

D R A F T
FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

WITH CHANGES SINCE FALL 2006 DRAFTING MEETING TRACKED

With Prefatory Notes and Comments

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ON UNIFORM STATE LAWS

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UNIFORM STATUTORY TRUST ENTITY ACT

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UNIFORM STATUTORY TRUST ENTITY ACT

Prefatory Note

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

To address the legal uncertainty over the common law business trust, at least thirty states have enacted legislation that validates the trust as a permissible form of business organization. See Robert H. Sitkoff, The Rise of the Statutory Business Trust [citation] (collecting state statutes). But the entity that arises under the more recent of these statutes is better understood as ~~the a~~ “statutory business trust,” “statutory trust entity,” or “statutory trust-” than as a common law business trust with statutory validation. See the Comment to Section 101.

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

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

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

The primary stimulus for the drafting of the Uniform Statutory Trust Entity Act is the

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

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

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

In choosing to follow Delaware, the drafting committee relied on a recent study that presents data on the number of statutory trusts formed in each state. See Sitkoff, *supra*, at ___. According to this study, the number of statutory trusts formed under the Delaware Act vastly exceeds the number formed in all other states, surpassing second-place Connecticut by a factor of almost ten to one. *Id.* at ___. The study also presents data on new trust formations. The new formation data show that the Delaware statutory trust has come also to dominate the Massachusetts business trust for the organization of business trusts more generally. *Id.* at ___. For a discussion of the Delaware Statutory Trust Act, see Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* ch. 19 (3d ed. 2005 Supp.).

Although under Section 105 ordinary trust law supplements this Act, numerous substantive provisions of this Act were drawn from corporate law, not from trust law. See, e.g., [Sections 302 \(internal affairs rule\); 304305\(eb\)](#) (attachment of statutory trust property); 401(a) (management by or under the authority of the trustees); [402-404](#) (standards of conduct of trustees); [405-408](#) (interested transactions); 506 (limited liability of “a domestic [business corporation](#)”). Looking to the corporate law model on these issues is consistent with the hybrid approach of the Delaware Act and reflects the nature of a statutory trust as [an unincorporated juridical](#) entity. [The Uniform Statutory Trust Entity Act is an unincorporated entity statute.](#)

In drafting the public filing and other provisions not unique to the statutory trust form, the drafting committee took the Uniform Limited Partnership Act (2001) as its starting point. For guidance on the common law of trusts, the drafting committee ~~looked to~~[took](#) the Uniform Trust Code (2000) [as its starting point](#).

Innovative Provisions. Although much of the Uniform Statutory Trust Entity Act reflects a reorganization and refinement of provisions found in the Delaware Statutory Trust Act, the Uniform Act contains several innovations including: (1) specification of rules that are not subject to override in the statutory trust's governing instrument (§103(b)); (2) exclusion of trusts with a ~~charitable or~~ prevailingly donative purpose (§~~301~~[302](#)); (3) clearer guidance on the relationship of ordinary trust law to statutory trust entities (§105); (4) clearer guidance on the relationship between the common law trust and statutory trust entities (§804); and (5) systematic treatment of conversion, merger, and dissolution (Article 6).

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

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

There is, however, no separate body of general business law that rivals ordinary trust law for application to a common law trust that has a business purpose. The common law of trusts applies to all trusts created under the common law, even those that have a business purpose, to the extent that the common law is not displaced by the trust instrument or specialized legislation. For this reason, although the Uniform Trust Code "is directed primarily at trusts that arise in an estate planning or other donative context," the Code applies to trusts with a business or commercial purpose to the extent that the Code's provisions are not displaced by the trust instrument or other legislation. UTC §102 cmt.

Accordingly, the Uniform Statutory Trust Entity Act is not a codification of general business law principles applicable to common law business trusts. Nothing in this Act displaces the common law of trusts, or the Uniform Trust Code, with respect to such trusts. [On the contrary,](#) Section 804(a) expressly confirms the continued applicability of the state's laws pertaining to trusts to a common law business trust.

The Uniform Statutory Trust Entity Act is more like a generic corporate code or unincorporated entity law than the Uniform Trust Code. Like a corporation, limited liability company, and limited partnership, but unlike a common law trust, a statutory trust is a juridical entity that may conduct transactions in its own name separate from that of its fiduciary and its beneficial owners. [See Sections 301, 305. Like those entities, but unlike a common law trust, a](#)

statutory trust is formed by making a filing with a public official. Compare Section 201 with Uniform Trust Code §401 (2000) and Restatement (Third) of Trusts §10 (2003).

Moreover~~Further~~, Section 105 provides that ordinary trust law supplements this Act in governing statutory trusts, but only to the extent not modified or displaced by this Act or the governing instrument—and this Act modifies or displaces a number~~host~~ of ordinary trust law principles including those concerning fiduciary standards of conduct (Section ~~402~~404) ~~and modification~~ and termination of trusts (Section ~~303~~304). Section 804(b) allows an existing common law trust that does not have a ~~charitable or~~ prevailingly donative purpose to convert into a statutory trust by filing a certificate of trust under Section 201.

Although the drafting committee contemplated that a statutory trust under this Act will be used primarily as a mode of business organization, Section 501(a) confirms that a person may become a beneficial owner of a statutory trust without an exchange of consideration. It is therefore possible that a statutory trust could be used as a substitute for the common law trust in a variety of commercial and noncommercial contexts. ~~To~~However, to ensure that a statutory trust is not used to evade ~~state regulatory oversight of charitable trusts or~~ mandatory rules applicable to common law trusts that enforce public policy limitations on donative transfers, Section ~~301(b)~~302 provides that a statutory trust may not have a ~~charitable or~~ prevailingly donative purpose.

1 **UNIFORM STATUTORY TRUST ENTITY ACT**

2

3 **[ARTICLE] 1**

4 **GENERAL PROVISIONS**

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

6 Trust Entity Act.

7 **Comment**

8

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

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

11 Business Trust Act,” or “Uniform Statutory Trust Act” would be a better title. However, after

12 deliberation informed by consultation with experts in the structured finance, bankruptcy, mutual

13 fund, and estate planning industries, the drafting committee rejected those and other such titles in

14 favor of “Uniform Statutory Trust Entity Act.”

15

16 The drafting committee included the word “entity” in the title for two reasons. First, the

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

18 property in its own name. A common law trust, by contrast, is not a juridical entity. Second, use

19 of the word “entity” in the title differentiates this act from the Uniform Trust Code, which is a

20 codification of the common law of trusts. However, to conform with prevailing trade usage

21 under the Delaware Statutory Trust Act, the entity that arises under this Act is called a “statutory

22 trust,” not a “statutory trust entity.” See Section 102(14). Moreover, because the entity features

23 of a statutory trust under this Act closely resemble those of a Delaware statutory trust, the

24 drafting committee assumed the applicability of Rev. Rul. 2004-86, 2004-33 IRB 191, to a

25 statutory trust under this Act. [Three questions for discussion: (1) Are we comfortable

26 saying this? (2) Should we ask the IRS for confirmation? (3) Should this statement be

27 located instead or in addition as a comment to 102(14)? Regarding question 2, the

28 Conference has done so before, for example in connection with the intersection of the

29 generation skipping transfer tax and the Uniform Statutory Rule Against Perpetuities.]

30

31 The drafting committee had three reasons for eschewing the phrase “business trust.”

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

33 contrary, Section ~~301~~ 302 confirms that a statutory trust may have any lawful purpose other than

34 a ~~charitable or~~ prevailingly donative purpose.

35

36 Second, the drafting committee endeavored to avoid any implication that a statutory trust

37 would necessarily qualify as a “business trust” under the bankruptcy code. [For discussion:

38 Rutledge’s suggestion to Sitkoff that the rest of this paragraph should be deleted.]Under the

1 bankruptcy code, the definition of a “debtor” eligible for bankruptcy includes a “person,” 11
2 U.S.C. §101(13), the definition of “person” includes a “corporation,” id. §101(41), and the
3 definition of “corporation” includes a “business trust.” Id. §101(9). Hence, a “business trust”
4 might qualify as an eligible “debtor.” Bankruptcy eligibility is a significant issue for trusts used
5 as special purpose entities in structured finance transactions, a principal use of the modern
6 statutory trust in practice. Such trusts are often designed to be “bankruptcy remote,” ~~the~~
7 ~~ultimate form of which is an entity that is not an eligible debtor under the bankruptcy code.~~
8 As Thus, as in the leading case of *In re Secured Equipment Trust of Eastern Airlines, Inc.*, 38
9 F.3d 86 (2d Cir. 1994), in certain configurations trusts used in securitization transactions have
10 indeed been held not to be “business trusts” under the bankruptcy code. The ultimate form of
11 “bankruptcy remoteness” is the use of an entity that is not an eligible debtor under the
12 bankruptcy code.
13

14 Third, the drafting committee was influenced by the revealed preference for “statutory
15 trust” over “business trust” among existing users of statutory business trusts as evidenced by the
16 dominant position of the Delaware Statutory Trust Act relative to the statutory or business trust
17 acts of the other states. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [in
18 progress]. In 2002 Delaware recast the “Delaware Business Trust Act” as the “Delaware
19 Statutory Trust Act,” replacing nearly every reference to “business trust” with “statutory trust.”
20 See 73 Del. Laws 329. The Connecticut statute, which is the second most popular, is likewise
21 cast as a Statutory Trust Act.
22

23 ~~Although styled the “Uniform Statutory Trust Entity Act,” to conform with current usage~~
24 ~~under the Delaware Statutory Trust Act the entity that arises under this Act is called a “statutory~~
25 ~~trust.” See Section 102(13).~~
26

27 SECTION 102. DEFINITIONS.

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

30 (2) “Certificate of trust” means the record that is delivered to the [Secretary of State] for
31 filing under Section 201.

32 (3) “Common law trust” means a fiduciary relationship with respect to property arising
33 from a manifestation of intention to create that relationship and subjecting the person that holds
34 title to the property to duties to deal with the property for the benefit of charity or for one or
35 more persons, at least one of which is not the sole trustee, whether or not the purpose of the trust

1 is donative or commercial. The term includes the type of trust known at common law as a
2 “business trust,” ~~or~~ “Massachusetts trust,” or “Massachusetts business trust”. ~~[For Discussion:~~

3 ~~We were asked in Hilton Head whether this last sentence belongs instead in the comment.]~~

4 (4) “Designated office” means:

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

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

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

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

12 (7) “Person” means an individual, corporation, statutory trust, foreign statutory trust,
13 common law trust, estate, partnership, limited partnership, limited liability company, association,
14 joint venture, government or governmental subdivision, agency, or instrumentality, or any other
15 legal or commercial entity. [For discussion: Style objects to our not using the boilerplate

16 definition of “person.” Here is a tracked-changes version of this section edited to match

17 the boilerplate: “Person” means an individual, corporation, ~~statutory trust, foreign~~
18 ~~statutory trust, common law trust,~~ estate, ~~trust,~~ partnership, limited partnership, limited
19 liability company, association, joint venture, public corporation, government or
20 governmental subdivision, agency, or instrumentality, or any other legal or commercial
21 entity.]

22 (8) “Qualified foreign statutory trust” means a foreign statutory trust that is authorized to

1 transact business in this state.

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

4 (910) “Recorded transmission” means any form of communication that creates a record;
5 electronic or otherwise.

6 (4011) “Related person”, with respect to a trustee, officer, employee, manager, or
7 beneficial owner, means:

8 (A) the spouse, ~~or a parent or sibling~~ of the person;

9 (B) a child, parent, sibling, grandchild, or grandparent of the person, or the spouse
10 of one of them; ~~[For Discussion, two issues: (1) Combining (A) and (B), and (2) whether to~~
11 ~~add language that would cover an entity owned by one of the covered individuals or in~~
12 ~~which a covered individual is a manager.]~~

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

14 (D) a trust or estate of which a related person described in subparagraph (A), (B),
15 or (C) is a substantial beneficiary; ~~[For Discussion: Should we define “substantial”?]or~~

16 (E) a trust, estate, incompetent, conservatee, or minor for which the person is a
17 fiduciary.

18 [For discussion: There has been continuing discontentment with this paragraph (11). At
19 the last meeting it was suggested that we examine several other potential models, and it was
20 also decided tentatively that an entity owned by one of the covered individuals should be
21 covered. Hence, here are some alternative models:

- 22 • SEC Rule 16a-1(e) –
 - 23 ○ “The term immediate family shall mean any child, stepchild, grandchild, parent,
 - 24 stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law,
 - 25 daughter-in-law, brother-in-law, or sister-in-law, and shall include adoptive
 - 26 relationships.”
- 27 • SEC Rule 144(a) –

- (1) An affiliate of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.
- (2) The term person when used with reference to a person for whose account securities are to be sold in reliance upon this section includes, in addition to such person, all of the following persons:
 - (i) Any relative or spouse of such person, or any relative of such spouse, any one of whom has the same home as such person;
 - (ii) Any trust or estate in which such person or any of the persons specified in paragraph (a)(2)(i) of this section collectively own 10 percent or more of the total beneficial interest or of which any of such persons serve as trustee, executor or in any similar capacity; and
 - (iii) Any corporation or other organization (other than the issuer) in which such person or any of the persons specified in paragraph (a)(2)(i) of this section are the beneficial owners collectively of 10 percent or more of any class of equity securities or 10 percent or more of the equity interest.
- RMBCA 8.60 –
 - (5) “Related person” means:
 - (i) the director’s spouse;
 - (ii) a child, stepchild, grandchild, parent, step parent, grandparent, sibling, step sibling, half sibling, aunt, uncle, niece or nephew (or spouse of any thereof) of the director or of the director’s spouse;
 - (iii) an individual living in the same home as the director;
 - (iv) an entity (other than the corporation of an entity controlled by the corporation) controlled by the director or any person specified above in this subdivision (5);
 - (v) a domestic or foreign (A) business or nonprofit corporation (other than the corporation or an entity controlled by the corporation) of which the director is a director, (B) unincorporated entity of which the director is a general partner or a member of the governing body, or (C) individual, trust, or estate for whom or of which the director is a trustee, guardian, personal representative or like fiduciary; or
 - (vi) a person that is, or an entity that is controlled by, an employer of the director.
 - Official Comment 5 to RMBCA 8.60:

Six categories of “related person” of the director are set out in subdivision (5). These categories are specific, exclusive and preemptive.

The first three categories involved closely related family, or near-family, individuals as specified in clauses (i) through (iii). The causes are exclusive insofar as family relationships are concerned and include adoptive relationships. The references to a “spouse” include a common-law spouse. Clause (iii) covers personal, as opposed to business, relationships; for example, clause (iii) does not cover a lessee.

Regarding the subcategories of persons described in clause (v) from the perspective of X Co., certain of D’s relationships with other entities and D’s fiduciary relationships are always a sensitive concern, separate and apart from whether D has a financial interest in the transaction. Clause (v) reflects the policy judgment that D cannot escape D’s legal obligation to act

1 in the best interests of another person for whom *D* has such a relationship
2 and, accordingly, that such a relationship (without regard to any financial
3 interest on *D*'s parks) should cause the relevant entity to have "related
4 person" status.

5 The term "employer" as used in subdivision (5)(vi) is not separately
6 defined that should be interpreted sensibly in light of the purpose of the
7 subdivision. The relevant inquiry is whether *D*, because of employment
8 relationship with an employer who had significant stake in the outcome of
9 the transaction, is likely to be influenced to act in the interest of that
10 employer rather than in the interest of *X* Co.

11
12 (412) "Sign" means, with the present intent to authenticate or adopt a record:

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

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

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

19 (414) "Statutory trust" means an unincorporated entity formed under this [act]. [For
20 discussion: Style would like us to delete "unincorporated." But the term is used in the
21 RMBCA and elsewhere.]

22 (415) "Trust instrument" means any instrument ~~or instruments~~ other than the certificate
23 of trust, whether referred to as a trust agreement, trust instrument, declaration of trust, bylaws, or
24 otherwise, that provides for the governance of the affairs of the statutory trust and the conduct of
25 its business.

26 (416) "Trustee" means a person designated, appointed, or elected as a trustee of a
27 statutory trust or foreign statutory trust in accordance with the governing instrument or
28 applicable law.

1 **Comment**

2
3 **Principal Sources** – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
4 Act §34-501; Uniform Limited Partnership Act §102 (2001).
5

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

10 Paragraphs (2), (6), and (4415) define “certificate of trust,” “governing instrument,” and
11 “trust instrument” respectively. The certificate of trust is the record that must be filed with a
12 public official under Section 201 to form a statutory trust. The trust instrument is the transaction
13 document that provides for the governance of the affairs of the statutory trust and that need not
14 be made part of the public record. Together, the certificate of trust and the trust instrument
15 compose the governing instrument. The term “governing instrument” is in the singular to
16 conform with standard commercial usage. Conflicts between the certificate of trust and the
17 governing instrument are resolved pursuant to Section 201(d). Although Paragraph (15) is
18 phrased in the singular, consistent with current commercial practice the drafting committee
19 contemplated that there would often be more than one “trust instrument.” Section 104(c) makes
20 the authorization of multiple instruments explicit.
21

22 In using but not defining the term “substantial” in Paragraph (11)(D), the drafting
23 committee contemplated that a totality of the circumstances test would apply.
24

25 [Depending on how we resolve the discussion question in the comment to Section
26 101, commentary on 102(14) and the 2004 revenue ruling might go here.]
27

28 Paragraph (16) defines trustee as a person designated as such in accordance with the
29 governing instrument or applicable law. For discussion of trustee appointment, see the Comment
30 to Section 401.
31

32
33 **SECTION 103. DEFAULT AND MANDATORY RULES.**

34 (a) Except as otherwise provided in the governing instrument, this [act] governs the
35 management and affairs of the statutory trust and the rights, interests, duties, obligations, powers,
36 and relations between and among the trustees, beneficial owners, and other persons.~~duties and~~
37 ~~powers of a trustee, relations among trustees, and the rights and interests of a beneficial owner.~~
38

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

- (1) the provisions of [Articles] 2, 7, and 8;
- (2) the exclusion of a prevailingly donative ~~and charitable~~ purposes under Section ~~301(b)~~ 302;
- (3) ~~the law governing the internal affairs of a statutory trust under the choice of~~ governing law as provided in Section ~~302~~ 303;
- (4) the standards of conduct for trustees under Section ~~402~~ 404, but the governing instrument may prescribe the standards by which “good faith”, “best interests of the statutory trust”, and “care that a person in a like position would reasonably believe appropriate under similar circumstances” are determined, if the standards are not manifestly unreasonable;
- (5) the limitations on direction of trustees provided in Section 405(b);
- ~~(56)~~ the right of a trustee to information under Section ~~404~~ 407, but the governing instrument may prescribe the standards by which for assessing whether information is “necessary reasonably related” to the trustee’s discharge of the trustee’s duties as trustee is determined if the standards are not manifestly unreasonable;
- ~~(67)~~ the prohibition under Section ~~407~~ 410 of indemnification, advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless indifference;
- ~~(7) the invalidity under Section 409(b) of a direction to a trustee or other person if the direction is manifestly contrary to the terms of the governing instrument or would constitute a serious breach of fiduciary duty;~~
- (8) the right of a beneficial owner to information under Section 503, but the governing instrument may prescribe the standards by which for assessing whether information is “necessary reasonably related” to the beneficial owner’s ability to enforce its rights as a

1 beneficial owner is determined if the standards are not manifestly unreasonable; ~~and~~
2 (9) the right of a beneficial owner to bring a derivative action under Section 508,
3 but the governing instrument may modify the terms of Section 508 to subject the right to
4 additional standards and restrictions including the requirement that beneficial owners owning a
5 specified amount or type of beneficial interest join in bringing the derivative action, provided
6 that the additional standards and restrictions are not manifestly unreasonable;

7 ~~(910) the public filing requirements in connection with a conversion or merger~~
8 ~~under Sections 604 and 608~~ Sections 601, 604, 605, 608, and 609; and

9 (11) the rules under Section 611 for dissolution of a statutory trust.-

10 ~~[For Discussion: Whether to include the following paragraph (c), which is based on~~
11 ~~the new ReULLCA.] (c) The court shall decide any claim under subsections (b)(4), (b)(5), or~~
12 ~~(b)(8) that a prescribed standard is manifestly unreasonable. The court:~~

13 ~~_____ (1) shall make its determination as of the time the challenged term became part of~~
14 ~~the governing instrument and by considering only circumstances existing at that time; and~~

15 ~~_____ (2) may invalidate the term only if, in light of the purposes and activities of the~~
16 ~~statutory trust, it is readily apparent that:~~

17 ~~_____ (A) the objective of the term is unreasonable; or~~

18 ~~_____ (B) the term is an unreasonable means to achieve the provision's~~
19 ~~objective.~~

20 **Comment**

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

Paragraph (a) emphasizes that the Uniform Statutory Trust Entity Act is primarily a default statute. Most of the Act's provisions may be overridden by the terms of the governing instrument.

Paragraph (b) lists the provisions of this act that are not subject to override in the governing instrument of a statutory trust. Most concern the rights of nonparties or public filing and notice requirements. By contrast, nearly with two exceptions all the provisions of this Act concerning the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficial owner may be overridden or at least altered by the terms of the governing instrument. Consistent with longstanding principles of trust law, the main~~The first~~ exception is the mandatory prohibition of indemnification, advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless indifference in ~~(paragraph (b)(67)).~~ This exception is familiar law. See Restatement (Second) of Trusts §222 (1959); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees §542 (rev. 2d ed. 1993); Uniform Trust Code §1008 (2000). See also John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1121-25 (2004). In 2006, the Delaware Statutory Trust Act was revised in a similar vein. See 2006 Delaware Laws Ch. 418 §7, revising Delaware Statutory Trust Act §3806(e). As revised, §3806(e) provides that the “governing instrument may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing instrument may not eliminate the implied contractual covenant of good faith and fair dealing.”

[This paragraph was moved up from later in this comment, but with tracking off so that changes within the paragraph would be indicated.] There second exception is contained in Paragraph-paragraph (b)(75), which makes mandatory the invalidity under Section ~~409~~405(b) of a direction to a trustee or other person that is manifestly contrary to the terms of the governing instrument or would constitute a serious breach of fiduciary duty. The reference to “serious” breach of fiduciary duty is designed to exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial owner. For some purposes, trust law distinguishes between serious and not serious breaches of trust.~~The use of the term “serious” for this purpose is consistent with the common law of trusts.~~ See, e.g., Uniform Trust Code §706(b)(1) (2000); Austin W. Scott, William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed. 2006); Restatement (Second) of Trusts §107 cmt. b (1959). However, the effect of paragraph (b)(75) is limited by paragraph (b)(4), which allows the trustee's fiduciary duty to be altered by the governing instrument if the alteration is not manifestly unreasonable.

Paragraphs (b)(4), (b)(56), ~~and~~ (b)(68), and (b)(9) allow the governing instrument to alter the nature of the trustee's fiduciary obligation, the right of a trustee to information, ~~and~~ the right of a beneficial owner to information, and the right of a beneficial owner to bring a derivative action, but only if the alteration is not “manifestly unreasonable.” In opting for a “manifestly unreasonable” standard instead of Delaware's “good faith and fair dealing” formulation, see 2006 Delaware Laws Ch. 418 §5, revising Delaware Statutory Trust Act §3806(c), the drafting committee took notice of the ~~term's~~ use of “manifestly unreasonable” in Revised Uniform

Limited Liability Company Act §110(d) (2006); Uniform Limited Partnership Act §110(b) (2001), Revised Uniform Partnership Act §103(b) (1997), Uniform Limited Liability Company Act §103(b) (1996), and intended a similar meaning here. ~~[?Moreover, paragraph (c), which is based on Revised Uniform Limited Liability Company Act §110(h), provides rules for applying the “manifestly unreasonable” standard.?]~~ See generally Mark J. Loewenstein, Fiduciary Duties and Unincorporated Business Entities: In Defense of the “Manifestly Unreasonable” Standard, __Tulsa L. Rev. __ (2006). The term is also used variously in Uniform Commercial Code §§1-201(28); 1-302(b); 2A-103(u); 4-103(a); 8-402(c)(1); 8-403(c); 9-603(a).

~~Paragraph (b)(7) makes mandatory the invalidity under Section 409(b) of a direction to a trustee or other person that is manifestly contrary to the terms of the governing instrument or would constitute a serious breach of fiduciary duty. The reference to “serious” breach of fiduciary duty is designed to exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial owner. The use of the term “serious” for this purpose is consistent with the common law of trusts. See, e.g., Austin W. Scott, William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed. 2006); Restatement (Second) of Trusts §107 cmt. b (1959). However, the effect of paragraph (b)(7) is limited by paragraph (b)(4), which allows the trustee’s fiduciary duty to be altered by the governing instrument if the alteration is not manifestly unreasonable. [This paragraph has been moved up.]~~

The Investment Company Act of 1940 (the “1940 Act”) trumps this Act with respect a statutory trust that registers as an investment company. For such a statutory trust the 1940 Act imposes additional mandatory rules. See, e.g., the comments-Comments to Sections 209 (name of statutory trust), 405-408 (interested transactions), 407-410 (indemnification, advancement, and exoneration), 410-411 (delegation by trustee), and 411-412 (action by trustees). ~~[For Discussion: Rutledge’s global objection to all references to the 1940 Act. This is the first such instance. Subsequent instances will not be flagged.]~~

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

~~[For Discussion: Whether the comment to all sections that are made mandatory under this section should so indicate. Currently, most do not.]~~

SECTION 104. SCOPE OF GOVERNING INSTRUMENT.

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

~~(1) any provision relating to:~~

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

1 ~~———(2B) any provision relating to~~ the rights, interests, duties, ~~and~~ obligations,
2 and powers of the trustees, beneficial owners, and other persons; and

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

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

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

8 ~~———(2) eliminate a beneficial owner's right to bring a derivative action under Section~~
9 ~~508 or subject such right to additional standards and restrictions including the requirement that~~
10 ~~beneficial owners owning a specified amount or type of beneficial interest join in bringing the~~
11 ~~derivative action;~~

12 (3) limit a beneficial owner's right to transfer its beneficial interest;

13 ~~———[The series provisions have been moved to Section 306.]———(4) provide for~~
14 ~~classes, groups, or series of trustees or beneficial owners, or classes, groups, or series of~~
15 ~~beneficial interests, having such relative rights, powers, and duties as the governing instrument~~
16 ~~may provide, and provide for the creation of additional classes, groups, or series of trustees,~~
17 ~~beneficial owners, or beneficial interests, having such relative rights, powers, and duties as may~~
18 ~~be established, including rights, powers, and duties senior or subordinate to existing classes,~~
19 ~~groups or series of trustees, beneficial owners or beneficial interests;~~

20 ~~———(5) provide for designated series of trustees, beneficial owners, or beneficial~~
21 ~~interests having separate rights, powers, or duties with respect to specified property or~~
22 ~~obligations or profits and losses associated with specified property or obligations, and permit the~~

1 ~~series to have a separate business purpose or investment objective;~~

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

5 (73) if and to the extent that voting rights are granted under the governing
6 instrument, include provisions relating to:

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

9 (B) waiver of notice;

10 (C) action by consent without a meeting;

11 (D) establishment of record dates, quorum requirements, or voting in
12 person, by proxy, by recorded transmission, by telephone, by or video conference, or in any
13 other manner; or

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

15 (84) provide for ~~the taking of~~ any action to be taken without the vote or approval
16 of any particular trustee or beneficial owner, or any class, group, or series of trustees or
17 beneficial owners, including:

18 (A) ~~the~~ amendment of the governing instrument;

19 (B) ~~the~~ accomplishment of a merger, conversion, or reorganization;

20 (C) ~~the~~ appointment of one or more trustees;

21 (D) ~~the~~ sale, lease, exchange, transfer, pledge or other disposition of all or
22 any part of the assets of the statutory trust or the assets of any series;

(E) ~~the~~ dissolution of the statutory trust, ~~and~~ [For discussion: This provision is in tension with Section 103(b)(11), which makes Section 612 mandatory.]

(F) ~~the creation of a class, group, or series of beneficial interests that was not previously outstanding;~~ [For discussion: Is not this provision mooted by Section 306(a)?]

(95) provide for the present or future creation of more than one statutory trust, including the creation of a future statutory trust to which all or any part of the assets, liabilities, profits, or losses of any existing statutory trust ~~will~~ may be transferred or exchanged, and for the conversion of beneficial interests in an existing statutory trust, or series thereof, into beneficial interests in the separate statutory trust, or series thereof;

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

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

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

1 (139) provide that a person becomes a beneficial owner, acquires a beneficial
2 interest, and is bound by the governing instrument if the person, ~~or a representative authorized~~
3 ~~by the person orally, in a record, or by conduct, such as payment by the representative for a~~
4 ~~beneficial interest~~, complies with the conditions for becoming a beneficial owner set forth in the
5 governing instrument such as payment to the statutory trust or to a previous beneficial owner;

6 (10) provide that a person may comply under paragraph (9) by a representative
7 authorized by the person orally, in a record, or by conduct, such as payment by the representative
8 for a beneficial interest [For discussion: “by” the representative versus “to” the
9 representative.];

10 ~~_____ (14) consist of one or more instruments, agreements, declarations, bylaws, or~~
11 ~~other records and refer to or incorporate any record containing provisions relating to the~~
12 ~~governance of the affairs of the statutory trust and the conduct of its business;~~

13 (1511) provide that the statutory trust or the trustees, acting for and on behalf of
14 the statutory trust, are deemed to hold beneficial ownership of any income earned on securities
15 held by the statutory trust that are issued by any business ~~entities~~ entity formed, organized, or
16 existing under the laws of any jurisdiction, including the laws of any foreign country; and

17 (1612) provide for the establishment of record dates ~~with respect to~~ for allocations
18 and distributions.

19 (c) The governing instrument may include one or more instruments, agreements,
20 declarations, bylaws, or other records and refer to or incorporate any record containing
21 provisions relating to the governance of the affairs of the statutory trust and the conduct of its
22 business.

1 **Comment**

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

4
5 The unusual principal sources citation reflects the drafting committee’s decision to
6 collect in a single section—that is, in paragraphs (b) and (c) of this Section—the various
7 permissive rules regarding the scope of the governing instrument that are scattered throughout
8 the Delaware and Connecticut Statutory Trust Acts. The main exceptions concern the
9 permissive rules regarding the creation of one or more series of a statutory trust in Section
10 306(a), and the permissive rules regarding the allowable remedies for a beneficial owner’s
11 breach in Section 501(c).

12
13 Paragraph (a) emphasizes the freedom of contract afforded to transactional planners by
14 the Uniform Statutory Trust Entity Act, which is primarily a default statute.

15
16 Paragraph (b) enumerates a nonexhaustive list of provisions that may validly be included
17 in a statutory trust’s governing instrument. The drafting committee concluded that the demand
18 of third parties and transactional planners to see language that expressly authorizes specific
19 terms justified inclusion of a detailed list. Prior to statutory confirmation, doubts sometimes
20 arose in opinion letters. Similar reasoning underlies the ~~existence-provision~~ of a detailed
21 schedule of powers in Uniform Trust Code §816 (2000) notwithstanding the broad general
22 statement in Uniform Trust Code §815.

23
24 ~~Among other things, paragraph (b) confirms in subsections (4) to (6) that a statutory trust~~
25 ~~may be organized with multiple series. Structuring a statutory trust with multiple series is~~
26 ~~common in mutual funds and other investment companies registered under the Investment~~
27 ~~Company Act of 1940. Section 304(d) provides that in a statutory trust that has created separate~~
28 ~~series under Section 104(b)(4) to (6), the debts, liabilities, and other obligations of a particular~~
29 ~~series are enforceable against the assets of that series only, but only if (1) separate records are~~
30 ~~maintained for each series and (2) notice of the limitation on liabilities of a series is set forth in~~
31 ~~the certificate of trust. Under Section 201 the certificate of trust is made part of the public~~
32 ~~record. Section 612 provides for the dissolution of a series.~~

33
34 **SECTION 105. APPLICABILITY OF TRUST LAW.** The law of this state pertaining
35 to common law trusts supplements this [act], except to the extent modified or displaced by the
36 governing instrument.

37 ~~——(1) this [act];~~

38 ~~——(2) subject to Section 103(b), the governing instrument; or~~

1 | ~~_____ (3) another statute of this state.~~

2 | **Comment**

3 |
4 | **Principal Sources** – Uniform Trust Code §106 (2000); Delaware Statutory Trust Act
5 | §3809; Connecticut Statutory Trust Act §34-519.

6 |
7 | Consistent with the Delaware Statutory Trust Act, the Uniform Statutory Trust Entity Act
8 | provides that state trust law, not corporate law, supplements this Act and the terms of the
9 | governing instrument. Thus, in an enacting jurisdiction that has also enacted the Uniform Trust
10 | Code, the Code will apply to a statutory trust to the extent that the Code’s provisions are not
11 | displaced by this act or the governing instrument. However, because this Act’s schedule of
12 | mandatory rules in Section 103 does not include this Section, the rules scheduled in Uniform
13 | Trust Code §105 that are mandatory with respect to a common law trust are not mandatory with
14 | respect to a statutory trust. [For discussion: This statement warrants discussion.] To prevent
15 | evasion of the mandatory rules in the Uniform Trust Code, which enforce public policy
16 | limitations on donative transfers, Section 302 of this Act provides that a statutory trust may not
17 | have “a prevailingly donative purpose.” For further discussion of the relationship between this
18 | Act and the common law and the Uniform Trust Code, see the Prefatory Note to this Act under
19 | the heading “Relationship to Common Law Trusts and the Uniform Trust Code.”

20 |
21 | ~~_____ In resolving this question in favor of looking to~~ trust law to supply defaults to fill gaps in
22 | this act and the governing instrument, the drafting committee was strongly influenced by the
23 | revealed preference for trust law among existing users of statutory trusts as evidenced by the
24 | popularity of the Delaware Act as compared to the business trust acts (such as those in Arizona,
25 | Indiana, Kansas, Mississippi, Montana, Oregon, Tennessee, Washington, and West Virginia) that
26 | look to corporate law. See Robert H. Sitkoff, The Rise of the Statutory Business Trust [in
27 | progress].

28 |
29 | **SECTION 106. RULES OF CONSTRUCTION.**

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

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

36 | **Comment**

1
2 **Principal Sources** – Delaware Statutory Trust Act §3825; Connecticut Statutory Trust
3 Act §34-546.
4

5 Paragraph (a) emphasizes the freedom of contract afforded to transactional planners by
6 the Uniform Statutory Trust Entity Act, which is primarily a default statute.
7

8 Paragraph (b) admonishes the courts not to apply to this Act the canon of construction
9 that statutes in derogation of the common law are to be strictly construed. Although Revised
10 Uniform Partnership Act §104 (1997) does not include a similar admonition on the ground that
11 the “principle is now so well established that it is not necessary to so state in the Act,” id. cmt.,
12 the drafting committee for the Uniform Statutory Trust Entity Act included this admonition
13 because several of this Act’s provisions are designed specifically to reject the application to a
14 statutory trust of one or more common law trust principles. Put differently, several provisions of
15 this Act derogate the common law. Those provisions should be interpreted accordingly.

1 [ARTICLE] 2

2 FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

3 SECTION 201. CERTIFICATE OF TRUST.

4 (a) To form a statutory trust, a person must deliver a certificate of trust ~~must be delivered~~
5 to the [Secretary of State] for filing. ~~The~~

6 (b) A certificate of trust must contain:

7 (1) ~~state~~ the name of the statutory trust, which must comply with Section 209;

8 (2) ~~provide~~ the street and mailing addresses of ~~its the current~~ designated office of
9 the statutory trust;

10 (3) ~~provide~~ the name and street and mailing addressed of the initial agent of the
11 statutory trust for service of process; and

12 (4) notice if the statutory trust might have one or more series.

13 ~~(bc)~~ A certificate of trust may ~~also~~ contain any ~~other~~ information in addition to that
14 required by subsection (b) that is not inconsistent with this [act].

15 ~~(ed)~~ Subject to Section 205(c) a statutory trust is formed when a certificate of trust that
16 complies with subsection (b) is filed by the [Secretary of State] ~~files the certificate of trust.~~

17 ~~(de)~~ If ~~any a~~ provision of ~~the a~~ trust instrument is inconsistent with the filed certificate of
18 trust, a filed statement of cancellation or change, or filed articles of conversion, reorganization,
19 or merger:

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

22 (2) the certificate of trust, statement of cancellation, or change or articles of

conversion or merger prevails as to a person other than a trustee or a beneficial owner that reasonably relies to its detriment on the filed record.

Comment

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

Unlike a common law trust, a statutory trust is a creature of statute that requires a filing with the state to come into existence. ~~-(Filing rules are typical of limited liability entities).~~ Such filing rules serve a notice function, alerting interested parties to creation and existence of a new limited liability juridical entity.

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

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

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

SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF TRUST.

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

- (1) the name of the statutory trust;

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

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

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

(1) cause the certificate to be amended; or

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

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

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

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

Comment

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

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

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

SECTION 203. STATEMENT OF CANCELLATION.

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

- (1) the name of the statutory trust;
- (2) the date of filing of its initial certificate of trust;
- (3) that the statutory trust has completed winding up; and
- (4) any other information as determined by the trustees filing the statement.

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

~~—— (c) On application of any person that shows good cause, the [appropriate court] may appoint a person to be a receiver for a terminated statutory trust with the power to undertake any action that might have been done by the statutory trust prior to its termination if such action is necessary for final settlement of unfinished business of the statutory trust. [For Discussion: Rutledge question to Sitkoff regarding limitation to “terminated” statutory trust.] [This paragraph was moved to Section 611.]~~

Comment

Principal Sources – Uniform Limited Partnership Act §203 (2001); Delaware Statutory Trust Act §3810; Connecticut Statutory Trust Act §34-503; ~~Delaware Limited Liability Company Act §18-805.~~

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

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

~~—— Paragraph (c) provides for the possibility that after issuance of a statement of cancellation additional unfinished business of the statutory trust is discovered.~~

SECTION 204. SIGNING OF RECORDS.

1 ~~—(a)~~ A record delivered to the [Secretary of State] for filing pursuant to this [act] must be
2 signed by at least one of the trustees.

3 ~~—(b) Any person may sign by an attorney in fact any record filed pursuant to this [act].~~ [For
4 discussion: Style says that “This is redundant of the law of agency.”]

5 **Comment**

6
7 **Principal Sources** – Uniform Limited Partnership Act §204 (2001); Delaware Statutory
8 Trust Act §3811; Connecticut Statutory Trust Act §34-504.

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

12
13
14 **SECTION 205. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY**
15 **OF STATE]; EFFECTIVE TIME AND DATE.**

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

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

24 (c) Except as otherwise provided in Sections 206 and 214, a record delivered to the
25 [Secretary of State] for filing under this [act] may specify an effective time and a delayed
26 effective date. Except as otherwise provided in this [act], a record filed by the [Secretary of
27 State] is effective:

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

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

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

(A) the specified date; or

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

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

(A) the specified date; or

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

Comment

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

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

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

1
2 Paragraph (c) allows most records to have a delayed effective date, up to 90 days after
3 the date the record is filed by the filing officer. A record specifying a longer delay will not be
4 rejected. Instead, under paragraph (c)(3) and (4), the delayed effective date is adjusted by
5 operation of law to the “90th day after the record is filed.” This Act does not require the filing
6 officer to notify anyone of the adjustment.
7

8 Consistent with the existing statutory trust acts, but inconsistent with most corporate
9 codes, this Act makes no provision for collecting a franchise tax. See generally Marcel Kahan &
10 Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205,
11 1218-33 (2001).
12

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

16 **SECTION 206. CORRECTING FILED RECORD.** 17

18 (a) A statutory trust or qualified foreign statutory trust may deliver to the [Secretary of
19 State] for filing a statement of correction to correct a filed record ~~previously delivered by the~~
20 ~~statutory trust or foreign statutory trust to the [Secretary of State] and filed by the [Secretary of~~
21 ~~State];~~ if at the time of filing the record contained incorrect ~~or erroneous~~ information or was
22 defectively or erroneously signed.

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

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

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

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

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

1 is effective;

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

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

6 **Comment**

7
8 **Principal Source** – Uniform Limited Partnership Act §207 (2001).

9
10 A statement of correction is appropriate only to correct inaccuracies that existed or
11 signatures that were defective “at the time of filing.” A statement of correction may not be used
12 to amend or revise a record that was accurate when filed but has become inaccurate as a result of
13 subsequent events.

14
15 Under paragraph (c), a statement of correction “relates back” by way of retroactive
16 application except against persons that have relied on the uncorrected record and would be
17 adversely affected if the correction related back.

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

21 22 **SECTION 207. CERTIFICATE OF EXISTENCE OR REGISTRATION.**

23
24 (a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish
25 to the person making the request a certificate of existence for a statutory trust if the records filed
26 in the [office of the Secretary of State] show that the [Secretary of State] has filed a certificate of
27 trust and has not filed a statement of cancellation. A certificate of existence must state:

28 (1) the ~~statutory trust's~~ name of the statutory trust;

29 (2) that ~~it the statutory trust~~ was ~~duly~~ formed under the laws of this state and the
30 date of formation;

31 (3) that all fees and penalties due under this [act] or other law to the [Secretary of

1 State] have been paid;

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

3 and

4 (54) whether the ~~statutory trust's~~ most recent annual report of the statutory trust
5 required by Section ~~211~~215 has been filed by the [Secretary of State]; and

6 (5) that a statement of cancellation has not been filed by the [Secretary of State].

7 (b) The [Secretary of State], upon request and payment of the requisite fee, shall furnish a
8 certificate of registration for a foreign statutory trust if the records filed in the [office of the
9 Secretary of State] show that the [Secretary of State] has filed a certificate of authority, has not
10 revoked the certificate of authority, and has not filed a notice of cancellation. A certificate of
11 registration must state: ~~[For Discussion: Whether (b) and the part of (c) that references~~
12 ~~registration (rather than existence) belong in Article 7.]~~[For Discussion: Because Style
13 believes that (b) and part of (c) should be moved to Article 7, it asks that we reconsider our
14 decision last time not to do so. To that end, it has supplied Sitkoff and Vigdor with a
15 revision of this section, and a new section for Article 7 (called “Certificate of
16 Registration”).]

17 (1) the foreign statutory trust's name and any alternate name adopted under
18 Section 706 for use in this state;

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

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

(34) whether the foreign statutory trust's most recent annual report required by Section 211-215 has been filed by the [Secretary of State]; and

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

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

Comment

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

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

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

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

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

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

SECTION 208. ~~CANCELLATION OF CERTIFICATE OF~~ ~~EXISTENCE~~ ADMINISTRATIVE DISSOLUTION.

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

1 ~~Discussion: Rutledge comments to Sitkoff re administrative dissolution.~~

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

4 (2) appoint and maintain an agent for service of process;

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

7 (4) file ~~an~~the annual report required by Section 215.

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

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

15 (2) ~~the statutory trust's failures to comply with any provision of subsection (a)~~
16 ~~that is~~ the basis for the ~~revocation~~cancellation under subsection (a).

17 (c) The authority of a statutory trust to transact business ceases on the effective date of
18 cancellation unless the statutory trust cures the failures to comply with subsection (a) stated in
19 the notice.

20 (d) If ~~the a~~ statutory trust cures the failures stated in the notice of cancellation under
21 subsection (c), the [Secretary of State] shall indicate that the statutory trust is reinstated on the
22 filed notice. The reinstatement of the statutory trust relates back for all purposes to the date of

1 the notice of cancellation. [For discussion: (1) Rutledge’s letter to Sitkoff of April 2, 2007
2 regarding administrative dissolution, and (2) ReULLCA §§705-707. Both were circulated
3 with this draft.]

4 **Comment**

5
6 **Principal Source** – Uniform Limited Partnership Act §906 (2001).

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

10 11 12 **SECTION 209. NAME OF STATUTORY TRUST.**

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

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

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

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

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

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

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

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

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

(A) has merged into the applicant;

(B) has been converted into the applicant; or

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

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

Comment

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

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

§270.35d-1 (listing types of names that have been deemed “materially deceptive or misleading”).
Under Section 103(b)(1), this Section is not subject to override by the governing instrument.

SECTION 210. RESERVATION OF NAME.

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

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

(2) a statutory trust or a ~~foreign statutory trust authorized to transact business in this state~~qualified foreign statutory trust intending to adopt the name;

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

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

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

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

(b) A person may apply to reserve a name under subsection (a) by delivering to the [Secretary of State] for filing an application that states the name to be reserved and the paragraph of subsection (a) ~~which~~that applies. If the [Secretary of State] finds that the name is available for use by the applicant, the [Secretary of State] shall file a statement of name reservation and

1 thereby reserve the name for the exclusive use of the applicant for a 120-day period.

2 (c) An applicant that has reserved a name pursuant to subsection (b) may reserve the
3 same name for additional 120-day periods. A person having a current reservation for a name
4 may not apply for another 120-day period for the same name until 90 days have elapsed in the
5 current reservation.

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

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

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

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

14 **Comment**

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

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

19 20 21 **SECTION 211. ANNUAL REPORT FOR [SECRETARY OF STATE].**

22 ~~—(a) Each statutory trust or a foreign statutory trust authorized to transact business in this~~
23 ~~state must deliver to the [Secretary of State] for filing an annual report that states the name of the~~
24 ~~statutory trust or foreign statutory trust and:~~

25 ~~—(1) in the case of a domestic statutory trust:~~

1 ~~_____ (A) the street and mailing address of its designated office; and~~
2 ~~_____ (B) the name and street and mailing address of its agent for service of~~
3 ~~process; or~~
4 ~~_____ (2) in the case of a foreign statutory trust:~~
5 ~~_____ (A) any alternate name adopted under Section 706(a);~~
6 ~~_____ (B) the name of the state or other jurisdiction under whose law the foreign~~
7 ~~statutory trust is formed; and~~
8 ~~_____ (C) the street and mailing address of its principal office and, if the laws of~~
9 ~~the jurisdiction under which the foreign statutory trust is formed require it to maintain an office~~
10 ~~in that jurisdiction, the street and mailing address of the required office; and~~
11 ~~_____ (D) the name and street and mailing address of its agent for service of~~
12 ~~process in this state.~~
13 ~~_____ (b) Information in an annual report under this section must be current as of the date the~~
14 ~~annual report is delivered to the [Secretary of State] for filing.~~
15 ~~_____ (c) The first annual report under this section must be delivered to the [Secretary of State]~~
16 ~~between [January 1 and April 1] of the year following the calendar year in which a statutory trust~~
17 ~~was formed or a foreign statutory trust was authorized to transact business. An annual report~~
18 ~~must be delivered to the [Secretary of State] between [January 1 and April 1] of each subsequent~~
19 ~~calendar year.~~
20 ~~_____ (d) If an annual report under this section does not contain the information required in~~
21 ~~subsection (a), the [Secretary of State] shall promptly notify the reporting statutory trust or~~
22 ~~foreign statutory trust and return the report to it for correction. If the report is corrected to~~

1 | ~~contain the information required in subsection (a) and delivered to the [Secretary of State] within~~
2 | ~~30 days after the effective date of the notice, it is timely delivered.~~

3 | ~~—— (e) If a filed annual report under this section contains an address of a designated office or~~
4 | ~~the name or address of an agent for service of process which differs from the information shown~~
5 | ~~in the records of the [Secretary of State] immediately before the filing, the differing information~~
6 | ~~in the annual report is considered a statement of change under Section 213.~~

7 | **Comment**

8 |
9 | ~~—— Source —~~ Uniform Limited Partnership Act §210 (2001).
10 |

11 | **SECTION ~~212~~211. AGENT FOR SERVICE OF PROCESS.**

12 | (a) A statutory trust ~~and or~~ a qualified foreign statutory trust ~~granted a certificate of~~
13 | ~~authority must shall~~ designate and continuously maintain in this state an agent for service of
14 | process.

15 | (b) An agent for service of process of a statutory trust or qualified foreign statutory trust
16 | must be an individual who is a resident of this state or a person authorized to do business in this
17 | state ~~that~~ which maintains an office in this state.

18 | **Comment**

19 |
20 | **Principal Sources** – Uniform Limited Partnership Act §114 (2001); Delaware Statutory
21 | Trust Act §3804; Connecticut Statutory Trust Act §34-507.
22 |

23 | Under Section 201(a)(3), the initial designation of a statutory trust's agent for service of
24 | process is made in the original certificate of trust. Under Section 702(a)(3), the initial
25 | designation of a foreign statutory trust's agent for service of process is made in the original
26 | application for a certificate of authority. The initial designation may be changed pursuant to a
27 | statement of change under Section 213, by an amendment to the certificate of trust under Section
28 | 202, or by an annual report under Section ~~244~~215(e) if the jurisdiction has adopted Section 215.
29 |

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

instrument.

SECTION ~~213~~212. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF PROCESS.

(a) 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 statutory trust or **qualified** foreign statutory trust;

(2) the street and mailing addresses of ~~its~~the current designated office of the statutory trust or qualified statutory trust;

(3) if the **current**-designated office is to be changed, the street and mailing address**es** of the new designated office;

(4) the name and street and mailing addresses of ~~its~~the current agent of the
statutory trust or qualified foreign statutory trust for service of process; and

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

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

Comment

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

Paragraph (a) uses “may” rather than “must” because a statutory trust may also change the information by an amendment to its certificate of trust under Section 202 and a [qualified](#) foreign statutory trust may also change the information by an amendment to its certificate of authority under Section 703. Further, if the information currently in the public record is not inaccurate, a statutory trust or [qualified](#) foreign statutory trust may change the information in an

1 | annual report under Section 21~~54~~(e) if the jurisdiction has enacted Section 215.

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

5 |
6 |
7 | **SECTION ~~214~~213. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

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

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

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

18 | **Comment**

19 |
20 | **Principal Source** – Uniform Limited Partnership Act §116 (2001).

21 |
22 | This section provides the exclusive means for an agent to resign without cooperation
23 | from the statutory trust or qualified foreign statutory trust and the only way the agent, rather than
24 | the statutory trust or foreign statutory trust, can effect a change in the public record. Unlike most
25 | records authorized or required to be delivered to the filing officer for filing under this Act, a
26 | statement of resignation may not provide for a delayed effective date. Paragraph (c) mandates
27 | the effective date. An effective date included in a statement of resignation is disregarded. To
28 | satisfy Section 212(a), the statutory trust or qualified foreign statutory trust must designate a new
29 | agent for service of process before the effective date. If the statutory trust or foreign statutory
30 | trust fails to do so, under Section ~~215~~214 service on the statutory trust or foreign statutory trust
31 | may be made on the [Secretary of State].

32 |
33 | Under Section 103(b)(1), this Section is not subject to override by the governing

1 | [instrument.](#)
2

3 | **SECTION ~~215~~214. SERVICE OF PROCESS.**

4 | (a) An agent for service of process appointed by a statutory trust or [qualified](#) foreign
5 | statutory trust is an agent of the statutory trust or [qualified](#) foreign statutory trust for service of
6 | any process, notice, or demand required or permitted by law to be served upon the statutory trust
7 | or [qualified](#) foreign statutory trust.

8 | (b) If a statutory trust or [qualified](#) foreign statutory trust does not appoint or maintain an
9 | agent for service of process in this state or the agent for service of process cannot with
10 | reasonable diligence be found at the agent's address [on file with the \[Secretary of State\]](#), the
11 | [Secretary of State] is an agent of the statutory trust [or qualified foreign statutory trust](#) for service
12 | of process.

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

18 | (d) Service is effected under subsections ~~(b) and~~ (c) at the earliest of:

19 | (1) the date the agent for the statutory trust or [qualified](#) foreign statutory trust
20 | receives the process, notice, or demand;

21 | (2) the date shown on the return receipt, if signed on behalf of the statutory trust
22 | or [qualified](#) foreign statutory trust; or

23 | (3) five days after the process, notice, or demand is deposited with the United

1 States Postal Service by the [Secretary of State], if correctly addressed and with sufficient
2 postage.

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

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

7 **Comment**

8
9 **Principal Source** – Uniform Limited Partnership Act §117 (2001).

10
11 Paragraph (f) confirms that the authority of the Secretary of State to accept process under
12 a state long-arm statute exists independently of paragraphs (b) through (e) of this Section.

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

16
17
18 [SECTION ~~211~~215. ANNUAL REPORT FOR [SECRETARY OF STATE]. [NOTE: This
19 Section, which was 211 in the prior draft, has been moved here and bracketed per our last
20 drafting session. The move was made without the tracking on, so that changes within the
21 section since last time would be indicated.]

22 (a) ~~Each A~~ statutory trust or ~~a~~ qualified foreign statutory trust ~~authorized to transact~~
23 ~~business in this state~~ must deliver to the [Secretary of State] for filing an annual report that ~~states~~
24 contains the name of the statutory trust or qualified foreign statutory trust and:

25 (1) in the case of a ~~domestic~~ statutory trust:

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

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

1 process; or

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

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

4 (B) the name of the state or other jurisdiction under whose law the
5 [qualified](#) foreign statutory trust is formed; and
6 (C) the street and mailing addresses of its principal office and, if the laws
7 of the jurisdiction under which the [qualified](#) foreign statutory trust is formed require it to
8 maintain an office in that jurisdiction, the street and mailing addresses of ~~the required~~that office;
9 and

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

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

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

19 (d) If an annual report ~~under this section~~ does not contain the information required in
20 subsection (a), the [Secretary of State] shall promptly notify the reporting statutory trust or
21 [qualified](#) foreign statutory trust and return the report to it for correction. If the report is corrected
22 to contain the information required in subsection (a) and delivered to the [Secretary of State]

within 30 days after the ~~effective~~ date of the notice, it is timely delivered.

(e) If ~~an filed~~ annual report under this section contains an address of a designated office or the name or address of an agent for service of process which differs from the information shown in the records of the [Secretary of State] immediately before the filing, the differing information in the annual report is considered a statement of change under Section ~~213212.~~213212.

Comment

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

This Section is in brackets in recognition of the diversity of practice among the states regarding annual reports. Uniformity is not expected. If adopted, under Section 103(b)(1) this Section would not be subject to override by the governing instrument.

1 [ARTICLE] 3

2 AUTHORIZATION; GOVERNING LAW; DURATION; POWERS

3 SECTION 301. STATUTORY TRUST AUTHORIZED; ~~PURPOSES.~~

4 ~~—(a)~~ A statutory trust is an ~~authorized~~ entity; separate from its trustees and beneficial
5 owners.

6 Comment

7
8 Principal Sources – Delaware Statutory Trust Act §§3810; Connecticut Statutory Trust
9 Act §§34-502.

10
11 Because this Section implements an entity conception of the statutory trust, it confirms
12 that any prior judicial decision that holds that a common law business trust violates the state’s
13 corporate law, trust law, or public policy is not applicable to a statutory trust created under this
14 Act. Examples of such decisions, which reflect the now outmoded concern that a business trust
15 could be used to evade regulatory limitations on the corporate form, are collected in Robert H.
16 Sitkoff, The Rise of the Statutory Business Trust [in progress].
17

18 SECTION 302. PERMISSIBLE PURPOSES.

19 ~~—(b)~~ A statutory trust may have any lawful purpose except:

20 ~~—(1) a prevailingly donative purpose; or [For Discussion: Rutledge’s comment~~
21 ~~to Sitkoff on “prevailingly.”]~~

22 ~~(2) a purpose that would make the statutory trust, or a person that transfers cash or~~
23 ~~property or renders services to the statutory trust, eligible for any federal or state income, gift, or~~
24 ~~estate tax charitable contributions deduction as a result of the transfer. [For Discussion:~~
25 ~~rationale for paragraph (b)(2).]~~

26 Comment

27
28 Principal Sources – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
29 Act §§~~34-502~~, 34-502a.
30

Paragraph (a) 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 created under this Act. Examples of such decisions, which reflect the now outmoded concern that a business trust could be used to evade regulatory limitations on the corporate form, are collected in Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [in progress].

Subject to subparagraphs (b)(1) and (b)(2), This Section provides that a statutory trust may be formed for "any lawful purpose except for a prevaillingly donative purpose." Thus, in addition to use in a commercial transaction, a statutory trust may be used in a custodial or other context that need 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.

Paragraph (b)(1) excludes The exclusion of "a prevaillingly donative purpose" to 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 word "prevaillingly" was included to account for the possibility that a donative transfer might be structured to look otherwise in form but still be a donative transfer in substance. Although statutory trusts are not commonly used in donative transfers, there is evidence of occasional such use. See Sitkoff, *supra*, at ____.

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

Examples of mandatory rules applicable to common law trusts that people drafters might have tried to avoid by using a statutory trust include the following:

- the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;
- the requirement that a trust and its terms be for the benefit of one or more ascertainable beneficiaries [For Discussion: The beneficiary requirement as applied to a statutory trust and the potential problem of purpose statutory trusts.], and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
- the power of the court to modify or terminate a trust;
- the effect of a spendthrift provision and the rights of the settlor's and the beneficiary's creditors and assignees to reach the assets of a trust;

- the power of the court to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- the power of the court to remove a trustee for a serious breach of trust;
- the duty of the trustee to give information and make reports concerning the administration of the trust to the beneficiary;
- the effect of an exoneration clause that purports to limit or eliminate the duties or liabilities of a trustee to a beneficiary;
- the rights of a party, other than a trustee or beneficiary, that transacts with the trustee in the trustee's capacity as such;
- the rules against perpetuities, accumulations of income, and suspension of the power of alienation; and
- the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

Most of the foregoing rules are scheduled in Uniform Trust Code §105 (2000), the Code's schedule of mandatory rules.

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

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

~~Paragraph (b)(2) address the parallel concern that a statutory trust might be used in a charitable context to evade public policy limitations on, and state regulatory oversight of, charitable entities. See, e.g., Marion R. Fremont-Smith, Governing Nonprofit Organizations: Federal and State Law and Regulation (Belknap/Harvard 2004). Paragraph (b)(2) implements this aim by excluding any purpose that would make the statutory trust, or a person that transfers cash or property or renders services to the statutory trust, eligible for any federal or state income, gift, or estate tax charitable contributions deduction as a result of the transfer. The drafting committee opted to state the test for the charitable purpose exclusion in relation to federal and state tax law because the tax standards are well known and have been clarified by an extensive body of interpretive rulings and regulations. The test is phrased as one of eligibility for tax benefits rather than the actual use of those benefits to prevent evasion by foregoing the tax benefits in question.~~

SECTION ~~302~~303. GOVERNING LAW. The law of this state governs:

- (1) the internal affairs of a statutory trust ~~created under this [act]; and~~
- (2) the liability of a beneficial owner as beneficial owner and a trustee as trustee for the debts, obligations, or other liabilities of a statutory trust; and

(3) the liability of a series of a statutory trust with respect to the statutory trust and other series thereof.

Comment

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

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

Paragraph (2) supports Sections 413 and 506 by confirming that the liability of a beneficial owner or a trustee for the debts, obligations, or other liabilities of the statutory trust is governed by the law of this state. This paragraph is stated separately from Paragraph (1) because the liabilities of a beneficial owner or trustee to third parties is arguably not an internal affair. See, e.g., Restatement (Second) of Conflict of Laws §307 (1971) (treating shareholders’ liability separately from the internal affairs doctrine).

Section 701(a) states rules for qualified foreign statutory trusts that parallel and are analogous in scope to those of this section.

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

SECTION ~~303~~304. DURATION.

(a) A statutory trust has perpetual existence.

(b) A statutory trust, or any series thereof, may not be terminated or revoked by a beneficial owner or other person except in accordance with this [act] or the terms of the statutory trust’s governing instrument of the statutory trust. ~~[For Discussion: Rutledge question to Sitkoff about “or any series thereof” and a potential negative inference elsewhere.~~
Compare Section 304(a).]

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

Comment

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

Following the corporate default rule of perpetual existence, paragraph (a) provides a default rule of perpetual existence for a statutory trust. The duration of a common law trust, by contrast, is curtailed by the Rule Against Perpetuities. See Restatement (Second) of Property: Donative Transfers § 2.1 (1983). Accordingly, unless the governing instrument provides otherwise, under this section a statutory trust is exempt from the Rule Against Perpetuities. Without taking a position on the policy soundness of the tax-driven movement to abolish the Rule Against Perpetuities with respect to donative trusts, see Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 Cardozo L. Rev. 2465 (2006), the drafting committee concluded that the dead-hand worries that underpin the Rule does not apply to a statutory trust. Under Section ~~301(b)(1)~~302, a statutory trust may not have a prevailingly donative purpose.

Paragraph (b) confirms that a statutory trust may only be terminated in accordance with the terms of this Act or the governing instrument. Thus, paragraph (b) overrides the common law of trust ~~modification and~~ termination that would otherwise be applicable to a statutory trust pursuant to Section 105. Those rules are concerned with mediating the tension between the donor's intent and subsequent contrary preferences of the beneficiaries, see Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 658-63 (2004), an issue that is not applicable to a statutory trust inasmuch as a statutory trust under this Act may not have a prevailingly donative purpose. Instead, the drafting committee contemplated that pursuant to Section 104(b)(8) the governing instrument would provide for termination of the statutory trust or modification of the governing instrument if such provisions are desirable.

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

[For discussion, whether to override the common law merger doctrine. See, e.g., Restatement (Third) of Trusts §69, which says "If the legal title to the trust property and the entire beneficial interest become untied in one person, the trust terminates."]

SECTION ~~304~~305. POWER TO SUE AND BE SUED; TITLE TO TRUST PROPERTY.

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

2 ~~(b) Except as otherwise provided in subsection (d), a statutory trust may be sued for~~
3 ~~debts, obligations, and other liabilities contracted or incurred by the trustees or by the duly~~
4 ~~authorized agents of such trustees in the performance of their respective duties under the~~
5 ~~governing instrument of the statutory trust and for any damages to persons or property resulting~~
6 ~~from the actionable conduct of the trustees or agents acting in the performance of their respective~~
7 ~~duties. [For Discussion: Rutledge question to Sitkoff re purpose of (b).]~~

8 (eb) Except as otherwise provided in ~~subsection (d)~~Section 306, the property of a
9 statutory trust is subject to attachment and execution as if it were a domestic ["business"]
10 corporation.

11 (c) Legal title to the property of a statutory trust or any part thereof may be held in the
12 name of any trustee of the statutory trust, in its capacity as trustee, with the same effect as if the
13 property were held in the name of the statutory trust. [For discussion: Relation of this
14 provision, if any, to Section 104(b)(11).]

15 Comment

16
17
18 Principal Sources – Delaware Statutory Trust Act §§3803-3805; Connecticut Statutory
19 Trust Act §§34-518, 34-523; Uniform Limited Partnership Act §303 (2001).

20
21 Paragraph (a) implements the concept that a statutory trust is a separate juridical entity by
22 confirming that a statutory trust has the power to sue and be sued in its own name.

23
24 Paragraph (b) addresses the attachment and execution of a statutory trust's property by
25 absorbing the rules applicable to a domestic corporation in like circumstances.

26
27 Paragraph (c) gives the trustee the option of holding property of the statutory trust in the
28 name of the trustee in the trustee's capacity as such even though the statutory trust is a juridical
29 entity that can hold property in its own name. The drafting committee reasoned that this
30 provision would be useful for a statutory trust that has dealings in a state that has not provided

1 for a statutory trust entity because property ownership by a trustee in the trustee's capacity as
2 such is familiar from the use of common law trusts. Indeed, because a common law trust is not
3 an entity separate from its trustee, property held in a common law trust must be held by the
4 trustee in its capacity as such. To police the boundary of the trustee's personal assets and the
5 assets of the trust, the common law imposes on the trustee duties to earmark trust property and
6 not to commingle it with the trustee's own. See Uniform Trust Code §810 (2000); Restatement
7 (Third) of Trusts §84 (T.D. No. 4, 2005); Restatement (Second) of Trusts §179 (1959). The
8 drafting committee contemplated that under appropriate circumstances Section 404(b) would be
9 read to require similar conduct by a trustee of a statutory trust that takes title to property of the
10 statutory trust in the name of the trustee in the trustee's capacity as such.
11

12 SECTION 306. SERIES OF STATUTORY TRUST.

13 (a) The governing instrument may: [The subsections to this section were moved from
14 Section 104.]

15 _____(41) provide for classes, groups, or series of trustees, ~~or~~ beneficial owners, or
16 ~~classes, groups, or series of~~ beneficial interests, having such relative rights, powers, and duties as
17 the governing instrument may provide, and provide for the creation of additional classes, groups,
18 or series of trustees, beneficial owners, or beneficial interests, having such relative rights,
19 powers, and duties as may be established, including rights, powers, and duties senior or
20 subordinate to existing classes, groups or series of trustees, beneficial owners, ~~or~~ beneficial
21 interests;

22 (52) provide for designated series of trustees, beneficial owners, or beneficial
23 interests having separate rights, powers, or duties with respect to ~~specified property or~~
24 ~~obligations or~~ [For discussion: This change came from style on the ground that the original
25 was "unnecessary repetition."] profits and losses associated with specified property or
26 obligations, and permit the series to have a separate business purpose or investment objective;

27 (63) grant to, or withhold from, all or certain trustees or beneficial owners, or a

1 specified class, group, or series of trustees or beneficial owners, the right to vote, separately or
2 with any or all other classes, groups, or series of the trustees or beneficial owners, on any matter;
3 ~~_____ (d) (b) If the governing instrument of a statutory trust, including a statutory trust that is a~~
4 ~~registered investment company under the Investment Company Act of 1940, as amended, 15~~
5 ~~U.S.C. Sections 80a-1 et seq., creates one or more series as provided in Section 104(b)(4) to~~
6 ~~(6), subsection (a), the debts, obligations, liabilities, and expenses incurred, contracted for, or~~
7 otherwise existing with respect to a particular series are enforceable against the assets of the
8 series only, and not against the assets of the statutory trust generally or any other series thereof,
9 and none of the debts, obligations, or other liabilities, ~~and or~~ expenses incurred, contracted for,
10 or otherwise existing with respect to the statutory trust generally or any other series thereof are
11 enforceable against the assets of the series if:

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

16 (2) notice of the limitation on liabilities of a series is set forth in the certificate of
17 trust ~~of the statutory trust.~~

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

1 under Section 18, or any amendment or successor provision, of the Investment Company Act of
2 1940[, 15 U.S.C. Section 80a-18], as amended, and any regulations issued thereunder.
3

4 **Comment**

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

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

11
12 ~~Paragraph (d)~~Paragraph (a) confirms that a statutory trust may be organized with one or
13 more series. The organization of a master statutory trust with several series is particularly
14 common among statutory trusts that are registered investment companies under the Investment
15 Company Act of 1940, as amended, 15 U.S.C. Sections 80a-1 et seq.

16
17 ~~Paragraph (b) provides confirms that for if~~ a statutory trust that has created separate
18 series under ~~Section 104(b)(4) to (6)~~paragraph (a), the debts, liabilities, and other obligations of
19 a particular series are enforceable against the assets of that series only, but only if (1) separate
20 records are maintained for each series and (2) notice of the limitation on liabilities of a series is
21 set forth in the certificate of trust. Under Section 201 the certificate of trust is made part of the
22 public record and must indicate whether the statutory trust might create one or more series.~~On~~
23 ~~the series concept, see also the Comment to Section 104.~~

24
25 Paragraph (c) [Assistance on this portion of the comment is invited, particularly from
26 Bibb and Victor.]

27
28 Section 612 provides for the dissolution of a series.
29

30
31
32 **SECTION ~~305~~307. POWER TO HOLD PROPERTY.** A statutory trust has the power
33 to hold or take title to property its own name whether in an active, passive, or custodial capacity.
34

35 **Comment**

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

1
2 This Section implements the concept that a statutory trust is an entity separate from its
3 trustee and beneficial owners by confirming that a statutory trust may transact over property in
4 its own name. The property of a common law trust, by contrast, must be held in the name of the
5 trustee as such. See also Section 408.

1 [ARTICLE 4]

2 TRUSTEES AND TRUST MANAGEMENT

3 SECTION 401. MANAGEMENT OF STATUTORY TRUSTS.

4 ~~—(a)~~ The business and affairs of a statutory trust must be managed by or under the
5 authority of its trustees.

6 Comment

7 Principal Sources – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
8 Act §34-517; Uniform Trust Code §815 (2000); Uniform Limited Partnership Act §105 (2001);
9 Delaware General Corporation Law §141.

10
11 Section 102(16) defines trustee as a person designated as such in accordance with the
12 governing instrument or applicable law. Section 104(b)(4)(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 applicable law is the state’s law pertaining to
16 trustee appointment in common law trusts. For treatment of the default rules of trustee
17 appointment, removal, and succession in common law trusts, see Restatement (Third) of Trusts
18 §§31-37 (2003); Uniform Trust Code §§701-02, 704-06 (2000); Restatement (Second) of Trusts
19 §§101, 106-08 (1959).

20
21
22 SECTION 402. TRUSTEE POWERS.

23 ~~(a)~~ A trustee, ~~without authorization by the court,~~ may exercise:

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

28 (b) The trustee’s exercise of a power is subject to the fiduciary duties prescribed by
29 Section 404 [An alternative: this [article]].

30 Comment

Principal Sources —~~Delaware Statutory Trust Act §3806; Connecticut Statutory Trust Act §34-517; Uniform Trust Code §815 (2000); Uniform Limited Partnership Act §105 (2001).~~

~~Paragraph (a) confirms that the trustees manage the statutory trust.~~

—— Paragraph (ba) is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. Hence, paragraph (a) overrides the application to a statutory trust under Section 105 of the outmoded common law rule that a trustee has only those powers granted by the trust instrument. See Uniform Trust Code §815 (2000); Restatement (Third) of Trusts §85 cmt. a (T.D. No. 4, 2005). ~~However~~

~~Paragraph (b) confirms that,~~ the existence of a power, regardless of ~~the-its~~ source, ~~of the power,~~ does not speak to the question whether in a particular case it is consistent with the trustee's fiduciary obligation ~~under Section 402~~ to exercise that power. ~~For a discussion with respect to the analogous principle in the common law of trusts, see John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale L.J. 625, 640-43 (1995). As the official comment to Uniform Trust Code §815 (2000) explains, "A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power." See also Restatement (Third) of Trusts §§70, 86 (T.D. No. 4, 2005); John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale L.J. 625, 640-43 (1995).~~

~~[For Discussion: Whether we need a provision like UTC §1012, which abrogates the common law rule requiring third parties dealing with a trustee to investigate the trustees' authority. Thus:~~

—— ~~1012(a): "A person . . . who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge tha the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power."~~

—— ~~1012(b): "A person . . . who in good faith deals with a trustee is not required to inquire into the extent of the trustees powers or the propriety of their exercise."}]~~

SECTION 403. PROTECTION OF PERSON DEALING WITH TRUSTEE.

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

5 (b) A person other than a beneficiary that in good faith deals with a trustee is not
6 required to inquire into the extent of the trustee's powers or the propriety of their exercise.

7 [For discussion: Whether to include also the following paragraphs (c), (d), and (e),
8 which are also taken from UTC 1012: (c) A person who in good faith delivers assets to a
9 trustee need not ensure their proper application.

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

14 (e) Comparable protective provisions of other laws relating to commercial
15 transactions or transfer of securities by fiduciaries prevail over the protection provided by
16 this section.]

17 Comment

18 Principal Source – Uniform Trust Code §1012 (2000).
19

20 [For discussion: Here is the full text of the official comment from UTC 1012, which
21 will need to be revised to reflect our different context and purpose, and whether we include
22 (c), (d), and (e).]

23
24 This section is derived from Section 7 of the Uniform Trustee Powers Act.
25

26 Subsection (a) protects two different classes; persons other than beneficiaries who assist a
27 trustee with a transaction, and persons other than beneficiaries who deal with the trustee for

1 value. As long as the assistance was provided or the transaction was entered into in good faith
2 and without knowledge, third persons in either category are protected in the transaction even if
3 the trustee was exceeding or improperly exercising the power. For the definition of “know,” see
4 Section 104. This Code does not define “good faith” for purposes of this and the next section.
5 Defining good faith with reference to the definition used in the State’s commercial statutes
6 would be consistent with the purpose of this section, which is to treat commercial transactions
7 with trustees similar to other commercial transactions.

8
9 Subsection (b) confirms that a third party who is acting in good faith is not charged with
10 a duty to inquire into the extent of a trustee’s powers or the propriety of their exercise. The third
11 party may assume that the trustee has the necessary power. Consequently, there is no need to
12 request or examine a copy of the trust instrument. A third party who wishes assurance that the
13 trustee has the necessary authority instead should request a certification of trust as provided in
14 Section 1013. Subsection (b), and the comparable provisions enacted in numerous States, are
15 intended to negate the rule, followed by some courts, that a third party is charged with
16 constructive notice of the trust instrument and its contents. The cases are collected in George G.
17 Bogert & George T. Bogert, The Law of Trusts and Trustees Section 897 (Rev. 2d ed. 1995); and
18 4 Austin W. Scott & William F. Fratcher, The Law of Trusts Section 297 (4th ed. 1989).

19
20 Subsection (c) protects any person, including a beneficiary, who in good faith delivers
21 property to a trustee. The standard of protection in the Restatement is phrased differently
22 although the result is similar. Under Restatement (Second) of Trusts Section 321 (1959), the
23 person delivering property to a trustee is liable if at the time of the delivery the person had notice
24 that the trustee was misapplying or intending to misapply the property.

25
26 Subsection (d) extends the protections afforded by the section to assistance provided to or
27 dealings for value with a former trustee. The third party is protected the same as if the former
28 trustee still held the office.

29
30 Subsection (e) clarifies that a statute relating to commercial transactions controls
31 whenever both it and this section could apply to a transaction. Consequently, the protections
32 provided by this section are superseded by comparable protective provisions of these other laws.
33 The principal statutes in question are the various articles of the Uniform Commercial Code,
34 including Article 8 on the transfer of securities, as well as the Uniform Simplification of
35 Fiduciary Securities Transfer Act. **End discussion note.**

36 37 38 **SECTION ~~402~~404. STANDARDS OF CONDUCT FOR TRUSTEES.**

39 (a) In discharging the duties of trusteeship, a trustee of a statutory trust shall act in good
40 faith and in a manner that the trustee reasonably believes to be in the best interests of the
41 statutory trust. ~~[For Discussion: A note from the floor suggested that we define “good~~

1 [faith.”\]](#)

2 (b) A trustee of a statutory trust shall discharge its duties with the care that a person in a

3 [like-similar](#) position would reasonably believe appropriate under similar circumstances.

4 **Comment**

5 **Principal Source** – [Revised](#) Model Business Corporation Act §8.30 (2002).

6 To police the exercise of the trustee’s broad powers under Section [401402](#), this section
7 subjects the trustee to fiduciary duties of loyalty (paragraph (a)) and care (paragraph (b)) akin to
8 those of a corporate director.

9
10 [Under](#) Section 103(b), the trustee’s standards of conduct under this section are mandatory
11 rules that are not subject to override by the governing instrument. However, the governing
12 instrument may prescribe the standards by which “good faith,” “best interests of the statutory
13 trust,” and “care that a person in a like position would reasonable believe appropriate under
14 similar circumstances” are determined provided that the standards are not “manifestly
15 unreasonable.” [See also Delaware Statutory Trust Act §3806\(c\), which as revised in 2006](#)
16 [provides that a trustee’s fiduciary duties “may be expanded or restricted or eliminated by](#)
17 [provisions in the governing instrument; provided, that the governing instrument may not](#)
18 [eliminate the implied contractual covenant of good faith and fair dealing.”](#)

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 \(2002\)](#) rather than the
22 more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a
23 mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the
24 context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of
25 commercial actors. [For a statement of the duties of loyalty and prudence in trust law, see](#)
26 [Restatement \(Third\) of Trusts §§77-78 \(T.D. No. 4, 2005\).](#) For a comparison, see Robert H.
27 Sitkoff, Trust Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82
28 (2003). See also sources cited in the [comment-Comment](#) to Section [405408](#).

29
30 Because the standards of conduct stated in this section are drawn from corporate law, the
31 drafting committee contemplated that [by default](#) the business judgment rule would apply in
32 litigation under paragraph (b) [unless the governing instrument provides otherwise](#). ~~[See generally](#)~~
33 ~~[Stephen M. Bainbridge, Corporation Law and Economics §6.4 \(2002\). \[For Discussion: \(1\)](#)~~
34 ~~[Rutledge’s comments to Sitkoff re this paragraph, \(2\) adding a citation to the Dennis Block](#)~~
35 ~~[treatise.\]\[For discussion: RMBCA 8.31, Standards of Liability for Directors, which says:](#)~~

36
37 [\(a\) A director shall not be liable to the corporation or its shareholders for any decision](#)
38 [to take or not to take action, or any failure to take any action, as a director, unless the](#)
39 [party asserting liability in a proceeding establishes that:](#)

(1) any provision in the articles of incorporation authorized by section 2.02(b)(4) or the protection afforded by section 8.61 for action taken in compliance with section 8.62 or 8.63, if interposed as a bar to the proceeding by the director, does not preclude liability; and

(2) the challenged conduct consisted or was the result of:

- (i) action not in good faith; or
- (ii) a decision
 - (A) which the director did not reasonably believe to be in the best interests of the corporation, or
 - (B) as to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or
- (iii) a lack of objectivity due to the director's familial, financial or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct
 - (A) which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation, and
 - (B) after a reasonable expectation to such effect has been established, the director shall not have established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation; or
- (iv) a sustained failure of the director to devote attention to ongoing oversight of the business and affairs of the corporation, or a failure to devote timely attention, by making (or causing to be made) appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need therefore; or
- (v) receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its shareholders that is actionable under applicable law.

(b) The party seeking to hold the director liable:

- (1) for money damages, shall also have the burden of establishing that:
 - (i) harm to the corporation or its shareholders has been suffered, and
 - (ii) the harm suffered was proximately caused by the director's challenged conduct; or
- (2) for other money payment under a legal remedy, such as compensation for the unauthorized use of corporate assets, shall also have whatever persuasion burden may be called for to establish that the payment sought is appropriate in the circumstances; or
- (3) for other money payment under an equitable remedy, such as profit recovery by or disgorgement to the corporation, shall also have whatever persuasion burden may be called for to establish that the equitable remedy sought is appropriate in the circumstances.

(c) Nothing contained in this section shall (1) in any instance where fairness is at issue, such as consideration of the fairness of a transaction to the corporation under section 8.61(b)(3), alter the burden of proving the fact or lack of fairness otherwise applicable, (2) alter the fact or lack of liability of a director under another section of this Act, such as the provisions governing the consequences of an unlawful distribution under section

1 8.33 or a transactional interest under section 8.61, or (3) affect any rights to which the
2 corporation or a shareholder may be entitled under another statute of this state or the
3 United States.]
4
5
6

7 SECTION ~~409~~405. DIRECTION OF TRUSTEES. [NOTE: In the prior draft this was
8 section 409, but per our last meeting it has been moved here, right after the section on
9 fiduciary duties. The cut-and-past was made with the tracking off so that the changes
10 made within the section and its comment would be indicated differently from the language
11 that was not changed.]

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

14 (b) If the terms of a statutory trust confer upon a person a power to direct certain actions
15 of a trustee or other person, the trustee or other person ~~must~~shall act in accordance with an
16 exercise of the power unless the ~~attempted exercise~~direction is manifestly [For discussion: Style
17 would like us to drop “manifestly.”] contrary to the terms of the governing instrument or the
18 trustee ~~or other person~~ knows or has reason to know that ~~the attempted exercise~~following the
19 direction would constitute a serious breach of fiduciary duty by the trustee. [For (Further)
20 Discussion: (1) “manifestly contrary,” and “serious” breach of duty.]

21 (c) Neither the power to direct a trustee or other person nor the exercise of the power by
22 any person, including a beneficial owner, causes the person to be a trustee or imposes on the
23 person duties, including fiduciary duties, or liabilities relating thereto, to a statutory trust or to a
24 beneficial owner thereof. [For Discussion: Rutledge’s comments to Sitkoff on this section.]

25 **Comment**

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

4 Paragraph (a) ratifies the use of a directed trustee, meaning a trustee that must act in
5 accordance with the directions of another person. Under paragraph (b), however, the trustee
6 need-must not follow a direction that is manifestly contrary to the terms of the governing
7 instrument or that the trustee knows or has reason to know would constitute a serious breach of
8 fiduciary duty. Cf. Restatement (Third) of Trusts §75 (T.D. No. 4, 2005); Restatement (Second)
9 of Trusts §185 (1959).
10

11 The reference in paragraph (b) to “serious” breach of fiduciary duty is designed to
12 exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial
13 owner. ~~The use of the term “serious” for this purpose is consistent with the common law of~~
14 ~~trusts~~For some purposes, trust law distinguishes between “serious” and not serious breaches of
15 trust. See, e.g., Uniform Trust Code §706(b)(1) (2000); Austin Wakeman Scott, William F.
16 Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed. 2006);
17 Restatement (Second) of Trusts §107 cmt. b (1959).
18

19 The trustee’s determination whether a direction is “manifestly contrary to the terms of the
20 governing instrument” or “would constitute a serious breach of fiduciary duty by the trustee” is
21 subject to the trustee’s fiduciary obligation under Section 404. The drafting committee
22 contemplated that, in accord with conventional trust practice, a trustee could seek judicial
23 resolution of whether an instruction falls within the exclusion of paragraph (b) by applying to the
24 appropriate court for instructions. See Restatement (Second) of Trusts §259 (1959); Restatement
25 (Third) of Trusts §71 (T.D. No. 4, 2005).
26

27 Under Section 103(b)(5), the limitation on direction of trustees stated in paragraph (b) is
28 not subject to override by the governing instrument.
29

30 Under paragraph (c), unless the governing instrument provides otherwise, a person that
31 has the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to
32 the statutory trust or the beneficial owners.
33

34 In conjunction with Section ~~410~~411, this section facilitates the current practice in existing
35 statutory trusts of creating a trusteeship with respect to some, but not all, aspects of the trust—
36 for example, in a mutual fund with an investment advisor or in a securitization transaction with a
37 person whose consent is required before the statutory trust can petition for bankruptcy.
38

39 **SECTION ~~403~~406. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT**
40 **COMPANY.**

41 (a) In this section, the terms “affiliated person” and “interested person” have the

meanings set forth in the Investment Company Act of 1940, as amended, 15 U.S.C. Section 80a-1 et seq., or any rule adopted thereunder.

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

~~(b) The terms “affiliated person” and “interested person” in subsection (a) have the meanings set forth in the Investment Company Act of 1940, as amended, 15 U.S.C. Section 80a-1 et seq., or any rule adopted thereunder.~~

Comment

Principal Source – Delaware Statutory Trust Act §3801.

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

In 1998 the Maryland legislature effectively overruled *Strougo* by amending the Maryland corporate code to provide that directors who are not “interested persons” under the Investment Company Act of 1940 also would be deemed disinterested under Maryland law. See Md. Code (Corporations & Associations) §2-405.3. A similar provision took effect in Massachusetts in 1999, see Mass. Laws. 182, § 2B, and in Delaware in 2000, see Delaware

1 Statutory Trust Act §3801(h). Almost all mutual funds are organized as ~~a~~ Maryland
2 corporation~~s~~, Massachusetts trusts~~s~~, or Delaware statutory trusts~~s~~. See Robert H. Sitkoff, The Rise
3 of the Statutory Business Trust [in progress].
4

5 [For discussion: Are there further suggested changes to this comment, perhaps
6 from Bibb and Victor?]
7

8 **SECTION ~~404~~407. TRUSTEE’S RIGHT TO INFORMATION.** A trustee has the
9 right to ~~examine~~ information relating to the affairs of the statutory trust ~~necessary for~~reasonably
10 related to the trustee’s discharge of the trustee’s duties as trustee.

11 **Comment**

12 Under Section 103(b)(~~6~~), the trustee’s right to information under this section is not
13 subject to override by the governing instrument. However, the trustee’s right to information is
14 limited to information “~~necessary~~” ~~for~~reasonably related to” the trustee’s ~~to~~ discharge ~~of~~ its
15 duties as trustee, and under Section 103(b)(~~6~~) the governing instrument may prescribe the
16 standards by which “~~necessary~~reasonably related” is determined provided that ~~the those~~
17 standards are not “manifestly unreasonable.”
18

19 By linking the trustee’s information rights to the scope of the trustee’s duties as trustee,
20 this section makes the trustee’s right to information function specific. This section therefore
21 allows for the creation of a limited-role or directed trustee that will not have access to
22 confidential information unrelated to the trustee’s limited role. At the same time, this section
23 ensures that such a trustee will have access to information ~~necessary for~~reasonably related to
24 discharge the trustee’s duties in connection with the trustee’s limited role.
25

26 Section 503 provides a comparable rule for a beneficial owner’s right to information.
27

28 **SECTION ~~405~~408. INTERESTED TRANSACTIONS.**

29 (a) A trustee, officer, employee, or manager of a statutory trust, or a related person of a
30 trustee, officer, employee, or manager, may lend money to, borrow money from, act as a surety,
31 guarantor, or endorser for, guarantee or assume one or more obligations of, provide collateral
32 for, and transact other business with ~~a the~~ statutory trust and ~~, subject to the trustee’s fiduciary~~
33 ~~obligation under Section 402,~~ has the same rights and obligations with respect to any such matter
34 as a person that is not a trustee, officer, employee, manager, or related person of a trustee,

1 officer, employee, or manager.

2 (b) No contract or transaction between a statutory trust and a trustee, officer, employee,
3 or manager of the statutory trust, or between a statutory trust and any other person in which a
4 trustee, officer, employee, or manager of the statutory trust is a trustee, officer, employee, or
5 manager or has a financial interest, shall be void or voidable solely for this reason, or solely
6 because the trustee, officer, employee, or manager is present at or participates in the decision of
7 the statutory trust to authorize the contract or transaction, or solely because the trustee, officer,
8 employee, or manager's votes are counted for such purpose, if the contract or transaction is fair
9 to the statutory trust as of the time it is authorized, approved or ratified, by the trustees or
10 beneficial owners. [For discussion: (1) Whether to require disclosure of the interested
11 person's interest. (2) Whether to include related persons. This draft of paragraph (b) is
12 based on DGCL 144(a)(3).]

13 **Comment**

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

16
17 Consistent with the use of the term “best interests” instead of “sole interest” in Section
18 402404(a), this section abrogates the no-further-inquiry rule of the common law of trusts, which
19 forbids self-dealing transactions. See Restatement (Third) of Trusts §78 (T.D. No. 5, 2005);
20 Restatement (Second) of Trusts §170 (1959); John H. Langbein, Questioning the Trust Law Duty
21 of Loyalty: Sole Interest or Best Interest?, 114 Yale L.J. 929 (2005); Melanie B. Leslie, Trusting
22 Trustees: Fiduciary Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005).
23

24 The application of this section to a statutory trust that is registered as an investment
25 company is preempted by the Investment Company Act of 1940, which generally prohibits a
26 trustee, officer, employee, manager, and their related persons from lending money to, borrowing
27 money from, and engaging in other transactions with the mutual fund without exemptive relief
28 from the Securities and Exchange Commission. See 15 U.S.C. §80a-17(a), (d).
29

30 **SECTION 406409. GOOD-FAITH RELIANCE ON GOVERNING**

1 **INSTRUMENT.**

2 (a) A trustee that acts in good-faith reliance on the terms of the governing instrument is
3 not liable to the statutory trust or to a beneficial owner for breach of any duty, including a
4 fiduciary duty, to the extent the breach resulted from the reliance.

5 (b) An officer, employee, manager, or committee of a statutory trust, or other person
6 designated pursuant to Section 104(b)(~~406~~) that acts in good-faith reliance on the terms of the
7 governing instrument is not liable to the statutory trust or to a beneficial owner for breach of any
8 duty, including a fiduciary duty, to the extent the breach resulted from the reliance.

9 **Comment**

10 **Principal Source** – Uniform Trust Code §1006 (2000); Delaware Statutory Trust Act
11 §3806; Connecticut Statutory Trust Act §34-517.

12
13 A trustee, officer, employee, manager, committee, or other such person or persons should
14 be able to administer a statutory trust with dispatch and without concern that a reasonable
15 reliance on the terms of the governing instrument is misplaced. This section protects a person
16 that so relies on a trust instrument, but only to the extent the breach of trust resulted from such
17 reliance and only if the person’s reliance was in good faith.

18
19 The drafting committee contemplated that a trustee’s good faith reliance on the records of
20 the statutory trust, or on a report made by a person that is within the person’s professional or
21 expert competence, would be protected from liability under Section ~~402~~404(b) by the business
22 judgment rule. ~~See the comment to Section 402.~~[For discussion: Delaware Statutory Trust
23 Act §3806(k), which as revised in 2006 now says, “A trustee, beneficial owner or an officer,
24 employee, manager or other person designated in accordance with paragraph (b)(7) of this
25 section shall be fully protected in relying in good faith upon the records of the statutory
26 trust and upon information, opinions, reports or statements presented by another trustee,
27 beneficial owner or officer, employee, manager or other person designated in accordance
28 with paragraph (b)(7) of this section, or by any other person as to matters the trustee,
29 beneficial owner or officer, employee, manager or other person designated in accordance
30 with paragraph (b)(7) of this section reasonably believes are within such other person's
31 professional or expert competence, including information, opinions, reports or statements
32 as to the value and amount of the assets, liabilities, profits or losses of the statutory trust,
33 or the value and amount of assets or reserves or contracts, agreements or other
34 undertakings that would be sufficient to pay claims and obligations of the statutory trust or
35 to make reasonable provision to pay such claims and obligations, or any other facts

pertinent to the existence and amount of assets from which distributions to beneficial owners or creditors might properly be paid.”]

**SECTION ~~407~~410. INDEMNIFICATION, ADVANCEMENT, AND
EXONERATION.**

(a) A statutory trust may indemnify and hold harmless any trustee or beneficial owner or other person with respect to any claim or demand on the person by reason of the person’s relationship with the statutory trust if the claim or demand does not arise from ~~such~~the person’s bad faith, willful misconduct, or reckless indifference. ~~[For Discussion: Rutledge raises the question whether we should also exclude willful misconduct or any knowing violation of the law.]~~

(b) Expenses, including reasonable attorney’s² fees and costs, incurred by a trustee, beneficial owner, or any other person in connection with a claim or demand on the person by reason of the person’s relationship with or to a statutory trust may be paid by the statutory trust in advance of the final disposition of the claim or demand upon an undertaking by or on behalf of the person to repay the statutory trust if the person is ultimately determined not to be entitled to be indemnified under subsection (a).

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

Comment

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

In Nakahara v. The NS 1991 American Trust, 739 A.2d 770 (Del.- Ch.- 1998), the court

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

3
4 Under Section 103(b)(7), this section's prohibition of indemnification, advancement, or
5 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference is not
6 subject to override by the governing instrument. Prohibiting indemnification, advancement, or
7 exoneration for such conduct is consistent with traditional ~~principles of~~ trust law doctrine. See
8 Restatement (Second) of Trusts §222 (1959); George G. -Bogert & George T. -Bogert, The Law
9 of Trusts and Trustees §542 (rev. 2d ed. 1993); Uniform Trust Code §1008. See also John H.
10 Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1121-25 (2004). It is
11 also consistent with the Delaware Statutory Trust Act. As revised in 2006, Delaware Statutory
12 Trust Act §3806(e) provides that the "governing instrument may provide for the limitation or
13 elimination of any and all liabilities for breach of contract and breach of duty (including
14 fiduciary duties) of a trustee . . . ; provided, that the governing instrument may not eliminate the
15 implied contractual covenant of good faith and fair dealing." See 2006 Delaware Laws Ch. 418
16 §7.

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

24
25 The SEC has taken the position that, before advancing legal fees to a trustee of a mutual
26 fund, the fund's "board must either (1) obtain assurances, such as by obtaining insurance or
27 receiving collateral provided by the [trustee], that the advance will be repaid if the trustee is
28 found to have engaged in disabling conduct, or (2) have a reasonable belief that the [trustee] has
29 not engaged in disabling conduct and ultimately will be entitled to indemnification." SEC
30 Interpretation: Matters Concerning Independent Directors of Investment Companies, Investment
31 Company Act Rel. No. 24083 (Oct. 14, 1999), 1999 WL 820629, *10. The SEC has also taken
32 the position that there is a rebuttable presumption that an independent trustee (see Section
33 403406) has not engaged in disabling conduct. Id.

34
35 ~~**SECTION 408. TITLE TO TRUST PROPERTY.** Legal title to the property of a~~
36 ~~statutory trust or any part thereof may be held in the name of any trustee of the statutory trust, in~~
37 ~~its capacity as trustee, with the same effect as if the property were held in the name of the~~
38 ~~statutory trust. [For Discussion: Rutledge objection to this section.] [Moved to paragraph~~
39 ~~(c) of Section 305.]~~

1 **Comment**

2
3 ~~—— **Principal Sources** — Delaware Statutory Trust Act §§3803, 3805; Connecticut Statutory~~
4 ~~Trust Act §34-523; Uniform Limited Partnership Act §303 (2001).~~

5
6 ~~—— Because a common law trust is not an entity separate from its trustee, the trust property~~
7 ~~must be held by the trustee in its capacity as such. To police the boundary of the trustee's~~
8 ~~personal assets and the assets of the trust, the common law imposes on the trustee duties to~~
9 ~~earmark trust property and not to commingle it with the trustee's own. See Uniform Trust Code~~
10 ~~§810; Restatement (Second) of Trusts §179 (1959).~~

11
12 ~~—— A statutory trust, by contrast, is a juridical entity with the power to transact over property~~
13 ~~in its own name. See Section 305. Hence, the question arises whether a trustee of a statutory~~
14 ~~trust may hold trust property in the name of the trustee in the trustee's capacity as such, or if~~
15 ~~instead trust property must be held only in the name of the statutory trust. This Section provides~~
16 ~~the more permissive answer, giving the trustee the option of holding property in the name of the~~
17 ~~trustee in the trustee's capacity as such. The drafting committee reasoned that this section would~~
18 ~~be useful for a statutory trust that has dealings in a state that has not provided for a statutory trust~~
19 ~~entity.~~

20
21 **SECTION 409. DIRECTION OF TRUSTEES. [Now Section 405.]**

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

24 ~~—— (b) If the terms of a statutory trust confer upon a person a power to direct certain actions~~
25 ~~of a trustee or other person, the trustee or other person must act in accordance with an exercise of~~
26 ~~the power unless the attempted exercise is manifestly contrary to the terms of the governing~~
27 ~~instrument or the trustee or other person knows or has reason to know that the attempted exercise~~
28 ~~would constitute a serious breach of fiduciary duty. [For (Further) Discussion: (1) “manifestly~~
29 ~~contrary,” and “serious” breach of duty.]~~

30 ~~—— (c) Neither the power to direct a trustee or other person nor the exercise of the power by~~
31 ~~any person, including a beneficial owner, causes the person to be a trustee or imposes on the~~
32 ~~person duties, including fiduciary duties, or liabilities relating thereto, to a statutory trust or to a~~

beneficial owner thereof. ~~[For Discussion: Rutledge's comments to Sitkoff on this section.]~~

Comment

~~Principal Sources~~—Delaware Statutory Trust Act §3806; Connecticut Statutory Trust Act §34-517; Uniform Trust Code §808 (2000).

~~Paragraph (a) ratifies the use of a directed trustee, meaning a trustee that must act in accordance with the directions of another person. Under paragraph (b), however, the trustee need not follow a direction that is manifestly contrary to the terms of the governing instrument or that the trustee knows or has reason to know would constitute a serious breach of fiduciary duty. The reference to “serious” breach of fiduciary duty is designed to exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial owner. The use of the term “serious” for this purpose is consistent with the common law of trusts. See, e.g., Austin Wakeman Scott, William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed. 2006); Restatement (Second) of Trusts §107 cmt. b (1959). The drafting committee contemplated that a trustee could seek judicial resolution of whether an instruction falls within the exclusion of paragraph (b) by applying to the appropriate court for instructions. See Restatement (Second) of Trusts §259 (1959).~~

~~Under paragraph (c), unless the governing instrument provides otherwise, a person that has the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to the statutory trust or the beneficial owners.~~

~~In conjunction with Section 410, this section facilitates the current practice in existing statutory trusts of creating a trusteeship with respect to some, but not all, aspects of the trust—for example, in a mutual fund with an investment advisor or in a securitization transaction with a person whose consent is required before the statutory trust can petition for bankruptcy.~~

SECTION ~~410~~411. DELEGATION BY TRUSTEE.

~~(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:~~

~~(1) selecting an agent;~~

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

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

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

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

4 (d) A trustee that complies with subsection (a) is not liable to the beneficial owners or to
5 the statutory trust for an action of the agent to whom the function was delegated.

6 (e) By accepting a delegation of powers or duties from the trustee of a trust that is
7 subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

8 ~~A trustee of a statutory trust may delegate to one or more other persons the trustee's rights and~~
9 ~~powers to manage and control the business and affairs of the statutory trust, including the power~~
10 ~~to delegate to agents, officers, managers, committees, or employees of the trustee or the statutory~~
11 ~~trust, and to delegate by management agreement or other agreement with, or otherwise to, other~~
12 ~~persons, including to another trustee. Delegation by a trustee of a statutory trust does not relieve~~
13 ~~the trustee of its duties with respect to the matter delegated or cause the person to which any~~
14 ~~rights and powers have been delegated to be a trustee of the statutory trust by reason of the~~
15 ~~delegation. [For Discussion: (1) Rutledge comments to Sitkoff on this section, and (2) the~~
16 ~~UPMIFA delegation rules, which are reproduced after the comment.]~~
17

18 **Comment**

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

21
22 This section reverses the outmoded common law rule against delegation by a trustee.
23 ~~Instead, the drafting committee contemplated that delegation under this section would be subject~~
24 ~~to the trustee's duties under Section 402. Thus, a trustee that fails to exercise due care in~~
25 ~~selecting, instructing and monitoring the agent could be held liable for breach of the trustee's~~
26 ~~fiduciary obligations under Section 402. Moreover, although an agent does not become a trustee~~
27 ~~by reason of a delegation from a trustee, nothing in this section prohibits the statutory trust from~~
28 ~~recovering against the agent for the agent's improper exercise of delegated authority.~~
29

30 ———In reversing the common law rule against delegation, the drafting committee followed
31 both the Delaware Statutory Trust Act and the modern trend with respect to common law trusts.
32 Most states have abrogated the common law nondelegation rule ~~with respect to common law~~
33 ~~trusts~~ with legislation based on the Uniform Prudent Investor Act, Uniform Trust Code, or the
34 Restatement (Third) of Trusts. See Uniform Trust Code §807 (2000); Uniform Prudent Investor
35 Act §9 (1994); Restatement (Third) of Trusts: Prudent Investor Rule §171 (1992). See also

1 [Restatement \(Third\) of Trusts §80 \(T.D. No. 4, 2005\)](#). See generally John H. Langbein,
2 [Reversing the Nondelegation Rule of Trust-Investment Law](#), 59 Mo. L. Rev. 105 (1994).

3
4 [Paragraphs \(a\), \(c\), \(d\), and \(e\) track the language of Uniform Trust Code §807 \(2000\),](#)
5 [which is derived from Uniform Prudent Investor Act §9 \(1994\).](#) Following the Delaware ~~and~~
6 ~~Connecticut~~ Statutory Trust Acts, [however, paragraph \(b\) this section](#) treats delegation to a co-
7 trustee in the same manner as delegation to another agent. By contrast, ~~the common law of~~
8 ~~trust~~[traditional trust law](#) disfavors delegation by one co-trustee to another. See Restatement
9 (Second) of Trusts §184 (1959).; ~~see also Uniform Trust Code §703(e) (2000)~~. [See also Uniform](#)
10 [Trust Code §703\(e\) \(2000\); Restatement \(Third\) of Trusts §81 cmt. c\(1\) \(T.D. No. 4, 2005\).](#)

11
12 Mutual funds often receive a common set of services from an organization that
13 specializes in operating mutual funds, which is typically the investment adviser or an affiliate.
14 The trustees monitor the service providers and the Investment Company Act of 1940 requires the
15 trustees to approve the contracts with the adviser and distributor. See 15 U.S.C. § 80a-15.

16
17 ~~[START EXCERPT OF UPMIFA §5—~~

18 ~~(a) Subject to any specific limitation set forth in a gift instrument or in law other than this [act],~~
19 ~~an institution may delegate to an external agent the management and investment of an~~
20 ~~institutional fund to the extent that an institution could prudently delegate under the~~
21 ~~circumstances. An institution shall act in good faith, with the care that an ordinarily prudent~~
22 ~~person in a like position would exercise under similar circumstances, in:~~

23 ~~———— (1) selecting an agent;~~

24 ~~———— (2) establishing the scope and terms of the delegation, consistent with the~~
25 ~~purposes of the institution and the institutional fund; and~~

26 ~~———— (3) periodically reviewing the agent’s actions in order to monitor the agent’s~~
27 ~~performance and compliance with the scope and terms of the delegation.~~

28 ~~———— (b) In performing a delegated function, an agent owes a duty to the institution to exercise~~
29 ~~reasonable care to comply with the scope and terms of the delegation.~~

30 ~~———— (c) An institution that complies with subsection (a) is not liable for the decisions or~~
31 ~~actions of an agent to which the function was delegated.~~

32 ~~———— (d) By accepting delegation of a management or investment function from an institution~~
33 ~~that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this~~
34 ~~state in all proceedings arising from or related to the delegation or the performance of the~~
35 ~~delegated function.~~

36 ~~———— (e) An institution may delegate management and investment functions to its committees,~~
37 ~~officers, or employees as authorized by law of this state other than this [act].]~~

38 ~~END UPMIFA EXCERPT]~~

39
40 **SECTION ~~411~~412. ACTION BY TRUSTEES.** On any matter that is to be acted on by
41 trustees:

42 (1) the trustees ~~may~~ **[For Discussion: Rutledge question re “may”]** act by majority of

1 their number;

2 (2) the trustees may take the action without a meeting, without previous notice, and
3 without a vote, if a consent or consents, in writing a record, setting forth the action so taken, are
4 signed by trustees having ~~not less than~~ at least the minimum number of ~~votes~~ **[For Discussion:**
5 **Rutledge question re “votes.”]** ~~trustees that would be~~ necessary to authorize or take the action at
6 a meeting at which all trustees entitled to vote thereon were present and voted, but prompt notice
7 of the action must be given to those trustees that did not consent; and

8 (3) a trustee may vote in person or by proxy, ~~and but if by proxy,~~ the proxy ~~may must~~ be
9 ~~granted contained in a signed record in writing or by means of recorded transmission. [For~~
10 **Discussion: “writing” or “record.”]**

11 Comment

12
13 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
14 Act § 34-517; Delaware General Corporation law §228; Uniform Trust Code §703 (2000).

15
16 In accord with Uniform Trust Code §703(a) (2000) and Restatement (Third) of Trusts
17 §39 (2003), paragraph (a)(1) rejects the common law rule requiring unanimity among the
18 trustees of a private trust, replacing it with a default rule requiring a majority.

19
20 The remainder of this section allows for maximum flexibility in the mechanics of
21 allowing the trustees to act or vote on actions. Section 104(b)(3) confirms that the rules stated in
22 this Section are subject to override by the governing instrument.

23
24 The Investment Company Act of 1940 requires a mutual fund’s investment advisory
25 contract, underwriting contract, fidelity bond, independent public accountants, and other such
26 matters to be approved by the trustees of the mutual fund. See 15 U.S.C. § 80a-15(a); 15 U.S.C.
27 80a-31(a); 17 C.F.R. § 270.17g-1. Investment advisory and underwriting contracts, and
28 selection of independent public accountants, must be approved by the noninterested trustees at an
29 in-person meeting. See 15 U.S.C. §80a-15(c); 15 U.S.C. 80a-31(a).

30 **SECTION ~~412~~413. NO RIGHTS OF TRUSTEE’S CREDITORS IN TRUST**

31
32 **PROPERTY.** Property of a statutory trust is not subject to personal obligations of the trustee.⁵

1 ~~even if the~~In the event that the trustee becomes insolvent or bankrupt, the trustee's creditors have
2 no claim upon the assets of the statutory trust. ~~[For Discussion: Rutledge's suggestion that~~
3 ~~this section, plus sections 413 and 414 below, be combined with the other limited liability~~
4 ~~provisions in a single limited liability section in article 3.]~~

5 **Comment**

6 **Principal Sources** – Uniform Trust Code §507 (2000); Delaware Statutory Trust Act
7 §3805.

8
9 ~~___~~ This section ~~implements the concept that a statutory trust is an entity separate from its~~
10 ~~trustee by confirming~~confirms that the personal creditors of a trustee have no recourse against
11 the assets of the statutory trust. The rule of this section is familiar from the operation of common
12 law trusts. See Uniform Trust Code Restatement §507 (2000); Restatement (Third) of Trusts
13 §42 cmt. c (2003); Restatement (Second) of Trusts §308 (1959). The protection afforded by this
14 section is also consistent with that provided by the Bankruptcy Code. Property in which the
15 trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. See 11 U.S.C.
16 §541(d). As a result, creditors of the statutory trust need not worry about the solvency of the
17 trustee personally. SeeFor a general discussion of asset partitioning rules in organizational law,
18 see Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 Yale
19 L.J. 387 (2000); Henry Hansmann & Ugo Mattei, The Functions of Trust Law: A Comparative
20 Legal and Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998). See also Henry Hansmann,
21 Reinier Kraakman, & Richard Squire, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333
22 (2006).
23

24 **SECTION ~~413~~414. TRUSTEE NOT LIABLE FOR ~~DEBTS~~ACTS, OMISSIONS,**
25 **OR OBLIGATIONS OF STATUTORY TRUST.** An obligation of a statutory trust, whether
26 arising in contract, or tort, or otherwise, is not ~~the~~an obligation of a trustee. A trustee, by reason
27 of being a trustee, is not liable to any person other than the statutory trust or a beneficial owner
28 for any act, omission, or obligation of the statutory trust or any ~~trustee-series~~ thereof.

29 **Comment**

30 **Principal Source** – Uniform Limited Liability Company §303 (1996).

31 This section implements the concept that the statutory trust is an entity separate from its

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

Nothing in this Section limits the personal liability of the trustee to the statutory trust for breach of duty under Section ~~402~~404.

SECTION 414. AGENTS, OFFICERS, EMPLOYEES, MANAGERS,
COMMITTEES AND AGENTS NOT LIABLE FOR DEBTS-ACTS, OMISSIONS, OR
OBLIGATIONS OF STATUTORY TRUST. ~~An officer, employee, manager, committee, or~~
~~other~~Any person acting pursuant to Section 104(b)(~~640~~) is not liable, by reason of acting in that
~~capacity~~being an officer, employee, manager, committee, or other person acting pursuant to
~~Section 104(b)(10)~~, to any person other than the statutory trust or a beneficial owner for any act,
omission, or obligation of the statutory trust or any ~~trustee-series~~ thereof.

Comment

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

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

1 [ARTICLE] 5

2 BENEFICIARIES AND BENEFICIAL RIGHTS

3 SECTION 501. CONTRIBUTIONS BY BENEFICIAL OWNERS.

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

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

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

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

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

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

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

(5) [imposing an](#) obligation to repay a loan to the statutory trust by another beneficial owner of the amount necessary to meet the defaulting beneficial owner's commitment; or

(6) fixing the value of the defaulting beneficial owner's beneficial interest by appraisal or by formula and redemption or sale of the defaulting beneficial owner's beneficial interest at ~~this~~[that](#) value.

Comment

Principal Sources – Delaware Statutory Trust Act §3802; Connecticut Statutory Trust Act §34-515.

Although statutory trusts are used primarily as a mode of business organization in commercial transactions, paragraph (a) acknowledges that a beneficial owner may obtain a beneficial interest without an exchange of consideration, an event that is not uncommon in existing commercial practice. However, a statutory trust may not be used to effect a donative transfer because Section ~~301(b)(1)~~[302](#) prohibits a statutory trust from having a "prevailing donative purpose."

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

[Under Section 104\(b\)\(1\), the governing instrument may provide the means by which beneficial ownership is determined and evidenced. Under Section 104\(b\)\(9\)-\(10\), the governing instrument may specify the conditions under which a person becomes a beneficial owner.](#)

SECTION 502. REDEMPTION OF BENEFICIAL INTERESTS. A statutory trust may acquire, by purchase, redemption, or otherwise, any beneficial interest in the statutory trust.

An interest so acquired by a statutory trust is canceled.

Comment

Principal Source – Delaware Statutory Trust Act §3818. ~~[For Discussion: Whether to observe (per Rutledge comment to Sitkoff) that we do not preclude distribution when the entity is unable to meet its debts and obligations in the ordinary course of business, hence the matter of distributions by an insolvent statutory trust is left to fraudulent transfer law.]~~

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

SECTION 503. BENEFICIAL OWNER'S RIGHT TO INFORMATION. A

beneficial owner ~~may examine~~has the right to information relating to the affairs of the statutory trust ~~necessary for~~reasonably related to the beneficial owner's ability to enforce its rights as a beneficial owner.

Comment

Principal Source – Delaware Statutory Trust Act §3819.

Under Section 103(b)(8), 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 "necessary" for the beneficial owner to enforce its rights as such, and under Section 103(b)(8) the governing instrument may prescribe the standards by which "necessary" is determined ~~provided that the~~ if those standards are not "manifestly unreasonable." Imposing a mandatory right to information critical to the beneficiary's ability to enforce the trust is familiar law. See Restatement (Second) of Trusts §173 cmt. c (1959).

Section 404 provides a comparable rule for a trustee's right to information.

1 Act §34-516.

2
3 Paragraph (a) implements the concept that a statutory trust is an entity separate from its
4 beneficial owners by confirming that a creditor of a beneficial owner cannot seize property of the
5 statutory trust. For discussion of the parallel provision in the Delaware Statutory Trust Act, see
6 Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A.
7 Finkelstein, The Delaware Law of Corporations & Business Organizations §19.4, at 19-9 – 19-
8 10 (3d ed. 2005 Supp.).
9

10 Paragraph (c) provides as a default rule that a beneficial owner's interest in the statutory
11 trust is freely transferable. Thus, this paragraph overrides the rule in some states, which would
12 otherwise be applicable to a statutory trust pursuant to Section 105, that makes a common law trust
13 spendthrift by default. See Jeffrey A. Schoenblum, 2007 Multistate Guide to Estate Planning Table
14 9.05, Part 1, Column 2 (collecting authority). However, because the rule stated in paragraph (c) is
15 not scheduled in Section 103(b), it is subject to override by the governing instrument. Section
16 104(b)(32) confirms that the governing instrument may provide otherwise limit a beneficial
17 owner's right to transfer its beneficial interest.
18

19 Under Section 104(b)(12), the governing instrument may provide for the establishment of
20 record dates for allocations and distributions.
21

22
23 **SECTION 505. TRANSACTION WITH BENEFICIAL OWNER.** A beneficial
24 owner or related person of a beneficial owner may lend money to, borrow money from, act as a
25 surety, guarantor or endorser for, guarantee or assume one or more obligations of, provide
26 collateral for, or transact other business with ~~a the~~ statutory trust and, subject to other law, has
27 the same rights and obligations with respect to those matters as a person that is not a beneficial
28 owner.

29 **Comment**

30
31 **Principal Source** – Delaware Statutory Trust Act §3806.
32

33 **SECTION 506. LIMITED LIABILITY OF BENEFICIAL OWNERS.** A beneficial
34 owner ~~of a statutory trust is entitled to~~ has the same limitation of liability accorded to a
35 shareholder of a domestic business corporation. ~~[For (Revisited) Discussion: Reference to~~

~~domestic corporation rather than spelling out the standard.]~~

Comment

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

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

SECTION 507. ~~ACTION~~ VOTING OR CONSENT BY BENEFICIAL OWNERS.

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

(1) ~~if a method is not specified in the governing instrument, the~~ The beneficial owners ~~may~~ act by majority of their ~~interests~~ vote; ~~[Rutledge asks: “Where is it indicated by what means the ownership interest of the beneficial owners is measured? Is this a per capita rule, similar to that applied to the trustees, or is it more of a per capital rule?”] [For discussion: “majority of their vote” is unclear. What “vote” rights do the beneficial owners have? Per capita? Per capital?]~~

(2) ~~the~~ The beneficial owners may take the action without a meeting, without ~~previous~~ notice, and without a vote, if a consent, or consents, in ~~writing~~ a record, setting forth the action so taken, are signed by beneficial owners having ~~not less than~~ at least the minimum number of votes ~~that would be~~ necessary to authorize or take the action at a meeting at which all beneficial

1 owners entitled to vote thereon were present and voted, but prompt notice of the action must be
2 given to those beneficial owners that did not consent. ~~and~~

3 (3) ~~a~~A beneficial owner may vote in person or by proxy, but if by proxy, the proxy must
4 be contained in a signed record. and the proxy may be granted in writing or by means of
5 recorded transmission.

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 Article 6, 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 interests. ~~[Rutledge asks: “Don’t~~
15 ~~we need to address the election of a replacement trustee or the ability to remove a trustee,~~
16 ~~perhaps for cause?]~~

17
18 Section 104(b)(3) confirms that the rules stated in this Section are subject to override by
19 the governing instrument.

20
21 [For discussion: Is there a ’40 Act section relevant for statutory trusts that are
22 mutual funds? If so, assistance on explanatory commentary is invited, particularly from
23 Bibb and Victor.]

24 **SECTION 508. DERIVATIVE ACTIONS.**

25
26 (a) A beneficial owner may maintain a derivative action in the [appropriate court] to
27 enforce a right of ~~a~~the statutory trust if:

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

31 (2) a demand would be futile.

32 (b) A derivative action on behalf of a statutory trust may be maintained only by a person

1 that is a beneficial owner at the time the action is commenced and:

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

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

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

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

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

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

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

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

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

20 (f) A derivative action on behalf of a statutory trust may not be ~~discontinued voluntarily~~
21 ~~dismissed~~ or settled without the court's approval. ~~[For Discussion: Whether (f) is/should be~~
22 ~~mandatory, and if not, inclusion of (f) in Section 104(b)'s confirmation of defaults that can~~

1 ~~be modified.]~~

2 **Comment**

3
4 **Principal Sources** - Uniform Limited Partnership Act §§1002-1005 (2001); Delaware
5 Statutory Trust Act §3816; Connecticut Statutory Trust Act §34-522.

6
7 ~~Section 104(b)(2) confirms that the governing instrument may eliminate or otherwise~~
8 ~~modify the right of a beneficial owner to bring a derivative action under this section. Under~~
9 ~~Section 103(b)(9), the right of a beneficial owner to bring a derivative action under this Section~~
10 ~~may not be eliminated by the governing instrument. However, Section 103(b)(9) permits the~~
11 ~~governing instrument to subject the right to additional standards and restrictions including the~~
12 ~~requirement that beneficial owners owning a specified amount or type of beneficial interest join~~
13 ~~in bringing the derivative action, provided that the additional standards and restrictions are not~~
14 ~~manifestly unreasonable.~~

15
16 In preserving a mandatory right to bring a derivative action, but allowing that right to be
17 subjected to additional standards and restrictions that are not manifestly unreasonable, the
18 drafting committee endeavored to strike an honorable compromise between two policy aims that
19 are in tension. On the one hand, without the right to bring a derivative action, a beneficial owner
20 might have no recourse in the event of trustee misconduct. On the other hand, without
21 appropriate safeguards, a meritless derivative action might be brought with the aim of extracting
22 a quick settlement. See, e.g., Reinier Kraakman, Hyun Park, & Steven Shavell, When Are
23 Shareholder Suits in Shareholder Interests?, 82 Georgetown L.J. 1733 (1994).

24
25 [Further suggestions for this comment are welcome, particularly from Bibb and
26 Victor concerning Section 16(c) of the '40 Act.]
27

1 [ARTICLE] 6

2
3 **CONVERSION, MERGER, AND DISSOLUTION**

4 **SECTION 601. DEFINITIONS.** In this [article]:

5 ~~(1) “Constituent statutory trust” means a constituent organization that is a statutory~~
6 ~~trust.~~

7 ~~—(21)~~ “Constituent organization” means an organization that is party to a merger.

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

9 (3) “Converted organization” means the organization into which a converting
10 organization converts pursuant to Sections 602 through 605.

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

12 (54) “Converting organization” means an organization that converts into another
13 organization pursuant to Section 602.

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

15 (6) “Governing statute” of an organization means the statute that governs the
16 organization’s internal affairs.

17 (7) “Organization” means a general partnership, including a limited liability partnership;
18 limited partnership, including a limited liability limited partnership; limited liability company;
19 corporation; statutory trust; or any other person having a governing statute. The term includes a
20 domestic or foreign organization whether or not organized for profit.

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

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

Comment

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

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

SECTION 602. CONVERSION.

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

- (1) the other organization’s governing statute authorizes the conversion;
- (2) the conversion is not prohibited by the law of the jurisdiction that enacted ~~the~~ other organization’s governing statute; and
- (3) the other organization complies with its governing statute in effecting the conversion.

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

- (1) the name and form of the organization before conversion;
- (2) the name and form of the organization after conversion;
- (3) the terms and conditions of the conversion, including the manner and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration; and
- (4) the organizational documents of the converted organization.

1 **Comment**

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

3
4 In a statutory conversion an existing entity changes its form, the jurisdiction of its
5 governing statute, or both. For example, a statutory trust formed under the laws of one
6 jurisdiction might convert to a corporation, limited liability company, or limited partnership
7 under the laws of the same or another jurisdiction (referred to in some statutes as
8 “domestication”).
9

10 In contrast to a merger, which involves at least two entities, a conversion involves only
11 one. The converting and converted organization are the same entity. See Section 605(a). For
12 this Act to apply to a conversion, either the converting or converted organization must be a
13 statutory trust subject to this Act.
14

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

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

23 **SECTION 603. ACTION ON PLAN OF CONVERSION BY CONVERTING**
24 **STATUTORY TRUST.**

25 (a) A plan of conversion must be consented to by all trustees and all beneficial owners of
26 a converting statutory trust. [\[For discussion: Rutledge note to Sitkoff urging additional](#)
27 [language to the effect that “no beneficial owner shall have the right to dissent from a](#)
28 [conversion.” Rutledge also suggests a parallel provision with respect to mergers.\]](#)

29 (b) A converting statutory trust may amend [the a plan of conversion](#) or abandon the
30 planned conversion:

31 (1) as provided in the plan; and

32 (2) except as prohibited by the plan, by the same consent as was required to
33 approve the plan. [\[For discussion: Style asks, “When does the authority to amend or](#)

abandon a plan end?”]

Comment

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

The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries is a default rule ~~because it is not scheduled in Section 103(b). See also Section~~ that may be overridden by the governing instrument. See Section 104(b)(84)(B). Hence, the governing instrument may state a different quantum of consent or provide a different approval mechanism. Varying this subsection’s rule means that a beneficial owner might be subject to a conversion (including a “squeeze out” conversion) without consent and with no appraisal remedy. If the converting organization is a statutory trust subject to this Act, the trustee of the converting organization is subject to the duties and obligations stated in this Act. Those duties would apply to the process and terms under which the conversion occurs. However, if the governing instrument allows for a conversion with less than unanimous consent, the mere fact that a beneficial owner objects to a conversion does not mean that a trustee that is favoring, arranging, consenting to, or effecting the conversation has breached a duty under this Act.

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

SECTION 604. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.

(a) After a conversion is approved:

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

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

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

1 ~~(C) the date the conversion is effective under the governing statute of the~~
2 ~~converted organization;~~

3 (DC) a statement that the conversion was approved as required by this
4 [act];

5 (ED) a statement that the conversion is not prohibited by the governing
6 statute of the converted organization; and

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

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

13 (A) a statement that the statutory trust was converted from another
14 organization;

15 (B) the name and form of the organization and the jurisdiction of its
16 governing statute; and

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

19 (b) A conversion becomes effective:

20 (1) if the converted organization is not a statutory trust, as provided by the
21 governing statute of the converted organization; or

22 (2) if the converted organization is a statutory trust, when the certificate of trust

1 takes effect.

2 **Comment**

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

4
5 Under paragraph (b) the effective date of a conversion is determined under the governing
6 statute of the converted organization.

7
8 Under Section 103(b)(10), this Section is not subject to override by the governing
9 instrument.

10 11 **SECTION 605. EFFECT OF CONVERSION.**

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

14 (b) When a conversion takes effect:

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

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

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

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

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

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

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

2 (c) A converted organization that is a foreign organization consents to the jurisdiction of
3 the courts of this state to enforce any debt, obligation, or other liability for which ~~owed by~~ the
4 converting statutory trust is liable, if, before the conversion, the converting statutory trust was
5 subject to suit in this state on the debt, obligation, or other liability. A converted organization
6 that is a foreign organization and not authorized to transact business in this state appoints the
7 [Secretary of State] as its agent for service of process for purposes of enforcing ~~an~~ a debt,
8 obligation, or other liability under this subsection. Service on the [Secretary of State] under this
9 subsection is made in the same manner and with the same consequences as in Section ~~215214~~(c)
10 and (d).

11 **Comment**

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

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

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

21 **SECTION 606. MERGER.**

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

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

26 (2) the merger is not prohibited by the law of a jurisdiction that enacted any of

27 ~~those~~ the governing statutes; and

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

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

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

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

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

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

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

Comment

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

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

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

SECTION 607. ACTION ON PLAN OF MERGER BY CONSTITUENT STATUTORY TRUST.

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

3 (b) After a merger is approved, and at any time before a filing is made under Section 608,
4 a constituent statutory trust may amend the plan or abandon the planned merger:

5 (1) as provided in the plan; and

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

8 **Comment**

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

10
11 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries
12 is a default rule that may be overridden by the governing instrument. See Section ~~because it is~~
13 ~~not scheduled in Section 103(b). See also Section 104(b)(84)(B).~~ Hence, the governing
14 instrument may state a different quantum of consent or provide a completely different approval
15 mechanism. Varying this subsection’s rule means that a beneficial owner might be subject to a
16 merger (including a “squeeze out” merger) without consent and with no appraisal remedy. The
17 trustee of a constituent statutory trust is subject to the duties and obligations stated in this Act,
18 and those duties would apply to the process and terms under which the merger occurs. However,
19 if the governing instrument allows for a merger with less than unanimous consent, the mere fact
20 a beneficial owner objects to a merger does not mean that a trustee that is favoring, arranging,
21 consenting to, or effecting the merger has breached a duty under this Act.
22

23 For the reasons discussed in the comment to Section 603, a mutual fund generally does
24 not afford dissenting rights to its shareholders because any shareholder of an acquired mutual
25 fund may redeem acquired fund shares at net asset value prior to the closing date of the proposed
26 reorganization of the acquired fund.
27

28 **SECTION 608. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.**

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

31 (1) each ~~preexisting~~ constituent statutory trust, by one or more trustees or other
32 authorized representative; and

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

(b) ~~The a~~Articles of merger under this section must include:

(1) the name and form of each constituent organization and the jurisdiction of its governing statute;

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

~~(3) the date the merger is effective under the governing statute of the surviving organization;~~

~~(4)~~ (3) if the surviving organization is to be created by the merger:

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

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

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

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

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

(8) any additional information required by the governing statute of any

1 constituent organization.

2 (c) ~~Each constituent statutory trust shall deliver to~~ The articles of merger ~~for filing~~ shall be
3 filed in the [office of the Secretary of State].

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

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

6 (A) compliance with subsection (c); or

7 (B) subject to Section 205(c)(2), (3), or (4), as specified in the articles of
8 merger; or

9 (2) if the surviving organization is not a statutory trust, as provided by the
10 governing statute of the surviving organization.

11 **Comment**

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

13
14 Under Section 103(b)(10), this Section is not subject to override by the governing
15 instrument.

16 17 **SECTION 609. EFFECT OF MERGER.**

18 (a) When a merger becomes effective:

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

20 (2) each constituent organization that merges into the surviving organization
21 ceases to exist as a separate entity;

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

24 (4) all debts, obligations, ~~and or~~ other liabilities of each constituent organization
25 that ceases to exist continue as debts, obligations, or other liabilities of the surviving

1 organization;

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

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

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

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

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

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

13 (9) if the surviving organization preexisted the merger, any amendments provided
14 for in the articles of merger for the organizational document that created the organization
15 become effective.

16 (b) A surviving organization that is a foreign organization consents to the jurisdiction of
17 the courts of this state to enforce any [debt](#), obligation, [or other liability](#) owed by a constituent
18 organization, if before the merger the constituent organization was subject to suit in this state on
19 the obligation. A surviving organization that is a foreign organization and not authorized to
20 transact business in this state appoints the [Secretary of State] as its agent for service of process
21 for the purposes of enforcing ~~an a debt~~, obligation, [or other liability](#) under this subsection.
22 Service on the [Secretary of State] under this subsection is made in the same manner and with

1 the same consequences as in Section 215(c) and (d).

2 **Comment**

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

4
5 Under Section 103(b)(10), this Section is not subject to override by the governing
6 instrument.

7
8 **SECTION 610. [ARTICLE] NOT EXCLUSIVE.** This [article] does not preclude an
9 entity from being converted or merged under law other than this [act].

10 **Comment**

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

12
13 **SECTION 611. DISSOLUTION OF A STATUTORY TRUST.** [For discussion, the
14 four notes on this section that were circulated with this draft on a separate page styled
15 “discussion notes regarding USTEA Section 611 (Dissolution of Statutory Trust).”]

16 (a) A statutory trust may be dissolved by agreement of all trustees and ~~all~~
17 beneficial owners.

18
19 (b) Upon dissolution of a statutory trust and until the filing of a statement of cancellation,
20 the trustees or other persons that under the governing instrument are responsible for winding up
21 the statutory trust’s affairs ~~may~~, in the name of and for and on behalf of the statutory trust, may:

22 (1) institute, maintain, and defend suits, whether civil, criminal, or administrative;

23 (2) settle and close the business of the statutory trust ~~business~~;

24 (3) dispose of and convey the property of the statutory trust ~~property~~;

25 (4) discharge or make reasonable provision for the liabilities of the statutory trust
26 liabilities; and

27
28 (5) distribute to the beneficial owners any remaining assets of the statutory trust.

29 (c) A statutory trust that has dissolved shall pay or make reasonable provision to pay all

claims and obligations, including all contingent, conditional, ~~or~~and unmatured claims and obligations, known to the statutory trust and all claims and obligations that are known to the statutory trust but for which the identity of the claimant is unknown, in accordance with the following rules:

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

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

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

(d) Any person, including any trustee, that under the governing instrument is responsible for winding up a statutory trust's affairs ~~that which~~ has complied with this section ~~[For Discussion: Rutledge inquiry to Sitkoff regarding "complied with this section," here and in Section 612 below.]~~ is not liable to the claimants of the ~~dissolved~~ statutory trust by reason of the person's actions in winding up the statutory trust.

(e) On application of any person that shows good cause, the [appropriate court] may appoint a person to be a receiver for a terminated statutory trust with the power to undertake any action that might have been done by the statutory trust before its termination if the action is necessary for final settlement of unfinished business of the statutory trust. [Moved here from Section 203.]

Comment

Principal Source – Delaware Statutory Trust Act §3808; [Delaware Limited Liability](#)

1 | Company Act §18-805.

2
3 Paragraph (a) provides as a default rule that a statutory trust may be dissolved by
4 agreement of all the trustees and all the beneficiaries.

5
6 Paragraph (e) provides for the possibility that after dissolution additional unfinished
7 business of the statutory trust is discovered.

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

11
12 [As noted above, we have four discussion issues on this section that were circulated with
13 this draft on a separate page styled “discussion notes regarding USTEA Section 611
14 (Dissolution of Statutory Trust).”]

15
16 **SECTION 612. DISSOLUTION OF SERIES.**

17 (a) A series ~~established in accordance with Section 104(b)(4) to (6)~~ may be dissolved and
18 its affairs wound up without causing the dissolution of the statutory trust or any other series
19 thereof in accordance with the following rules:

20 (1) The dissolution, winding up, liquidation, or termination of any series does not
21 affect the limitation of liability with respect to a series ~~established in accordance with Section~~
22 ~~304(d).~~

23 (2) A series ~~established in accordance with Section 104(b)(4) to (6)~~ is dissolved
24 and its affairs must be wound up at the time or upon the happening of events specified in the
25 governing instrument of the statutory trust.

26 (3) Upon dissolution of a series of a statutory trust, the persons that under the
27 governing instrument of the statutory trust are responsible for winding up the series's affairs, in
28 the name of the statutory trust and for and on behalf of the statutory trust and the series, may take
29 all actions with respect to the series as are permitted under Section 604(a) and shall provide for
30 the claims and obligations of the series and distribute the assets of the series as provided Section

1 | 604(b).

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

6 | [For discussion: (1) The omission in this Section of several paragraphs in the
7 | comparable Section 611. (2) Whether this section should be moved into Section 306 on
8 | series.]

9 | **Comment**

10 | **Principal Source** – Delaware Statutory Trust Act §3808.

11 |
12 | This section parallels and is analogous in scope and effect to Section 604, except that it
13 | applies to a series rather than the entire statutory trust. On the series concept, see the Comment
14 | to Section ~~404~~306.

1 [ARTICLE] 7

2 FOREIGN STATUTORY TRUSTS

3 SECTION 701. GOVERNING LAW.

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

- 6 (1) the internal affairs of the foreign statutory trust; ~~and~~
7 (2) the liability of a beneficial owner as beneficial owner and trustee as trustee for
8 the debts, obligations, or other liabilities of the foreign statutory trust; and
9 (3) the liability of a series of a foreign statutory trust with respect to the foreign
10 statutory trust and other series thereof. .

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

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

17 Comment

18
19 **Principal Sources** – Revised Uniform Limited Liability Company §801 (2006); Uniform
20 Limited Partnership Act §901 (2001); Delaware Statutory Trust Act §3851; Connecticut
21 Statutory Trust Act §34-530.

22
23 Paragraph (a) parallels and is analogous in scope and effect to Section 302-303 for a
24 domestic statutory trust. Paragraph (b) allows for a foreign statutory trust to operate
25 domestically even if the law governing it is different from the laws governing domestic statutory
26 trusts, but under paragraph (c) a foreign statutory trust cannot engage in any business or exercise
27 any power that a domestic statutory trust could not.
28

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

SECTION 702. APPLICATION FOR CERTIFICATE OF AUTHORITY.

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

(1) the name of the foreign statutory trust and, if the name does not comply with Section 209, an alternate name adopted pursuant to Section 706(a).

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

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

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

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

Comment

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

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

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

6 **SECTION 703. AMENDMENT OR RESTATEMENT OF CERTIFICATE.**

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

- 9 (1) the name of the qualified foreign statutory trust;
10 (2) the date of filing of its initial certificate; and
11 (3) the changes that the amendment makes to the certificate as most recently
12 amended or restated.

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

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

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

21 (d) ~~Subject to Section 205(c), a~~ An amendment or restated certificate of authority of a
22 foreign statutory trust is effective ~~when filed by the [Secretary of State] as provided in Section~~
23 205(c).

24 **Comment**
25

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

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

5
6 Under Section 103(b)(1), this Section is not subject to override by the governing
7 instrument.
8

9
10 **SECTION 704. ACTIVITIES NOT CONSTITUTING TRANSACTING**

11 **BUSINESS.**

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

- 14 (1) maintaining, defending, ~~and~~or settling an action or proceeding;
15 (2) holding meetings of its trustees or carrying on any other activity concerning
16 its internal affairs;
17 (3) maintaining accounts in financial institutions;
18 (4) maintaining offices or agencies for the transfer, exchange, and registration of
19 the foreign statutory trust's own beneficial interests or securities or maintaining trustees or
20 depositories with respect to those beneficial interests or securities;
21 (5) selling through independent contractors;
22 (6) soliciting or obtaining orders, whether by mail or electronic means or through
23 employees or agents or otherwise, if the orders require acceptance outside this state before they
24 become contractual obligations;
25 (7) creating or acquiring indebtedness, mortgages, or security interests in real or
26 personal property;
27 (8) securing or collecting debts or enforcing mortgages or other security interests

1 in property securing the debts, and holding, protecting, ~~and or~~ maintaining property so acquired;

2 (9) conducting an isolated transaction that is completed within 30 days and is not

3 ~~one~~ in the course of similar transactions ~~of a like manner~~; and

4 (10) transacting business in interstate commerce.

5 ~~—— (b) For purposes of this [article], the ownership in this state of income-producing real~~
6 ~~property or tangible personal property, other than property excluded under subsection (a),~~
7 ~~constitutes transacting business in this state.~~

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

11 (dc) A person is not deemed to be doing business in the state solely by reason of being a
12 trustee or a beneficial owner of a foreign statutory trust.

13 Comment

14
15 **Principal Sources** – Uniform Limited Partnership Act §903 (2001); ~~Delaware Statutory~~
16 ~~Trust Act §3852.~~

17
18 The schedule of activities that ~~do (paragraph (b)) and do not (in paragraph (a)) that do not~~
19 constitute transacting business in the state are illustrative and not exhaustive. As revised in
20 2006, the Delaware Statutory Trust Act contains a similar schedule. See 2006 Delaware Laws
21 Ch. 418 §20 (H.B. 445), adding Delaware Statutory Trust Act §3863.

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

25
26
27 **SECTION 705. FILING OF CERTIFICATE OF AUTHORITY.** If all filing fees
28 have been paid, unless the [Secretary of State] determines that an application for a certificate of
29 authority of a foreign statutory trust does not comply with the filing requirements of this [act],

1 the [Secretary of State] shall file the application, prepare, sign, and file a certificate of authority
2 to transact business in this state and make available a copy of the filed certificate to the foreign
3 statutory trust or its representative.

4 **Comment**

5
6 **Principal Source** – Based on Uniform Limited Partnership Act §904 (2001).

7
8 A certificate of authority filed under this section is different than a certificate of
9 registration under Section 207.

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

13 14 15 **SECTION 706. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.**

16 (a) A foreign statutory trust whose name does not comply with Section 107 may not
17 obtain a certificate of authority until it adopts, for the purpose of transacting business in this
18 state, an alternate name that complies with Section 107. A foreign statutory trust that adopts an
19 alternate name under this subsection and obtains a certificate of authority with the name need not
20 comply with [fictitious or assumed name statute]. After obtaining a certificate of authority with
21 an alternate name, a foreign statutory trust shall transact business in this state under the name
22 unless the foreign statutory trust is authorized under [fictitious or assumed name statute] to
23 transact business in this state under another name.

24 (b) If a qualified foreign statutory trust ~~authorized to transact business in this state~~
25 changes its name to one that does not comply with Section 107, it may not thereafter transact
26 business in this state until it complies with subsection (a) and obtains an amended certificate of
27 authority.

28 **Comment**

1
2 **Principal Source** – Uniform Limited Partnership Act §905 (2001).

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

6
7
8 **SECTION 707. REVOCATION OF CERTIFICATE OF AUTHORITY.**

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

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

14 (2) appoint and maintain an agent for service of process;

15 (3) deliver for filing a statement of change within 30 days after a change has
16 occurred in the name or address of the agent; ~~or~~

17 (4) file an annual report; or:-

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

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

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

(2) the ~~foreign statutory trust's failures to comply with any provision of subsection (a) that is the~~ basis for the revocation.

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

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

Comment

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

Paragraph (a)(3)-(4) is bracketed in recognition of the diversity of approaches among the states with respect to annual reports ((a)(3)) and taxes and other fees ((a)(4)). Uniformity is not expected.

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

SECTION 708. CANCELLATION OF CERTIFICATE OF AUTHORITY; EFFECT OF FAILURE TO HAVE CERTIFICATE.

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

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

(b) ~~The A~~ certificate of authority under subsection (a) is canceled when the notice of cancellation becomes effective under Section 205. [For discussion, whether to split this section into two, with (a) and (b) as cancellation of certificate of authority, and the rest as effect of failure to have a certificate.]

(c) A foreign statutory trust transacting business in this state may not maintain an action or proceeding in this state unless it has a certificate of authority to transact business in this state.

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

[For discussion, whether to add a provision based on ReULLCA 808(c), which says “A member or manager of a foreign limited liability company is not liable for the debts, obligations, or other liabilities of the company solely because the company transacted business in this state without a certificate of authority.”]

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

Comment

Principal Source – Uniform Limited Partnership Act §907 (2001).

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

SECTION 709. ACTION BY [ATTORNEY GENERAL]. The [Attorney General]

may maintain an action to ~~restrain~~ enjoin a foreign statutory trust from transacting business in this state in violation of this [article].

Comment

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

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

1 [ARTICLE] 8

2 MISCELLANEOUS PROVISIONS

3 [For discussion: Rutledge urges that we include a reservation of power to amend or
4 repeal clause. Such a clause appeared in an earlier draft, but was later removed when the
5 conference dropped the clause from its routine boilerplate.]

6 SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In
7 applying and construing this uniform act, consideration must be given to the need to promote
8 uniformity of the law with respect to its subject matter among states that enact it.

9 **Comment**

10
11 **Principal Source** – Uniform Limited Partnership Act §1201 (2001).

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

15
16
17 **SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
18 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the federal
19 Electronic Signatures in Global and National Commerce Act[, 15 U.S.C. Section 7001 et seq.],
20 but this [act] does not modify, limit, or supersede Section 101(c) of that Aetact or authorize
21 electronic delivery of any of the notices described in Section 103(b) of that Aetact.

22 **Comment**

23
24 **Principal Source** – Uniform Limited Partnership Act §1203 (2001).

25
26 Under Section 103(b)(1), this Section is not subject to override by the governing
27 instrument.
28
29

SECTION 803. SAVING CLAUSE. This [act] does not affect an action commenced, proceeding brought, or right accrued before this [act] takes effect.

Comment

Principal Source – Uniform Limited Partnership Act §1207 (2001).

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

SECTION 804. APPLICATION TO EXISTING RELATIONSHIPS.

(a) This [act] ~~may not be construed to~~does not limit, prohibit, or invalidate the existence, acts, or obligations of any common--law trust created or doing business in this state before or after the effective date of the act. The laws of this state other than this [act] pertaining to trusts ~~continue to~~ apply to common--law trusts.

(b) ~~Subject to Section 301(b), a~~ common-law trust created before or after the effective date of this [act] that does not have a prevalingly donative purpose may elect to be governed by ~~the provisions of this [act] upon the~~ filing of a certificate of trust under Section 201.

[(c) A ~~domestic statutory~~ trust 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] may elect to be governed by the provisions of this [act] ~~upon the~~by filing an amendment to its certificate of trust under Section 202.]

[(d) Beginning On two years after the effective date of this [act], this [act] governs the organization and internal affairs of all ~~domestic statutory~~ 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].]

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

4 | **Comment**

6 | **Principal Source** – Uniform Limited Partnership Act §1206 (2001).

7 | This Act governs all ~~domestic~~-statutory trusts formed on or after the Act’s effective date.
8 | For pre-existing ~~domestic~~-statutory trusts, this section establishes an optional “elect in” period
9 | and a mandatory, all-inclusive date of two years following the effective date. Beginning on the
10 | all-inclusive date, each pre-existing ~~domestic~~-statutory trust that has not previously elected in
11 | becomes subject to this Act—including the schedule of mandatory rules in Section 103(b)—by
12 | operation of law.

14 | Because Consistent with Section 302, paragraph (b) is subject to Section 301(b), of this
15 | Section prohibits a common law trust with a ~~charitable or~~ prevailing donative purpose ~~may~~
16 | ~~not from~~ converting to a statutory trust.

18 | The drafting committee contemplated that some enacting jurisdictions might modify this
19 | section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not
20 | expected—to address other transition problems arising from differences between this Act and
21 | prior law. [For discussion: States that lack a reserved power clause. Perhaps the answer is
22 | simply to remark the problem in this comment?]

24 | ~~SECTION 805. SEVERABILITY CLAUSE. If any provision of this [act] or its~~
25 | ~~application to any person or circumstance is held invalid, the invalidity does not affect other~~
26 | ~~provisions or applications of this [act] which can be given effect without the invalid provision or~~
27 | ~~application, and to this end the provisions of this [act] are severable.~~

28 | **Comment**

30 | ~~Principal Source~~ – Uniform Limited Partnership Act §1202 (2001).

32 | **SECTION ~~806~~805. REPEALS.** Effective On [all-inclusive date], the following acts are
33 | repealed:

34 | (1) [the State Statutory Trust Act as amended and in effect immediately before the
35 | effective date of this [act]];

(2) [the State Business Trust Act as amended and in effect immediately before the effective date of this [act]]; and

(3) [the State Real Estate Investment Trust Act as amended an in effect immediately before the effective date of this [act]].

Comment

Principal Sources – Uniform Limited Partnership Act §1205 (2001).

Paragraphs (1) and (2) supply model language for enacting jurisdictions that have previously enacted a Statutory Trust Act or a Business Trust Act.

Paragraph (3) supplies model language for enacting jurisdictions that have previously enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a REIT, is not a type of trust but rather is a tax status awarded to any business entity that qualifies under 26 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under 26 U.S.C. §860D. In spite of the use of the word “trust” in its title, there is no reason why a REIT must be organized as a trust, whether statutory or common law. Indeed, in contemporary practice nearly all publicly-traded REITs are organized as Maryland corporations, not as trusts. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* __ [citation]. Nonetheless, a number of states have enacted REIT statutes that authorize the creation of a REIT-specific entity designed to qualify as a REIT under the Internal Revenue Code. Because a statutory trust under this Act could serve the same purpose, the drafting committee contemplated that enacting jurisdictions might take the occasion of enacting ~~the USTEA~~[this act](#) to repeal their REIT statutes.

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

SECTION 807. EFFECTIVE DATE. This [act] takes effect

Comment

Principal Source – Uniform Limited Partnership Act §1204 (2001).

Section 804 specifies how this Act affects ~~domestic~~ statutory trusts, with special provisions pertaining to ~~domestic~~ statutory trusts formed before the Act’s effective date. Section 804 contains no comparable provisions for foreign statutory trusts. Therefore, once this Act is effective, it applies immediately to all foreign statutory trusts, whether formed before or after the Act’s effective date.

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