

DRAFT
FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

~~For February 27—March 1, 2009 Drafting Committee Meeting~~DRAFT AS OF MARCH 11,
2009

With Prefatory Notes and Comments

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DRAFTING COMMITTEE ON UNIFORM STATUTORY TRUST ENTITY ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

JUSTIN L. VIGDOR, 2400 Chase Square, Rochester, NY 14604, *Chair*

THOMAS J. BUIREWEG, 121 W. Washington, Suite 300, Ann Arbor, MI 48104

ANN E. CONAWAY, Widener University School of Law, 4601 Concord Pike, Wilmington, DE 19803

LANI LIU EWART, 1099 Alakea St., Suite 1800, Honolulu, HI 96813

THOMAS L. JONES, University of Alabama School of Law, P.O. Box 865557, Tuscaloosa, AL 35486-0050

DIMITRI G. KARCAZES, 55 E. Monroe St., Suite 3300, Chicago, IL 60603

JOHN H. LANGBEIN, Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215

L. GENE LEMON, 1136 W. Butler Dr., Phoenix, AZ 85021-4428

HARRY M. WALSH, 456 Summit Ave. #206, St. Paul, MN 55102

ROBERT H. SITKOFF, Harvard Law School, 1575 Massachusetts Ave., Cambridge, MA 02138, *Reporter*

EX OFFICIO

MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563, *President*

ANNE L. MCGIHON, 837 Sherman St., Denver, CO 80203, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

ELLISA OPSTBAUM HABBART, 300 Martin Luther King Blvd., Suite 200, Wilmington, DE 19801, *ABA Advisor*

WILLIAM H. CLARK, JR., One Logan Square, 18th and Cherry Streets, Philadelphia, PA 19103-6996, *ABA Section Advisor*

THOMAS E. RUTLEDGE, 2000 PNC Plaza, 500 W. Jefferson St., Louisville, KY 40202-2874, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

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UNIFORM STATUTORY TRUST ENTITY ACT

Prefatory Note

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

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

A statutory trust differs from a common-law trust in several important respects. A common-law trust, whether its purpose is donative or commercial, arises from private action without the involvement of a public official. See Uniform Trust Code §401 (2000); Restatement (Third) of Trusts §10 (2003). Because a common-law trust is not a juridical entity, it must sue, be sued, and transact in the name of the trustee in the trustee’s capacity as such. By contrast, a statutory trust is formed by delivering a certificate of trust to a public official, typically the Secretary of State, for filing in the public record. See Section 201. Moreover, a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue, be sued, and transact in its own name. See Sections 302~~4~~, 307-308.

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

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

The primary stimulus for the drafting of the Uniform Statutory Trust Entity Act is the increasing popularity of statutory trust entities, chiefly in the structured finance and mutual fund industries. Increasing use of the statutory 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 sparse.

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

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

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

Following the Delaware model, Section 105 provides that ordinary trust law supplements this Act. However, several substantive provisions of this Act are drawn from corporate or unincorporated entity law rather than trust law. See, e.g., Sections ~~501 (management by or under the authority of the trustees); 505 (standards of conduct of trustees); 507 (interested transactions).~~ Looking to corporate law on these issues is consistent with the hybrid approach of the Delaware Act and reflects the nature of a statutory trust as a juridical entity. The Uniform Statutory Trust Entity Act is an unincorporated entity statute. Looking variously to corporate and unincorporated entity law in addition to trust law is consistent with the hybrid nature of the Delaware Statutory Trust, which likewise includes provisions that draw variously on all three traditions.

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

Innovative Provisions. Although much of the Uniform Statutory Trust Entity Act reflects a reorganization and refinement of provisions found in the Delaware Statutory Trust Act, the Uniform Act contains several innovations including: (1) specification of rules that are not

subject to override in the statutory trust's governing instrument (§103(c)); (2) clearer guidance on the applicability of ordinary trust law to a statutory trust entities (§105); (3) ~~exclusion of trusts with prohibition against a statutory trust having~~ a prevailingly donative purpose (§302); (4) an entire article on series trusts (Article 4); (5) a charging order provision (§606); (6) systematic treatment of conversion and merger (Article 7), and of dissolution (Article 8); and (7) clearer guidance on the relationship between the common-law trust and statutory trust entities (§1005).

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

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

Relationship to Common-Law Trusts and the Uniform Trust Code. In the culture of American law the common-law trust is ~~customarily considered to be~~ typically thought of as a vehicle for effecting donative transfers. Indeed, leading compilations of the common law of trusts tend to exclude business trusts from their coverage. See e.g., Restatement (Third) of Trusts §1 cmt. b (2003); 1 Austin Wakeman Scott, William F. Fratcher, & 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." ~~Restatement (Third) of Trusts, supra.~~

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

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

The Uniform Statutory Trust Entity Act more closely resembles a generic corporate code or unincorporated entity law than the Uniform Trust Code. Like a corporation, limited liability company, and limited partnership, but unlike a common-law trust, a statutory trust is a juridical entity that may conduct transactions in its own name separate from that of the trustee and the beneficial owners. See Sections 302~~4~~, 307-08. Like those entities, but unlike a common-law trust, a statutory trust is formed by delivering a certificate of trust to a public official for filing.

Compare Section 201 with Uniform Trust Code §401 (2000) and Restatement (Third) of Trusts §10 (2003). Further, Section 105 provides that ordinary trust law supplements this Act, but only to the extent not modified or displaced by this Act or the governing instrument—and this Act modifies or displaces a host of ordinary trust law principles including those concerning fiduciary standards of conduct (Section 505) and termination of trusts (Section 306). Section 1005(b) allows an existing common-law trust that does not have a prevailingly donative purpose to convert into a statutory trust by delivering a certificate of trust for filing under Section 201.

Although the drafting committee contemplated that a statutory trust under this Act will be used primarily as a mode of business organization, Section 603(a) confirms that a person may become a beneficial owner of a statutory trust without an exchange of consideration. It is therefore possible that a statutory trust could be used as a substitute for the common-law trust in noncommercial contexts. However, to ensure that a statutory trust is not used to evade mandatory rules applicable to common-law trusts that enforce public policy limitations on donative transfers, Section 303~~2~~ provides that a statutory trust may not have a prevailingly donative purpose. For discussion of the nonapplicability to a statutory trust of the mandatory rules applicable to common-law trusts (including Uniform Trust Code §105), see the comment to Section 103 under the heading “Relationship to Mandatory Rules Under the Uniform Trust Code” and the comments to Sections 105 and 303~~2~~.

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

1 **UNIFORM STATUTORY TRUST ENTITY ACT**

2
3 **[ARTICLE] 1**

4 **GENERAL PROVISIONS**

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

7 **Comment**

8
9 Because this Act provides for the creation and use of a statutory trust as a form of
10 business organization, it might seem that “Uniform Business Trust Act,” “Uniform Statutory
11 Business Trust Act,” or “Uniform Statutory Trust Act” would be a better title. However, after
12 consultation with experts in the structured finance, bankruptcy, mutual fund, and estate planning
13 industries, the drafting committee rejected those and other such titles in favor of “Uniform
14 Statutory Trust Entity Act.”
15

16 The drafting committee included the word “entity” in the title for two reasons. First, the
17 creature of this act is indeed a trust entity. It has the power to sue, be sued, and transact in its
18 own name. A common-law trust, by contrast, is not a juridical entity. Second, the word “entity”
19 in the title differentiates this act from the Uniform Trust Code, which is a codification of the
20 common law of trusts. However, to conform with prevailing usage under the Delaware Statutory
21 Trust Act, the entity that arises under this Act is called a “statutory trust,” not a “statutory trust
22 entity.” See Section 102(15). Further, because the drafting committee wanted a statutory trust
23 under this act to receive treatment under applicable regulatory law similar to that of a Delaware
24 statutory trust, the entity features of a statutory trust under this act closely resemble those of a
25 Delaware statutory trust.
26

27 The drafting committee had three reasons for eschewing the phrase “business trust.”
28 First, under this act a statutory trust need not have a business or commercial purpose. On the
29 | contrary, Section 303~~2~~ confirms that a statutory trust may have any lawful purpose other than a
30 prevailingly donative purpose.
31

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

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

5 Third, the drafting committee was influenced by the revealed preference for “statutory
6 trust” over “business trust” ~~among existing users of statutory business trusts in practice~~ as
7 evidenced by the dominant position of the Delaware Statutory Trust Act relative to the statutory
8 or business trust acts of the other states. ~~See Robert H. Sitkoff, The Rise of the Statutory~~
9 ~~Business Trust [in progress].~~ In 2002 Delaware recast the “Delaware Business Trust Act” as the
10 “Delaware Statutory Trust Act,” replacing nearly every reference to “business trust” with
11 “statutory trust.” See 73 Del. Laws 329 (2002). ~~The Connecticut statute, which is the second~~
12 ~~most popular, is likewise cast as a Statutory Trust Act. See Connecticut Statutory Trust Act~~
13 ~~§§34-500, 34-501(2).~~
14

15 SECTION 102. DEFINITIONS.

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

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

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

26 (4) “Designated office” means:

27 (A) for a statutory trust, the mailing address that it is required to designate under
28 Section 201(~~ba~~)(2); or

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

30 (5) “Foreign statutory trust” means a trust that is formed under the laws of a jurisdiction

1 other than this state that would be a statutory trust if formed under the laws of this state.

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

3 (7) “Jurisdiction” means a state, a foreign country, or a subdivision of a foreign country.

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

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

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

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

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

15 (A) the spouse of the person;

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

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

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

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

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

1 control ~~with~~ the person.

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

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

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

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

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

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

11 ~~(1617)~~ “Trust” includes a common-law trust, statutory trust, and foreign statutory trust.

12 ~~(1718)~~ “Trust instrument” means a record other than the certificate of trust which
13 provides for the governance of the affairs of the statutory trust and the conduct of its business.
14 The term includes a trust agreement, a declaration of trust, and bylaws.

15 ~~(1819)~~ “Trustee” means a person designated, appointed, or elected as a trustee of a
16 statutory trust or foreign statutory trust in accordance with the governing instrument or
17 applicable law.

18 **Comment**

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

23
24 Paragraphs (2), (6), and ~~(187)~~ define “certificate of trust,” “governing instrument,” and
25 “trust instrument” respectively. The certificate of trust is the record that under Section 201 must
26 be delivered to a public official for filing to form a statutory trust. The trust instrument is the
27 transaction document that provides for the governance of the statutory trust and that need not be
28 made part of the public record. Together, the certificate of trust and the trust instrument
29 compose the governing instrument. The term “governing instrument” is in the singular to

1 conform with ~~standard commercial~~prevailing usage. Conflicts between the certificate of trust
2 and the governing instrument are resolved pursuant to Section 201(~~ed~~). Although the term “trust
3 instrument” is phrased in the singular, consistent with current commercial practice the drafting
4 committee contemplated that there would often be more than one such instrument. Section
5 ~~104(b)~~104(c) makes authorization of multiple instruments explicit.

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

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

16
17 Paragraph (~~19~~8) defines “trustee” as a person designated as such in accordance with the
18 governing instrument or applicable law. For discussion of trustee appointment, see the Comment
19 to Section 501.

20 21 **SECTION 103. DEFAULT AND MANDATORY RULES.**

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

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

28 (1) ~~any provision relating to the management and,~~ affairs, and conduct of the
29 business of the statutory trust; and

30 (2) ~~any provision relating to the rights, interests, duties, obligations, and powers~~
31 of, and relations among, the trustees, the beneficial owners, the statutory trust, and other persons.

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

33 (1) the provisions of [Articles] 2, 8 except for section 801~~8(b2)~~, except for 703, 9,

1 and 10;

2 ~~(2) the exclusion of a prevailingly donative purpose under Section 302;~~

3 ~~(3) the choice of governing law as provided in Section 301;~~

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

5 (4) the provisions pertaining to series trusts in Sections 401(ba), (c), and (d),
6 402(b) and (c), 404, and 406, 403, and 405.

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

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

15
16 ~~(7) the right of a trustee to information under Section 508, but the governing~~
17 instrument may prescribe the standards for assessing whether information is reasonably related
18 to the trustee's discharge of the trustee's duties as trustee, if the standards are not manifestly
19 unreasonable;

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

22 ~~(9) the limitations obligations of a trustee in Section 510(c) or not to follow a~~
23 ~~direction of trustees that is manifestly contrary to the terms of the governing instrument or would~~

1 constitute a serious breach of trust;

2 | (109) the right of a judgment creditor of a beneficial owner to seek a charging
3 order under Section 606;

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

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

13 | (132) the provisions pertaining to conversion and merger stated in Sections 701,
14 704, 705, 708, and 709. [FOR DISCUSSION: Bad mandatory rule decision in Chicago.]

15 | **Comment**

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

20 | **Default Rules.** Paragraphs (a) and (b) emphasize that the Uniform Statutory Trust Entity
21 Act is primarily a states default statute rules. Most of the Act's provisions may be overridden by
22 | the terms of the governing instrument.
23

24 | **Mandatory Rules.** Paragraph (c) schedules the provisions of this act that are not subject
25 | to override in the governing instrument ~~of a statutory trust~~. The provisions included in this
26 | schedule are the only rules that have mandatory application to a statutory trust.
27

28 |
29 | Most of the provisions scheduled in paragraph (c) concern the rights of nonparties or
30 public filing and notice requirements. By contrast, with two exceptions all the provisions of this
31 Act concerning the powers and duties of a trustee, relations among trustees, and the rights and

1 interests of a beneficial owner may be overridden or at least altered by the terms of the
2 governing instrument.

3
4 The first exception is the mandatory prohibition of indemnification, advancement, or
5 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference in
6 paragraph (c)(~~8~~7). This exception is familiar trust law. See Uniform Trust Code §1008 (2000);
7 Restatement (Second) of Trusts §222 (1959); 4 Austin Wakeman Scott, William Franklin
8 Fratcher, and Mark L. Ascher, Scott and Ascher on Trusts §24.27.3 (5th ed. 2007). For a general
9 discussion, see John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev.
10 1105, 1121-25 (2004); Melanie B. Leslie, Trusting Trustees: Fiduciary Duties and the Limits of
11 Default Rules, 94 Georgetown L.J. 67 (2005).

12
13 The Delaware Statutory Trust Act likewise limits the permissible scope of exoneration.
14 See Delaware Statutory Trust Act §3806(e), which provides that the “governing instrument may
15 provide for the limitation or elimination of any and all liabilities for breach of contract and
16 breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing
17 instrument may not eliminate the implied contractual covenant of good faith and fair dealing.”
18

19 Limitations on permissible exoneration are also familiar corporate and alternative entity
20 law. See, e.g., Delaware General Corporation Law §102(b)(7); Delaware Limited Liability
21 Company Act §18-1101; **[To come: Citation to MBCA 2.02(b)(4) and/or other uniform acts]**.
22

23 The second exception is ~~contained in~~ paragraph (c)(~~9~~8), which makes mandatory the
24 invalidity under Section 510(c) of a direction to a trustee or other person that is manifestly
25 contrary to the terms of the governing instrument or would constitute a serious breach of
26 fiduciary duty. The reference to serious breach of fiduciary duty is ~~designed meant~~ to exclude an
27 inconsequential, immaterial, or technical breach that does not harm the trust or a beneficial
28 owner. For some purposes, trust law distinguishes between serious and not serious breaches of
29 trust. See, e.g., Uniform Trust Code §706(b)(1) (2000); 2 Austin W. Scott, William F. Fratcher,
30 ~~&and~~ Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed. 2006); Restatement
31 (Second) of Trusts §107 cmt. b (1959). However, the effect of paragraph (c)(~~5~~8) is limited by
32 paragraph (c)(~~4~~5), which allows the trustee’s fiduciary duty to be altered by the governing
33 instrument if the alteration is not manifestly unreasonable.
34

35 Paragraphs (c)(5), (c)(6), (c)(7), (c)(~~11~~10), and (c)(~~12~~+) allow the governing instrument to
36 alter the nature of the trustee’s fiduciary obligation; the nonliability of a trustee or another for
37 good faith reliance on the governing instrument, records of the statutory trust, or opinions of
38 experts; the right of a trustee to information, the right of a beneficial owner to information, and
39 the right of a beneficial owner to bring an action, but only if the alteration is not “manifestly
40 unreasonable.” In opting for the “manifestly unreasonable” standard instead of Delaware’s
41 “good faith and fair dealing” formulation, see Delaware Statutory Trust Act §3806(c) and (e), the
42 drafting committee took notice of the use of the term “manifestly unreasonable” in Revised
43 Uniform Limited Liability Company Act §110(d) (2006); Uniform Limited Partnership Act
44 §110(b) (2001), Revised Uniform Partnership Act §103(b) (1997), Uniform Limited Liability
45 Company Act §103(b) (1996), and intended a similar meaning here. See Mark J. Loewenstein,
46 Fiduciary Duties and Unincorporated Business Entities: In Defense of the “Manifestly

1 Unreasonable” Standard, 41 Tulsa L. Rev. 411 (2006).

2
3 **Relationship to Mandatory Rules and the Uniform Trust Code.** Section 105(a)
4 provides that the law of this state pertaining to common-law trusts supplements this act.
5 However, Section 105(b) provides that, except for the mandatory rules scheduled above in
6 Section 103(c), the governing instrument of a statutory trust may override or modify the
7 application to the statutory trust of any rule pertaining to common-law trusts. Accordingly, in
8 ~~an enacting~~ jurisdiction that has also enacted the Uniform Trust Code (UTC), the UTC will
9 apply to a statutory trust, but only to the extent that the ~~Code's~~ UTC's provisions are not
10 displaced by this act or the governing instrument. No provision of the UTC, including the rules
11 stated in UTC §105 that are mandatory with respect to a common-law trust, is mandatory with
12 respect to a statutory trust. Likewise, any common law rule that is mandatory with respect to a
13 common-law trust may nonetheless be overridden with respect to a statutory trust by the
14 governing instrument of the statutory trust. In sum, the governing instrument of a statutory trust
15 may override or alter any rule of trust law other than those scheduled in §103(c) of this act.
16

17 To prevent evasion of the public policy limitations on donative transfers that underpin the
18 mandatory rules applicable to a common-law trust, see John H. Langbein, Mandatory Rules in
19 the Law of Trusts, 98 Nw. U.L. Rev. 1105 (2004), Section 302 of this Act provides that a
20 statutory trust may not have “a prevailingly donative purpose.” For further discussion of the
21 relationship between this Act, the common law, and the Uniform Trust Code, see the Prefatory
22 Note to this Act under the heading “Relationship to Common-law trusts and the Uniform Trust
23 Code” and the comments to Sections 105 and 3032.
24

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

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

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

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

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

38 (1) provide the means by which beneficial ownership is determined and

1 evidenced;

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

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

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

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

8 (B) waiver of notice;

9 (C) action by consent without a meeting;

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

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

14 (5) provide for any action to be taken without the vote or approval of any

15 particular trustee or beneficial owner, or series of trustees, beneficial owners, or beneficial
16 interests, including:

17 (A) amendment of the governing instrument;

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

19 (C) appointment of one or more trustees;

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

22 (E) dissolution of the statutory trust;

23 (6) provide for the ~~present or future~~ creation of ~~more than one~~ a statutory trust,

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

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

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

12 (9) ~~provide for the manner in which the governing instrument may be amended,~~
13 ~~including a requirement that the approval of a person that is not a party to the instrument or the~~
14 ~~satisfaction of specified conditions and, to the extent the instrument provides for the manner in~~
15 ~~which it may be amended, provide that it may be amended only in that manner or as otherwise~~
16 ~~permitted by law, but the approval of any person may be waived by the person and these~~
17 ~~conditions may be waived by all persons for whose benefit the conditions were intended;~~ provide
18 for the manner in which the governing instrument may be amended, including:

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

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

23 Any condition or requirement under subsections (A) or (B) may be waived by all

1 persons for whose benefit the condition or requirement was intended.

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

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

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

11 ~~and~~

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

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

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

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

22 **Comment**

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

1
2 Paragraph (a) provides a default rule that the governing instrument may be amended by
3 unanimous agreement of the beneficial owners. This paragraph therefore provides for an
4 amendment mechanism in circumstance where the governing instrument does not already do so.

5
6 **[Paragraph (b) note to come]**
7

8 The unusual principal sources citation reflects the drafting committee’s decision to
9 collect in a single section the various permissive rules regarding the scope of the governing
10 instrument that are scattered throughout the Delaware and Connecticut Statutory Trust Acts. The
11 main exception concerns the allowable remedies for a beneficial owner’s breach in Section
12 603(c).

13
14 Paragraph (c) collects various permissive rules regarding the scope of the governing
15 instrument. Most are based on scattered provisions of the Delaware and Connecticut Statutory
16 Trust Acts. ~~[Comment to be expanded to explain that this section implements Section 103(b)~~
17 ~~without limiting the generality of 103(b).]~~ The drafting committee concluded that the demand
18 of third parties and transactional planners to see language that expressly authorizes specific
19 terms justified inclusion of a detailed list in addition to the broad statement of freedom of
20 contract in Sections 103(a)-(b) and 106. Statutory confirmation reduces transaction costs by
21 resolving doubts in practice over the permissibility of such provisions. Similar reasoning
22 underlies the provision of a detailed schedule of powers in Uniform Trust Code §816 (2000) in
23 addition to the broad general statement in Uniform Trust Code §815.
24

25 **SECTION 105. APPLICABILITY OF TRUST LAW.**

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

27 (b) Except as otherwise provided in section 103(c), the governing instrument may
28 override or modify application to the statutory trust of any law of this state pertaining to
29 common-law trusts.

30 **Comment**

31 **Principal Sources** – Uniform Trust Code §106 (2000); Delaware Statutory Trust Act
32 §3809; Connecticut Statutory Trust Act §34-519.

33
34 **Trust Law Supplements this Act.** Paragraph (a) provides that state trust law
35 supplements this ~~a~~Act and the terms of the governing instrument. In looking to trust law to
36 supplement this act and the governing instrument, the drafting committee was strongly
37 influenced by the preference for trust law among existing users of statutory trusts. This
38 preference is evidenced by the popularity of the Delaware Statutory Trust Act, which likewise
39 looks to trust law, in comparison to the business trust acts (such as those in Arizona, Indiana,

1 Kansas, Mississippi, Montana, Oregon, Tennessee, Washington, and West Virginia) that look to
2 corporate law. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [in progress].
3

4 **No Mandatory Rules Other Than Those Scheduled in Section 103(c).** Paragraph (b)
5 confirms that, except for the mandatory rules scheduled in §103(c), the governing instrument
6 may override any rule or law pertaining to common-law trusts that would otherwise be
7 applicable to a statutory trust under paragraph (a).
8

9 **Relationship to the Uniform Trust Code.** In an enacting jurisdiction that has also
10 enacted the Uniform Trust Code, the joint effect of paragraphs (a) and (b) is to make the ~~Code~~
11 UTC applicable to a statutory trust, but only to the extent that the ~~Code's~~UTC's provisions—
12 including the mandatory rules scheduled in UTC §105—are not displaced by this act or the
13 trust's governing instrument. For further discussion, see the comment to Section 103 under the
14 heading "Relationship to Mandatory Rules and the Uniform Trust Code."
15

16 **Remedies.** ~~The rules pertaining to common-law trusts that, unless the governing~~
17 ~~instrument provides otherwise, are absorbed by this Section for application to a statutory trust~~
18 ~~include the law of remedies for breach of trust. Under this Section, the law of remedies for breach~~
19 ~~of trust applies to a statutory trust unless the governing instrument provides otherwise.~~ See 4
20 Austin Wakeman Scott, William F. Fratcher, ~~&~~and Mark L. Ascher, 2 Scott and Ascher on
21 Trusts §24.9 (5th ed. 2006); Uniform Trust Code §1002 (2000). However, when a breach of
22 trust injures the trust rather than a beneficial owner directly, such remedies are properly sought
23 in a derivative suit under Section 609 rather than in a direct suit by the beneficiary because a
24 statutory trust is itself an entity. See generally ALI Principles of Corporate Governance §7.01
25 (1994).
26

27 **SECTION 106. RULES OF CONSTRUCTION.**

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

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

32 **Comment**

33
34 **Principal Sources** – Delaware Statutory Trust Act §3825; Connecticut Statutory Trust
35 Act §34-546; Uniform Statute and Rule Construction Act §18 (1995).
36

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

1
2 | Paragraph (b) admonishes the courts not to apply to this Act the canon of construction
3 that statutes in derogation of the common law are to be strictly construed. The drafting
4 committee included this admonition because several of this Act's provisions are designed
5 specifically ~~to reject~~ preclude the application to a statutory trust of one or more common-law
6 trust principles. See, e.g., Sections ~~_____~~ 203, 302, 304, 306, 502, 503, 504, 505, 506, 507, 511,
7 [to come]. Those provisions, which deliberately derogate the common law, should be
8 interpreted in accord with that purpose.

1 [ARTICLE] 2

2 FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

3 SECTION 201. CERTIFICATE OF TRUST.

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

6 (b) A certificate of trust must contain:

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

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

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

11 (4) ~~notice whether the trust may create one or more series under Section~~
12 401 operate as a series trust.

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

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

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

20 **Comment**

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

24
25 ~~Unlike a common law trust, a statutory trust is a creature of statute that requires a filing~~
26 ~~with the state to come into existence. Filing rules are typical of limited liability entities. Such~~
27 ~~filing rules serve a notice function, alerting interested parties to creation and existence of a new~~

1 | ~~limited liability juridical entity. See Section 204(b), which entitles any person to a certified copy~~
2 | ~~of a filing made pursuant to this act.~~

3 | _____
4 | ~~_____~~ Unlike a common-law trust, a statutory trust is a creature of statute. A statutory trust
5 | comes into existence only if (1) a certificate of trust is prepared and delivered to the specified
6 | public official for filing (see Section 204), and (2) the public official files the certificate. For
7 | more on the meaning of “filing,” see Section 204 and the comment thereto. Filing rules are
8 | typical of limited liability entities. Such rules serve a notice function, alerting interested parties
9 | to the creation and existence of a new juridical entity with limited liability. The certificate of
10 | trust ~~provides notice to interested third parties of the existence of the statutory trust also~~
11 | identifies and the identification of the statutory trust’s initial agent for service of process. And in
12 | connection with Pursuant to Section _____, 401, the certificate of trust ~~also~~ puts third parties on
13 | notice if the statutory trust further segregates its property and liabilities by creating one or more
14 | series.

15 |
16 | [Discussion of (b)(4) to come.] Although formed by making a public filing, a statutory
17 | trust is also a creature of contract. As such, it will be possible, though improper, for the trust
18 | instrument to be inconsistent with the certificate of trust or other public filings relating to the
19 | statutory trust. Paragraph (d) provides that in such circumstances the public filing controls.

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

23 |
24 | **SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF**
25 | **TRUST.**

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

- 28 | (1) the name of the trust;
29 | (2) the date of filing of its initial certificate; and
30 | (3) the changes to the certificate.

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

- 33 | (1) cause the certificate to be amended; or
34 | (2) if appropriate, deliver to the [Secretary of State] for filing a statement of

1 correction.

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

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

5 **Comment**

6
7 **Principal Sources** – Uniform Limited Partnership Act §202 (2001); Delaware Statutory
8 Trust Act §3810; Connecticut Statutory Trust Act §34-503.

9
10 Paragraph (a) provides a mechanism for updating a statutory trust’s filed certificate of
11 trust. Paragraph (b) imposes an obligation directly on the trustee rather than on the statutory
12 trust.

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

16
17 **SECTION 203. SIGNING OF RECORDS.**

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

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

21 **Comment**

22
23 **Principal Sources** – Uniform Limited Partnership Act §204 (2001); Delaware Statutory
24 Trust Act §3811; Connecticut Statutory Trust Act §34-504.

25
26 Paragraph (b) confirms that the signing of a public record by a trustee is a delegable act,
27 ensuring that the discredited common law nondelegation rule will not apply. See Uniform Trust
28 Code §807 (2000); Restatement (Third) of Trusts §80 (2007).

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

32
33 **SECTION 204. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY**
34 **OF STATE]; EFFECTIVE TIME AND DATE.**

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

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

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

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

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

18 (3) if the record specifies a delayed effective date but not an effective time, at
19 12:01 a.m. on the earlier of:

20 (A) the specified date; or

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

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

1 (A) the specified date; or

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

3 **Comment**

4
5 **Principal Sources** – Uniform Limited Partnership Act §206 (2001); Delaware Statutory
6 Trust Act §3812; Connecticut Statutory Trust Act §34-505.

7
8 For a record prepared by a private person to become part of the public record under this
9 aAct, (1) someone must put a properly prepared version of the record into the possession of the
10 public official specified in the aAct as the appropriate filing officer, and (2) the filing officer
11 must determine that the record complies with the filing requirements of this aAct and then
12 officially make the record part of the public record. This Act refers to the first step as “delivery
13 to the [Secretary of State] for filing” and refers to the second step as “filing.” Thus, under this
14 aAct “filing” is an official act.

15
16 Under paragraph (a), the caption need only indicate the title of the record—for example,
17 “Certificate of Trust” or “Statement of Change for Statutory Trust.” Filing officers typically
18 note on a filed record the fact, date, and time of filing. Copies provided by the filing officer
19 under paragraph (a) should contain that notation. This Act does not provide a remedy if the
20 filing officer wrongfully fails or refuses to file a record.

21
22 Paragraph (c) allows most records to have a delayed effective date, up to 90 days after
23 the date the record is filed by the filing officer. A record specifying a longer delay will not be
24 rejected. Instead, under paragraphs (c)(3) and (4), the delayed effective date is adjusted by
25 operation of law to the “90th day after the record is filed.” This Act does not require the filing
26 officer to notify anyone of the adjustment.

27
28 Consistent with the existing statutory trust acts, but inconsistent with most corporate
29 codes, this Act makes no provision for collecting a franchise tax. See generally Marcel Kahan
30 & Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev.
31 1205, 1218-33 (2001).

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

35
36 **SECTION 205. CORRECTING FILED RECORD.**

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

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

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

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

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

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

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

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

14 **Comment**

15
16 **Principal Source** – Uniform Limited Partnership Act §207 (2001).

17
18 A statement of correction is appropriate only to correct inaccuracies that existed or
19 signatures that were defective “at the time of filing.” A statement of correction may not be used
20 to amend or revise a record that was accurate when filed but has become inaccurate as a result of
21 subsequent events.

22
23 | Under paragraph (c), a statement of correction “relates back” by way of retroactive
24 application except against persons that have relied on the uncorrected record and would be
25 adversely affected if the correction related back.

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

29 30 **SECTION 206. CERTIFICATE OF GOOD STANDING.**

31 (a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish

1 to the person making the request a certificate of good standing for a statutory trust if the records
2 filed in the [office of the Secretary of State] show that:

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

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

6 (3) the most recent annual report of the trust required by Section 2135 has been
7 filed by the [Secretary of State];

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

10 (5) the [Secretary of State] has not filed a notice of administrative dissolution
11 under Section 8065 or, if the [Secretary of State] has filed such a notice, that the [Secretary of
12 State] has filed a declaration of reinstatement under Section 8076.

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

14 (1) the name of the trust;

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

16 and

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

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

21 **Comment**

22

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

24

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

1 | the public record.

2 |
3 | Section 905 provides for the issuance of a certificate of registration for a qualified foreign
4 | statutory trust.

5 |
6 | Under Section 103(c)(1), this Section is not subject to override by the governing
7 | instrument.

8 |
9 | **SECTION 207. NAME OF STATUTORY TRUST.**

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

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

14 | (2) any name reserved under Section ~~20840~~ [or other state laws allowing the
15 | reservation or registration of business names, including fictitious or assumed name statutes].

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

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

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

27 | (2) the applicant delivers to the [Secretary of State] a certified copy of the final

1 judgment of a court of competent jurisdiction establishing the applicant’s right to use in this state
2 the name applied for; or

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

5 (A) has merged with the applicant;

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

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

9 (d) Subject to Section 906, this section applies to any foreign statutory trust ~~doing~~
10 transacting business in this state, having a certificate of qualification to do business in this state,
11 or applying for a certificate of qualification.

12 **Comment**

13
14 **Principal Sources** – Uniform Limited Partnership Act §108 (2001); Delaware Statutory
15 Trust Act §3814.

16
17 The drafting committee ~~opted~~ considered but decided not to require that the name of a
18 statutory trust contain a traditional limited liability appellation. Such a requirement would be
19 inconsistent with current practice under the Delaware Statutory Trust Act, though the drafting
20 committee contemplated that an enacting jurisdiction with a strong policy regarding names of
21 limited liability entities might modify this Section accordingly. Moreover, other regulatory law
22 will sometimes limit the range of permissible names notwithstanding this Section. For example,
23 the names of mutual funds typically do not contain a limited liability appellation, but Section
24 35(d) of the Investment Company Act of 1940, which is applicable to a statutory trust that is a
25 registered investment company, prohibits “materially deceptive or misleading” names. 15
26 U.S.C. §80a-34(d). See also Rule 35d-1, 17 C.F.R. §270.35d-1 (listing types of names that have
27 been deemed “materially deceptive or misleading”).

28
29 [Cross – 903]

30
31 Under Section 103(c)(1), this Section is not subject to override by the governing
32 instrument.

33
34 **SECTION 208. RESERVATION OF NAME.**

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

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

5 (2) a statutory trust or a qualified foreign statutory trust intending to adopt the
6 name;

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

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

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

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

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

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

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

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

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

7 (e) A transfer or termination under subsection (d) is effective as provided in Section
8 204(c).

9 **Comment**

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

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

14
15 **SECTION 209. AGENT FOR SERVICE OF PROCESS.**

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

18 (b) An agent for service of process of a statutory trust or qualified foreign statutory trust
19 must be an individual who is a resident of this state or a person incorporated, organized, formed,
20 or authorized to do business in this state which 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(~~ba~~)(3), the initial designation of a statutory trust's agent for service of
27 process is made in the original certificate of trust. Under Section 902(a)(4), the initial
28 designation of a foreign statutory trust's agent for service of process is made in the original
29 application for a certificate of qualification. The initial designation may be changed pursuant to
30 a statement of change under Section 210, by an amendment to the certificate of trust under

1 instrument.

2

3 **SECTION 212. SERVICE OF PROCESS.**

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

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

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

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

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

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

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

23 (e) The [Secretary of State] shall keep a record of each process, notice, and demand
24 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.

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

12
13 **SECTION 213. ANNUAL REPORT FOR [SECRETARY OF STATE].**

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

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

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

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

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

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

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

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

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

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

3 (c) The first annual report under this section must be delivered to the [Secretary of State]
4 between [January 1 and April 1] of the year following the calendar year in which a statutory trust
5 was formed or a qualified foreign statutory trust was authorized to do business in this State. An
6 annual report must be delivered to the [Secretary of State] between [January 1 and April 1] of
7 each subsequent calendar year.

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

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

17 **Comment**

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

19
20 A statutory trust that fails to comply with this section is subject to administrative
21 dissolution. See Section 8065.

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

1 [ARTICLE] 3

2 GOVERNING LAW; AUTHORIZATION; DURATION; POWERS

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

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

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

7 (3) the enforceability of a debt, obligation, or other liability of the statutory trust or a
8 series thereof against the property of the trust or any ~~any~~ series thereof. ~~[For discussion: Does~~
9 ~~this rewrite resolve the problem, that is, preserve the desired choice of law for creditor~~
10 ~~rights without implying that the series is an entity?]~~

11 Comment

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

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

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

30
31 Paragraph (3) [to come].
32

33 Section 901 states rules for qualified foreign statutory trusts that parallel and are
34 analogous in scope to those of this section.
35

36 Under Section 103(c)(3), this Section is not subject to override by the governing

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

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

- 11
- 12 • the duty of a trustee to act in good faith and in accordance with the terms and
- 13 purposes of the trust and the interests of the beneficiaries;
- 14 • the requirement that a trust and its terms be for the benefit of one or more
- 15 ascertainable beneficiaries, and that the trust have a purpose that is lawful, not
- 16 contrary to public policy, and possible to achieve;
- 17 • the power of the court to modify or terminate a trust;
- 18 • the effect of a spendthrift provision and the rights of the settlor's and the
- 19 beneficiary's creditors and assignees to reach the property of a trust;
- 20 • the power of the court to adjust a trustee's compensation specified in the terms of
- 21 the trust which is unreasonably low or high;
- 22 • the power of the court to remove a trustee for a serious breach of trust;
- 23 • the duty of the trustee to give information and make reports concerning the
- 24 administration of the trust to the beneficiary;
- 25 • the effect of an exoneration clause that purports to limit or eliminate the duties or
- 26 liabilities of a trustee to a beneficiary;
- 27 • the rights of a party, other than a trustee or beneficiary, that transacts with the
- 28 trustee in the trustee's capacity as such;
- 29 • the rules against perpetuities, accumulations of income, and suspension of the
- 30 power of alienation; and
- 31 • the power of the court to take such action and exercise such jurisdiction as may be
- 32 necessary in the interests of justice.
- 33

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

38
39 **[Possible discussion of series purpose provision and cross-reference to come.]**

40
41 Under Section 103(c)(2), this Section is not subject to override by the governing
42 instrument.

43
44 **SECTION 304. STATUTORY TRUST SOLELY LIABLE FOR DEBTS,**

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

7 **Comment**

8 **Principal Sources** – Delaware Statutory Trust Act §3803; Connecticut Statutory trust
9 Act §34-523; Revised Uniform Partnership Act §306 (1994); Uniform Limited Liability
10 Company Act §303; Uniform Limited Partnership Act §§303, 404 (2001); Uniform Trust Code
11 §507 (2000).

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

23
24 **[Cross-reference and/or discussion of series to come.]**

25
26 Second, this section confirms that the statutory trust, ~~not the agent of the statutory trust or~~
27 ~~the trustee,~~ is solely liable for the debts, obligations, and liabilities of the trust ~~incurred by an~~
28 ~~agent of the trust or the trustee acting on behalf of the trust or the trustee.~~

29
30 Third, this section confirms the limited liability of a beneficial owner and trustee by
31 providing that ~~the~~ neither a beneficial owner nor trustee of a statutory trust is ~~not~~ liable for the
32 debts, obligations, or liabilities of the statutory trust. An agent of the beneficial owner or trustee
33 is likewise not liable for the debts, obligations, or liabilities of the statutory trust. This section
34 therefore confirms that the “control test” of Williams v. Inhabitants of Milton, 102 N.E. 355
35 (Mass. 1913), and Restatement (Second) of Agency §14B (1958), is not applicable to a statutory
36 trust. Under the control test, if a beneficial owner/beneficiary of a common law business trust
37 had a say in the administration of the trust or the right to remove and replace the trustees, the
38 beneficial ownership might be held liable for the debts of the trust. By contrast, under this section
39 a beneficial owner may participate in the management of the statutory trust without exposure to

1 liability for the debts of the statutory trust. For discussion of a beneficial owner’s limited
2 liability under the Delaware Statutory Trust Act, see Wendell Fenton &and Eric A. Mazie,
3 Delaware Statutory Trusts, in 2 R. Franklin Balotti &and Jesse A. Finkelstein, The Delaware
4 Law of Corporations &and Business Organizations §19.3 (3d ed. 2005 Supp.). **[Placeholder:
5 Update cite.]**
6

7 **SECTION 305. NO RIGHTS OF BENEFICIAL OWNER AND**
8 **TRUSTEE CREDITOR RIGHTS IN TRUST PROPERTY.**

9 ~~—— (a) A beneficial owner’s beneficial interest in the statutory trust is personal property~~
10 ~~regardless of the nature of the property of the trust. A beneficial owner has no interest in~~
11 ~~specific property of the trust.~~

12 Except as provided otherwise in Section 606, (b) A creditor of a beneficial owner or of a
13 trustee does not have the right to obtain possession of, or otherwise exercise legal or equitable
14 remedies with respect to, the property of the statutory trust.

15 **Comment**

16
17 **Principal Sources** - Delaware Statutory Trust Act §3805; Connecticut Statutory Trust
18 Act §34-516; Uniform Trust Code §507 (2000); Revised Uniform Partnership Act §203 (1994);
19 Uniform Limited Liability Company Act §501 (1996); Uniform Limited Partnership Act §701
20 (2001).
21

22 Paragraph (b) implements the concept that a statutory trust is an entity separate from its
23 trustees and beneficial owners by confirming that a creditor of a beneficial owner or a trustee has
24 no recourse against the property of the statutory trust.
25

26 With respect to trustees, the rule of this paragraph is familiar from the operation of
27 common-law trusts. See Uniform Trust Code §507 (2000); Restatement (Third) of Trusts §42,
28 cmt. c (2003); Restatement (Second) of Trusts §308 (1959). The rule of this section is also
29 consistent with bankruptcy law. Property in which the trustee holds legal title as trustee is not
30 part of the trustee’s bankruptcy estate. See 11 U.S.C. §541(d).
31

32 With respect to beneficial owners, for discussion of the parallel provision in the Delaware
33 Statutory Trust Act, see Wendell Fenton &and Eric A. Mazie, Delaware Statutory Trusts, in 2 R.
34 Franklin Balotti &and Jesse A. Finkelstein, The Delaware Law of Corporations &and Business
35 Organizations §19.4, at 19-9 – 19-10 (3d ed. 2005 Supp.). However, **[cross-reference to
36 charging order provision to come.]**
37

1 For a general discussion of asset partitioning rules in organizational law, see Henry
2 Hansmann &and Reinier Kraakman, The Essential Role of Organizational Law, 110 Yale L.J.
3 387 (2000); Henry Hansmann &and Ugo Mattei, The Functions of Trust Law: A Comparative
4 Legal and Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998). See also Henry Hansmann,
5 Reinier Kraakman, &and Richard Squire, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333
6 (2006).
7

8 SECTION 306. DURATION.

9 (a) A statutory trust has perpetual existence.

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

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

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

16 Comment

17
18 **Principal Sources** – Delaware Statutory Trust Act §3808; Connecticut Statutory Trust
19 Act §34-518.
20

21 Paragraph (a) provides a default rule of perpetual existence for a statutory trust. See also
22 Section 801, which provides for dissolution of a statutory trust only upon the occurrence of an event
23 or circumstance stated in the governing instrument, and Section 806~~5~~, which provides for
24 administrative dissolution. The duration of a common-law trust, by contrast, is curtailed by the Rule
25 Against Perpetuities. See Restatement (Second) of Property: Donative Transfers § 2.1 (1983).
26 Accordingly, unless the governing instrument provides otherwise, under this section a statutory trust
27 is exempt from the Rule Against Perpetuities. Without taking a position on the policy soundness of
28 the tax-driven movement to abolish the Rule Against Perpetuities with respect to donative trusts, see
29 ~~Max M. Schanzenbach & Robert H. Sitkoff, Perpetuities or Taxes? Explaining the Rise of the~~
30 ~~Perpetual Trust, 27 Cardozo L. Rev. 2465 (2006)~~ **[RST3 prop cite to come]**, the drafting
31 committee concluded that the dead-hand worries that underpin the Rule do not apply to a
32 statutory trust. Under Section 302, a statutory trust may not have a prevailingly donative
33 purpose.
34

35 Paragraph (b) confirms that a statutory trust may only be terminated in accordance with the
36 terms of this aAct or the governing instrument. Thus, paragraph (b) overrides the rules of common-
37 law trust termination that would otherwise be applicable to a statutory trust pursuant to Section 105.

1 Those rules are concerned with mediating the tension between the donor’s intent and subsequent
2 contrary preferences of the beneficiaries, see Robert H. Sitkoff, An Agency Costs Theory of Trust
3 Law, 89 Cornell L. Rev. 621, 658-63 (2004), an issue that is not applicable to a statutory trust
4 because a statutory trust ~~under this Act~~ may not have a prevailingly donative purpose. Instead, the
5 drafting committee contemplated that pursuant to Section 104(a)(9) the governing instrument
6 would provide for termination of the statutory trust or modification of the governing instrument if
7 such provisions are desirable.

8
9 Paragraph (c) confirms that the rule of partnership law under which a partnership is
10 dissolved upon the death or incapacity of one of the partners does not apply to a statutory trust.
11 ~~Section 405(c) provides a similar rule for the series of a statutory trust.~~

12
13 Paragraph (d) overrides the application to a statutory trust under Section 105 of the
14 common law rule of merger whereby legal and equitable title to the trust property merge and the
15 trust terminates if the same person is the sole trustee and sole beneficiary. See Restatement
16 (Third) of Trusts §69 (2003); Restatement (Second) of Trusts §341 (1959); Comment, The
17 Doctrine of Merger as Applied to Commercial Trusts, 29 Yale L.J. 97 (1919).

18 19 **SECTION 307. POWER TO HOLD PROPERTY; TITLE TO TRUST**

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

23 **Comment**

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

26
27 This Section implements the concept that a statutory trust is an entity separate from its
28 trustees and beneficial owners by confirming that a statutory trust may transact in its own name.
29 The property of a common-law trust, by contrast, must be held in the name of the trustee as such.

30
31
32 However, this section also permits the statutory trust to take title to property in the name
33 of the trustee in the trustee’s capacity as such even though the trust can hold property in its own
34 name. The drafting committee reasoned that this provision would be useful for a statutory trust
35 that has dealings in a state that has not provided for a statutory trust entity. Property ownership
36 by a trustee in the trustee’s capacity as such is familiar from the use of common-law trusts.

37
38 To police the boundary of the trustee’s personal property and the property of the trust, the
39 common law imposes on the trustee duties to earmark trust property and not to commingle it
40 with the trustee’s own. See Uniform Trust Code §810 (2000); Restatement (Third) of Trusts §84

1 (2007); Restatement (Second) of Trusts §179 (1959). The drafting committee contemplated that
2 under appropriate circumstances Section 505(b) would be read to require similar conduct by a
3 trustee of a statutory trust that takes title to property of the statutory trust in the name of the
4 trustee in the trustee’s capacity as such.
5
6

7 **SECTION 308. POWER TO SUE AND BE SUED.**

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

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

12 **Comment**

13
14 **Principal Sources** – Delaware Statutory Trust Act §§3803-3805; Connecticut Statutory
15 Trust Act §§34-518, 34-523; Uniform Limited Partnership Act §303 (2001).
16

17 Paragraph (a) implements the concept that a statutory trust is an entity separate from the
18 trustee and beneficial owner by confirming that a statutory trust has the power to sue and be sued
19 in its own name.
20

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

1 [ARTICLE 4]

2
3 SERIES TRUSTS

4
5
6 SECTION 401. SERIES OF STATUTORY TRUST.

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

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

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

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

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

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

22 **Comment**

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

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

1 best interests of a series and the best interests of the trust in a case where the governing
2 instrument provides that the trustee has duties only to a series of the trust. See also the
3 changes to Sections 403 and 505.] Comparison to classes under Section 104 (c) (15) to
4 come.]
5
6

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

13
14 Paragraph (c) [discussion and cross-reference to Section 302 to come.]

15
16 [Paragraph (d) discussion to come.]

17
18 ~~Paragraph (e) [discussion and cross-reference to Section 302 to come.]~~ The
19 organization of a master statutory trust with several series is particularly common among
20 statutory trusts that are registered as investment companies under the Investment Company Act
21 of 1940, as amended, 15 U.S.C. Sections 80a-1 et seq. (the “1940 Act”). In such a case, any
22 series of beneficial interests established by the governing instrument of the trust is a series
23 preferred in distribution of property or payment of dividends over all other series with respect to
24 property specifically allocated to the series under Section 18 of the Investment Company Act of
25 1940. [For discussion: (1) Conversion of former Section 404 to this comment. (2)
26 Comparison with Delaware §3805(h): “Except to the extent otherwise provided in the
27 governing instrument of the statutory trust, where the statutory trust is a registered
28 investment company under the Investment Company Act of 1940, as amended (15 U.S.C. §
29 80a-1 et seq.), any class, group or series of beneficial interests established by the governing
30 instrument with respect to such statutory trust shall be a class, group or series preferred as
31 to distribution of assets or payment of dividends over all other classes, groups or series in
32 respect to assets specifically allocated to the class, group or series as contemplated by § 18
33 (or any amendment or successor provision) of the Investment Company Act of 1940 [15
34 U.S.C. § 80a-18], as amended, and any regulations issued thereunder, provided that this
35 section is not intended to affect in any respect the provisions of § 3804(a) of this title.”]
36
37

38
39 Under Section 103(c)(4), paragraphs (b), ~~and (c)~~, and (d) of this Section are not subject to
40 override by the governing instrument.
41

42 SECTION 402. LIABILITY OF SERIES TRUST.

43 (a) ~~Subject to subsection (b),~~ if a statutory trust has one or more series as provided in

1 Section 401:

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

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

8 ~~Section (a) applies only if:~~

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

13 ~~(2) notice of series is set forth in the certificate of trust pursuant to Section~~
14 ~~201(b)(4).~~

15 ~~(be) Property of the statutory trust or any series thereof may not be associated,~~
16 ~~disassociated, or reassociated with the trust or a series thereof if t~~The association, disassociation,
17 or reassociation would be a fraudulent~~of property of the statutory trust or a series thereof to the~~
18 trust or a series thereof, including by conversion or merger under [article] 7 is deemed to be a
19 transfer under [Uniform Fraudulent Transfers Act or other state fraudulent transfer statute] as if
20 the statutory trust and each series thereof were separate persons. ~~{For Discussion: Is this~~
21 ~~paragraph, as rewritten, better? Are we there yet?}~~

22 **Comment**

23
24 **Principal Sources** – Delaware Statutory Trust Act §3804; Delaware Limited Liability
25 Company Act §18-215.

1
2 Paragraph (a) provides that if a statutory trust creates one or more series under Section
3 401 and satisfies the conditions of paragraph (b), the debts, liabilities, and other obligations of a
4 particular series are enforceable against the property of that series only. In such circumstances,
5 the debts, liabilities, and other obligations of the trust generally and any other series thereof are
6 not enforceable against the property of the series. **[Possible discussion of the common creditor
7 problem and the idea of the trust as a separate bucket from each series to come.]**
8

9 Paragraph (b) sets forth two conditions that must be satisfied before the liability-limiting
10 rules of paragraph (a) may apply: (1) records must be maintained that reasonably identify the
11 property of the series, and (2) notice of the limitation on liabilities of a series must be set forth in
12 the certificate of trust.
13

14 The earmarking requirement of paragraph (b)(1) safeguards the separate interests of the
15 beneficial owners of each series by clarifying the boundaries between the property and liabilities
16 of each series. For similar reasons, the earmarking requirement also protects third parties that
17 deal with a series trust. Third parties are further protected by paragraph (b)(2), which conditions
18 limited liability across series on notice in the certificate of trust that the trust might have one or
19 more series.
20

21 Failure to satisfy paragraph (b) exposes the property of one series to the creditors of
22 another series and the creditors of the trust generally. In such a case, the failure to maintain
23 separate records would likely amount to a breach of trust under Section 505, remediable by a
24 beneficial owner in a derivative or direct suit against the trustee. **[Placeholder for possible
25 further discussion of trust versus series-level buckets to come.]**
26

27 Paragraph (be) addresses the concern that **[to come, the basic idea is that we don't
28 want to allow transfer of property from series A to series B, thereby frustrating the
29 creditors of series A, if the transfer will leave series A insolvent or otherwise would have
30 qualified as a fraudulent transfer if A and B were separate entities].**
31

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

36 **SECTION 403. ~~GOVERNANCE OF~~ DUTIES OF TRUSTEE IN SERIES TRUST.**

37 ~~(a) The governing instrument may limit the duties of a trustee under Section 505 to one
38 or more series of the statutory trust provided that there is at least one trustee that owes fiduciary
39 duties to the statutory trust without limitation to one or more series thereof. **[For Discussion: Is**~~

40 ~~this provision sufficient? Can we do better, that is, design a more elegant provision?~~

41 ~~Should we drop “under Section 505”?~~ If there is at least one trustee that, in discharging its

1 duties, must consider the interests of the statutory trust and all series thereof, then the governing
2 instrument may provide that one or more other trustees, in discharging their duties, may consider
3 only the interests of the trust or one or more series thereof.

4 ~~—— (b) The governing instrument may grant to, or withhold from, all or certain trustees or~~
5 ~~beneficial owners, or a specified series of trustees or beneficial owners, the right to vote,~~
6 ~~separately or with any or all other trustees or beneficial owners, or series of trustees or beneficial~~
7 ~~owners, on any matter.~~

8 **Comment**

9
10 ~~Principal Sources — [to come].~~

11
12 ~~—— [Default rule notation and discussion of section to come.] [Comment to come]~~

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

16
17 ~~—— **SECTION 404. SERIES TRUST AS INVESTMENT COMPANY.** If a statutory trust~~
18 ~~is a registered investment company under the Investment Company Act of 1940, [as amended,]~~
19 ~~15 U.S.C. Section 80a-1 et seq., [or any successor statute thereto,] [and any regulations issued~~
20 ~~thereunder,] any series of beneficial interests established by the governing instrument of the trust~~
21 ~~is a series preferred in distribution of property or payment of dividends over all other series with~~
22 ~~respect to property specifically allocated to the series under Section 18 of the Investment~~
23 ~~Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [or any amendment or~~
24 ~~successor provision,] [and any regulations issued thereunder].~~

25 **Comment**

26
27 ~~—— **Principal Sources** — Delaware Statutory Trust Act §3805.~~

28
29 ~~The organization of a master statutory trust with several series is particularly common~~
30 ~~among statutory trusts that are registered as investment companies under the Investment~~

1 Company Act of 1940, as amended, 15 U.S.C. Sections 80a-1 et seq. (the “1940 Act”).

2
3 ~~[Remainder of comment Conversion to comment to 402 to come.]~~

4
5
6 **SECTION 4045. DISSOLUTION OF SERIES.**

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

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

12 (c) Upon dissolution of a series, the persons that under the governing instrument are
13 responsible for winding up the affairs of the series may cause the statutory trust to take all
14 actions as are permitted under Section 802(e)3, and shall provide for the claims and obligations
15 of the series as provided in Sections 803 and 804 to 805., ~~and distribute the property of the series~~
16 ~~as provided in Section 808.~~

17 (d) Any person, including a trustee, that under the governing instrument is responsible for
18 winding up the affairs of a series under subsection (a) is not liable to the claimants of the
19 dissolved series by reason of the person’s actions in winding up the series if the person complied
20 with this section.

21 ~~———— [For discussion: In the conference call, we discussed adding a provision that the~~
22 ~~series is not dissolved or terminated if a beneficiary dies, etc. But are not these possibilities~~
23 ~~adequately addressed by Section 306 (“or any series thereof”)?]~~

24 **Comment**

25 **Principal Source** – Delaware Statutory Trust Act §3808; Revised Uniform Limited
26 Liability Company Act §§701-02 (2006).
27

1 | _____ [Comment to explain that series dissolves as if it were a trust to come.]

2

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

5

6

1 [ARTICLE 5]

2 TRUSTEES AND TRUST MANAGEMENT

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

5 Comment

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

9
10 Section 102(189) defines the term “trustee” as a person designated as such in accordance
11 with the governing instrument or applicable law. Section 104(c)(5)(C) confirms that the
12 governing instrument may provide for trustee appointment. However, because no provision in
13 this Act provides default rules for trustee appointment, if the governing instrument does not
14 provide for trustee appointment, then under Section 105 the applicable law is the state’s law
15 pertaining to trustee appointment in common-law trusts controls.

16
17 For treatment of the default rules of trustee appointment, removal, and succession in
18 common-law trusts, see Restatement (Third) of Trusts §§31-37 (2003); Uniform Trust Code
19 §§701-02, 704-06 (2000). See also ~~chapter 11 of 2~~ Austin Wakeman Scott, William F. Fratcher,
20 & Mark L. Ascher, 1 Scott and Ascher on Trusts Ch. 2 (5th ed. 2006);
21

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

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

27 Comment

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

29
30 This section is intended to grant trustees the broadest possible powers. Hence, this
31 section overrides the application to a statutory trust under Section 105 of the outmoded common-
32 law rule that a trustee has only those powers granted by the trust instrument. See Uniform Trust
33 Code §815 (2000); Restatement (Third) of Trusts §85, cmt. a (2007).
34

1 80a-31(a); 17 C.F.R. § 270.17g-1. Investment advisory and underwriting contracts, and
2 selection of independent public accountants, must be approved by the noninterested trustees at an
3 in-person meeting. See 15 U.S.C. §80a-15(c); 15 U.S.C. 80a-31(a).

4
5
6 **SECTION 504. PROTECTION OF PERSON DEALING WITH TRUSTEE.**

7 (a) A person, ~~other than a beneficial owner,~~ that in good faith assists a trustee, or that in
8 good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or
9 improperly exercising the trustee’s power, is protected from liability as if the trustee properly
10 exercised the power.

11 (b) A person, ~~other than a beneficial owner,~~ that in good faith deals with a trustee is not
12 required to inquire into the extent of a trustee’s power or the propriety of its exercise.

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

15 (d) A person, ~~other than a beneficial owner,~~ that in good faith assists a former trustee as
16 if the former trustee were still trustee, or that in good faith and for value deals with a former
17 trustee as if the former trustee were still trustee, without knowledge that the trusteeship has
18 terminated is protected from liability as if the former trustee were still a trustee.

19 ~~———— [For Discussion: We should discuss, once again, the different meanings of good~~
20 ~~faith and whether to try to define the term, per the fresh comments from the floor, or to~~
21 ~~give more/better commentary on the statutory trust’s hybrid trust/corporate roots.]~~

22 **Comment**

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

24
25 Paragraph (a) protects two different classes of persons: (1) a person ~~other than a~~
26 ~~beneficial owner~~ that assists a trustee with a transaction, and (2) a person ~~other than a beneficial~~
27 ~~owner~~ that deals with the trustee for value. As long as the assistance was provided or the
28 transaction was entered into in good faith and without knowledge that the trustee was exceeding
29 or improperly exercising the trustee’s powers, ~~a third~~the person ~~in either category~~ is protected in

1 the transaction.

2
3 Paragraph (b) confirms that a ~~third-party person~~ that is acting in good faith is not charged
4 with a duty to inquire into the extent of a trustee's power or the propriety of its exercise. The
5 ~~third-party person~~ may assume that the trustee has the necessary power. Paragraph (b) therefore
6 overrides the application to a statutory trust under Section 105 of the outmoded common-law
7 rule that a third party is charged with constructive notice of the trust instrument and its contents.
8 See Austin Wakeman Scott, William F. Fratcher, ~~&and~~ Mark L. Ascher, 5 Scott and Ascher on
9 Trusts §29.2 (5th ed. 2008).

10
11 Paragraph (c) protects ~~any person, including a beneficial owner,~~ that in good faith
12 delivers property to a trustee. The standard of protection in Restatement (Second) of Trusts §321
13 (1959) is phrased differently, but the result is similar. Under the Restatement ~~(Second) of Trusts,~~
14 the person delivering property to a trustee is liable if at the time of the delivery the person had
15 notice that the trustee was misapplying or intending to misapply the property.

16
17 Paragraph (d) extends the protections afforded by this section to assistance provided to or
18 dealings for value with a former trustee. The ~~third-party person~~ is protected as if the former
19 trustee still held the office if the ~~third-party person~~ acted in good faith.

20
21 **[To come: Discussion of differences with the UTC.]**

22
23 **For discussion of the meaning of good faith, see the comment to Section 505.**

24
25 **SECTION 505. STANDARDS OF CONDUCT FOR TRUSTEES.**

26 (a) Subject to Section 403, in ~~discharging the duties~~ exercising the powers of trusteeship,
27 a trustee shall act in good faith and in a manner that the trustee reasonably believes to be in the
28 best interests of the statutory trust.

29 (b) ~~Subject to Section 403, a~~ A trustee shall discharge its duties with the care that a person
30 in a similar position would reasonably believe appropriate under similar circumstances. ~~For~~
31 ~~discussion, duty to be reasonably informed and the rest of RMBCA 8.30, based on a~~
32 ~~question from the floor.]~~

33
34 **Comment**

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

1 To police the exercise of the trustee’s broad powers under Section 502, this section
2 subjects the trustee to fiduciary duties of loyalty (~~paragraph (a)~~) and care (~~paragraph (b)~~) akin to
3 those of a corporate director.
4

5 The drafting committee opted to model the trustee’s duties on the corporate fiduciary
6 obligation as stated in Revised Model Business Corporation Act §8.30 (2005) rather than the
7 more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a
8 mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the
9 context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of
10 commercial actors. For a statement of the duties of loyalty and prudence in trust law, see
11 Restatement (Third) of Trusts §§77-78 (2007). For a comparison, see Robert H. Sitkoff, Trust
12 Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82 (2003). See
13 also the sources cited in the Comment to Section 507.
14

15 **[Discussion of Cargill, to come.]**
16

17 The drafting committee declined the suggestion to define the term good faith on the
18 ground that such a definition necessarily would be over- and under-inclusive. Instead, the
19 committee contemplated that the term would be interpreted in light of its evolving meaning in
20 the business and trust law cases.
21

22 **[Discussion of Cargill, to come.]**
23
24

25 **[To come: Commentary explaining rationale for the “subject to Section 403” language.]**
26

27 Under Section 103(c)(5), the trustee’s standards of conduct under this section are
28 mandatory rules that are not subject to override by the governing instrument. However, the
29 governing instrument may prescribe the standards by which good faith, best interests of the
30 statutory trust, and care that a person in a similar position would reasonably believe appropriate
31 under similar circumstances are determined provided that the standards are not manifestly
32 unreasonable.
33

34 Delaware Statutory Trust Act §3806(c) provides that a trustee’s fiduciary duties “may be
35 expanded or restricted or eliminated by provisions in the governing instrument; provided, that
36 the governing instrument may not eliminate the implied contractual covenant of good faith and
37 fair dealing,” and §3806(e), which provides that a “governing instrument may provide for the
38 limitation or elimination of any and all liabilities for . . . breach of duties (including fiduciary
39 duties) . . .; provided, that a governing instrument may not limit or eliminate liability for any act
40 or omission that constitutes a bad faith violation of the implied contractual covenant of good
41 faith and fair dealing.”
42
43

44 ~~The drafting committee opted to model the trustee’s duties on the corporate fiduciary~~
45 ~~obligation as stated in Revised Model Business Corporation Act §8.30 (2005) rather than the~~
46 ~~more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a~~

1 (2007).

2
3
4 [Treatment of Section 103 (b)(b) to come.]

5
6 ~~———— [For discussion: Haynsworth’s concern that this provision isn’t mandatory and the~~
7 ~~role of Section 505 as a backstop. Ditto for Section 507.]~~

8
9 **SECTION 507. INTERESTED TRANSACTIONS.**

10 (a) In this section, “~~related~~ covered party” means a trustee, officer, employee, or manager
11 of a statutory trust, or a related person of a trustee, officer, employee, or manager.

12 (b) Subject to subsection (c), a ~~related~~ covered party may lend money to, borrow money
13 from, act as a surety, guarantor, or endorser for, guarantee or assume one or more obligations of,
14 provide collateral for, and do other business with the statutory trust and has the same rights and
15 obligations with respect to any such matter as a person that is not a ~~trustee, officer, employee,~~
16 ~~manager, or related person of a trustee, officer, employee, or manager~~ covered party.

17 (c) A transaction under subsection (b) is voidable by the statutory trust unless the ~~related~~
18 covered party shows that the transaction is fair to the trust. ~~[For Discussion: (1) Per a~~
19 ~~comment from the floor, should we use a “best interests of the trust” standard instead? (2)~~
20 ~~Note that there is a new paragraph (a), which neatened up the section.]~~

21 **Comment**

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

24
25 Consistent with the use of the term “best interests” instead of “sole interest” in Section
26 505(a), this section abrogates the no-further-inquiry rule of the common law of trusts, which
27 forbids self-dealing transactions even if the transaction is fair and in the best interests of the trust
28 and the beneficiaries. See Restatement (Third) of Trusts §78 (2007); Restatement (Second) of
29 Trusts §170 (1959); John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest
30 or Best Interest?, 114 Yale L.J. 929 (2005); Melanie B. Leslie, Trusting Trustees: Fiduciary
31 Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005).

32
33 ———— Instead, this section follows the corporate model whereby an interested transaction is

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

5
6 **[To come: possible additional commentary on the point that this section is not**
7 **scheduled in 103(c), hence ratification and related ideas may be addressed/alterd in the**
8 **governing instrument; and that the purpose of this section is to override the no-further-**
9 **inquiry rule, not to validate all self-dealing transactions]**

10
11 The application of this section to a statutory trust that is registered as an investment
12 company is preempted by the Investment Company Act of 1940, which generally prohibits a
13 trustee, officer, employee, manager, and their related persons from lending money to, borrowing
14 money from, and engaging in other transactions with the mutual fund without exemptive relief
15 from the Securities and Exchange Commission. See 15 U.S.C. §80a-17(a), (d).
16

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

21 **Comment**

22 Under Section 103(c)(6), the trustee’s right to information under this section is not
23 subject to override by the governing instrument. However, the trustee’s right to information is
24 limited to information “reasonably related to the trustee’s discharge of the trustee’s duties as
25 trustee,” and under Section 103(c)(6) the governing instrument may prescribe the standards by
26 which reasonably related is determined provided that those standards are not manifestly
27 unreasonable.
28

29 By linking the trustee’s information rights to the scope of the trustee’s duties as trustee,
30 this section makes the trustee’s right to information function specific. This section therefore
31 allows for the creation of a limited-role or directed trustee that will not have access to
32 confidential information unrelated to the trustee’s limited role. At the same time, this section
33 ensures that such a trustee will have access to information reasonably related to discharging the
34 trustee’s duties in connection with the trustee’s limited role.
35

36 Section 608 provides for a beneficial owner’s right to information.
37

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

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

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

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

14 ~~———— [For Discussion, questions from the floor: 1. What about an unknowing violation of~~
15 ~~law? 2. Why the trust law model rather than a corporate model? 3. What about taking as a~~
16 ~~model section 27 of the Revised Uniform Unincorporated Nonprofit Associations Act:~~

17 ~~(a) Except as otherwise provided in the governing principles, an~~
18 ~~unincorporated nonprofit association shall reimburse a member or manager~~
19 ~~for authorized expenses reasonably incurred in the course of the member's~~
20 ~~or manager's activities on behalf of the association.~~

21 ~~(b) An unincorporated nonprofit association may indemnify a member or~~
22 ~~manager for any debt, obligation, or other liability incurred in the course of~~
23 ~~the member's or manager's activities on behalf of the association if the~~
24 ~~person seeking indemnification has complied with Sections 18 and 23.~~
25 ~~Governing principles in a record may broaden or limit indemnification.~~

26 ~~(c) If a person is made or threatened to be made a party in an action based~~
27 ~~on that person's activities on behalf of an unincorporated nonprofit~~
28 ~~association and the person makes a request in a record to the association, a~~
29 ~~majority of the disinterested managers may approve in a record advance~~
30 ~~payment, or reimbursement, by the association, of all or a part of the~~

1 reasonable expenses, including attorney's fees and costs, incurred by the
2 person before the final disposition of the proceeding. To be entitled to an
3 advance payment or reimbursement, the person must state in a record that
4 the person has a good faith belief that the criteria for indemnification in
5 subsection (b) have been satisfied and that the person will repay the amounts
6 advanced or reimbursed if the criteria for payment have not been satisfied.
7 The governing principles in a record may broaden or limit the advance
8 payments or reimbursements.

9 ~~_____ (d) An unincorporated nonprofit association may purchase insurance
10 on behalf of a member or manager for liability asserted against or incurred
11 by the member or manager in the capacity of a member or manager,
12 whether or not the association has authority under this [act] to reimburse,
13 indemnify, or advance expenses to the member or manager against the
14 liability.~~

15 ~~_____ (e) The rights of reimbursement, indemnification, and advancement
16 of expenses under this section apply to a former member or manager for an
17 activity undertaken on behalf of the unincorporated nonprofit association
18 while a member or manager.]~~
19

20 Comment

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

25
26 This Section confirms that the governing instrument may provide for indemnification,
27 advancement, or exoneration, and it states limitations on any such provisions. This Section does
28 not, by itself, compel indemnification, advancement, or exoneration. In *Nakahara v. The NS*
29 1991 American Trust, 739 A.2d 770 (Del. Ch. 1998), the Delaware Chancery Court held that a
30 Delaware statutory trust had the power to advance litigation expenses, but denied the trustees'
31 request for indemnification on the ground of unclean hands.

32
33 ~~_____ Under Section 103(c)(87), this section's prohibition of against indemnification,~~
34 ~~advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless~~
35 ~~indifference is not subject to override by the governing instrument. Prohibiting indemnification,~~
36 ~~advancement, or exoneration for such conduct is consistent with traditional trust doctrine, and~~
37 ~~the drafting committee contemplated that this section would be interpreted in accordance with~~
38 ~~existing trust law precedent. See Uniform Trust Code §1008 (2000); Restatement (Second) of~~
39 ~~Trusts §222 (1959); 4 Austin Wakeman Scott, William Franklin Fratcher, and Mark L. Ascher,~~
40 ~~Scott and Ascher on Trusts §24.27.3 (5th ed. 2007). [RST3 TO CITE.]~~

41
42 The Delaware Statutory Trust Act likewise limits the permissible scope of exoneration.
43 See Delaware Statutory Trust Act §3806(e), which provides that the “governing instrument may
44 provide for the limitation or elimination of any and all liabilities for breach of contract and
45 breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing

1 instrument may not eliminate the implied contractual covenant of good faith and fair dealing.”

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

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

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

19
20 The SEC has taken the position that, before advancing legal fees to a trustee of a mutual
21 fund, the fund’s “board must either (1) obtain assurances, such as by obtaining insurance or
22 receiving collateral provided by the [trustee], that the advance will be repaid if the trustee is
23 found to have engaged in disabling conduct, or (2) have a reasonable belief that the [trustee] has
24 not engaged in disabling conduct and ultimately will be entitled to indemnification.” SEC
25 Interpretation: Matters Concerning Independent Directors of Investment Companies, Investment
26 Company Act Rel. No. 24083 (Oct. 14, 1999), 1999 WL 820629, *10. The SEC has also taken
27 the position that there is a rebuttable presumption that an independent trustee (see Section)
28 512 has not engaged in disabling conduct. *Id.*

29
30
31 **SECTION 510. DIRECTION OF TRUSTEES.**

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

34 (b) The governing instrument may provide that neither the power to direct a trustee or
35 other person nor the exercise of the power by any person, including a beneficial owner, causes
36 the person to be a trustee or imposes on the person duties, including fiduciary duties, or
37 liabilities relating thereto, to a statutory trust or to a beneficial owner thereof.

38 (c) If the governing instrument confers upon a person a power to direct certain actions of

1 a trustee or other person, the trustee or other person shall act in accordance with an exercise of
2 the power unless the direction is manifestly contrary to the terms of the governing instrument or
3 the trustee knows or has reason to know that following the direction would constitute a serious
4 breach of fiduciary duty by the trustee.

5 **Comment**

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

8
9 Paragraph (a) ratifies the use of a directed trustee, meaning a trustee that must act in
10 accordance with the directions of another person. Under paragraph (b), however, the trustee
11 must not follow a direction that is manifestly contrary to the terms of the governing instrument
12 or that the trustee knows or has reason to know would constitute a serious breach of fiduciary
13 duty. For general discussion, see Restatement (Third) of Trusts §75 (2007); Restatement
14 (Second) of Trusts §185 (1959); Richard W. Nenno, Directed Trusts: Can Directed Trustees
15 Limit Their Liability?, 21 Prob. & Prop. 45 (Nov./Dec. 2007).

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

20
21 The reference in paragraph (c) to “serious” breach of fiduciary duty is designed to
22 exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial
23 owner. For some purposes, such as trustee removal, trust law distinguishes between “serious”
24 and not serious breaches of trust. See Uniform Trust Code §706(b)(1) (2000); Austin Wakeman
25 Scott, William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, at 661
26 (5th ed. 2006); Restatement (Second) of Trusts §107, cmt. b (1959).

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

34
35 Under Section 103(c)(98), ~~the limitation on direction of trustees stated in paragraph (c)(A)~~
36 the obligation of a trustee not to follow a direction that is manifestly contrary to the terms of the
37 governing instrument or that would constitute a serious breach of trust is not subject to override
38 by the governing instrument.

39
40 In conjunction with Section 511, this section facilitates the current practice in existing
41 statutory trusts of creating a limited purpose trustee—for example, ~~in a mutual fund with an~~

1 | ~~against delegation, the drafting committee followed both~~ authorizing delegation, this section
2 | follows the Delaware Statutory Trust Act and the modern trend with respect to common-law
3 | trusts. Most states have abrogated the common law nondelegation rule with legislation based on
4 | the Uniform Prudent Investor Act, Uniform Trust Code, or the Restatement (Third) of Trusts.
5 | See Uniform Trust Code §807 (2000); Uniform Prudent Investor Act §9 (1994); Restatement
6 | (Third) of Trusts §80 (2007). See also John H. Langbein, Reversing the Nondelegation Rule of
7 | Trust-Investment Law, 59 Mo. L. Rev. 105 (1994).

8
9 | Paragraphs (a), (c), (d), and (e) are patterned on Uniform Trust Code §807 (2000), which
10 | is derived from Uniform Prudent Investor Act §9 (1994). This section deviates from prior
11 | uniform acts, however, on the issue of delegation to a co-trustee. Following the Delaware
12 | Statutory Trust Act, paragraph (b) treats delegation to a co-trustee in the same manner as
13 | delegation to another person. By contrast, traditional trust law disfavors delegation by one co-
14 | trustee to another. See Restatement (Second) of Trusts §184 (1959). See also Uniform Trust
15 | Code §703(e) (2000); Restatement (Third) of Trusts §81 cmt. c(1) (2007). The traditional rule is
16 | based on the assumption that, if the donor named more than one trustee, the donor intended each
17 | to be a check on the other(s). That policy does not fit commercial statutory trust practice, in
18 | which limited purpose-~~or function~~ trustees are common.

19
20 | ~~[For discussion: the next four paragraphs, which are derived from the comment to~~
21 | ~~UPIA §9, are new.]~~ There is an intrinsic tension in trust law between granting trustees broad
22 | powers that facilitate flexible and efficient trust administration, on the one hand, and protecting
23 | trust beneficiaries from the misuse of such powers on the other hand. Delegation, which is a
24 | species of trustee power, raises the same tension. If the trustee delegates effectively, the
25 | beneficiaries obtain the advantage of the agent's specialized ~~investment~~ skills or whatever other
26 | attributes induced the trustee to delegate. But if the trustee delegates to a knave or an
27 | incompetent, the delegation can work harm upon the beneficiaries.

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

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

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

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

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

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

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

20 **Comment**

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

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

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

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

1 [ARTICLE] 6

2 BENEFICIARIES AND BENEFICIAL RIGHTS

3
4 SECTION 601. BENEFICIAL INTEREST.

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

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

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

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

11 Comment

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

15
16 Paragraph (a) provides as a default rule that a beneficial owner's interest in the statutory
17 trust is freely transferable. This paragraph therefore overrides the rule in some states, which
18 would otherwise be applicable to a statutory trust pursuant to Section 105, that makes a common-law
19 trust spendthrift by default. See Jeffrey A. Schoenblum, 2009~~8~~ Multistate Guide to Estate Planning
20 Table 9.05, Part 1, Column 2 (collecting authority). However, because the rule stated in paragraph
21 (a) is not scheduled in Section 103(c), it is subject to override by the governing instrument. Section
22 | 104(~~bc~~)(2) confirms that the governing instrument may limit a beneficial owner's right to
23 transfer its beneficial interest. Section 606 provides for a charging order against a beneficial
24 owner's rights to distributions in the event that the beneficial owner's beneficial interest is not
25 freely transferable.

26
27 ~~_____ [Commentary for paragraph (b) to come.]~~

28
29 ~~_____ Under Section 104(b)(13), the governing instrument may provide for the establishment of~~
30 ~~record dates for distributions.~~

31
32
33 SECTION 602. VOTING OR CONSENT BY BENEFICIAL OWNERS.

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

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

1 (2) The beneficial owners may take the action without a meeting, without notice,
2 and without a vote, if a consent, or consents, in a record, setting forth the action so taken, are
3 signed by beneficial owners having at least the minimum number of votes necessary to authorize
4 or take the action at a meeting at which all beneficial owners entitled to vote thereon were
5 present and voted, but prompt notice of the action must be given to those beneficial owners that
6 did not consent.

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

9 ~~————(b) The governing instrument may be amended by consent of all the beneficial owners.~~

10 **Comment**

11
12 **Principal Source** – Delaware Statutory Trust Act §3806; Delaware General Corporation
13 Law §228.

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

25
26 ~~————Paragraph (b) provides a default rule that the governing instrument may be amended by~~
27 ~~unanimous agreement of the beneficial owners. As with the voting rule of paragraph (a), the~~
28 ~~drafting committee contemplated that the governing instrument will provide for amendment.~~
29 ~~This paragraph provides for an amendment mechanism in circumstance where the governing~~
30 ~~instrument does not already do so. [For discussion: 1. Paragraph (b) is new, per our~~
31 ~~conference call on dissolution. 2. Does it belong in this section? 3. Should the section title be~~
32 ~~changed?]~~

33
34 The Investment Company Act of 1940, as amended, specifies the percentage of vote
35 necessary to approve certain actions related to the investment company. In other instances, 1940
36 Act requires the action to be approved at a shareholders’ meeting called for that purpose. In such
37 instances, approval of the action by written consent without notice would not be valid. For

1 example, Section 16(a) of the 1940 Act provides that “no person shall serve as a director of an
2 investment company unless elected to that office by the holders of the outstanding voting
3 securities of such company, at an annual or a special meeting duly called for that purpose.” In
4 addition, investment companies seeking the vote of shareholders on specific actions must comply
5 with rules governing the communication to, and solicitation of, their shareholders. See Rules
6 14a-1 to 14b-2 under the Securities Exchange Act of 1934, as amended. These rules are
7 significantly more comprehensive than most state statutes and rules governing communications
8 to shareholders and other aspects of a shareholder meeting.

9
10 | Section 104(c)(4) confirms that the rules stated in this Section are subject to override by
11 the governing instrument.
12

13 SECTION 603. CONTRIBUTION BY BENEFICIAL OWNER.

14 (a) A contribution of a beneficial owner to a statutory trust may be in cash, property, or
15 services rendered or a promissory note or other obligation to contribute cash or property or to
16 perform services. A person may become a beneficial owner of a statutory trust and may receive
17 a beneficial interest in a statutory trust without making a contribution or being obligated to make
18 a contribution to the trust.

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

27 (c) The governing instrument may provide that a beneficial owner that fails to make a
28 | required contribution ~~that the beneficial owner is obligated to make~~ or fails to perform in
29 accordance with, or to comply with the terms and conditions of, the governing instrument is

1 subject to specified penalties or consequences of the failure, including:

2 (1) reduction or elimination of the defaulting beneficial owner’s proportionate
3 interest in the statutory trust or series thereof;

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

6 (3) forced sale or forfeiture of the defaulting beneficial owner’s beneficial
7 interest;

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

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

13 **Comment**

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

17
18 Although statutory trusts are used primarily as a mode of business organization in
19 commercial transactions, paragraph (a) acknowledges that a beneficial owner may obtain a
20 beneficial interest without an exchange of consideration, an event that is not uncommon in
21 existing commercial practice. However, a statutory trust may not be used to effect a donative
22 transfer because Section 302 prohibits a statutory trust from having a “prevailingly donative
23 purpose.”

24
25 Paragraph (c) repudiates the hostility of traditional law to penalties, thereby resolving the
26 doubts that arose prior to statutory confirmation about the validity of particular remedies for a
27 beneficial owner’s breach.

28
29 Under Section ~~104(b)~~104(c)(1), the governing instrument may provide the means by
30 which beneficial ownership is determined and evidenced. Under Section ~~104(b)~~104(c)(10)-(11),
31 the governing instrument may specify the conditions under which a person becomes a beneficial
32 owner.
33

1
2 **Principal Source** – Delaware Statutory Trust Act §3818.
3

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

13
14 **SECTION 606. CHARGING ORDER.**

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

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

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

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

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

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

30 (e) A statutory trust or beneficial owner that is not subject to the charging order may pay

1 to the judgment creditor the full amount due under the judgment lien and thereby succeed to the
2 rights of ~~a~~the judgment creditor, including the charging order.

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

5 **Comment**

6
7 **Principal Source** - Revised Uniform Limited Liability Company Act §503 (2006).

8
9 **[Comment to come.]**

10
11 Under Section 103(c)(~~109~~), the right of a judgment creditor of a beneficial owner to seek
12 a charging order may not be eliminated by the governing instrument.
13

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

20 **Comment**

21
22 **Principal Source** – Delaware Statutory Trust Act §3806.
23

24 **SECTION 608. BENEFICIAL OWNER’S RIGHT TO INFORMATION.** A
25 beneficial owner has the right to receive or to obtain by summary proceeding in the [appropriate
26 court] information from the statutory trust or a trustee relating to the affairs of the statutory trust
27 reasonably related to the beneficial owner’s ~~ability to enforce its rights as beneficial~~
28 ~~owner~~interest.

29 **Comment**

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

3
4 Under Section 103(c)(10), a beneficial owner’s right to information under this section is
5 not subject to override by the governing instrument. However, a beneficial owner’s right to
6 information under this section is limited to information “reasonably related to the beneficial
7 owner’s ability to enforce its rights as a beneficial owner,” and under Section 103(c)(8) the
8 governing instrument may prescribe the standards by which reasonably related is determined if
9 those standards are not manifestly unreasonable.

10
11 Imposing a mandatory, minimum right to information critical to the beneficiary’s ability
12 to enforce the trust is familiar law. For example, Restatement (Third) of Trusts §82, cmt. a(2)
13 (2007), provides that “a beneficiary is always entitled . . . to request such information as is
14 reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and
15 otherwise to enforce his or her rights under the trust.” See also 3 Austin Wakeman Scott,
16 William F. Fratcher, & and Mark L. Ascher, 1 Scott and Ascher on Trusts §17.5, at p. 1202 (5th
17 ed. 2006); Restatement (Second) of Trusts §173, cmt. c (1959); T.P. Gallanis, The Trustee’s
18 Duty to Inform, 85 N.C. L. Rev. 1595 (2007).

19
20 The drafting committee declined the suggestion to include in this section a schedule of
21 accessible information on the ground that such a rule-based schedule necessarily would be over-
22 and under-inclusive. Instead, the committee contemplated that the term “reasonably related”
23 would provide a more robust and flexible right to information by allowing the beneficiary to
24 obtain a court order in a summary proceeding for the release of any type of information that
25 bears on enforcement of the beneficial owner’s beneficial interest.

26
27 Section 508 provides for a trustee’s right to information.

28
29 **SECTION 609. ACTION BY BENEFICIAL OWNER.**

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

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

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

1 (2) a demand would be futile.

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

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

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

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

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

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

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

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

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

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

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

1 **Comment**

2
3 **Principal Sources** - Uniform Limited Partnership Act §§1002-1005 (2001); ALI
4 Principles of Corporate Governance §7.01 (1994); Delaware Statutory Trust Act §3816;
5 Connecticut Statutory Trust Act §34-522.
6

7 Under Section 103(c)(110), the right of a beneficial owner to bring an action under this
8 Section may not be eliminated by the governing instrument. However, Section 103(c)(110)
9 permits the governing instrument to subject the right to additional standards and restrictions,
10 including the requirement that beneficial owners owning a specified amount or type of beneficial
11 interest join in bringing the action, provided that the additional standards and restrictions are not
12 manifestly unreasonable.
13

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

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

1 [ARTICLE] 7

2 CONVERSION AND MERGER

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

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

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

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

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

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

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

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

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

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

23 **Comment**

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

2
3 This section contains definitions specific to this Article.

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

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

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

17
18 **SECTION 702. CONVERSION.**

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

22 (1) the conversion is not prohibited by the governing law of the jurisdiction that
23 ~~enacted the other organization’s governing law~~; and

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

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

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

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

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

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

2 **Comment**

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

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

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

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

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

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

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

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

29 (1) as provided in the plan; and

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

32 **Comment**

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

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

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

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

24 (a) After a conversion is approved:

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

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

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

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

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

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

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

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

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

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

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

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

12 **Comment**

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

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

16 Under Section 103(c)(~~132~~), this Section is not subject to override by the governing
17 instrument.

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

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

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

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

24 (2) all debts, obligations, and other liabilities of the converting organization,
25

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

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

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

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

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

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

21 **Comment**

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

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

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

4
5 | Under Section 103(c)(132), this Section is not subject to override by the governing
6 instrument.

7
8 **SECTION 706. MERGER.**

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

11 | ~~_____ (1) the governing law of each of the other organizations authorizes the merger;~~

12 | (21) the merger is not prohibited by the governing law of a jurisdiction that
13 ~~enacted any of the governing law~~ any constituent organization; and

14 | (32) each of the other organizations complies with its governing law 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
26 amendments to be made by the merger to the surviving organization’s organizational documents.

1 **Comment**

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

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

7 A plan of merger may provide that some persons with interests in a constituent
8 organization will receive interests in the surviving organization, while other persons with
9 interests in the same constituent organization will receive some other form of consideration.
10 Thus, a “squeeze out” merger is possible. As noted in the comment to Section 703, the duties
11 and obligations stated in this Act apply to a trustee of a constituent organization that is a
12 statutory trust subject to this Act. Those duties would apply to the process and terms under
13 which a “squeeze out” merger occurs.
14

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

16 **STATUTORY TRUST.**

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

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

21 (1) as provided in the plan; and

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

24 **Comment**

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

27 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries
28 is a default rule that may be overridden by the governing instrument. See Section
29 | ~~404(b)~~104(c)(5)(B). Hence, the governing instrument may state a different quantum of consent
30 or provide a completely different approval mechanism. Varying this subsection’s rule means
31 that a beneficial owner might be subject to a merger (including a “squeeze out” merger) without
32 consent and with no appraisal remedy. The trustee of a constituent statutory trust is subject to
33 the duties and obligations stated in this Act, and those duties would apply to the process and
34 terms under which the merger occurs. However, if the governing instrument allows for a merger

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

5 For the reasons discussed in the comment to Section 703, a mutual fund generally does
6 not afford dissenting rights to its shareholders because any shareholder of an acquired mutual
7 fund may redeem acquired fund shares at net asset value prior to the closing date of the proposed
8 reorganization of the acquired fund.
9

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 **Comment**

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

19
20 | Under Section 103(c)(~~132~~), this Section is not subject to override by the governing
21 instrument.
22

23 **SECTION 709. EFFECT OF MERGER.**

24 (a) When a merger becomes effective:

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

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

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

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

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

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

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

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

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

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

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

23 (b) A surviving organization that is a foreign organization consents to the jurisdiction of

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

8 **Comment**

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

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

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

16 **Comment**

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

1 [ARTICLE] 8

2
3 DISSOLUTION AND WINDING UP

4
5 SECTION 801. EVENTS CAUSING DISSOLUTION. A statutory trust ~~may~~shall
6 only be dissolved ~~upon the occurrence of~~by an administrative dissolution under Section 806 or
7 by the filing of articles of dissolution under Section 802 upon the occurrence of:

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

9 (2) consent by all the beneficial owners; ~~or,~~

10 ~~(3) an administrative dissolution under Section 806.~~

11 Comment

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

13
14 This Section provides that a statutory trust may be dissolved only ~~upon the occurrence of~~
15 ~~an event or circumstance stated in the governing instrument, by unanimous consent of all the~~
16 ~~beneficial owners, or by administrative dissolution under Statute 806, or by the filing of articles~~
17 ~~of dissolution under Section 802 upon either the occurrence of an event or circumstance stated in~~
18 ~~the governing instrument or the unanimous consent of the beneficial owners. However, as~~
19 ~~confirmed by Section 306, the governing instrument need not provide for an event or~~
20 ~~circumstance that causes dissolution. **[For discussion, paragraph (2) and mandatory rules.]**,~~
21 ~~or may provide that the trust is not dissolved even with the consent of all the beneficial owners.~~

22
23 Under Section 103(c)(1), the provisions of this section other than paragraph (2) are not
24 subject to override by the governing instrument.

25
26
27 SECTION 802. ARTICLES OF DISSOLUTION.

28 (a) If dissolution of a statutory trust is authorized under paragraphs (1) or (2) of Section
29 801, the trust must deliver to the [Secretary of State] for filing articles of dissolution setting
30 forth:

31 (1) the name of the trust; and

32 (2) the date of the dissolution.

33 (b) Except as otherwise provided in Section 204(c), a statutory trust is dissolved when

1 articles of dissolution that comply with subsection (b) are filed by the [Secretary of State].

2 **Comment**

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

4
5 ~~———— [For Discussion: Do we want a section here based on RMBCA §14.04, something~~
6 ~~like —~~

7 ~~———— (a) A statutory trust may revoke its dissolution within 120 days of its effective date.~~

8 ~~———— (b) Revocation of dissolution must be authorized in the same manner as the~~
9 ~~dissolution was authorized unless that authorization permitted revocation by the trustees~~
10 ~~alone, in which event the trustees may revoke the dissolution.~~

11 ~~———— (c) After the revocation of dissolution is authorized, the statutory trust may revoke~~
12 ~~the dissolution by delivering to the [Secretary of State] for filing articles of revocation of~~
13 ~~dissolution, together with a copy of its articles of dissolution, that set forth:~~

14 ~~———— (1) the name of the trust;~~

15 ~~———— (2) the effective date of the dissolution that was revoked;~~

16 ~~———— (3) the date that the revocation of dissolution was authorized; and~~

17 ~~———— (4) a statement of the authorization to revoke the dissolution.~~

18 ~~———— (d) Revocation of dissolution is effective upon the effective date of the articles of~~
19 ~~dissolution.~~

20 ~~———— (e) When the revocation of dissolution is effective, it relates back to and takes effect~~
21 ~~as of the effective date of the dissolution and the statutory trust resumes carrying on its~~
22 ~~business as if dissolution had never occurred.~~

23
24 **SECTION 803. WINDING UP.**

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

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

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

30 ~~———— (2) first apply its property to discharge its obligations to creditors; and —~~

31 ~~———— (23) distribute any surplus property after complying with subsection (b)(12) to the~~
32 ~~beneficial owners in proportion to their beneficial interests.~~

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

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

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

5 (3) transfer the trust’s property;

6 (4) settle disputes;

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

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

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

13
14 ~~(e)~~ On application of any person that shows good cause, the [appropriate court] may
15 appoint a person to be a receiver for a dissolved statutory trust with the power to undertake any
16 action that might have been done by the trust during its winding up if the action is necessary for
17 final settlement of the trust.

18 **Comment**

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

22
23 If the governing instrument of a statutory trust provides for the dissolution of the trust,
24 then upon the event or circumstance that triggers dissolution, the statutory trust may continue
25 only for the purpose of winding up.

26
27 In winding up the statutory trust within a reasonable time, the trustees are neither
28 required to undertake a fire sale of the property of the statutory trust on unfavorable terms nor

1 permitted to continue the trust endlessly under the guise of winding down. The question of what
2 period of time is “reasonable” under paragraph (c)(1) turns on the totality of the circumstances.
3

4 Paragraph (e) provides for the possibility that after dissolution additional unfinished
5 business of the statutory trust is discovered. **[Search RST for property that comes in after**
6 **termination.]**
7

8 Under Section 103(c)(1), the provisions of this section are not subject to override by the
9 governing instrument.
10

11 **SECTION 804. KNOWN CLAIMS AGAINST DISSOLVED STATUTORY**
12 **TRUSTACTUAL NOTICE TO CLAIMANT.**

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

15 (b) A dissolved statutory trust may dispose of ~~the~~ a known claims against it by notifying
16 ~~its the known~~ claimants in a record of the dissolution of the trust. ~~[For discussion: this sentence~~
17 ~~has been revised to track the RMBCA.]~~ The notice must:

- 18 (1) specify the information required to be included in a claim;
19 (2) provide a mailing address to which the claim is to be sent;
20 (3) state the deadline for receipt of the claim, which may not be less than 120 days
21 after the date the notice is received by the claimant; and
22 (4) state that the claim will be barred if not received by the deadline.

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

- 25 (1) the claim is not received by the specified deadline; or
26 (2) if the claim is timely received but rejected by the trust:
27 (A) the trust notifies the claimant in a record that the claim is rejected and
28 will be barred unless the claimant commences an action against the trust to enforce the claim

1 within 90 days after the claimant receives the notice; and

2 (B) the claimant does not commence the required action within the 90
3 days.

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

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

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

7 **Comment**

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

9
10 **[To come: Excerpt/paraphrase of the commentary from the RMBCA, on which the**
11 **RULLCA provision was based.]**

12
13 Under Section 103(c)(1), the provisions of this section are not subject to override by the
14 governing instrument.

15

16 **~~SECTION 805. OTHER CLAIMS AGAINST DISSOLVED STATUTORY~~**

17 **~~TRUST~~PUBLICATION NOTICE.**

18 (a) A dissolved statutory trust may publish notice of its dissolution and request persons
19 having claims against the trust to present them in accordance with the notice. ~~[For discussion:~~
20 ~~removal of “other” in line with RMBCA model.]~~

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

22 (1) be published at least once in a newspaper of general circulation in the [county]
23 in this state in which the dissolved statutory trust’s principal office is located or, if it has none in
24 this state, in the [county] in which the trust’s designated office is or was last located;

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

27 (3) state that a claim against the trust is barred unless an action to enforce the

1 | claim is commenced within [three] years after publication of the notice. ~~[For discussion: note~~
2 | ~~the change to three years from five, per our conference call and RMBCA.]~~

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

- 7 | (1) a claimant that did not receive notice in a record under Section 804;
8 | (2) a claimant whose claim was timely sent to the trust but not acted on; and
9 | (3) a claimant whose claim is contingent at, or based on an event occurring after,
10 | the effective date of dissolution.

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

- 12 | (1) against ~~a dissolved statutory trust, to the extent of its undistributed property;~~

13 | and

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

19 | **Comment**

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

21 |
22 | **[To come: Excerpt of the commentary from the RMBCA, on which the RULLCA**
23 | **provision was based. Commentary to include discussion of the three year bracketed limit.]**
24 |

25 | Under Section 103(c)(1), the provisions of this section are not subject to override by the
26 | governing instrument.
27 |

1 ~~_____ [For Discussion, whether we want a court proceedings provision, like RMBCA~~
2 ~~§14.08:~~

3 ~~_____ (a) A dissolved corporation that has published a notice under section 14.07~~
4 ~~may file an application with the [name or describe] court of the county where the~~
5 ~~dissolved corporation's principal office (or, if none in this state, its registered office)~~
6 ~~is located for a determination of the amount and form of security to be provided for~~
7 ~~payment of claims that are contingent or have not been made known to the~~
8 ~~dissolved corporation or that are based on an event occurring after the effective~~
9 ~~date of dissolution but that, based on the facts known to the dissolved corporation,~~
10 ~~are reasonably estimated to arise after the effective date of dissolution. Provision~~
11 ~~need not be made for any claim that is or is reasonably anticipated to be barred~~
12 ~~under section 14.07(c).~~

13 ~~(b) Within 10 days after the filing of the application, notice of the proceeding~~
14 ~~shall be given by the dissolved corporation to each claimant holding a contingent~~
15 ~~claim whose contingent claim is shown on the records of the dissolved corporation.~~

16 ~~(c) The court may appoint a guardian ad litem to represent all claimants~~
17 ~~whose identities are unknown in any proceeding brought under this section. The~~
18 ~~reasonable fees and expenses of such guardian, including all reasonable expert~~
19 ~~witness fees, shall be paid by the dissolved corporation.~~

20 ~~(d) Provision by the dissolved corporation for security in the amount and the~~
21 ~~form ordered by the court under section 14.08(a) shall satisfy the dissolved~~
22 ~~corporation's obligations with respect to claims that are contingent, have not been~~
23 ~~made known to the dissolved corporation or are based on an event occurring after~~
24 ~~the effective date of dissolution, and such claims may not be enforced against a~~
25 ~~shareholder who received assets in liquidation.]~~

26
27
28 ~~_____ [For Discussion, RMBCA 14.09:~~

29 ~~_____ (a) Directors shall cause the dissolved corporation to discharge or make~~
30 ~~reasonable provision for the payment of claims and make distributions of assets to~~
31 ~~shareholders after payment or provision for claims.~~

32 ~~(b) Directors of a dissolved corporation which has disposed of claims under~~
33 ~~sections 14.06, 14.07, or 14.08 shall not be liable for breach of section 14.09(a) with~~
34 ~~respect to claims against the dissolved corporation that are barred or satisfied~~
35 ~~under sections 14.06, 14.07, or 14.08.]~~

36
37 **SECTION 806. ADMINISTRATIVE DISSOLUTION.**

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

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

40 ~~_____ (2) the trust does not deliver for filing a statement of change within 30 days after~~
41 ~~a change has occurred in the name or address of the agent;~~

1 (23) the trust does not file an annual report within 630 days after it is due; or

2 (34) the trust does not pay, within 30-60 days after the due date, any fee, tax, or
3 penalty due to the [Secretary of State].

4 ~~—— [For discussion: Whether to add a provision, based on RMBCA 14.20(5), to the~~
5 ~~effect “the trust’s period of duration stated in its certificate of trust expires.”]~~

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

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

12 (2) the basis for the revocation.

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

19 ~~—— (d) A statutory trust that has been administratively dissolved continues in existence but,~~
20 ~~subject to Section 806, may carry on only activities necessary to wind up its activities and~~
21 ~~liquidate its property under Sections 802 and 808 and to notify claimants under Sections 803 and~~
22 ~~804.~~

23 ~~—— (e) The administrative dissolution of a statutory trust does not terminate the authority of~~

1 | its agent for service of process.

2 | **Comment**

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

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

7 |
8 | **SECTION 807. REINSTATEMENT FOLLOWING ADMINISTRATIVE**
9 | **DISSOLUTION.**

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

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

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

15 | (3) that the trust’s name satisfies the requirements of Section 207.

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

20 | (c) When a reinstatement becomes effective, it relates back to and takes effect as of the
21 | effective date of the administrative dissolution as if the dissolution had not occurred, except for
22 | the rights of a person arising out of conduct in reliance on the dissolution before the person knew
23 | or had reason to know of the reinstatement. ~~**[For discussion: (1) whether and if so how to**~~
24 | ~~**carve out third parties who rely on dissolution to their detriment, (2) whether to include a**~~
25 | ~~**provision based on Ky Stat 271B.14-220(4), “Notwithstanding any other provision to the**~~

1 ~~contrary, any corporation which was administratively dissolved or revoked and has taken~~
2 ~~the action necessary to wind up and liquidate its business and affairs under _____, and notify~~
3 ~~claimants under _____ and _____, shall be prohibited from reinstatement.”]~~

4 **Comment**

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

7
8 Under Section 103(c)(1), the provisions of this section are not subject to override by the
9 governing instrument.
10

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

12 (a) If the [Secretary of State] rejects a statutory trust’s application for reinstatement
13 following administrative dissolution, the [Secretary of State] shall send a notice that explains the
14 reason for rejection to the trust’s agent for service of process.

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

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

21 **Comment**

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

23
24 Under Section 103(c)(1), the provisions of this section are not subject to override by the
25 governing instrument.
26

1 [ARTICLE] 9

2 FOREIGN STATUTORY TRUSTS

3
4 SECTION 901. GOVERNING LAW.

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

7 (1) the internal affairs of the trust;

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

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

12 ~~discussion: problem solved?]~~

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

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

19 **Comment**

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

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

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

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

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

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

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

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

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

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

21 **Comment**

22
23 **Principal Source** – Uniform Limited Partnership Act §902 (2001).
24

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

1 certificate of good standing for a statutory trust under Section 206.[**Further commentary to**
2 **come.**]

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

7 **SECTION 903. ACTIVITIES NOT CONSTITUTING TRANSACTING**
8 **BUSINESS.**

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

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

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

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

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

18 (5) selling through independent contractors;

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

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

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

26 (9) conducting an isolated transaction that is completed within 30 days and is not in

1 the course of similar transactions; and

2 (10) transacting business in interstate commerce.

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

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

8 **Comment**

9

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

11

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

16

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

19

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

26 **Comment**

27

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

29

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

32

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

3
4 **SECTION 905. CERTIFICATE OF REGISTRATION.**

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

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

12 **Comment**

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

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

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

20
21 **SECTION 906. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.**

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

1 unless the trust is authorized under [fictitious or assumed name statute] to transact business in this
2 state under another name.

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

6 **Comment**

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

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

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

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

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

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

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

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

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

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

3 (2) the basis for the revocation.

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

7 (d) If a foreign statutory trust cures ~~the~~any failures stated in the notice of revocation under
8 subsection (c), the [Secretary of State] shall indicate that the trust is reinstated on the filed notice.

9 The reinstatement of the trust relates back for all purposes to the date of the notice of revocation.

10 **Comment**

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

12 Under Section 103(c)(1), this Section is not subject to override by the governing
13 instrument.
14
15
16

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

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

21 (1) the name of the trust;

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

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

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

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

1 **Comment**

2
3 **Principal Source** – Uniform Limited Partnership Act §907 (2001).

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

7
8 **SECTION 909. EFFECT OF FAILURE TO HAVE CERTIFICATE.**

9 (a) A foreign statutory trust transacting business in this state may not maintain an action or
10 proceeding in this state unless it has a certificate of qualification to transact business in this state.

11 (b) The failure of a foreign statutory trust to have a certificate of qualification to transact
12 business in this state does not impair the validity of a contract or act of the trust or prevent the trust
13 from defending an action or proceeding in this state.

14 (c) A trustee or beneficial owner of a statutory trust is not liable for the debts, obligations,
15 or other liabilities of the trust solely because the trust transacted business in this state without a
16 certificate of qualification.

17 (d) If a foreign statutory trust transacts business in this state without a certificate of
18 qualification or cancels its certificate of qualification, the [Secretary of State] is its agent for
19 service of process for actions arising out of the transaction of business in this state.

20 **Comment**

21
22 **Principal Source** – Uniform Limited Partnership Act §907 (2001).

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

26
27 **SECTION 910. ACTION BY [ATTORNEY GENERAL].** The [Attorney General] may
28 maintain an action to enjoin a foreign statutory trust from transacting business in this state in
29 violation of this [article].

1 **Comment**

2
3 **Principal Source** – Uniform Limited Partnership Act §908 (2001).

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

1 [ARTICLE] 10

2 MISCELLANEOUS PROVISIONS

3 SECTION 1001. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In

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

6 Comment

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

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

13 SECTION 1002. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND

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

18 Comment

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

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

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

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

28 Comment

29
30 Principal Source – Uniform Limited Partnership Act §1207 (2001).

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

1 (a) This [act] does not limit, prohibit, or invalidate the existence, acts, or obligations of any
2 common-law trust created or doing business in this state before or after [the effective date of the
3 act]. The laws of this state other than this [act] pertaining to trusts apply to common-law trusts.

4 (b) A common-law trust arising under the law of this state before or after [the effective date
5 of this [act]] that does not have a prevailingly donative purpose may elect to be governed by this
6 [act] by filing of a certificate of trust under Section 201.

7 [(c) A trust created pursuant to a statute of this state that was required by that statute to file
8 a certificate of trust with [the Secretary of State] before [the effective date of this [act]] may elect
9 to be governed by the provisions of this [act] by filing an amendment to its certificate of trust
10 under Section 202.]

11 [(d) On [two years] after [the effective date of this [act]], this [act] governs the organization
12 and internal affairs of all trusts created pursuant to a statute of this state that was required by that
13 statute to file a certificate of trust with the [Secretary of State] before the effective date of this
14 [act].]

15 **Comment**

16 **Principal Source** – Uniform Limited Partnership Act §1206 (2001).
17

18 This Act governs all statutory trusts formed on or after the Act’s effective date. For pre-
19 existing statutory trusts, this section establishes an optional “elect in” period and a mandatory, all-
20 inclusive date of two years following the effective date. Beginning on the all-inclusive date, each
21 pre-existing statutory trust that has not previously elected in becomes subject to this Act—
22 including the schedule of mandatory rules in Section 103(c)—by operation of law.
23

24 Paragraphs (a) and (b) confirm that this act does not govern a common-law trust unless the
25 trust forms a statutory trust by filing a certificate of trust under Section 201. However, consistent
26 with Section 302, paragraph (b) of this Section prohibits a common-law trust with a prevailingly
27 donative purpose from becoming a statutory trust. An alternative mode for a common-law trust to
28 become a statutory trust is provided by the conversion provisions of Article 6. Unlike the
29 formation of a new statutory trust by filing a certificate of trust under Section 201, the conversion
30 provisions of Article 6 allow for the conversion of another organization into the statutory trust
31 form while preserving continuity in the converting organization’s relationships with third parties.

1 See the Comments to Sections 701 and 705.

2
3 The drafting committee contemplated that some enacting jurisdictions might modify this
4 section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not
5 expected—to address other transition problems arising from differences between this Act and prior
6 law. For example, an enacting jurisdiction might choose to allow trusts formed under a prior
7 statute to remain governed by the prior statute for longer than the two years suggested in paragraph
8 (d).

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

12
13 **SECTION 1006. REPEALS.** On [all-inclusive date], the following acts are repealed:

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

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

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

20 **Comment**

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

22
23 Paragraphs (1) and (2) supply model language for enacting jurisdictions that have
24 previously enacted a Statutory Trust Act or a Business Trust Act.

25
26 Paragraph (3) supplies model language for enacting jurisdictions that have previously
27 enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a
28 REIT, is not a type of trust but rather is a tax status awarded to any entity that qualifies under 26
29 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under 26 U.S.C.
30 §860D. Although the Internal Revenue Code at one time favored the trust form for the
31 organization of a REIT, the code today does not regulate the form of entity. **[Article cite.**
32 Accordingly, there is no longer any reason why a REIT must be organized as a trust, whether
33 statutory or common law. Indeed, data assembled by the reporter shows that in contemporary
34 practice most publicly-traded REITs are organized as Maryland corporations, not as trusts. ~~See~~
35 ~~Robert H. Sitkoff, The Rise of the Statutory Business Trust — [citation].~~ Nonetheless, prior to the
36 liberalization of the tax code, a number of states enacted REIT statutes that authorize the creation
37 of a trust entity designed to qualify as a REIT under the code. Because a statutory trust under this

1 Act could serve the same purpose, the drafting committee contemplated that enacting jurisdictions
2 might take the occasion of enacting this act to repeal their REIT statutes.

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

6

7 **SECTION 1007. EFFECTIVE DATE.** This [act] takes effect

8 **Comment**

9

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

11

12 Section 1005 specifies how this Act affects statutory trusts, with special provisions
13 pertaining to statutory trusts formed before the Act’s effective date. ~~Section — [article 9~~
14 ~~problem] contains~~ There are no comparable provisions for foreign statutory trusts. Therefore, once
15 this Act is effective, it applies immediately to all foreign statutory trusts, whether formed before or
16 after the Act’s effective date.

17

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