 from each series to come.]

18
19 Paragraph (b) addresses [discussion to come; the basic idea is that we don't want to allow
20 transfer of property from series A to series B, thereby frustrating the creditors of series A, if the
21 transfer will leave series A insolvent or otherwise would have qualified as a fraudulent transfer if
22 A and B were separate entities].

23
24 Under Section 103(f)(4), paragraph (b) of this Section is not subject to override by the
25 governing instrument.
26

27 **SECTION 403. DUTIES OF TRUSTEE IN SERIES TRUST.** If there is at least one
28 trustee of a series trust that, in discharging its duties, is obligated to consider the interests of the
29 trust and all series thereof, the governing instrument may provide that one or more other trustees,
30 in discharging their duties, may consider only the interests of the trust or one or more series
31 thereof.

32 **Comment**

33
34 [Explanatory comment]

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

5 **SECTION 404. DISSOLUTION OF SERIES.**

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

8 (b) A series of a series trust is dissolved, and its activities must be wound up, on the
9 occurrence of an event or circumstance that the governing instrument states causes dissolution of
10 the series or upon the dissolution of the trust.

11 (c) On dissolution of a series of a series trust, the persons that under the governing
12 instrument are responsible for winding up the affairs of the series may cause the trust to take all
13 actions permitted under Section 803, and shall take actions with respect to the claims and
14 obligations of the series as provided in Sections 803 through 805.

15 (d) Any person, including a trustee, that under the governing instrument is responsible for
16 winding up the affairs of a series of a series trust is not liable to the creditors of the dissolved
17 series by reason of the person's actions in winding up the series.

18 **Comment**

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

21
22 [Comment to explain that series dissolves as if it were a trust, and default/mandatory
23 treatment, to come.]
24

25 Under Section 103(f)(4), paragraph (c) of this Section is not subject to override by the
26 governing instrument.
27
28

1 [ARTICLE 5]

2 TRUSTEES AND TRUST MANAGEMENT

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

6 **Comment**

7 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust Act
8 §34-517; Uniform Limited Partnership Act §105 (2001); Delaware General Corporation Law
9 §141; Revised Model Business Corporation Act §8.01 (2005).

10
11 Section 102(19) defines the term “trustee” as a person designated as such in accordance
12 with the governing instrument or applicable law. Section 104(e)(6)(C) confirms that the governing
13 instrument may provide for trustee appointment. However, because no provision in this Act
14 provides default rules for trustee appointment, if the governing instrument does not provide for
15 trustee appointment, then under Section 105 the state’s law pertaining to trustee appointment in
16 common-law trusts controls.

17
18 For treatment of the default rules of trustee appointment, removal, and succession in
19 common-law trusts, see Uniform Trust Code §§701-02, 704-06 (2000); Restatement (Third) of
20 Trusts §§31-37 (2003). [Scott and Ascher on Trusts citation to come.]
21

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

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

27 **Comment**

28 **Principal Source** –Uniform Trust Code §815 (2000).
29

30 This section is intended to grant trustees the broadest possible powers. Hence, this section
31 overrides the application to a statutory trust under Section 105 of the outmoded common-law rule
32 that a trustee has only those powers granted by the trust instrument. See Uniform Trust Code §815
33 (2000); Restatement (Third) of Trusts §85, cmt. a (2007).
34

However, the existence of a power does not answer the question whether the exercise or nonexercise of that power in a particular case is consistent with the trustee's fiduciary obligation. The trustee's exercise or nonexercise of the broad powers conferred by this section is subject to scrutiny for compliance with the trustee's standard of conduct under Section 505. See UTC §815, cmt. (2000); Restatement (Third) of Trusts §§70, 86 (2007); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 640-43 (1995).

SECTION 503. ACTION BY TRUSTEES. On any matter that is to be acted on by trustees, the following rules apply:

(1) The trustees act by majority of the trustees.

(2) The trustees may act without a meeting, without previous notice, and without a vote, if the minimum number of trustees necessary to authorize or take the action at a meeting at which all trustees entitled to vote thereon were present and voted consent in a signed record. However, prompt notice of the action must be given to those trustees that did not consent.

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

Comment

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

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

The remainder of this section allows for maximum flexibility in the mechanics of allowing the trustees to act or vote on actions. Section 103(e)(4) confirms that the rules stated in this Section are subject to override by the governing instrument.

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

SECTION 504. PROTECTION OF PERSON DEALING WITH TRUSTEE.

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

(b) A person that in good faith deals with a trustee need not inquire into the extent of a trustee's power or the propriety of its exercise.

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

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

Comment

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

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

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

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

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

4
5 [To come: Discussion of differences with the UTC.]

6
7 For discussion of the meaning of good faith, see the comment to Section 505.
8

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

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

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

15 **Comment**

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

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

19
20 The drafting committee opted to model the trustee’s duties on the corporate fiduciary
21 obligation as stated in Revised Model Business Corporation Act §8.30 (2005) rather than the more
22 restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a mode of
23 business organization. Unlike the trust law fiduciary obligation, which evolved in the context of
24 donative transfers, the corporate law fiduciary obligation evolved to serve the needs of commercial
25 actors. For a statement of the duties of loyalty and prudence in trust law, see Restatement (Third)
26 of Trusts §§77-78 (2007). For a comparison, see Robert H. Sitkoff, Trust Law, Corporate Law,
27 and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82 (2003). See also the sources cited in the
28 Comment to Section 507.

29
30 [Discussion of *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096 (Del.Ch.
31 2008), and differences between the Delaware Act and this Section, to come.]

32
33 The drafting committee declined the suggestion to define the term good faith on the ground
34 that such a definition necessarily would be over- and under-inclusive. Instead, the committee
35 contemplated that the term would be interpreted in light of its evolving meaning in the business
36 and trust law cases.
37

1 [Commentary explaining rationale for the “subject to Section 403” language.]

2
3 Under Section 103(f)(5), the trustee’s standards of conduct under this section are
4 mandatory rules that are not subject to override by the governing instrument. However, the
5 governing instrument may prescribe the standards by which good faith, best interests of the
6 statutory trust, and care that a person in a similar position would reasonably believe appropriate
7 under similar circumstances are determined provided that the standards are not manifestly
8 unreasonable.
9

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

19 **SECTION 506. GOOD-FAITH RELIANCE.** A trustee, officer, employee, manager, or
20 committee of a statutory trust, or other person designated pursuant to Section 104(c)(8), is not
21 liable to the trust or to a beneficial owner for breach of any duty, including a fiduciary duty, to the
22 extent the breach results from good-faith reliance on:

23 (1) a term of the governing instrument;

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

25 (3) an opinion, report, or statement of another person that the trustee reasonably believes is
26 within the other person’s professional or expert competence and is made or delivered to the
27 trustee, officer, employee, manager, or committee of a statutory trust or other person designated
28 pursuant to Section 103(e)(8).

29 **Comment**

30 **Principal Source** – Uniform Trust Code §1006 (2000); Delaware Statutory Trust Act
31 §3806; Connecticut Statutory Trust Act §34-517.
32

33 A trustee, officer, employee, manager, committee, or other such person or persons should
34 be able to administer a statutory trust with dispatch and without concern that a reasonable reliance

on (1) the terms of the governing instrument, (2) the records of the statutory trust, or (3) the opinions of experts is misplaced. This section protects a person that so relies, but only to the extent the breach of trust resulted from such reliance and only if the person's reliance was in good faith. "Taking the advice of legal counsel," for example, "evidences prudence on the part of the trustee. Reliance on the advice of counsel, however, is not a complete defense to an alleged breach of trust, because that would reward a trustee who shopped for legal advice that would support the trustee's desired course of conduct or who otherwise acted unreasonably in procuring or following legal advice. In seeking and considering advice of counsel, the trustee has a duty to act with prudence. Thus, if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence." Restatement (Third) of Trusts §77, cmt. b(2) (2007).

SECTION 507. INTERESTED TRANSACTIONS.

(a) In this section, "covered party" means a trustee, officer, employee, or manager of a statutory trust, or a related person of a trustee, officer, employee, or manager.

(b) Subject to subsection (c), a covered party 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, or do other business with the statutory trust and has the same rights and obligations with respect to those matters as a person that is not a covered party.

(c) A transaction described in subsection (b) is voidable by the statutory trust unless the covered party shows that the transaction is fair to the trust.

Comment

Principal Sources – Delaware Statutory Trust Act §3806; Delaware General Corporation Law §144.

Consistent with the use of the term "best interests" instead of "sole interest" in Section 505(a), this section abrogates the no-further-inquiry rule of the common law of trusts, which renders a self-dealing or conflicted transaction by the trustee voidable by the beneficiaries even if the transaction is fair and in the best interests of the trust and the beneficiaries. See Restatement (Third) of Trusts §78 (2007); Restatement (Second) of Trusts §170 (1959); John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?, 114 Yale L.J. 929 (2005); Melanie B. Leslie, Trusting Trustees: Fiduciary Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005).

Instead, this section follows the corporate model whereby an interested transaction is

voidable by the statutory trust unless the related party shows that the transaction is fair to the trust. For discussion of the fairness test as applied in corporate law, see Steven M. Bainbridge, Corporation Law and Economics §7.2, at pp. 315-16 (2002), citing Marciano v. Nakash, 535 A.2d 400 (Del. 1987). [To come: Further discussion, along with reference to ALI Principles of Corporate Governance.]

[To come: Explanation for omitting this Section from 103(f), hence ratification and related ideas may be addressed in the governing instrument. The point of this section is to override the no-further-inquiry rule, not to validate all self-dealing transactions.]

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

SECTION 508. TRUSTEE’S RIGHT TO INFORMATION. A trustee has the right to receive information from a statutory trust or another trustee relating to the affairs of the trust reasonably related to the trustee’s discharge of the trustee’s duties as trustee. The trustee may enforce this right by summary proceeding in the [appropriate court].

Comment

Under Section 103(f)(8), the trustee’s right to information under this section is not subject to override by the governing instrument. However, the trustee’s right to information is limited to information “reasonably related to the trustee’s discharge of the trustee’s duties as trustee,” and under Section 103(f)(8) the governing instrument may prescribe the standards by which reasonably related is determined provided that those standards are not manifestly unreasonable.

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

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

SECTION 509. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.

(a) A statutory trust may indemnify and hold harmless a trustee or beneficial owner or

1 other person with respect to any claim or demand on the person by reason of the person's
2 relationship with the trust if the claim or demand does not arise from the person's bad faith, willful
3 misconduct, or reckless indifference.

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

9 (a).

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

13 **Comment**

14
15 **Principal Sources** – Delaware Statutory Trust Act §3817; Connecticut Statutory Trust Act
16 §34-524; Delaware General Corporation Law §145; Uniform Trust Code §§105, 1008 (2000).

17
18 This Section confirms that the governing instrument may provide for indemnification,
19 advancement, or exoneration, and it states limitations on any such provisions. This Section does
20 not, by itself, compel indemnification, advancement, or exoneration. Under Section 103(f)(8), this
21 section's prohibition against indemnification, advancement, or exoneration for conduct involving
22 bad faith, willful misconduct, or reckless indifference is not subject to override by the governing
23 instrument. Prohibiting indemnification, advancement, or exoneration for such conduct is
24 consistent with traditional trust doctrine. See Uniform Trust Code §1008 (2000); Restatement
25 (Third) of Trusts §96, cmt. d (T.D. No. 5, 2009); 4 Austin Wakeman Scott, William Franklin
26 Fratcher, and Mark L. Ascher, Scott and Ascher on Trusts §24.27.3 (5th ed. 2007).

27
28 The Delaware Statutory Trust Act likewise limits the permissible scope of exoneration.
29 See Delaware Statutory Trust Act §3806(e), which provides that the "governing instrument may
30 provide for the limitation or elimination of any and all liabilities for breach of contract and breach
31 of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing instrument may
32 not eliminate the implied contractual covenant of good faith and fair dealing."

33
34 In *Nakahara v. The NS 1991 American Trust*, 739 A.2d 770 (Del. Ch. 1998), the Delaware

1 Chancery Court held that a Delaware statutory trust had the power to advance litigation expenses,
2 but denied the trustees' request for indemnification on the ground of unclean hands.

3
4 Limitations on permissible exoneration are also familiar corporate and alternative entity
5 law. See, e.g., Delaware General Corporation Law §102(b)(7); Delaware Limited Liability
6 Company Act §18-1101; [to come: Citation to MBCA 2.02(b)(4) and/or other uniform acts].

7
8 Any indemnification provision in the governing instrument of a statutory trust that operates
9 as a mutual fund is subject to Section 17(h) of the Investment Company Act of 1940, which
10 generally prohibits a fund from including in its organizational documents any provision that
11 protects a trustee or officer of a fund against liability to the fund or its shareholders by reason of
12 "willful misfeasance, bad faith, gross negligence, or reckless disregard" of the person's duties as
13 trustee or officer. 15 U.S.C. § 80a-17(h).

14
15 The SEC has taken the position that, before advancing legal fees to a trustee of a mutual
16 fund, the fund's "board must either (1) obtain assurances, such as by obtaining insurance or
17 receiving collateral provided by the [trustee], that the advance will be repaid if the trustee is found
18 to have engaged in disabling conduct, or (2) have a reasonable belief that the [trustee] has not
19 engaged in disabling conduct and ultimately will be entitled to indemnification." SEC
20 Interpretation: Matters Concerning Independent Directors of Investment Companies, Investment
21 Company Act Rel. No. 24083 (Oct. 14, 1999), 1999 WL 820629, *10. The SEC has also taken the
22 position that there is a rebuttable presumption that an independent trustee (see Section 512) has not
23 engaged in disabling conduct. *Id.*

24 25 **SECTION 510. DIRECTION OF TRUSTEES.**

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

28 (b) The governing instrument may provide that neither the power to direct a trustee or other
29 person nor the exercise of the power by any person, including a beneficial owner, causes the
30 person to be a trustee or imposes on the person duties, including fiduciary duties, or liabilities
31 relating to these duties, to a statutory trust or beneficial owner.

32 (c) If the governing instrument confers on a person a power to direct actions by a trustee or
33 other person, the trustee or other person shall act in accordance with an exercise of the power,
34 unless the direction is manifestly contrary to the terms of the governing instrument or the trustee
35 knows or has reason to know that following the direction would constitute a serious breach of

1 fiduciary duty by the trustee.

2 **Comment**

3 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust Act
4 §34-517; Uniform Trust Code §808 (2000).

5
6 Paragraph (a) ratifies the use of a directed trustee, meaning a trustee that must act in
7 accordance with the directions of another person. Under paragraph (b), however, the trustee must
8 not follow a direction that is manifestly contrary to the terms of the governing instrument or that
9 the trustee knows or has reason to know would constitute a serious breach of fiduciary duty. For
10 discussion, see Restatement (Third) of Trusts §75 (2007); Mary Clarke and Diana S.C. Zeydel,
11 Directed Trusts: The Statutory Approaches to Authority and Liability, 35 Est. Plan. 14 (2008);
12 Richard W. Nenno, Directed Trusts: Can Directed Trustees Limit Their Liability?, 21 Prob. and
13 Prop. 45 (Nov./Dec. 2007).

14
15 Paragraph (b) confirms that the governing instrument may provide that a person that has
16 the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to the
17 statutory trust or a beneficial owner.

18
19 The reference in paragraph (c) to “serious” breach of fiduciary duty is designed to exclude
20 an inconsequential, immaterial, or technical breach that does not harm a beneficial owner. For
21 some purposes, such as trustee removal, trust law distinguishes between “serious” and not serious
22 breaches of trust. See Uniform Trust Code §706(b)(1) (2000); 2 Scott and Ascher on Trusts,
23 supra, §11.10, at 661; Restatement (Second) of Trusts §107, cmt. b (1959).

24
25 The trustee’s determination whether a direction is “manifestly contrary to the terms of the
26 governing instrument” or “would constitute a serious breach of fiduciary duty by the trustee” is
27 subject to the trustee’s fiduciary obligations. The drafting committee contemplated that, in accord
28 with conventional trust practice, a trustee could seek judicial resolution of whether an instruction
29 falls within the exclusion of paragraph (b) by applying to the appropriate court for instructions.
30 See Restatement (Third) of Trusts §71 (2007).

31
32 Under Section 103(f)(9), the obligation of a trustee not to follow a direction that is
33 manifestly contrary to the terms of the governing instrument or that would constitute a serious
34 breach of trust is not subject to override by the governing instrument.

35
36 In conjunction with Section 511, this section facilitates the current practice in existing
37 statutory trusts of creating a limited purpose trustee — for example in a securitization transaction
38 with a person who is responsible for distribution computations or whose consent is required before
39 the statutory trust can petition for bankruptcy.

40 41 **SECTION 511. DELEGATION BY TRUSTEE.**

42 (a) A trustee may delegate duties and powers. The trustee shall exercise the care a person

1 in a similar position would reasonably believe appropriate under similar circumstances in:

2 (1) selecting an agent;

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

4 (3) periodically reviewing the agent's actions in order to monitor the agent's
5 performance and compliance with the terms of the delegation.

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

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

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

11 (e) An agent of a trustee submits to the jurisdiction of the courts of this state by accepting
12 a delegation of powers or duties from a trustee.

13 **Comment**

14 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust Act
15 §34-517; Uniform Trust Code §807.

16
17 This section is intended to facilitate delegation to specialists. To that end, it reverses the
18 outmoded common law rule against delegation by a trustee. In authorizing delegation, this section
19 follows the Delaware Statutory Trust Act and the modern trend with respect to common-law trusts.
20 Most states have abrogated the common law nondelegation rule with legislation based on one or
21 more of Uniform Trust Code §807 (2000); Uniform Prudent Investor Act §9 (1994); Restatement
22 (Third) of Trusts §80 (2007). See also John H. Langbein, Reversing the Nondelegation Rule of
23 Trust-Investment Law, 59 Mo. L. Rev. 105 (1994).

24
25 Paragraphs (a), (c), (d), and (e) are patterned on UTC §807 (2000), which is derived from
26 Uniform Prudent Investor Act §9. This section deviates from prior uniform acts, however, on the
27 issue of delegation to a co-trustee. Following the Delaware Statutory Trust Act, paragraph (b)
28 treats delegation to a co-trustee in the same manner as delegation to another person. Traditional
29 law, by contrast, disfavors delegation by one co-trustee to another. See Uniform Trust Code
30 §703(e) (2000); Restatement (Third) of Trusts §81, cmt. c(1) (2007). The traditional rule is based
31 on the assumption that, if the donor named more than one trustee, the donor intended each to be a
32 check on the others. That policy does not fit commercial statutory trust practice, in which limited
33 purpose trustees are common.

1
2 There is an intrinsic tension in trust law between granting trustees broad powers that
3 facilitate flexible and efficient trust administration, on the one hand, and protecting trust
4 beneficiaries from the misuse of such powers on the other hand. Delegation, which is a species of
5 trustee power, raises the same tension. If the trustee delegates effectively, the beneficiaries obtain
6 the advantage of the agent’s specialized skills or whatever other attributes induced the trustee to
7 delegate. But if the trustee delegates to a knave or an incompetent, the delegation can work harm
8 upon the beneficiaries.
9

10 This section is designed to strike the appropriate balance between the advantages and the
11 hazards of delegation. It authorizes delegation under the limitations of paragraphs (a) and (c).
12 Paragraph (a) requires the trustee to exercise the care a person in a similar position would
13 reasonably believe appropriate under similar circumstances in selecting the agent, in establishing
14 the terms of the delegation, and in reviewing the agent’s compliance with the terms of the
15 delegation.
16

17 The trustee’s duty of care in framing the terms of the delegation should protect the
18 beneficial owners against overbroad delegation. For example, a trustee could not prudently agree
19 to a delegation agreement containing an exculpation clause that leaves the statutory trust without
20 recourse against reckless action or bad faith by the agent. Leaving the trust without a remedy for
21 willful wrongdoing is inconsistent with the trustee’s duty of care in formulating the terms of the
22 delegation.
23

24 Although paragraph (d) exonerates the trustee from personal responsibility for the agent’s
25 conduct when the delegation satisfies the standards of paragraph (a), paragraph (c) makes the agent
26 responsible to the statutory trust. The beneficial owners can, therefore, rely upon the trustee to
27 enforce the terms of the delegation.
28

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

34 **SECTION 512. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT** 35 **COMPANY.**

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

39 (b) If a statutory trust is registered as an investment company under the Investment

1 Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [or any successor statute]
2 [and any regulations issued thereunder,] a trustee is an independent trustee for all purposes under
3 this [act] if the trustee is not an interested person of the trust. The receipt of compensation both for
4 service as an independent trustee of the trust and for service as an independent trustee of one or
5 more other investment companies managed by a single investment adviser or an affiliated person
6 of an investment adviser, does not affect the status of the trustee as an independent trustee under
7 this section.

8 **Comment**

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

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

22
23 In 1998 the Maryland legislature effectively overruled *Strougo* by amending the Maryland
24 corporate code to provide that directors who are not “interested persons” under the Investment
25 Company Act of 1940 also would be deemed disinterested under Maryland law. See Md. Code
26 (Corporations and Associations) §2-405.3. A similar provision took effect in Massachusetts in
27 1999, see Mass. Laws. 182, § 2B, and in Delaware in 2000, see Delaware Statutory Trust Act
28 §3801(h). Almost all mutual funds are organized as Maryland corporations, Massachusetts trusts,
29 or Delaware statutory trusts. Consistent with the Maryland, Massachusetts, and Delaware
30 legislation, this section rejects *Strougo* by deeming a trustee to be independent if he or she is not
31 an interested person under the Investment Company Act of 1940, as amended.
32

1 [ARTICLE] 6

2 BENEFICIARIES AND BENEFICIAL RIGHTS

3
4 SECTION 601. BENEFICIAL INTEREST.

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

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

8 (c) A beneficial owner's interest is not an interest in specific property of a statutory trust.

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

11 Comment

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

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

26 SECTION 602. VOTING OR CONSENT BY BENEFICIAL OWNERS. On any
27 matter that is to be acted on by beneficial owners, the following rules apply:

28 (1) The beneficial owners act by majority of the beneficial owners.

29 (2) The beneficial owners may take the action without a meeting, without notice, and
30 without a vote, if beneficial owners having at least the minimum number of votes necessary to

1 authorize or take the action at a meeting at which all beneficial owners entitled to vote thereon
2 were present and voted consent in a signed record. However, prompt notice of the action must be
3 given to those beneficial owners that did not consent.

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

6 **Comment**

7
8 **Principal Source** – Delaware Statutory Trust Act §3806; Delaware General Corporation
9 Law §228.

10
11 Except for a conversion, merger, or dissolution under Articles 7 and 8, nothing in this act
12 provides for the beneficial owners to act on any matter. However, because the beneficial owners
13 may be given such a right by the terms of the governing instrument, paragraph (a) supplies a
14 default rule requiring a majority of the number of beneficial owners. The drafting committee
15 contemplated that the governing instrument typically will address voting rules by providing a per
16 capital or other share-based allocation of voting rights. However, the drafting committee declined
17 the suggestion to try to incorporate such a rule as a default. Such rules are necessarily transaction-
18 specific and hence infeasible to specify in a one-size-fits-all default. Compare Revised Uniform
19 Partnership Act §401(f) (1997), which provides that “[e]ach partner has equal rights in the
20 management and conduct of the partnership business.”

21
22 The Investment Company Act of 1940, as amended, specifies the percentage of vote
23 necessary to approve certain actions related to the investment company. In other instances, 1940
24 Act requires the action to be approved at a shareholders’ meeting called for that purpose. In such
25 instances, approval of the action by written consent without notice would not be valid. For
26 example, Section 16(a) of the 1940 Act provides that “no person shall serve as a director of an
27 investment company unless elected to that office by the holders of the outstanding voting
28 securities of such company, at an annual or a special meeting duly called for that purpose.” In
29 addition, investment companies seeking the vote of shareholders on specific actions must comply
30 with rules governing the communication to, and solicitation of, their shareholders. See Rules 14a-
31 1 to 14b-2 under the Securities Exchange Act of 1934, as amended. These rules are significantly
32 more comprehensive than most state statutes and rules governing communications to shareholders
33 and other aspects of a shareholder meeting.

34
35 Section 104(c)(4) confirms that the rules stated in this Section are subject to override by
36 the governing instrument.
37

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

39 (a) A contribution of a beneficial owner to a statutory trust may be in cash, property, or

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

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

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

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

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

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

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

23 (5) redemption or sale of the defaulting beneficial owner's beneficial interest at a

1 value fixed by appraisal or by formula.

2 **Comment**

3
4 **Principal Sources** – Delaware Statutory Trust Act §3802; Connecticut Statutory Trust Act
5 §34-515.

6
7 Although statutory trusts are used primarily as a mode of business organization in
8 commercial transactions, paragraph (a) acknowledges that a beneficial owner may obtain a
9 beneficial interest without an exchange of consideration, an event that is not uncommon in existing
10 commercial practice. However, a statutory trust may not be used to effect a donative transfer
11 because Section 302 prohibits a statutory trust from having a “predominantly donative purpose.”
12

13 Paragraph (c) repudiates the hostility of traditional law to penalties, thereby resolving the
14 doubts that arose prior to statutory confirmation about the validity of particular remedies for a
15 beneficial owner’s breach.
16

17 Section 104(e)(1) confirms that the governing instrument may provide the means by which
18 beneficial ownership is determined and evidenced. Section 104(e)(12) confirms that the governing
19 instrument may specify the conditions under which a person becomes a beneficial owner.
20

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

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

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

27 (c) The trust may distribute an asset in kind if each part of the asset is fungible with each
28 other part and each beneficial owner receives a percentage of the asset equal in value to the
29 beneficial owner’s share of the distribution.

30 **Comment**

31
32 **Principal Source** – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust Act
33 §34-516; Revised Uniform Limited Liability Company Act §404 (2006).
34

35 In the case of a statutory trust that is a registered investment company organized as an

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

10
11 Section 104(e)(14) confirms that the governing instrument may provide for the
12 establishment of record dates for distributions.
13

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

17 **Comment**

18
19 **Principal Source** – Delaware Statutory Trust Act §3818.
20

21 A registered investment company organized as an open-end mutual fund generally is
22 obligated to honor redemption requests by its shareholders at the net asset value per share next
23 calculated after receipt of the request, with payment to be made in cash (or, in some cases, in kind)
24 within seven days of the request. See 15 U.S.C. §80a-22(e); 17 CFR §270.22c-1. In narrowly
25 defined circumstances, this redemption right and obligation may be postponed. See 15 U.S.C.
26 §80a-22(e). The redemption proceeds may be reduced by various fees retained by the fund and/or
27 its selling agent (i.e., sales loads and redemption fees). See 17 CFR §§270.22c-2; 270.6c-10.
28

29 **SECTION 606. CHARGING ORDER.**

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

33 (b) On application by a judgment creditor of a beneficial owner, the [appropriate court]
34 may issue a charging order against the beneficial owner's right to distributions from the trust for
35 the unsatisfied part of the judgment and:

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

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

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

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

11 (e) This [act] does not deprive a beneficial owner or a transferee of the beneficial interest
12 of any exemption law applicable to the beneficial interest.

13 **Comment**

14
15 **Principal Source** - Revised Uniform Limited Liability Company Act §503 (2006).

16
17 [Commentary to come.]

18
19 Under Section 103(f)(10), the right of a judgment creditor of a beneficial owner to seek a
20 charging order may not be restricted by the governing instrument.

21
22 **SECTION 607. TRANSACTION WITH BENEFICIAL OWNER.** A beneficial owner
23 or related person of a beneficial owner may lend money to, borrow money from, act as a surety,
24 guarantor, or endorser for, guarantee or assume an obligation of, provide collateral for, or do other
25 business with the statutory trust and, subject to law other than this [act], has the same rights and
26 obligations with respect to a matter as a person that is not a beneficial owner.

27 **Comment**

Principal Source – Delaware Statutory Trust Act §3806.

SECTION 608. BENEFICIAL OWNER’S RIGHT TO INFORMATION. A

beneficial owner has the right to receive information from the statutory trust or a trustee relating to the affairs of a statutory trust reasonably related to the beneficial owner's interest. The beneficial owner may enforce this right by summary proceeding in the [appropriate court].

Comment

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

Under Section 103(f)(11), a beneficial owner’s right to information under this section is not subject to override by the governing instrument. However, a beneficial owner’s right to information under this section is limited to information “reasonably related to the beneficial owner’s ability to enforce its rights as a beneficial owner,” and under Section 103(f)(11) the governing instrument may prescribe the standards by which reasonably related is determined if those standards are not manifestly unreasonable.

Imposing a mandatory, minimum right to information critical to the beneficiary's ability to enforce the trust is familiar law. Restatement (Third) of Trusts §82, cmt. a(2) (2007), provides that "a beneficiary is always entitled ... to request such information as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust." See also 3 Austin Wakeman Scott, William F. Fratcher, and Mark L. Ascher, Scott and Ascher on Trusts §17.5, at 1202 (5th ed. 2006); T.P. Gallanis, The Trustee's Duty to Inform, 85 N.C. L. Rev. 1595 (2007).

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

Section 508 provides for a trustee's right to information.

SECTION 609. ACTION BY BENEFICIAL OWNER.

(a) A beneficial owner may maintain a direct action against a statutory trust to redress an injury sustained by, or to enforce a duty owed to, the beneficial owner if the beneficial owner can

1 prevail without showing an injury or breach of duty to the trust.

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

4 (1) the beneficial owner first makes a demand on the trustees, requesting that the
5 trustees cause the trust to bring an action to redress the injury or 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 (c) A derivative action on behalf of a statutory trust may be maintained only by a person
9 that is a beneficial owner at the time the action is commenced and:

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

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

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

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

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

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

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

22 (2) if the plaintiff receives any proceeds, it shall immediately remit them to the
23 trust.

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

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

6 **Comment**

7
8 **Principal Sources** - Uniform Limited Partnership Act §§1002-1005 (2001); ALI Principles
9 of Corporate Governance §7.01 (1994); Delaware Statutory Trust Act §3816; Connecticut
10 Statutory Trust Act §34-522.

11
12 Under Section 103(f)(12), the right of a beneficial owner to bring an action under this
13 Section may not be eliminated by the governing instrument. However, Section 103(f)(12) permits
14 the governing instrument to subject the right to additional standards and restrictions, including the
15 requirement that beneficial owners owning a specified amount or type of beneficial interest join in
16 bringing the action, provided that the additional standards and restrictions are not manifestly
17 unreasonable.

18
19 In preserving a mandatory right to bring suit, but allowing that right to be subjected to
20 additional standards and restrictions that are not manifestly unreasonable, this section balances two
21 policy aims that are in tension. On the one hand, without the right to bring an action, a beneficial
22 owner might have no recourse in the event of trustee misconduct. On the other hand, without
23 appropriate safeguards, a meritless action might be brought with the aim of extracting a quick
24 settlement. See Reinier Kraakman, Hyun Park, and Steven Shavell, When Are Shareholder Suits in
25 Shareholder Interests?, 82 Georgetown L.J. 1733 (1994).

26
27 For a discussion of remedies, see the comment to Section 105.
28

1 [ARTICLE] 7

2 **CONVERSION AND MERGER**

3
4 **SECTION 701. DEFINITIONS.** In this [article]:

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

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

7 (3) “Converted organization” means the organization into which a converting organization
8 converts pursuant to Sections 702 through 705.

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

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

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

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

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

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

24 **Comment**

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

2
3 This section contains definitions specific to this Article.

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

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

14
15 Under Section 103(f)(13), this definitions stated in this Section are not subject to override
16 by the governing instrument.

17 18 **SECTION 702. CONVERSION.**

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

22 (1) the conversion is not prohibited by the governing law of the other organization;
23 and
24 (2) the other organization complies with its governing law in effecting the
25 conversion.

26 (b) A plan of conversion must be in a record and must include:
27 (1) the name and form of the organization before conversion;
28 (2) the name and form of the organization after conversion;
29 (3) the terms and conditions of the conversion, including the manner and basis for
30 converting interests in the converting organization into any combination of money, interests in the
31 converted organization, and other consideration; and

(4) the organizational documents of the converted organization.

Comment

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

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

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

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

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

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

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

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

(1) as provided in the plan; and

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

Comment

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

1 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries is
2 a default rule that may be overridden by the governing instrument. See Section 103(e)(6)(B).
3 Hence, the governing instrument may state a different quantum of consent or provide a different
4 approval mechanism. Varying this subsection's rule means that a beneficial owner might be
5 subject to a conversion (including a "squeeze out" conversion) without consent and with no
6 appraisal remedy. If the converting organization is a statutory trust subject to this Act, the trustee
7 of the converting organization is subject to the duties and obligations stated in this Act. Those
8 duties would apply to the process and terms under which the conversion occurs. However, if the
9 governing instrument allows for a conversion with less than unanimous consent, the mere fact that
10 a beneficial owner objects to a conversion does not mean that a trustee that is favoring, arranging,
11 consenting to, or effecting the conversion has breached a duty under this Act.
12

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

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

23 (a) After a conversion is approved:

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

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

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

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

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

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

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

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

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

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

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

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

12 **Comment**

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

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

17
18 Under Section 103(f)(13), this Section is not subject to override by the governing
19 instrument.

20 21 **SECTION 705. EFFECT OF CONVERSION.**

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

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

25 (1) all property owned by the converting organization remains vested in the
26 converted organization;

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

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

5 (3) an action or proceeding pending by or against the converting organization
6 continues as if the conversion had not occurred;

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

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

12 (6) except as otherwise agreed, the conversion does not dissolve a converting
13 statutory trust or any series thereof for the purposes of Section 801.

14 (c) A converted organization that is a foreign organization consents to the jurisdiction of
15 the courts of this state to enforce any debt, obligation, or other liability for which the converting
16 statutory trust is liable, if, before the conversion, the converting statutory trust was subject to suit
17 in this state on the debt, obligation, or other liability. A converted organization that is a foreign
18 organization and not authorized to do business in this state may be served in accordance with
19 Section 212.

20 **Comment**

21
22 Principal Source – Uniform Limited Partnership Act §1105 (2001).
23

24 Paragraph (a) confirms that conversion changes an organization's legal type, but does not
25 create a new organization. Unlike a merger, a conversion involves a single organization.
26 Therefore under paragraph (b) a conversion does not transfer any of the organization's rights or
27 obligations. For further discussion, see Model Entity Transactions Act §406 (2006) and comment

1 1 thereto.

2
3 Under Section 103(f)(13), this Section is not subject to override by the governing
4 instrument.
5

6 **SECTION 706. MERGER.**

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

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

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

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

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

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

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

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

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

24 **Comment**

25 **Principal Source** – Uniform Limited Partnership Act §1106 (2001).
26

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

3
4 A plan of merger may provide that some persons with interests in a constituent
5 organization will receive interests in the surviving organization, while other persons with interests
6 in the same constituent organization will receive some other form of consideration. Thus, a
7 “squeeze out” merger is possible. As noted in the comment to Section 703, the duties and
8 obligations stated in this Act apply to a trustee of a constituent organization that is a statutory trust
9 subject to this Act. Those duties would apply to the process and terms under which a “squeeze
10 out” merger occurs.
11

12 **SECTION 707. ACTION ON PLAN OF MERGER BY CONSTITUENT**

13 **STATUTORY TRUST.**

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

16 (b) After a merger is approved, and at any time before a filing is made under Section 708, a
17 constituent statutory trust may amend the plan or abandon the planned merger:

18 (1) as provided in the plan; and

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

21 **Comment**

22 **Principal Sources** – Uniform Limited Partnership Act §1107 (2001).
23

24 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries is
25 a default rule that may be overridden by the governing instrument. See Section 104(e)(6)(B).
26 Hence, the governing instrument may state a different quantum of consent or provide a completely
27 different approval mechanism. Varying this subsection’s rule means that a beneficial owner might
28 be subject to a merger (including a “squeeze out” merger) without consent and with no appraisal
29 remedy. The trustee of a constituent statutory trust is subject to the duties and obligations stated in
30 this Act, and those duties would apply to the process and terms under which the merger occurs.
31 However, if the governing instrument allows for a merger with less than unanimous consent, the
32 mere fact a beneficial owner objects to a merger does not mean that a trustee that is favoring,
33 arranging, consenting to, or effecting the merger has breached a duty under this Act.
34

35 For the reasons discussed in the comment to Section 703, a mutual fund generally does not

1 afford dissenting rights to its shareholders because any shareholder of an acquired mutual fund
2 may redeem acquired fund shares at net asset value prior to the closing date of the proposed
3 reorganization of the acquired fund.
4

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

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

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

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

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

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

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

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

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

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

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

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

25 (6) if the surviving organization is a foreign organization not authorized to do

business in this state, the street and mailing address of an office that the [Secretary of State] may use for the purposes of Section 709(b); and

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

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

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

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

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

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

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

Comment

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

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

SECTION 709. EFFECT OF MERGER.

(a) When a merger becomes effective:

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

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

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

1 the surviving organization;

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

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

8 (6) except as prohibited by law other than this [act], all rights, privileges,
9 immunities, powers, and purposes of each constituent organization that ceases to exist vest in the
10 surviving organization;

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

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

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

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

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

20 (b) A surviving organization that is a foreign organization consents to the jurisdiction of
21 the courts of this state to enforce any debt, obligation, or other liability owed by a constituent
22 organization if, before the merger, the constituent organization was subject to suit in this state on
23 the obligation. A surviving organization that is a foreign organization not authorized to do

1 business in this state may be served in accordance with Section 212.

2 **Comment**

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

4
5 Under Section 103(f)(13), this Section is not subject to override by the governing
6 instrument.
7

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

10 **Comment**

11 **Principal Source** – Uniform Limited Partnership Act §1113 (2001).
12

1 [ARTICLE] 8

2 DISSOLUTION AND WINDING UP

3
4 **SECTION 801. EVENTS CAUSING DISSOLUTION.** A statutory trust is dissolved
5 only by an administrative dissolution under Section 806 or by the filing of articles of dissolution
6 under Section 802:

7 (1) on the occurrence of an event or circumstance that the governing instrument states
8 causes dissolution; or

9 (2) with the approval of all the beneficial owners.

10 **Comment**

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

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

19
20 Under Section 103(f)(14), the provisions of this section other than paragraph (2) are not
21 subject to override by the governing instrument.
22

23 **SECTION 802. ARTICLES OF DISSOLUTION.**

24 (a) If dissolution of a statutory trust is authorized under Section 801, the trust shall deliver
25 to the [Secretary of State] for filing articles of dissolution setting forth:

26 (1) the name of the trust; and

27 (2) the date of the dissolution.

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

1 **Comment**

2 **Principal Source** – Revised Model Business Corporation Act §14.03 (2005).
3

4 **SECTION 803. WINDING UP.**

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

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

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

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

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

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

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

17 (3) transfer the trust's property;

18 (4) settle disputes; and

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

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

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

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

Comment

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

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

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

Paragraph (e) provides for the possibility that after dissolution additional unfinished business of the statutory trust is discovered. [Discussion of property that comes in after termination, referencing Restatement (Third) of Trusts and Scott and Ascher on Trusts, to come.]

Under Section 103(f)(14), the provisions of this section are not subject to override by the governing instrument.

SECTION 804. NOTICE TO CLAIMANT.

(a) Except as otherwise provided in subsection (c), a dissolved statutory trust may dispose of a known claim against it by notifying the claimant in a record of the dissolution of the trust. The notice must:

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

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

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

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

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

(A) the trust notifies the claimant in a record that the claim is rejected and will be barred unless the claimant commences an action against the trust to enforce the claim by the 90th day after the claimant receives the notice; and

(B) the claimant does not commence the required action by the 90th day.

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

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

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

Comment

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

[Commentary to come, drawing on the MBCA provision that is the ultimate source of these provisions.]

Under Section 103(f)(14), the provisions of this section are not subject to override by the governing instrument.

SECTION 805. PUBLICATION OF NOTICE.

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

(b) A notice under subsection (a) must:

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

1 this state, in the [county] in which the trust's designated office was last located;

2 (2) describe the information required for a claim and provide a mailing address to
3 which the claim may be sent; and

4 (3) state that a claim against the trust is barred unless an action to enforce the claim
5 is commenced not later than [three] years after publication of the notice.

6 (c) If a dissolved statutory trust publishes a notice in accordance with subsection (b), unless
7 the claimant commences an action to enforce the claim against the trust not later than [three] years
8 after the publication date of the notice, the claim of each of the following claimants is barred:

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

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

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

13 (d) A claim not barred under this section may be enforced against undistributed property;.

14 (e) A claim not barred under this section may be enforced if property of the trust has been
15 distributed after dissolution, against a beneficial owner to the extent of that beneficial owner's
16 proportionate share of the property distributed to the beneficial owner after dissolution. However,
17 a beneficial owner's total liability for all claims under this subsection does not exceed the total
18 amount of property distributed to the beneficial owner after dissolution.

19 **Comment**

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

21
22 [Commentary to come, including treatment of the three year bracketed term, drawing on
23 the MBCA provision that is the ultimate source of these provisions.]

24
25 Under Section 103(f)(14), the provisions of this section are not subject to override by the
26 governing instrument.
27

1 **SECTION 806. ADMINISTRATIVE DISSOLUTION.**

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

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

4 (2) the trust does not file an annual report by the 60th day after it is due; or

5 (3) the trust does not pay, by the 60th day after the due date, any fee, tax, or penalty
6 due to the [Secretary of State].

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

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

13 (2) the reason for the dissolution.

14 (c) Unless a statutory trust cures the failure to comply with subsection (a) stated in the
15 notice of dissolution before the date stated in the notice, the [Secretary of State] shall dissolve the
16 trust administratively by preparing, signing, and filing a declaration of dissolution that states the
17 grounds for dissolution. The [Secretary of State] shall file a notice of dissolution and send a copy
18 to the trust's agent for service of process, or if the trust does not have an agent for service of
19 process in this state, to the trust's designated office.

20 **Comment**

21 **Principal Source** – Revised Uniform Limited Liability Company Act §705 (2006).
22

23 Under Section 103(f)(14), the provisions of this section are not subject to override by the
24 governing instrument.
25

1 **SECTION 807. REINSTATEMENT FOLLOWING ADMINISTRATIVE**
2 **DISSOLUTION.**

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

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

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

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

9 (b) If the [Secretary of State] determines that an application under subsection (a) contains
10 the required information and that the information is correct, the [Secretary of State] shall prepare a
11 declaration of reinstatement that states this determination, sign and file the original of the
12 declaration of reinstatement, and send a copy to the trust's agent for service of process.

13 (c) When a reinstatement becomes effective, it relates back to and takes effect as of the
14 effective date of the administrative dissolution as if the dissolution had not occurred, except for the
15 rights of a person arising out of an act or omission in reliance on the dissolution before the person
16 knew or had reason to know of the reinstatement.

17 **Comment**

18 **Principal Source** – Revised Uniform Limited Liability Company Act §706 (2006);
19 Revised Uniform Partnership Act §802 (1997).

20
21 Under Section 103(f)(14), the provisions of this section are not subject to override by the
22 governing instrument.
23

24 **SECTION 808. APPEAL FROM REJECTION OF REINSTATEMENT.**

25 (a) If the [Secretary of State] rejects a statutory trust's application for reinstatement
26 following administrative dissolution, the [Secretary of State] shall send a notice that states the

1 reason for rejection to the trust's agent for service of process.

2 (b) A statutory trust may appeal from the rejection by petitioning the [appropriate court] to
3 set aside the dissolution. The petition must be delivered to the [Secretary of State] and contain a
4 copy of the [Secretary of State's] declaration of dissolution, the trust's application for
5 reinstatement, and the [Secretary of State's] notice of rejection.

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

8 **Comment**

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

10
11 Under Section 103(f)(14), the provisions of this section are not subject to override by the
12 governing instrument.
13
14

1 [ARTICLE] 9

2 FOREIGN STATUTORY TRUSTS

3
4 SECTION 901. GOVERNING LAW.

5 (a) The law of the jurisdiction of formation of a foreign statutory trust governs:

6 (1) the internal affairs of the trust;

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

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

11 (b) The [Secretary of State] may not deny a foreign statutory trust a certificate of
12 registration by reason of any difference between the law of the jurisdiction of formation of the
13 foreign statutory trust and the laws of this state.

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

16 Comment

17
18 **Principal Sources** – Revised Uniform Limited Liability Company §801 (2006); Uniform
19 Limited Partnership Act §901 (2001); Delaware Statutory Trust Act §3851; Connecticut Statutory
20 Trust Act §34-530.

21
22 Paragraph (a) parallels and is analogous in scope and effect to Section 301 for a domestic
23 statutory trust. Paragraph (b) allows for a foreign statutory trust to operate domestically even if
24 the law governing it is different from the laws governing domestic statutory trusts, but under
25 paragraph (c) a foreign statutory trust cannot engage in any business or exercise any power that a
26 domestic statutory trust could not.

27
28 [To come: Discussion of statutory trust from a nonseries state.]

29
30 Under Section 103(f)(15), this Section is not subject to override by the governing
31 instrument.

1

2 **SECTION 902. APPLICATION FOR CERTIFICATE OF REGISTRATION.**

3 (a) To register to do business in this state, a foreign statutory trust may apply for a
4 certificate of registration to transact business in this state by delivering an application to the
5 [Secretary of State] for filing. The application must contain:

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

8 (2) the name of the state or other jurisdiction of formation of the trust;

9 (3) the street and mailing address of the trust's principal office and, if the laws of
10 the jurisdiction of formation of the the trust require it to maintain an office in that jurisdiction, the
11 street and mailing address of the required office; and

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

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

18 **Comment**

19
20 **Principal Source** – Uniform Limited Partnership Act §902 (2001).

21
22 A certificate of registration for a foreign statutory trust is akin to a certificate of good
23 standing for a statutory trust under Section 206. [Further commentary to come.]

24
25 Under Section 103(f)(14), this Section is not subject to override by the governing
26 instrument.

27
28 **SECTION 903. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS.**

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

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

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

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

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

10 (5) selling through independent contractors;

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

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

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

18 (9) conducting an isolated transaction that is completed by the 30th day and is not
19 in the course of similar transactions; and

20 (10) transacting business in interstate commerce.

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

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

3 **Comment**
4

5 **Principal Sources** – Uniform Limited Partnership Act §903 (2001).
6

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

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

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

21 **Comment**
22

23 **Principal Source** –Uniform Limited Partnership Act §904 (2001).
24

25 Under Section 103(f)(14), this Section is not subject to override by the governing
26 instrument.
27

28 **SECTION 905. CERTIFIED COPY OF CERTIFICATE OF REGISTRATION.**

29 (a) The [Secretary of State], upon request and payment of the required fee, shall furnish a
30 certified copy of the certificate of registration for a qualified foreign statutory trust if the records
31 filed in the [office of the Secretary of State] show that the [Secretary of State] has filed a certificate
32 of registration, has not revoked the certificate of registration, and has not filed a notice of

1 cancellation.

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

6 **Comment**

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

8 [Comment to come.]
9

10 Under Section 103(f)(14), this Section is not subject to override by the governing
11 instrument.
12

13 **SECTION 906. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.**

14 (a) A foreign statutory trust whose name does not comply with Section 207 may not obtain
15 a certificate of registration until it adopts, for the purpose of transacting business in this state, an
16 alternate name that complies with Section 207. A foreign statutory trust that adopts an alternate
17 name under this subsection and obtains a certificate of registration with the name need not comply
18 with [this state's fictitious or assumed name statute]. After obtaining a certificate of registration
19 with an alternate name, a foreign statutory trust shall transact business in this state under the name
20 unless the trust is authorized under [this states's fictitious or assumed name statute] to transact
21 business in this state under another name.

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

25 **Comment**
26

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

2
3 Under Section 103(f)(14), this Section is not subject to override by the governing
4 instrument.
5

6 **SECTION 907. REVOCATION OF CERTIFICATE OF REGISTRATION.**

7 (a) The [Secretary of State] may revoke the certificate of registration of a qualified foreign
8 statutory trust if the trust does not:

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

10 (2) deliver for filing a statement of change by the 60th day after a change has
11 occurred in the name or address of the agent;

12 (3) file an annual report pursuant to Section 213 by the 60th day after it is due; or

13 (4) pay, by the 60th day after the due date, any fee, tax, or penalty due to the
14 [Secretary of State].

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

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

21 (2) the basis for the revocation.

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

25 (d) If a foreign statutory trust cures the failure stated in the notice of revocation under

1 subsection (b), the [Secretary of State] shall indicate that the trust is reinstated on the filed notice.
2 The reinstatement of the trust relates back for all purposes to the date of the notice of revocation,
3 except for the rights of a person arising out of an act or omission in reliance on the dissolution
4 before the person knew or had reason to know of the reinstatement.

5 **Comment**

6
7 **Principal Source** – Uniform Limited Partnership Act §906 (2001).

8
9 Under Section 103(f)(14), this Section is not subject to override by the governing
10 instrument.
11

12 **SECTION 908. CANCELLATION OF CERTIFICATE OF REGISTRATION.**

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

16 (1) the name of the trust;

17 (2) the date of filing of its initial certificate of registration;

18 (3) that the certificate of registration is being canceled; and

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

20 (b) A certificate of registration under subsection (a) is canceled when the notice of
21 cancellation becomes effective under Section 204.

22 **Comment**

23
24 **Principal Source** – Uniform Limited Partnership Act §907 (2001).

25
26 Under Section 103(f)(14), this Section is not subject to override by the governing
27 instrument.
28

29 **SECTION 909. EFFECT OF FAILURE TO HAVE CERTIFICATE OF**

1 **REGISTRATION.**

2 (a) A foreign statutory trust transacting business in this state may not maintain an action or
3 proceeding in this state unless it has a certificate of registration to transact business in this state.

4 (b) The failure of a foreign statutory trust to have a certificate of registration to transact
5 business in this state does not impair the validity of a contract or act of the trust or prevent the trust
6 from defending an action or proceeding in this state.

7 (c) A trustee or beneficial owner of a foreign statutory trust is not liable for the debts,
8 obligations, or other liabilities of the trust solely because the trust transacted business in this state
9 without a certificate of registration.

10 (d) If a foreign statutory trust transacts business in this state without a certificate of
11 registration or cancels its certificate of registration, the trust may be served in accordance with
12 Section 212 for actions arising out of the transaction of business in this state.

13 **Comment**

14
15 **Principal Source** – Uniform Limited Partnership Act §907 (2001).

16
17 Under Section 103(f)(14), this Section is not subject to override by the governing
18 instrument.
19

20 **SECTION 910. ACTION BY [ATTORNEY GENERAL].** The [Attorney General] may
21 maintain an action to enjoin a foreign statutory trust from transacting business in this state in
22 violation of this [article].

23 **Comment**

24
25 **Principal Source** – Uniform Limited Partnership Act §908 (2001).

26 Under Section 103(f)(14), this Section is not subject to override by the governing
27 instrument.
28
29

1 [ARTICLE] 10

2 MISCELLANEOUS PROVISIONS

3
4 SECTION 1001. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In
5 applying and construing this uniform act, consideration must be given to the need to promote
6 uniformity 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 (2001).

10
11 Under Section 103(f)(16), this Section is not subject to override by the governing
12 instrument.
13

14 SECTION 1002. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND
15 NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal
16 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
17 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
18 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
19 U.S.C. Section 7003(b).

20 Comment

21
22 Principal Source – Uniform Limited Partnership Act §1203 (2001).

23
24 Under Section 103(f)(16), this Section is not subject to override by the governing
25 instrument.
26

27
28 SECTION 1003. SAVING CLAUSE. This [act] does not affect an action commenced,
29 proceeding brought, or right accrued before this [act] takes effect.

30 Comment

Principal Source – Uniform Limited Partnership Act §1207 (2001).

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

SECTION 1004. RESERVATION OF POWER TO AMEND OR REPEAL. The [name of state legislature] has power to amend or repeal all or part of this [act] at any time and all statutory trusts and foreign statutory trusts subject to this [act] are governed by the amendment or repeal.

Comment

Principal Source – Revised Model Business Corporation Act §1.02 (2005).

This paragraph address the concern that under the Constitution a subsequent amendment to this act could not be applied to an existing statutory trust or foreign statutory trust. The official comment to Revised Model Business Corporation Act §1.02 (2005), on which this section is based, explains:

Provisions similar to section 1.02 have their genesis in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to section 1.02. The purpose of section 1.02 is to avoid any possible argument that a corporation has contractual or vested rights in any specific statutory provision and to ensure that the state may in the future modify its corporation statutes as it deems appropriate and require existing corporations to comply with the statutes as modified.

All articles of incorporation or certificates of authority granted under the Model Act are subject to the reservation of power set forth in section 1.02. Further, corporations “governed” by this Act—which includes all corporations formed or qualified under earlier, general incorporation statutes that contain a reservation of power—are also subject to the reservation of power of section 1.02 and bound by subsequent amendments to the Act.

Many states have constitutional provisions mandating the reservation of power to amend or modify corporate statutes and charters. In these states section 1.02 is also supported by specific constitutional authorization.

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

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(b) A common-law trust arising under the law of this state before or after [the effective date of this [act]] that does not have a predominantly donative purpose may elect to be governed by this [act] by filing of a certificate of trust under Section 201.

[(d) On [two years after the effective date of this [act]], this [act] governs the organization and internal affairs of all trusts created pursuant to a statute of this state that was required by that statute to file a certificate of trust with the [Secretary of State] before the effective date of this [act].]

Principal Source – Uniform Limited Partnership Act §1206 (2001).

Paragraphs (a) and (b) confirm that this act does not govern a common-law trust unless the trust forms a statutory trust by filing a certificate of trust under Section 201. However, consistent with Section 302, paragraph (b) of this Section prohibits a common-law trust with a predominantly donative purpose from becoming a statutory trust. An alternative mode for a common-law trust to

1 become a statutory trust is provided by the conversion provisions of Article 6. Unlike the
2 formation of a new statutory trust by filing a certificate of trust under Section 201, the conversion
3 provisions of Article 6 allow for the conversion of another organization into the statutory trust
4 form while preserving continuity in the converting organization's relationships with third parties.
5 See the Comments to Sections 701 and 705.

6
7 The drafting committee contemplated that some enacting jurisdictions might modify this
8 section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not
9 expected—to address other transition problems arising from differences between this Act and prior
10 law. For example, an enacting jurisdiction might choose to allow trusts formed under a prior
11 statute to remain governed by the prior statute for longer than the two years suggested in paragraph
12 (d).

13
14 Under Section 103(f)(16), this Section is not subject to override by the governing
15 instrument.

16
17 **SECTION 1006. REPEALS.** [On [all-inclusive date], the] [The] following are repealed:

18 (1) [the state Statutory Trust Act as amended and in effect immediately before [the
19 effective date of this [act]]];

20 (2) [the state Business Trust Act as amended and in effect immediately before [the effective
21 date of this [act]]]; and

22 (3) [the state Real Estate Investment Trust Act as amended and in effect immediately
23 before [the effective date of this [act]]].

24 **Comment**

25 **Principal Sources** – Uniform Limited Partnership Act §1205 (2001).

26
27 Paragraphs (1) and (2) supply model language for enacting jurisdictions that have
28 previously enacted a Statutory Trust Act or a Business Trust Act.

29
30 Paragraph (3) supplies model language for enacting jurisdictions that have previously
31 enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a
32 REIT, is not a type of trust but rather is a tax status awarded to any entity that qualifies under 26
33 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under 26 U.S.C.
34 §860D. Although the Internal Revenue Code at one time favored the trust form for the
35 organization of a REIT, the code today does not regulate the form of entity. [Citation to come.]
36 Accordingly, there is no longer any reason why a REIT must be organized as a trust, whether
37 statutory or common law. Indeed, data assembled by the reporter shows that in contemporary

1 practice most publicly-traded REITs are organized as Maryland corporations, not as trusts.
2 Nonetheless, prior to the liberalization of the tax code, a number of states enacted REIT statutes
3 that authorize the creation of a trust entity designed to qualify as a REIT under the code. Because
4 a statutory trust under this Act could serve the same purpose, the drafting committee contemplated
5 that enacting jurisdictions might take the occasion of enacting this act to repeal their REIT statutes.
6

7 Under Section 103(f)(16), this Section is not subject to override by the governing
8 instrument.
9

10 **SECTION 1007. EFFECTIVE DATE.** This [act] takes effect

11 **Comment**
12

13 **Principal Source** – Uniform Limited Partnership Act §1204 (2001).
14

15 Section 1005 specifies how this Act affects statutory trusts, with special provisions
16 pertaining to statutory trusts formed before the Act's effective date. There are no comparable
17 provisions for foreign statutory trusts. Therefore, once this Act is effective, it applies immediately
18 to all foreign statutory trusts, whether formed before or after the Act's effective date.
19

20 Under Section 103(f)(16), this Section is not subject to override by the governing
21 instrument.