

D R A F T
FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For December 2006 Drafting Committee Meeting

With Prefatory Notes and Comments

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November 15, 2006

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UNIFORM STATUTORY TRUST ENTITY ACT

Prefatory Note

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

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 “statutory business trust,” “statutory trust entity,” or “statutory trust.”

Since the 1980s, statutory trust entities have thrived in a variety of niches, particularly in the mutual fund 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).

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. 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. 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.

Most existing state business trust statutes do not prohibit use of the common law trust for a commercial purpose. Instead, these 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, 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); 304(c) (attachment of statutory trust property); 401(a) (management by or under the authority of the trustees); 402 (standards of conduct of trustees); 405 (interested transactions); 506 (limited liability of “a domestic corporation”). Looking to the corporate law model on these issues is consistent with the hybrid approach of the Delaware Act and reflect the nature of a statutory trust as an unincorporated entity.

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 the Uniform Trust Code (2000).

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 prevaillingly donative purpose (§301); (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).

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. 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. Moreover, 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 of ordinary trust law principles including those concerning fiduciary standards of conduct (Section 402) and modification and termination of trusts (Section 303). Section 804(b) allows an existing common law trust that does not have a charitable or prevaillingly 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 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) 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. Second, use of the word “entity” in the title differentiates this act from

19 the Uniform Trust Code, which is a codification of the common law of trusts.

20

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

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

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

24 charitable or prevaillingly donative purpose.

25

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

27 would necessarily qualify as a “business trust” under the bankruptcy code. Under the

28 bankruptcy code, the definition of a “debtor” eligible for bankruptcy includes a “person,” 11

29 U.S.C. §101(13), the definition of “person” includes a “corporation,” id. §101(41), and the

30 definition of “corporation” includes a “business trust.” Id. §101(9). Hence, a “business trust”

31 might qualify as an eligible “debtor.” Bankruptcy eligibility is a significant issue for trusts used

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

33 statutory trust in practice. Such trusts are often designed to be “bankruptcy remote,” the ultimate

34 form of which is an entity that is not an eligible debtor under the bankruptcy code. As in the

35 leading case of *In re Secured Equipment Trust of Eastern Airlines, Inc.*, 38 F.3d 86 (2d Cir.

36 1994), in certain configurations trusts used in securitization transactions have indeed been held

37 not to be “business trusts” under the bankruptcy code.

38

1 Third, the drafting committee was influenced by the revealed preference for “statutory
2 trust” over “business trust” among existing users of statutory business trusts as evidenced by the
3 dominant position of the Delaware Statutory Trust Act relative to the statutory or business trust
4 acts of the other states. See Robert H. Sitkoff, The Rise of the Statutory Business Trust [in
5 progress]. In 2002 Delaware recast the “Delaware Business Trust Act” as the “Delaware
6 Statutory Trust Act,” replacing nearly every reference to “business trust” with “statutory trust.”
7 See 73 Del. Laws 329. The Connecticut statute, which is the second most popular, is likewise
8 cast as a Statutory Trust Act.
9

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

14 **SECTION 102. DEFINITIONS.**

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

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

18 (3) “Common law trust” means a fiduciary relationship with respect to property arising
19 from a manifestation of intention to create that relationship and subjecting the person that holds
20 title to the property to duties to deal with the property for the benefit of charity or for one or
21 more persons, at least one of which is not the sole trustee, whether or not the purpose of the trust
22 is donative or commercial. The term includes the type of trust known at common law as a
23 “business trust” or “Massachusetts trust”. **[For Discussion: We were asked in Hilton Head**
24 **whether this last sentence belongs instead in the comment.]**

25 (4) “Designated office” means:

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

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

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

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

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

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

11 (9) “Recorded transmission” means any form of communication that creates a record,
12 electronic or otherwise.

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

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

16 (B) a child, grandchild, or grandparent of the person, or the spouse of one of
17 them; **[For Discussion, two issues: (1) Combining (A) and (B), and (2) whether to add**
18 **language that would cover an entity owned by one of the covered individuals or in which a**
19 **covered individual is a manager.]**

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

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

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

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

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

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

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

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

(14) “Trust instrument” means any instrument or instruments other than the certificate of trust, whether referred to as a trust agreement, trust instrument, declaration of trust, bylaws, or otherwise, that provide for the governance of the affairs of the statutory trust and the conduct of its business.

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

Comment

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

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

Paragraphs (2), (6), and (14) define “certificate of trust,” “governing instrument,” and “trust instrument” respectively. The certificate of trust is the record that must be filed with a public official under Section 201 to form a statutory trust. The trust instrument is the transaction

1 document that provides for the governance of the affairs of the statutory trust and that need not
2 be made part of the public record. Together, the certificate of trust and the trust instrument
3 compose the governing instrument. The term “governing instrument” is in the singular to
4 conform with standard commercial usage. Conflicts between the certificate of trust and the
5 governing instrument are resolved pursuant to Section 201(d).
6

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

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

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

- 12 (1) [Articles] 2, 7, and 8;
- 13 (2) the exclusion of donative and charitable purposes under Section 301(b);
- 14 (3) the law governing the internal affairs of a statutory trust under Section 302;
- 15 (4) the standards of conduct for trustees under Section 402, but the governing
16 instrument may prescribe the standards by which “good faith”, “best interests of the statutory
17 trust”, and “care that a person in a like position would reasonably believe appropriate under
18 similar circumstances” are determined, if the standards are not manifestly unreasonable;
- 19 (5) the right of a trustee to information under Section 404, but the governing
20 instrument may prescribe the standards by which “necessary” is determined if the standards are
21 not manifestly unreasonable;
- 22 (6) the prohibition under Section 407 of indemnification, advancement, or
23 exoneration for conduct involving bad faith or reckless indifference;
- 24 (7) the invalidity under Section 409(b) of a direction to a trustee or other person if
25 the direction is manifestly contrary to the terms of the governing instrument or would constitute

1 a serious breach of fiduciary duty;

2 (8) the right of a beneficial owner to information under Section 503, but the
3 governing instrument may prescribe the standards by which “necessary” is determined if the
4 standards are not manifestly unreasonable; and

5 (9) the public filing requirements in connection with a conversion or merger
6 under Sections 604 and 608.

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

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

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

14 (A) the objective of the term is unreasonable; or

15 (B) the term is an unreasonable means to achieve the provision’s
16 objective.

17 **Comment**

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

22
23 Paragraph (a) emphasizes that the Uniform Statutory Trust Entity Act is primarily a
24 default statute. Most of the Act’s provisions may be overridden by the terms of the governing
25 instrument.

26
27 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 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 by the terms of the governing instrument. Consistent with longstanding principles of trust law, the main exception is the mandatory prohibition of indemnification, advancement, or exoneration for conduct involving bad faith or reckless indifference (paragraph (b)(6). 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).

Paragraphs (b)(4), (b)(5), and (b)(6) 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, but only if the alteration is not "manifestly unreasonable." In opting for a "manifestly unreasonable" standard, the drafting committee took notice of the term's use 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 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.

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 to Sections 209 (name of statutory trust), 405 (interested transactions), 407 (indemnification, advancement, and exoneration), 410 (delegation by trustee), and 411 (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.]**

1 Because paragraph (b) refers specifically to other sections of the Act, enacting
2 jurisdictions that modify those other sections may also need to modify paragraph (b).
3

4 **[For Discussion: Whether the comment to all sections that are made mandatory**
5 **under this section should so indicate. Currently, most do not.]**
6

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

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

9 (1) any provision relating to:

10 (A) the management and affairs of the statutory trust;

11 (B) the rights, duties, and obligations of the trustees, beneficial owners,
12 and other persons; and

13 (C) any other provision that is not inconsistent with this [act].

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

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

17 (2) eliminate a beneficial owner's right to bring a derivative action under Section
18 508 or subject such right to additional standards and restrictions including the requirement that
19 beneficial owners owning a specified amount or type of beneficial interest join in bringing the
20 derivative action;

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

22 (4) provide for classes, groups, or series of trustees or beneficial owners, or
23 classes, groups, or series of beneficial interests, having such relative rights, powers, and duties as
24 the governing instrument may provide, and provide for the creation of additional classes, groups,
25 or series of trustees, beneficial owners, or beneficial interests, having such relative rights,

1 powers, and duties as may be established, including rights, powers, and duties senior or
2 subordinate to existing classes, groups or series of trustees, beneficial owners or beneficial
3 interests;

4 (5) provide for designated series of trustees, beneficial owners, or beneficial
5 interests having separate rights, powers, or duties with respect to specified property or
6 obligations or profits and losses associated with specified property or obligations, and permit the
7 series to have a separate business purpose or investment objective;

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

11 (7) if and to the extent that voting rights are granted under the governing
12 instrument, include provisions relating to:

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

15 (B) waiver of notice;

16 (C) action by consent without a meeting;

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

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

21 (8) provide for the taking of any action without the vote or approval of any
22 particular trustee or beneficial owner, or class, group, or series of trustees or beneficial owners,

1 including:

2 (A) the amendment of the governing instrument;

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

4 (C) the appointment of one or more trustees;

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

7 (E) the dissolution of the statutory trust; and

8 (F) the creation of a class, group, or series of beneficial interests that was
9 not previously outstanding;

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

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

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

22 (12) provide for the manner in which the governing instrument may be amended,

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

6 (13) provide that a person becomes a beneficial owner, acquires a beneficial
7 interest, and is bound by the governing instrument if the person, or a representative authorized
8 by the person orally, in a record, or by conduct, such as payment by the representative for a
9 beneficial interest, complies with the conditions for becoming a beneficial owner set forth in the
10 governing instrument such as payment to the statutory trust or to a previous beneficial owner;

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

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

18 (16) provide for the establishment of record dates with respect to allocations and
19 distributions.

20 **Comment**

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

23
24 Paragraph (a) emphasizes the freedom of contract afforded to transactional planners by

1 the Uniform Statutory Trust Entity Act, which is primarily a default statute.

2
3 Paragraph (b) enumerates a nonexhaustive list of provisions that may validly be included
4 in a statutory trust's governing instrument. The drafting committee concluded that the demand
5 of third parties and transactional planners to see language that expressly authorizes specific
6 terms justified inclusion of a detailed list. Similar reasoning underlies the existence of a detailed
7 schedule of powers in Uniform Trust Code §816 (2000) notwithstanding the broad general
8 statement in Uniform Trust Code §815.

9
10 Among other things, paragraph (b) confirms in subsections (4) to (6) that a statutory trust
11 may be organized with multiple series. Structuring a statutory trust with multiple series is
12 common in mutual funds and other investment companies registered under the Investment
13 Company Act of 1940. Section 304(d) provides that in a statutory trust that has created separate
14 series under Section 104(b)(4) to (6), the debts, liabilities, and other obligations of a particular
15 series are enforceable against the assets of that series only, but only if (1) separate records are
16 maintained for each series and (2) notice of the limitation on liabilities of a series is set forth in
17 the certificate of trust. Under Section 201 the certificate of trust is made part of the public
18 record. Section 612 provides for the dissolution of a series.

19
20 **SECTION 105. APPLICABILITY OF TRUST LAW.** The law of this state pertaining
21 to trusts supplement this [act], except to the extent modified or displaced by:

22 (1) this [act];

23 (2) subject to Section 103(b), the governing instrument; or

24 (3) another statute of this state.

25 **Comment**

26
27 **Principal Sources** – Uniform Trust Code §106 (2000); Delaware Statutory Trust Act
28 §3809; Connecticut Statutory Trust Act §34-519.

29
30 Consistent with the Delaware Statutory Trust Act, the Uniform Statutory Trust Entity Act
31 provides that state trust law, not corporate law, supplements this Act and the terms of the
32 governing instrument. In resolving this question in favor of trust law, the drafting committee
33 was strongly influenced by the revealed preference for trust law among existing users of
34 statutory trusts as evidenced by the popularity of the Delaware Act as compared to the business
35 trust acts (such as those in Arizona, Indiana, Kansas, Mississippi, Montana, Oregon, Tennessee,
36 Washington, and West Virginia) that look to corporate law.

SECTION 106. RULES OF CONSTRUCTION.

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

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

Comment

Principal Sources – Delaware Statutory Trust Act §3825; Connecticut Statutory Trust Act §34-546.

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

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

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 certificate of trust must be delivered to the [Secretary of
5 State] for filing. The certificate must:

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

7 (2) provide the street and mailing address of its current designated office;

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

10 (b) A certificate of trust may also contain any other information not inconsistent with this
11 [act].

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

14 (d) If any provision of the trust instrument is inconsistent with the filed certificate of
15 trust, a filed statement of cancellation or change, or filed articles of conversion, reorganization,
16 or merger:

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

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

22 Comment
23

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

3
4 Unlike a common law trust, a statutory trust is a creature of statute that requires a filing
5 with the state to come into existence (filing rules are typical of limited liability entities). A
6 statutory trust comes into existence only if (1) a certificate of trust is prepared and delivered to
7 the specified public official for filing, and (2) the public official files the certificate. (For more
8 on the meaning of “filing,” see Section 205 and the comment thereto.) The certificate of trust
9 provides notice to interested third parties of the existence of the statutory trust and the
10 identification of the statutory trust’s initial agent for service of process. Pursuant to Section
11 304(d)(2), the certificate of trust also puts third parties on notice if the statutory trust further
12 segregates its assets and liabilities by creating one or more series.

13
14 Although created by a public filing, a statutory trust is also a creature of contract. As
15 such, it will be possible, though improper, for the trust instrument to be inconsistent with the
16 certificate of trust or other public filings relating to the statutory trust. Paragraph (d) provides
17 the rule for determining which prevails in such circumstances. Under paragraph (d)(1), the
18 inconsistent provision of the trust instrument prevails as to trustees and beneficial owners.
19 Under paragraph (d)(2), the terms of the public filings trust prevail as to all other parties that
20 reasonably rely on the filing. The different rule is justified on the theory that a party other than a
21 beneficial owner or trustee is entitled to rely on the public record.

22
23 **SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE.**

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

26 (1) the name of the statutory trust;

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

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

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

33 (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 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.

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.]**

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.

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.

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

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

Comment

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

SECTION 205. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY OF STATE]; EFFECTIVE TIME AND DATE.

(a) A record authorized or required to be delivered to the [Secretary of State] for filing under this [act] must be captioned to describe the record’s purpose, be in a medium permitted by

1 the [Secretary of State], and be delivered to the [Secretary of State]. If all filing fees have been
2 paid, unless the [Secretary of State] determines that a record does not comply with the filing
3 requirements of this [act], the [Secretary of State] shall file the record and make available a copy
4 of the filed record to the person on whose behalf the record was filed.

5 (b) Upon request and payment of a fee, the [Secretary of State] shall send to any person a
6 certified copy of a record.

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

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

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

16 (3) if the record specifies a delayed effective date but not an effective time, at
17 12:01 a.m. on the earlier of:

18 (A) the specified date; or

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

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

22 (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.

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

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

SECTION 206. CORRECTING FILED RECORD.

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

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

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

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

(3) correct the incorrect information or defective signature.

(c) When filed by the [Secretary of State], a statement of correction under subsection (a) is effective retroactively as of the effective date of the record the statement corrects, but the statement is effective when filed with respect to persons that relied on the uncorrected record and would be adversely affected by the correction.

Comment

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

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

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

SECTION 207. CERTIFICATE OF EXISTENCE OR REGISTRATION.

(a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish a certificate of existence for a statutory trust if the records filed in the [office of the Secretary of State] show that the [Secretary of State] has filed a certificate of trust and has not filed a

statement of cancellation. A certificate of existence must state:

(1) the statutory trust's name;

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

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

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

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

(b) The [Secretary of State], upon request and payment of the requisite fee, shall furnish a certificate of registration for a foreign statutory trust if the records filed in the [office of the Secretary of State] show that the [Secretary of State] has filed a certificate of authority, has not revoked the certificate of authority, and has not filed a notice of cancellation. A certificate of registration must state: **[For Discussion: Whether (b) and the part of (c) that references registration (rather than existence) belong in Article 7.]**

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

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

(3) whether the foreign statutory trust's most recent annual report required by Section 211 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.

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

5 **Comment**

6
7 **Principal Source** – Uniform Limited Partnership Act §209 (2001).
8

9 A certificate of existence or registration can reveal only information present in the public
10 record. Under this Act significant information bearing on the status of a statutory trust may be
11 outside the public record.
12

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

16 A certificate of registration furnished under paragraph (b) is different than a certificate of
17 authority under Section 705.
18

19 **SECTION 208. CANCELLATION OF CERTIFICATE OF EXISTENCE.**

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

22 **Discussion: Rutledge comments to Sitkoff re administrative dissolution.]**

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

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

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

28 (4) file an annual report.

29 (b) To cancel a certificate of existence of a statutory trust, the [Secretary of State] must

1 prepare, sign, and file a notice of cancellation and send a copy to the statutory trust's agent for
2 service of process or, if the statutory trust does not appoint and maintain a proper agent in this
3 state, to the statutory trust's designated office. The notice must state:

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

6 (2) the statutory trust's failures to comply with any provision of subsection (a)
7 that is the basis for the revocation.

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

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

15 **Comment**

16
17 **Principal Source** – Uniform Limited Partnership Act §906 (2001).
18

19 **SECTION 209. NAME OF STATUTORY TRUST.**

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

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

24 (2) any name reserved under Section 210 [or other state laws allowing the

1 reservation or registration of business names, including fictitious or assumed name statutes].

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

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

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

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

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

18 (A) has merged into the applicant;

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

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

22 (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. For example, the names of mutual funds typically do not contain a limited liability appellation, though 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”).

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 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

1 Section 209, but the name reserved under this paragraph may differ from the foreign statutory
2 trust's name only to the extent necessary to comply with Section 209.

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

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

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

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

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

18 Subject to Section 205(c), the transfer or termination is effective when the [Secretary of State]
19 files the notice of transfer.

20 **Comment**

21 **Principal source** – Uniform Limited Partnership Act §109 (2001).
22

23 **SECTION 211. ANNUAL REPORT FOR [SECRETARY OF STATE].**

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

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

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

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

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

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

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

12 (C) the street and mailing address of its principal office and, if the laws of
13 the jurisdiction under which the foreign statutory trust is formed require it to maintain an office
14 in that jurisdiction, the street and mailing address of the required office; and

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

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

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

1 calendar year.

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

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

11 **Comment**

12
13 **Source** – Uniform Limited Partnership Act §210 (2001).
14

15 **SECTION 212. AGENT FOR SERVICE OF PROCESS.**

16 (a) A statutory trust and a foreign statutory trust granted a certificate of authority must
17 designate and continuously maintain in this state an agent for service of process.

18 (b) An agent for service of process of a statutory trust or foreign statutory trust must be
19 an individual who is a resident of this state or a person authorized to do business in this state that
20 maintains an office in this state.

21 **Comment**

22
23 **Principal Sources** – Uniform Limited Partnership Act §114 (2001); Delaware Statutory
24 Trust Act §3804; Connecticut Statutory Trust Act §34-507.
25

26 Under Section 201(a)(3), the initial designation of a statutory trust's agent for service of

process is made in the original certificate of trust. Under Section 702(a)(3), the initial designation of a foreign statutory trust's agent for service of process is made in the original application for a certificate of authority. The initial designation may be changed pursuant to a statement of change under Section 213, by an amendment to the certificate of trust under Section 202, or by an annual report under Section 211(e).

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

(a) A statutory trust or 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 foreign statutory trust;
- (2) the street and mailing address of its current designated office;
- (3) if the current designated office is to be changed, the street and mailing address of the new designated office;
- (4) the name and street and mailing address of its current agent 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].

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 foreign statutory trust may also change the information by an amendment to its certificate of authority

1 under Section 703. Further, if the information currently in the public record is not inaccurate, a
2 statutory trust or foreign statutory trust may change the information in an annual report under
3 Section 211(e).
4

5 **SECTION 214. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

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

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

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

15 **Comment**

16
17 **Principal Source** – Uniform Limited Partnership Act §116 (2001).
18

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

30 **SECTION 215. SERVICE OF PROCESS.**

31 (a) An agent for service of process appointed by a statutory trust or foreign statutory trust

1 is an agent of the statutory trust or foreign statutory trust for service of any process, notice, or
2 demand required or permitted by law to be served upon the statutory trust or foreign statutory
3 trust.

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

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

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

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

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

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

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

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

3 **Comment**
4

5 **Principal Source** – Uniform Limited Partnership Act §117 (2001).
6

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

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

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

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

13 Comment

14
15 Principal Sources – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
16 Act §§34-502, 34-502a.

17
18 Paragraph (a) confirms that any prior judicial decision that holds that a common law
19 business trust violates the state’s corporate law, trust law, or public policy is not applicable to a
20 statutory trust created under this Act. Examples of such decisions, which reflect the now
21 outmoded concern that a business trust could be used to evade regulatory limitations on the
22 corporate form, are collected in Robert H. Sitkoff, The Rise of the Statutory Business Trust [in
23 progress].

24
25 Subject to subparagraphs (b)(1) and (b)(2), a statutory trust may be formed for “any
26 lawful purpose.” Thus, in addition to use in a commercial transaction, a statutory trust may be
27 used in a custodial or other context that need not be for profit. The limitation to “lawful” activity
28 addresses the concern that some states limit the type of organizations that may be used in
29 regulated industries such as banking and insurance.

30
31 Paragraph (b)(1) excludes “a prevailingly donative purpose” to address the concern that a
32 statutory trust might be used in an estate planning or other donative context to evade public

1 policy limitations on donative transfers and common law trusts. See, e.g., Uniform Trust Code
2 §105 (2000); John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105
3 (2004). The word “prevailingly” was included to account for the possibility that a donative
4 transfer might be structured to look otherwise in form but still be a donative transfer in
5 substance. Although statutory trusts are not commonly used in donative transfers, there is
6 evidence of occasional such use. See Sitkoff, *supra*, at ____.

7
8 By prohibiting a statutory trust from having “a prevailingly donative purpose,” the
9 drafting committee avoided the necessity of designing a comprehensive schedule of mandatory
10 rules applicable only to statutory trusts with such a purpose, a task made more difficult by the
11 increasing differentiation among the states on these matters, particularly with respect to the
12 rights of the settlor’s creditors in a self-settled trust and the continued application of the Rule
13 Against Perpetuities to interests held in trust. See Robert H. Sitkoff & Max M. Schanzenbach,
14 Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes,
15 115 Yale L.J. 356 (2005).

16
17 Examples of mandatory rules applicable to common law trusts that people might have
18 tried to avoid by using a statutory trust include the following:

- 19 • the duty of a trustee to act in good faith and in accordance with the terms and
20 purposes of the trust and the interests of the beneficiaries;
- 21 • the requirement that a trust and its terms be for the benefit of one or more
22 ascertainable beneficiaries [**For Discussion: The beneficiary requirement as**
23 **applied to a statutory trust and the potential problem of purpose statutory**
24 **trusts.],** and that the trust have a purpose that is lawful, not contrary to public
25 policy, and possible to achieve;
- 26 • the power of the court to modify or terminate a trust;
- 27 • the effect of a spendthrift provision and the rights of the settlor’s and the
28 beneficiary’s creditors and assignees to reach the assets of a trust;
- 29 • the power of the court to adjust a trustee’s compensation specified in the terms of
30 the trust which is unreasonably low or high;
- 31 • the power of the court to remove a trustee for a serious breach of trust;
- 32 • the duty of the trustee to give information and make reports concerning the
33 administration of the trust to the beneficiary;
- 34 • the effect of an exoneration clause that purports to limit or eliminate the duties or
35 liabilities of a trustee to a beneficiary;
- 36 • the rights of a party, other than a trustee or beneficiary, that transacts with the
37 trustee in the trustee’s capacity as such;
- 38 • the rules against perpetuities, accumulations of income, and suspension of the
39 power of alienation; and
- 40 • the power of the court to take such action and exercise such jurisdiction as may be
41 necessary in the interests of justice.

42
43 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. 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 trustee as trustee for the debts, obligations, or other liabilities of a statutory trust.

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 foreign statutory trusts that parallel and are analogous in scope to those of this section.

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

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), a statutory trust may not have a prevailingly donative purpose.

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.

40

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 (c) Except as otherwise provided in subsection (d), the property of a statutory trust is
9 subject to attachment and execution as if it were a domestic corporation.

10 (d) If the governing instrument of a statutory trust, including a statutory trust that is a
11 registered investment company under the Investment Company Act of 1940, as amended, 15
12 U.S.C. Sections 80a-1 et seq., creates one or more series as provided in Section 104(b)(4) to (6),
13 the debts, obligations, liabilities, and expenses incurred, contracted for, or otherwise existing
14 with respect to a particular series are enforceable against the assets of the series only, and not
15 against the assets of the statutory trust generally or any other series thereof, and none of the
16 debts, obligations, liabilities, and expenses incurred, contracted for, or otherwise existing with
17 respect to the statutory trust generally or any other series thereof are enforceable against the
18 assets of the series if:

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

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

3 **Comment**

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

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

10
11 Paragraph (d) confirms that for a statutory trust that has created separate series under
12 Section 104(b)(4) to (6), the debts, liabilities, and other obligations of a particular series are
13 enforceable against the assets of that series only, but only if (1) separate records are maintained
14 for each series and (2) notice of the limitation on liabilities of a series is set forth in the
15 certificate of trust. Under Section 201 the certificate of trust is made part of the public record.
16 On the series concept, see also the Comment to Section 104.

17
18
19 **SECTION 305. POWER TO HOLD PROPERTY.** A statutory trust has the power to
20 hold or take title to property its own name whether in an active, passive, or custodial capacity.

21 **Comment**

22 **Principal Source** – Connecticut Statutory Trust Act §34-502a.

23
24 This Section implements the concept that a statutory trust is an entity separate from its
25 trustee and beneficial owners by confirming that a statutory trust may transact over property in
26 its own name. The property of a common law trust, by contrast, must be held in the name of the
27 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 (b) A trustee, without authorization by the court, may exercise:

7 (1) powers conferred by the governing instrument;

8 (2) except as limited by the governing instrument, any other powers necessary or
9 convenient to carry out the business and affairs of the statutory trust; and

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

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

14 1012(a): "A person . . . who in good faith assists a trustee, or who in good faith and
15 for value deals with a trustee, without knowledge tha the trustee is exceeding or improperly
16 exercising the trustee's powers is protected from liability as if the trustee properly
17 exercised the power."

18 1012(b): "A person . . . who in good faith deals with a trustee is not required to
19 inquire into the extent of the trustees powers or the propriety of their exercise."]

20 Comment

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

23
24 Paragraph (a) confirms that the trustees manage the statutory trust.

Paragraph (b) is intended to override 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, the existence of a power, regardless of the source of the power, does not speak to the question whether in a particular case it is consistent with the 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).

SECTION 402. STANDARDS OF CONDUCT FOR TRUSTEES.

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

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

Comment

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

To police the exercise of the trustee's broad powers under Section 401, this section subjects the trustee to fiduciary duties of loyalty (paragraph (a)) and care (paragraph (b)) akin to those of a corporate director. Under Section 103(b), the trustee's standards of conduct under this section are mandatory rules that are not subject to override by the governing instrument. However, 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 reasonable believe appropriate under similar circumstances” are determined provided that the standards are not “manifestly unreasonable.”

The drafting committee opted to model the trustee's duties on the corporate fiduciary obligation rather than the more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of commercial actors. For a comparison, see Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. Corp. L. 565, 572-82

(2003). See also sources cited in the comment to Section 405.

Because the standards of conduct stated in this section are drawn from corporate law, the drafting committee contemplated that the business judgment rule would apply in litigation under paragraph (b). See generally Stephen M. Bainbridge, *Corporation Law and Economics* §6.4 (2002). **[For Discussion: (1) Rutledge’s comments to Sitkoff re this paragraph, (2) adding a citation to the Dennis Block treatise.]**

SECTION 403. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT COMPANY.

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

SECTION 404. TRUSTEE’S RIGHT TO INFORMATION. A trustee has the right to examine information relating to the affairs of the statutory trust necessary for the trustee’s discharge of the trustee’s duties as trustee.

Comment

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

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

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

SECTION 405. INTERESTED TRANSACTIONS. A trustee, officer, employee, manager, or a related person of a trustee, officer, employee, or manager, may lend money to, borrow money from, act as a surety, guarantor, or endorser for, guarantee or assume one or more obligations of, provide collateral for, and transact other business with a statutory trust and,

1 subject to the trustee’s fiduciary obligation under Section 402, has the same rights and
2 obligations with respect to any such matter as a person that is not a trustee, officer, employee,
3 manager, or related person of a trustee, officer, employee, or manager.

4 **Comment**

5 **Principal Sources** – Delaware Statutory Trust Act §3806.
6

7 Consistent with the use of the term “best interests” instead of “sole interest” in Section
8 402(a), this section abrogates the no-further-inquiry rule of the common law of trusts, which
9 forbids self-dealing transactions. See Restatement (Second) of Trusts §170 (1959); John H.
10 Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?, 114 Yale
11 L.J. 929 (2005); Melanie B. Leslie, Trusting Trustees: Fiduciary Duties and the Limits of Default
12 Rules, 94 Georgetown L.J. 67 (2005).
13

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

20 **SECTION 406. GOOD-FAITH RELIANCE ON GOVERNING INSTRUMENT.**

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

24 (b) An officer, employee, manager, committee, or other person designated pursuant to
25 Section 104(b)(10) that acts in good-faith reliance on the terms of the governing instrument is
26 not liable to the statutory trust or to a beneficial owner for breach of any duty, including a
27 fiduciary duty, to the extent the breach resulted from the reliance.

28 **Comment**

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

1
2 A trustee, officer, employee, manager, committee, or other such person or persons should
3 be able to administer a statutory trust with dispatch and without concern that a reasonable
4 reliance on the terms of the governing instrument is misplaced. This section protects a person
5 that so relies on a trust instrument, but only to the extent the breach of trust resulted from such
6 reliance and only if the person's reliance was in good faith.
7

8 The drafting committee contemplated that a trustee's good faith reliance on the records of
9 the statutory trust, or on a report made by a person that is within the person's professional or
10 expert competence, would be protected from liability under Section 402(b) by the business
11 judgment rule. See the comment to Section 402.
12

13 **SECTION 407. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.**

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

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

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

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

Under Section 103(b), this section’s prohibition of indemnification, advancement, or exoneration for conduct involving bad faith or reckless indifference is not subject to override by the governing instrument. Prohibiting indemnification, advancement, or exoneration for such conduct is consistent with traditional principles of trust 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. See also John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U.L. Rev. 1105, 1121-25 (2004).

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

The SEC has taken the position that, before advancing legal fees to a trustee of a mutual fund, the fund's "board must either (1) obtain assurances, such as by obtaining insurance or receiving collateral provided by the [trustee], that the advance will be repaid if the trustee is found to have engaged in disabling conduct, or (2) have a reasonable belief that the [trustee] has not engaged in disabling conduct and ultimately will be entitled to indemnification." SEC Interpretation: Matters Concerning Independent Directors of Investment Companies, Investment Company Act Rel. No. 24083 (Oct. 14, 1999), 1999 WL 820629, *10. The SEC has also taken the position that there is a rebuttable presumption that an independent trustee (see Section 403) has not engaged in disabling conduct. *Id.*

SECTION 408. TITLE TO TRUST PROPERTY. Legal title to the property of a statutory trust or any part thereof may be held in the name of any trustee of the statutory trust, in its capacity as trustee, with the same effect as if the property were held in the name of the statutory trust. **[For Discussion: Rutledge objection to this section.]**

Comment

1
2 **Principal Sources** – Delaware Statutory Trust Act §§3803, 3805; Connecticut Statutory
3 Trust Act §34-523; Uniform Limited Partnership Act §303 (2001).
4

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

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

20 **SECTION 409. DIRECTION OF TRUSTEES.**

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

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

29 (c) Neither the power to direct a trustee or other person nor the exercise of the power by
30 any person, including a beneficial owner, causes the person to be a trustee or imposes on the
31 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. DELEGATION BY TRUSTEE. A trustee of a statutory trust may delegate to one or more other persons the trustee’s rights and powers to manage and control the business and affairs of the statutory trust, including the power to delegate to agents, officers, managers, committees, or employees of the trustee or the statutory trust, and to delegate by management agreement or other agreement with, or otherwise to, other persons, including to another trustee. Delegation by a trustee of a statutory trust does not relieve the trustee of its duties with respect to the matter delegated or cause the person to which any rights and powers

1 have been delegated to be a trustee of the statutory trust by reason of the delegation. [For

2 **Discussion: (1) Rutledge comments to Sitkoff on this section, and (2) the UPMIFA**
3 **delegation rules, which are reproduced after the comment.]**

4 **Comment**

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

7
8 This section reverses the outmoded common law rule against delegation by a trustee.
9 Instead, the drafting committee contemplated that delegation under this section would be subject
10 to the trustee’s duties under Section 402. Thus, a trustee that fails to exercise due care in
11 selecting, instructing and monitoring the agent could be held liable for breach of the trustee’s
12 fiduciary obligations under Section 402. Moreover, although an agent does not become a trustee
13 by reason of a delegation from a trustee, nothing in this section prohibits the statutory trust from
14 recovering against the agent for the agent’s improper exercise of delegated authority.

15
16 In reversing the common law rule against delegation, the drafting committee followed
17 both the Delaware Statutory Trust Act and the modern trend with respect to common law trusts.
18 Most states have abrogated the nondelegation rule with respect to common law trusts with
19 legislation based on the Uniform Prudent Investor Act, Uniform Trust Code, or the Restatement
20 (Third) of Trusts. See Uniform Trust Code §807 (2000); Uniform Prudent Investor Act §9
21 (1994); Restatement (Third) of Trusts: Prudent Investor Rule §171 (1992). See generally John
22 H. Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Mo. L. Rev. 105
23 (1994).

24
25 Following the Delaware and Connecticut Statutory Trust Acts, this section treats
26 delegation to a co-trustee in the same manner as delegation to another agent. By contrast, the
27 common law of trusts disfavors delegation by one co-trustee to another. See Restatement
28 (Second) of Trusts §184 (1959); see also Uniform Trust Code §703(e) (2000).

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

34
35 **[START EXCERPT OF UPMIFA §5—**

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

1 (1) selecting an agent;
2 (2) establishing the scope and terms of the delegation, consistent with the
3 purposes of the institution and the institutional fund; and
4 (3) periodically reviewing the agent's actions in order to monitor the agent's
5 performance and compliance with the scope and terms of the delegation.
6 (b) In performing a delegated function, an agent owes a duty to the institution to exercise
7 reasonable care to comply with the scope and terms of the delegation.
8 (c) An institution that complies with subsection (a) is not liable for the decisions or
9 actions of an agent to which the function was delegated.
10 (d) By accepting delegation of a management or investment function from an institution
11 that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this
12 state in all proceedings arising from or related to the delegation or the performance of the
13 delegated function.
14 (e) An institution may delegate management and investment functions to its committees,
15 officers, or employees as authorized by law of this state other than this [act].]
16 **END UPMIFA EXCERPT]**
17

18 **SECTION 411. ACTION BY TRUSTEES.** On any matter that is to be acted on by
19 trustees:

20 (1) the trustees may **[For Discussion: Rutledge question re “may”]** act by majority of
21 their number;

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

28 (3) a trustee may vote in person or by proxy, and the proxy may be granted in writing or
29 by means of recorded transmission. **[For Discussion: “writing” or “record.”]**

30 **Comment**
31

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

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

The remainder of this section allows for maximum flexibility in the mechanics of allowing the trustees to act or vote on actions.

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

SECTION 412. RIGHTS OF TRUSTEE IN TRUST PROPERTY. Property of a statutory trust is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt. **[For Discussion: Rutledge’s suggestion that this section, plus sections 413 and 414 below, be combined with the other limited liability provisions in a single limited liability section in article 3.]**

Comment

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

This section implements the concept that a statutory trust is an entity separate from its trustee by confirming that the personal creditors of a trustee have no recourse against the assets of the statutory trust. As a result, creditors of the statutory trust need not worry about the solvency of the trustee personally. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387 (2000); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998). See also Henry Hansmann, Reinier Kraakman, & Richard Squire, *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1333 (2006).

SECTION 413. TRUSTEE NOT LIABLE FOR DEBTS OF STATUTORY TRUST.

1 An obligation of a statutory trust, whether arising in contract, tort, or otherwise, is not the
2 obligation of a trustee. A trustee, by reason of being a trustee, is not liable to any person other
3 than the statutory trust or a beneficial owner for any act, omission, or obligation of the statutory
4 trust or any trustee thereof.

5 **Comment**

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

7 This section implements the concept that the statutory trust is an entity separate from its
8 trustee by confirming that a trustee, as a manager of the statutory trust, is not liable for the debts,
9 obligations, and liabilities of the statutory trust. However, a trustee may be held liable to the
10 statutory trust for breach of duty under Section 402.
11

12 **SECTION 414. OFFICERS, EMPLOYEES, MANAGERS, COMMITTEES AND**
13 **AGENTS NOT LIABLE FOR DEBTS OF STATUTORY TRUST.** An officer, employee,
14 manager, committee, or other person acting pursuant to Section 104(b)(10) is not liable, by
15 reason of being an officer, employee, manager, committee, or other person acting pursuant to
16 Section 104(b)(10), to any person other than the statutory trust or a beneficial owner for any act,
17 omission, or obligation of the statutory trust or any trustee thereof.

18 **Comment**

19
20 **Principal Sources** – Delaware Statutory Trust Act §3803; Connecticut Statutory Trust
21 Act §34-523.
22

23 A statutory trust may act through agents. This section confirms that the statutory trust,
24 not the statutory trust's agents, is liable for the acts, omissions, and obligations of agents acting
25 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 of, any other rights, including the right to specific performance, that
17 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 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 failure, including:

- 1 (1) reduction or elimination of the defaulting beneficial owner's proportionate
2 interest in the statutory trust;
- 3 (2) subordination of the defaulting beneficial owner's beneficial interest to that of
4 nondefaulting beneficial owners;
- 5 (3) forced sale of the defaulting beneficial owner's beneficial interest;
- 6 (4) forfeiture of the defaulting beneficial owner's beneficial interest;
- 7 (5) obligation to repay a loan to the statutory trust by another beneficial owner of
8 the amount necessary to meet the defaulting beneficial owner's commitment; or
- 9 (6) fixing the value of the defaulting beneficial owner's beneficial interest by
10 appraisal or by formula and redemption or sale of the defaulting beneficial owner's beneficial
11 interest at this value.

12 **Comment**

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

16
17 Although statutory trusts are used primarily as a mode of business organization in
18 commercial transactions, paragraph (a) acknowledges that a beneficial owner may obtain a
19 beneficial interest without an exchange of consideration, an event that is not uncommon in
20 existing commercial practice. However, a statutory trust may not be used to effect a donative
21 transfer because Section 301(b)(1) prohibits a statutory trust from having a “prevailing
22 donative purpose.”

23
24 Paragraph (c) repudiates the hostility of traditional law to penalties.
25

26 **SECTION 502. REDEMPTION OF BENEFICIAL INTERESTS.** A statutory trust
27 may acquire, by purchase, redemption, or otherwise, any beneficial interest in the statutory trust.
28 An interest so acquired by a statutory trust is canceled.

29 **Comment**

1
2 **Principal Source** – Delaware Statutory Trust Act §3818. [For Discussion: Whether to
3 **observe (per Rutledge comment to Sitkoff) that we do not preclude distribution when the**
4 **entity is unable to meet its debts and obligations in the ordinary course of business, hence**
5 **the matter of distributions by an insolvent statutory trust is left to fraudulent transfer law.]**
6

7 A registered investment company organized as an open-end mutual fund generally is
8 obligated to honor redemption requests by its shareholders at the net asset value per share next
9 calculated after receipt of the request, with payment to be made in cash (or, in some cases, in
10 kind) within seven days of the request. See 15 U.S.C. §80a-22(e); 17 CFR §270.22c-1. In
11 narrowly defined circumstances, this redemption right and obligation may be postponed. See 15
12 U.S.C. §80a-22(e). The redemption proceeds may be reduced by various fees retained by the
13 fund and/or its selling agent (i.e., sales loads and redemption fees). See 17 CFR §§270.22c-2;
14 270.6c-10.
15

16 **SECTION 503. BENEFICIAL OWNER’S RIGHT TO INFORMATION. A**

17 beneficial owner may examine information relating to the affairs of the statutory trust necessary
18 for the beneficial owner to enforce its rights as a beneficial owner.

19 **Comment**

20 Under Section 103(b), a beneficial owner’s right to information under this section is not
21 subject to override by the governing instrument. However, a beneficial owner’s right to
22 information under this section is limited to information “necessary” for the beneficial owner to
23 enforce its rights as such, and under Section 103(b) the governing instrument may prescribe the
24 standards by which “necessary” is determined provided that the standards are not “manifestly
25 unreasonable.”
26

27 Section 404 provides a comparable rule for a trustee’s right to information.
28

29 **SECTION 504. RIGHTS OF BENEFICIAL OWNER IN TRUST PROPERTY.**

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

32 (b) A beneficial owner’s beneficial interest in the statutory trust is personal property
33 regardless of the nature of the property of the statutory trust. A beneficial owner has no interest

1 in specific property of the statutory trust.

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

3 (d) At the time a beneficial owner becomes entitled to receive a distribution, the
4 beneficial owner has the status of, and is entitled to all remedies available to, a creditor of the
5 statutory trust with respect to the distribution.

6 (e) A beneficial owner does not have a preemptive right to subscribe to any additional
7 issue of beneficial interests or any other interest.

8 (f) Subject to section 304(d), if a statutory trust is a registered investment company under
9 the Investment Company Act of 1940, as amended, 15 U.S.C. Section 80a-1 et seq., any class,
10 group or series of beneficial interests established by the governing instrument with respect to the
11 statutory trust is a class, group, or series preferred as to distribution of assets or payment of
12 dividends over all other classes, groups, or series in respect to assets specifically allocated to the
13 class, group, or series under Section 18, or any amendment or successor provision, of the
14 Investment Company Act of 1940, 15 U.S.C. Section 80a-18, as amended, and any regulations
15 issued thereunder.

16 **Comment**

17
18 **Principal Source** – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust
19 Act §34-516.

20
21 Paragraph (a) implements the concept that a statutory trust is an entity separate from its
22 beneficial owners by confirming that a creditor of a beneficial owner cannot seize property of the
23 statutory trust. For discussion of the parallel provision in the Delaware Statutory Trust Act, see
24 Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A.
25 Finkelstein, The Delaware Law of Corporations & Business Organizations §19.4, at 19-9 – 19-
26 10 (3d ed. 2005 Supp.).

27
28 Paragraph (c) provides as a default rule that a beneficial owner's interest in the statutory
29 trust is freely transferable. Section 104(b)(3) confirms that the governing instrument may

provide otherwise.

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

Comment

Principal Source – Delaware Statutory Trust Act §3806.

SECTION 506. LIMITED LIABILITY OF BENEFICIAL OWNERS. A beneficial owner of a statutory trust is entitled to the same limitation of liability accorded to a shareholder of a domestic 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 BY BENEFICIAL OWNERS. On any matter that is to be acted on by beneficial owners:

(1) if a method is not specified in the governing instrument, the beneficial owners may act by majority of their interests; **[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?”]**

(2) the beneficial owners may take the action without a meeting, without previous notice, and without a vote, if a consent, or consents, in writing, setting forth the action so taken, are signed by beneficial owners having not less than the minimum number of votes that would be necessary to authorize or take the action at a meeting at which all beneficial owners entitled to vote thereon were present and voted, but prompt notice of the action must be given to those beneficial owners that did not consent; and

(3) a beneficial owner may vote in person or by proxy, and the proxy may be granted in writing or by means of recorded transmission.

Comment

Principal Source – Delaware Statutory Trust Act §3806; Delaware General Corporation Law §228.

Except for a conversion, merger, or dissolution under Article 6, nothing in this act provides for the beneficial owners to act on any matter. However, because the beneficial owners may be given such a right by the terms of the governing instrument, paragraph (a) supplies a default rule requiring a majority of beneficial interests. **[Rutledge asks: “Don’t we need to address the election of a replacement trustee or the ability to remove a trustee, perhaps for cause?”]**

SECTION 508. DERIVATIVE ACTIONS.

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

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

6 (2) a demand would be futile.

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

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

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

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

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

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

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

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

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

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

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

5 **[For Discussion: Whether (f) is/should be mandatory, and if not, inclusion of (f) in Section**
6 **104(b)'s confirmation of defaults that can be modified.]**

7 **Comment**
8

9 **Principal Sources** - Uniform Limited Partnership Act §§1002-1005 (2001); Delaware
10 Statutory Trust Act §3816; Connecticut Statutory Trust Act §34-522.
11

12 Section 104(b)(2) confirms that the governing instrument may eliminate or otherwise
13 modify the right of a beneficial owner to bring a derivative action under this section.

1 [ARTICLE] 6

2 CONVERSION, MERGER, AND DISSOLUTION

3 SECTION 601. DEFINITIONS. In this [article]:

4 (1) “Constituent statutory trust” means a constituent organization that is a statutory trust.

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

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

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

9 (5) “Converting organization” means an organization that converts into another
10 organization pursuant to Section 602.

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

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

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

20 (9) “Surviving organization” means an organization into which one or more other
21 organizations are merged. A surviving organization may preexist the merger or be created by the
22 merger.

1 **Comment**

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

3
4 This section contains definitions specific to this Article.
5

6 **SECTION 602. CONVERSION.**

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

10 (1) the other organization’s governing statute authorizes the conversion;

11 (2) the conversion is not prohibited by the law of the jurisdiction that enacted the
12 governing statute; and

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

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

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

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

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

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

22 **Comment**

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

24
25 In a statutory conversion an existing entity changes its form, the jurisdiction of its
26 governing statute, or both. For example, a statutory trust formed under the laws of one

1 jurisdiction might convert to a corporation, limited liability company, or limited partnership
2 under the laws of the same or another jurisdiction (referred to in some statutes as
3 “domestication”).
4

5 In contrast to a merger, which involves at least two entities, a conversion involves only
6 one. The converting and converted organization are the same entity. See Section 605(a). For
7 this Act to apply to a conversion, either the converting or converted organization must be a
8 statutory trust subject to this Act.
9

10 A plan of conversion may provide that some persons with interests in the converting
11 organization will receive interests in the converted organization while other persons with
12 interests in the converting organization will receive some other form of consideration. Thus, a
13 “squeeze out” conversion is possible.
14

15 **SECTION 603. ACTION ON PLAN OF CONVERSION BY CONVERTING** 16 **STATUTORY TRUST.**

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

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

- 20 (1) as provided in the plan; and
21 (2) except as prohibited by the plan, by the same consent as was required to
22 approve the plan.

23 **Comment**

24 **Principal Source** – Uniform Limited Partnership Act §1103 (2001).
25

26 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries
27 is a default rule because it is not scheduled in Section 103(b). See also Section 104(b)(8)(B).
28 Hence, the governing instrument may state a different quantum of consent or provide a different
29 approval mechanism. Varying this subsection’s rule means that a beneficial owner might be
30 subject to a conversion (including a “squeeze out” conversion) without consent and with no
31 appraisal remedy. If the converting organization is a statutory trust subject to this Act, the
32 trustee of the converting organization is subject to the duties and obligations stated in this Act.
33 Those duties would apply to the process and terms under which the conversion occurs.
34 However, if the governing instrument allows for a conversion with less than unanimous consent,

1 the mere fact that a beneficial owner objects to a conversion does not mean that a trustee that is
2 favoring, arranging, consenting to, or effecting the conversion has breached a duty under this
3 Act.
4

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

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

15 (a) After a conversion is approved:

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

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

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

22 (C) the date the conversion is effective under the governing statute of the
23 converted organization;

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

25 (E) a statement that the conversion is not prohibited by the governing
26 statute of the converted organization; and

27 (F) if the converted organization is a foreign organization not authorized
28 to transact business in this state, the street and mailing address of an office which the [Secretary

of State] may use for the purposes of Section 605(c); and

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

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

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

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

(b) A conversion becomes effective:

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

(2) if the converted organization is a statutory trust, when the certificate of trust takes effect.

Comment

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

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

SECTION 605. EFFECT OF CONVERSION.

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

1 (b) When a conversion takes effect:

2 (1) all property owned by the converting organization remains vested in the
3 converted organization;

4 (2) all debts, obligations, and other liabilities of the converting organization
5 continue as liabilities of the converted organization;

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

8 (4) except as prohibited by other law, all of the rights, privileges, immunities,
9 powers, and purposes of the converting organization remain vested in the converted
10 organization;

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

13 (6) except as otherwise agreed, the conversion does not dissolve a converting
14 statutory trust or any series thereof for the purposes of Sections 611 and 612.

15 (c) A converted organization that is a foreign organization consents to the jurisdiction of
16 the courts of this state to enforce any obligation owed by the converting statutory trust, if before
17 the conversion the converting statutory trust was subject to suit in this state on the obligation. A
18 converted organization that is a foreign organization and not authorized to transact business in
19 this state appoints the [Secretary of State] as its agent for service of process for purposes of
20 enforcing an obligation under this subsection. Service on the [Secretary of State] under this
21 subsection is made in the same manner and with the same consequences as in Section 215(c) and

22 (d).

1 **Comment**

2 Principal Source – Uniform Limited Partnership Act §1105 (2001).
3

4 Paragraph (a) confirms that conversion changes an entity’s legal type, but does not create
5 a new entity. Unlike a merger, a conversion involves a single entity. Therefore under paragraph
6 (b) a conversion does not transfer any of the entity’s rights or obligations.
7

8 **SECTION 606. MERGER.**

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

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

12 (2) the merger is not prohibited by the law of a jurisdiction that enacted any of
13 those governing statutes; and

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

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

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

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

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

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

25 (5) if the surviving organization is not to be created by the merger, any

1 amendments to be made by the merger to the surviving organization’s organizational documents.

2 **Comment**

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

4
5 For this Act to apply to a merger, at least one of the constituent organizations must be a
6 statutory trust subject to this Act.

7
8 A plan of merger may provide that some persons with interests in a constituent
9 organization will receive interests in the surviving organization, while other persons with
10 interests in the same constituent organization will receive some other form of consideration.
11 Thus, a “squeeze out” merger is possible. As noted in the comment to Section 603, the duties
12 and obligations stated in this Act apply to a trustee of a constituent organization that is a
13 statutory trust subject to this Act. Those duties would apply to the process and terms under
14 which a “squeeze out” merger occurs.
15

16 **SECTION 607. ACTION ON PLAN OF MERGER BY CONSTITUENT**

17 **STATUTORY TRUST.**

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

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

22 (1) as provided in the plan; and

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

25 **Comment**

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

27
28 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries
29 is a default rule because it is not scheduled in Section 103(b). See also Section 104(b)(8)(B).
30 Hence, the governing instrument may state a different quantum of consent or provide a
31 completely different approval mechanism. Varying this subsection’s rule means that a beneficial

owner might be subject to a merger (including a “squeeze out” merger) without consent and with no appraisal remedy. The trustee of a constituent statutory trust is subject to the duties and obligations stated in this Act, and those duties would apply to the process and terms under which the merger occurs. However, if the governing instrument allows for a merger with less than unanimous consent, the mere fact a beneficial owner objects to a merger does not mean that a trustee that is favoring, arranging, consenting to, or effecting the merger has breached a duty under this Act.

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

SECTION 608. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.

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

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

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

(b) The articles of merger 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;

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

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

3 (B) if it will be an organization other than a statutory trust, the

4 organizational document that creates the organization;

5 (5) if the surviving organization preexisted the merger, any amendments provided

6 for in the plan of merger for the organizational document that created the organization;

7 (6) a statement as to each constituent organization that the merger was approved

8 as required by the organization's governing statute;

9 (7) if the surviving organization is a foreign organization not authorized to

10 transact business in this state, the street and mailing address of an office which the [Secretary of

11 State] may use for the purposes of Section 609(b); and

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

13 constituent organization.

14 (c) Each constituent statutory trust shall deliver the articles of merger for filing in the

15 [office of the Secretary of State].

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

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

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

19 (B) subject to Section 205(c), as specified in the articles of merger; or

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

21 governing statute of the surviving organization.

22 **Comment**

1 **Principal Source** – Uniform Limited Partnership Act §1108 (2001).
2

3 **SECTION 609. EFFECT OF MERGER.**

4 (a) When a merger becomes effective:

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

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

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

10 (4) all debts, obligations, and other liabilities of each constituent organization that
11 ceases to exist continue as liabilities of the surviving organization;

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

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

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

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

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

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

23 (9) if the surviving organization preexisted the merger, any amendments provided

1 for in the articles of merger for the organizational document that created the organization
2 become effective.

3 (b) A surviving organization that is a foreign organization consents to the jurisdiction of
4 the courts of this state to enforce any obligation owed by a constituent organization, if before the
5 merger the constituent organization was subject to suit in this state on the obligation. A
6 surviving organization that is a foreign organization and not authorized to transact business in
7 this state appoints the [Secretary of State] as its agent for service of process for the purposes of
8 enforcing an obligation 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 215(c) and
10 (d).

11 **Comment**

12 **Principal Source** – Uniform Limited Partnership Act §1109 (2001).
13

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

16 **Comment**

17 **Principal Source** – Uniform Limited Partnership Act §1113 (2001).
18

19 **SECTION 611. DISSOLUTION OF A STATUTORY TRUST.**

20 (a) A statutory trust may be dissolved by agreement of all trustees and all beneficial
21 owners.

22 (b) Upon dissolution of a statutory trust and until the filing of a statement of cancellation,
23 the trustees or other persons that under the governing instrument are responsible for winding up
24 the statutory trust's affairs may, in the name of and for and on behalf of the statutory trust:

- (1) institute, maintain, and defend suits, whether civil, criminal, or administrative;
- (2) settle and close the statutory trust business;
- (3) dispose of and convey the statutory trust property;
- (4) discharge or make reasonable provision for the statutory trust liabilities; and
- (5) distribute to the beneficial owners any remaining assets of the statutory trust.

(c) A statutory trust that has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or 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 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.

Comment

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

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 **SECTION 612. DISSOLUTION OF SERIES.**

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

10 (1) The dissolution, winding up, liquidation, or termination of any series does not
11 affect the limitation of liability with respect to a series established in accordance with Section
12 304(d).

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

16 (3) Upon dissolution of a series of a statutory trust, the persons that under the
17 governing instrument of the statutory trust are responsible for winding up the series's affairs, in
18 the name of the statutory trust and for and on behalf of the statutory trust and the series, may take
19 all actions with respect to the series as are permitted under Section 604(a) and shall provide for
20 the claims and obligations of the series and distribute the assets of the series as provided Section
21 604(b).

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

1 the series.

2 **Comment**

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

4
5 This section parallels and is analogous in scope and effect to Section 604, except that it
6 applies to a series rather than the entire statutory trust. On the series concept, see the Comment
7 to Section 104.

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.

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

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

15 Comment

16
17 **Principal Sources** – Revised Uniform Limited Liability Company §801 (2006); Uniform
18 Limited Partnership Act §901 (2001); Delaware Statutory Trust Act §3851; Connecticut
19 Statutory Trust Act §34-530.

20
21 Paragraph (a) parallels and is analogous in scope and effect to Section 302 for a domestic
22 statutory trust. Paragraph (b) allows for a foreign statutory trust to operate domestically even if
23 the law governing it is different from the laws governing domestic statutory trusts, but under
24 paragraph (c) a foreign statutory trust cannot engage in any business or exercise any power that a
25 domestic statutory trust could not.
26

27 SECTION 702. APPLICATION FOR CERTIFICATE OF AUTHORITY.

28 (a) A foreign statutory trust may apply for a certificate of authority to transact business in

1 this state by delivering an application to the [Secretary of State] for filing. The application must
2 state:

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

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

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

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

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

16 **Comment**

17
18 **Principal Source** – Uniform Limited Partnership Act §902 (2001).

19
20 A certificate of authority applied for under this section is different than a certificate of
21 existence or registration furnished under Section 207.
22

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

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

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

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

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

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

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

15 **Comment**

16
17 **Principal Source** – Uniform Limited Partnership Act §202 (2001).

18
19 Paragraph (a) provides a mechanism for updating a statutory trust's certificate of
20 authority. Paragraph (b) imposes an obligation directly on the trustee rather than on the statutory
21 trust.
22

23 **SECTION 704. ACTIVITIES NOT CONSTITUTING TRANSACTING** 24 **BUSINESS.**

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

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

1 foreign statutory trust to service of process, taxation, or regulation under law of this state other
2 than this [act].

3 (d) A person is not deemed to be doing business in the state solely by reason of being a
4 trustee or a beneficial owner of a foreign statutory trust.

5 **Comment**

6
7 **Principal Sources** – Uniform Limited Partnership Act §903 (2001); Delaware Statutory
8 Trust Act §3852.

9
10 The schedule of activities that do (paragraph (b)) and do not (paragraph (a)) constitute
11 transacting business in the state are illustrative and not exhaustive.
12

13 **SECTION 705. FILING OF CERTIFICATE OF AUTHORITY.** If all filing fees
14 have been paid, unless the [Secretary of State] determines that an application for a certificate of
15 authority does not comply with the filing requirements of this [act], the [Secretary of State] shall
16 file the application, prepare, sign, and file a certificate of authority to transact business in this
17 state and make available a copy of the filed certificate to the foreign statutory trust or its
18 representative.

19 **Comment**

20
21 **Principal Source** – Based on Uniform Limited Partnership Act §904 (2001).

22
23 A certificate of authority filed under this section is different than a certificate of
24 registration under Section 207.
25

26 **SECTION 706. NAME OF FOREIGN STATUTORY TRUST.**

27 (a) A foreign statutory trust whose name does not comply with Section 107 may not
28 obtain a certificate of authority until it adopts, for the purpose of transacting business in this
29 state, an alternate name that complies with Section 107. A foreign statutory trust that adopts an

1 alternate name under this subsection and obtains a certificate of authority with the name need not
2 comply with [fictitious or assumed name statute]. After obtaining a certificate of authority with
3 an alternate name, a foreign statutory trust shall transact business in this state under the name
4 unless the foreign statutory trust is authorized under [fictitious or assumed name statute] to
5 transact business in this state under another name.

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

9 **Comment**

10 **Principal Source** – Uniform Limited Partnership Act §905 (2001).
11
12

13 **SECTION 707. REVOCATION OF CERTIFICATE OF AUTHORITY.**

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

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

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

20 (3) deliver for filing a statement of change within 30 days after a change has
21 occurred in the name or address of the agent; or

22 (4) file an annual report.

23 (b) To revoke a certificate of authority, the [Secretary of State] must prepare, sign, and
24 file a notice of revocation and send a copy to the foreign statutory trust's agent for service of

process in this state, or if the foreign statutory trust does not appoint and maintain a proper agent in this state, to the foreign statutory trust's designated office. The notice must state:

(1) the revocation's effective date, which must be at least 60 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 authority of a foreign statutory trust to transact business in this state ceases on the effective 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 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.

Comment

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

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 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;

1 (3) that the certificate of authority is being canceled; and

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

3 (b) The certificate of authority under subsection (a) is canceled when the notice of
4 cancellation becomes effective under Section 205.

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

7 (d) The failure of a foreign statutory trust to have a certificate of authority to transact
8 business in this state does not impair the validity of a contract or act of the foreign statutory trust
9 or prevent the foreign statutory trust from defending an action or proceeding in this state.

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

13 **Comment**

14
15 **Principal Source** – Uniform Limited Partnership Act §907 (2001).
16

17 **SECTION 709. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]
18 may maintain an action to restrain a foreign statutory trust from transacting business in this state
19 in violation of this [article].

20 **Comment**

21
22 **Principal Source** – Uniform Limited Partnership Act §908 (2001).

1 **[ARTICLE] 8**

2 **MISCELLANEOUS PROVISIONS**

3 **SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

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

6 **Comment**

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8 **Principal Source** – Uniform Limited Partnership Act §1201 (2001).
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10 **SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**

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

15 **Comment**

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17 **Principal Source** – Uniform Limited Partnership Act §1203 (2001).
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20 **SECTION 803. SAVING CLAUSE.** This [act] does not affect an action commenced,

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

22 **Comment**

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24 **Principal Source** – Uniform Limited Partnership Act §1207 (2001).
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26 **SECTION 804. APPLICATION TO EXISTING RELATIONSHIPS.**

27 (a) This [act] may not be construed to 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] 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 before the effective date of this [act] may elect to be governed by the provisions of this [act] upon the filing an amendment to its certificate of trust under Section 202.]

[(d) Beginning two years after the effective date of this [act], this [act] governs the organization and internal affairs of all domestic statutory trusts created before the effective date.]

Comment

Principal Source – Uniform Limited Partnership Act §1206 (2001).

This Act governs all domestic statutory trusts formed on or after the Act’s effective date. For pre-existing domestic statutory trusts, this section establishes an optional “elect in” period and a mandatory, all-inclusive date of two years following the effective date. Beginning on the all-inclusive date, each pre-existing domestic statutory trust that has not previously elected in becomes subject to this Act—including the schedule of mandatory rules in Section 103(b)—by operation of law.

Because paragraph (b) is subject to Section 301(b), a common law trust with a charitable or prevaillingly donative purpose may not convert to a statutory trust.

The drafting committee contemplated that some enacting jurisdictions might modify this section to address other transition problems arising from differences between this Act and prior law.

SECTION 805. SEVERABILITY CLAUSE. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other

provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.

Comment

Principal Source – Uniform Limited Partnership Act §1202 (2001).

SECTION 806. REPEALS. Effective [all-inclusive date], the following acts are repealed:

(1) [the State Statutory Trust Act as amended and in effect immediately before the effective date of this [act]];

(2) [the State Business Trust Act as amended and in effect immediately before the effective date of this [act]]; and

(3) [the State Real Estate Investment Trust Act as amended and in effect immediately before the effective date of this [act]].

Comment

Principal Sources – Uniform Limited Partnership Act §1205 (2001).

Paragraphs (1) and (2) supply model language for enacting jurisdictions that have previously enacted a Statutory Trust Act or a Business Trust Act.

Paragraph (3) supplies model language for enacting jurisdictions that have previously enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a REIT, is not a type of trust but rather is a tax status awarded to any business entity that qualifies under 26 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under 26 U.S.C. §860D. In spite of the use of the word “trust” in its title, 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 to repeal their REIT statutes.

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SECTION 807. EFFECTIVE DATE. This [act] takes effect

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Comment

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Principal Source – Uniform Limited Partnership Act §1204 (2001).

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8 Section 804 specifies how this Act affects domestic statutory trusts, with special
9 provisions pertaining to domestic statutory trusts formed before the Act's effective date. Section
10 804 contains no comparable provisions for foreign statutory trusts. Therefore, once this Act is
11 effective, it applies immediately to all foreign statutory trusts, whether formed before or after the
Act's effective date.