

D R A F T  
FOR DISCUSSION ONLY

# UNIFORM STATUTORY TRUST ENTITY ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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For April 20-22, 2007 Drafting Committee Meeting

*With Prefatory Notes and Comments*

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# **UNIFORM STATUTORY TRUST ENTITY ACT**

## **TABLE OF CONTENTS**

Prefatory Note .....	1
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### **[ARTICLE] 1**

#### **GENERAL PROVISIONS**

SECTION 101. SHORT TITLE .....	5
SECTION 102. DEFINITIONS .....	6
SECTION 103. DEFAULT AND MANDATORY RULES .....	11
SECTION 104. SCOPE OF GOVERNING INSTRUMENT .....	14
SECTION 105. APPLICABILITY OF TRUST LAW .....	17
SECTION 106. RULES OF CONSTRUCTION .....	18

### **[ARTICLE] 2**

#### **FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS**

SECTION 201. CERTIFICATE OF TRUST .....	20
SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF TRUST .....	21
SECTION 203. STATEMENT OF CANCELLATION .....	22
SECTION 204. SIGNING OF RECORDS .....	23
SECTION 205. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY OF STATE]; EFFECTIVE TIME AND DATE .....	23
SECTION 206. CORRECTING FILED RECORD .....	25
SECTION 207. CERTIFICATE OF EXISTENCE OR REGISTRATION .....	27
SECTION 208. ADMINISTRATIVE DISSOLUTION .....	29
SECTION 209. NAME OF STATUTORY TRUST .....	30
SECTION 210. RESERVATION OF NAME .....	32
SECTION 211. AGENT FOR SERVICE OF PROCESS .....	33
SECTION 212. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF PROCESS .....	34
SECTION 213. RESIGNATION OF AGENT FOR SERVICE OF PROCESS .....	35
SECTION 214. SERVICE OF PROCESS .....	36
[SECTION 215. ANNUAL REPORT FOR [SECRETARY OF STATE] .....	37

### **[ARTICLE] 3**

#### **AUTHORIZATION; GOVERNING LAW; DURATION; POWERS**

SECTION 301. STATUTORY TRUST AUTHORIZED .....	40
SECTION 302. PERMISSIBLE PURPOSES .....	40
SECTION 303. GOVERNING LAW .....	42
SECTION 304. DURATION .....	42

SECTION 305. POWER TO SUE AND BE SUED; TITLE TO TRUST PROPERTY .....	44
SECTION 306. SERIES OF STATUTORY TRUST .....	45
SECTION 307. POWER TO HOLD PROPERTY .....	47

#### [ARTICLE 4]

##### TRUSTEES AND TRUST MANAGEMENT

SECTION 401. MANAGEMENT OF STATUTORY TRUST .....	48
SECTION 402. TRUSTEE POWERS .....	48
SECTION 403. PROTECTION OF PERSON DEALING WITH TRUSTEE.....	49
SECTION 404. STANDARDS OF CONDUCT FOR TRUSTEES.....	51
SECTION 405. DIRECTION OF TRUSTEES .....	53
SECTION 406. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT COMPANY	55
SECTION 407. TRUSTEE'S RIGHT TO INFORMATION .....	56
SECTION 408. INTERESTED TRANSACTIONS .....	57
SECTION 409. GOOD-FAITH RELIANCE ON GOVERNING INSTRUMENT .....	58
SECTION 410. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.....	59
SECTION 411. DELEGATION BY TRUSTEE .....	61
SECTION 412. ACTION BY TRUSTEES. ....	62
SECTION 413. NO RIGHTS OF TRUSTEE'S CREDITORS IN TRUST PROPERTY .....	63
SECTION 414. TRUSTEE NOT LIABLE FOR ACTS, OMISSIONS, OR OBLIGATIONS OF STATUTORY TRUST .....	63
SECTION 415. AGENTS, OFFICERS, EMPLOYEES, MANAGERS, COMMITTEES AND AGENTS NOT LIABLE FOR ACTS, OMISSIONS, OR OBLIGATIONS OF STATUTORY TRUST .....	64

#### [ARTICLE] 5

##### BENEFICIARIES AND BENEFICIAL RIGHTS

SECTION 501. CONTRIBUTIONS BY BENEFICIAL OWNERS .....	65
SECTION 502. REDEMPTION OF BENEFICIAL INTERESTS .....	66
SECTION 503. BENEFICIAL OWNER'S RIGHT TO INFORMATION.....	67
SECTION 504. RIGHTS OF BENEFICIAL OWNER IN TRUST PROPERTY .....	67
SECTION 505. TRANSACTION WITH BENEFICIAL OWNER .....	68
SECTION 506. LIMITED LIABILITY OF BENEFICIAL OWNERS .....	69
SECTION 507. VOTING OR CONSENT BY BENEFICIAL OWNERS.....	69
SECTION 508. DERIVATIVE ACTION .....	70

#### [ARTICLE] 6

##### CONVERSION, MERGER, AND DISSOLUTION

SECTION 601. DEFINITIONS .....	73
SECTION 602. CONVERSION.....	74

SECTION 603. ACTION ON PLAN OF CONVERSION BY CONVERTING STATUTORY TRUST .....	75
SECTION 604. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.....	76
SECTION 605. EFFECT OF CONVERSION. ....	78
SECTION 606. MERGER.....	79
SECTION 607. ACTION ON PLAN OF MERGER BY CONSTITUENT STATUTORY TRUST.....	80
SECTION 608. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.....	81
SECTION 609. EFFECT OF MERGER. ....	83
SECTION 610. [ARTICLE] NOT EXCLUSIVE.....	84
SECTION 611. DISSOLUTION OF STATUTORY TRUST.....	85
SECTION 612. DISSOLUTION OF SERIES.....	86

## [ARTICLE] 7

### FOREIGN STATUTORY TRUSTS

SECTION 701. GOVERNING LAW .....	88
SECTION 702. APPLICATION FOR CERTIFICATE OF AUTHORITY .....	89
SECTION 703. AMENDMENT OR RESTATEMENT OF CERTIFICATE.....	89
SECTION 704. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS. ....	90
SECTION 705. FILING OF CERTIFICATE OF AUTHORITY.....	92
SECTION 706. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.....	92
SECTION 707. REVOCATION OF CERTIFICATE OF AUTHORITY.....	93
SECTION 708. CANCELLATION OF CERTIFICATE OF AUTHORITY; EFFECT OF FAILURE TO HAVE CERTIFICATE.....	95
SECTION 709. ACTION BY [ATTORNEY GENERAL]. ....	96

## [ARTICLE] 8

### MISCELLANEOUS PROVISIONS

SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	97
SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT .....	97
SECTION 803. SAVING CLAUSE. ....	98
SECTION 804. APPLICATION TO EXISTING RELATIONSHIPS.....	98
SECTION 805. REPEALS. ....	99
SECTION 806. EFFECTIVE DATE.....	100

# UNIFORM STATUTORY TRUST ENTITY ACT

## Prefatory Note

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

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

Since the 1980s, statutory trust entities have thrived in a variety of niches, particularly in the organization of 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, & James M. Storey, *The Massachusetts Business Trust and Registered Investment Companies*, 13 *Del. J. Corp. L.* 421 (1988). Moreover, under a recent IRS revenue ruling, in certain configurations a statutory trust may be used in tax-advantaged real estate transactions. See *Rev. Rul. 2004-86, 2004-33 IRB 191*.

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

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

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

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

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

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

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

Although under Section 105 ordinary trust law supplements this Act, numerous substantive provisions of this Act were drawn from corporate law, not from trust law. See, e.g., 305(b) (attachment of statutory trust property); 401 (management by or under the authority of the trustees); 404 (standards of conduct of trustees); 408 (interested transactions); 506 (limited liability of “a domestic business corporation”). Looking to the corporate law model on these issues is consistent with the hybrid approach of the Delaware Act and reflects the nature of a statutory trust as a juridical entity. The Uniform Statutory Trust Entity Act is an unincorporated entity statute.

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

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

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

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

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

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

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



statutory trust is formed by making a filing with a public official. Compare Section 201 with Uniform Trust Code §401 (2000) and Restatement (Third) of Trusts §10 (2003). Further, Section 105 provides that ordinary trust law supplements this Act in governing statutory trusts, but only to the extent not modified or displaced by this Act or the governing instrument—and this Act modifies or displaces a host of ordinary trust law principles including those concerning fiduciary standards of conduct (Section 404) and termination of trusts (Section 304). Section 804(b) allows an existing common law trust that does not have a prevailingly donative purpose to convert into a statutory trust by filing a certificate of trust under Section 201.

Although the drafting committee contemplated that a statutory trust under this Act will be used primarily as a mode of business organization, Section 501(a) confirms that a person may become a beneficial owner of a statutory trust without an exchange of consideration. It is therefore possible that a statutory trust could be used as a substitute for the common law trust in a variety of commercial and noncommercial contexts. 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 302 provides that a statutory trust may not have a prevailingly donative purpose.

1                                   **UNIFORM STATUTORY TRUST ENTITY ACT**

2

3                                   **[ARTICLE] 1**

4                                   **GENERAL PROVISIONS**

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

6 Trust Entity Act.

7                                   **Comment**

8

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

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

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

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

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

14 favor of “Uniform Statutory Trust Entity Act.”

15

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30

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

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

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

34 prevailingly donative purpose.

35

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

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

14 Third, the drafting committee was influenced by the revealed preference for “statutory  
15 trust” over “business trust” among existing users of statutory business trusts as evidenced by the  
16 dominant position of the Delaware Statutory Trust Act relative to the statutory or business trust  
17 acts of the other states. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [in  
18 progress]. In 2002 Delaware recast the “Delaware Business Trust Act” as the “Delaware  
19 Statutory Trust Act,” replacing nearly every reference to “business trust” with “statutory trust.”  
20 See 73 Del. Laws 329. The Connecticut statute, which is the second most popular, is likewise  
21 cast as a Statutory Trust Act.  
22  
23

## 24 **SECTION 102. DEFINITIONS.**

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

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

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

1 (4) “Designated office” means:

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

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

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

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

9 (7) “Person” means an individual, corporation, statutory trust, foreign statutory trust,  
10 common law trust, estate, partnership, limited partnership, limited liability company, association,  
11 joint venture, government or governmental subdivision, agency, or instrumentality, or any other  
12 legal or commercial entity. **[For discussion: Style objects to our not using the boilerplate**  
13 **definition of “person.” Here is a tracked-changes version of this section edited to match**  
14 **the boilerplate: “Person” means an individual, corporation, estate, trust, partnership,**  
15 **limited partnership, limited liability company, association, joint venture, public**  
16 **corporation, government or governmental subdivision, agency, or instrumentality, or any**  
17 **other legal or commercial entity.]**

18 (8) “Qualified foreign statutory trust” means a foreign statutory trust that is authorized to  
19 transact business in this state.

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

22 (10) “Recorded transmission” means any form of communication that creates a record.

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

(A) the spouse of the person;

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

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

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

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

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

- ***SEC Rule 16a-1(e)*** –
  - “The term immediate family shall mean any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, and shall include adoptive relationships.”
- ***SEC Rule 144(a)*** –
  - (1) An affiliate of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.
  - (2) The term person when used with reference to a person for whose account securities are to be sold in reliance upon this section includes, in addition to such person, all of the following persons:
    - (i) Any relative or spouse of such person, or any relative of such spouse, any one of whom has the same home as such person;
    - (ii) Any trust or estate in which such person or any of the persons specified in paragraph (a)(2)(i) of this section collectively own 10 percent or more of the total beneficial interest or of which any of such persons serve as trustee, executor or in any similar capacity; and
    - (iii) Any corporation or other organization (other than the issuer) in which such person or any of the persons specified in paragraph (a)(2)(i) of this section are the beneficial owners collectively of 10 percent or more of any class of equity securities or 10 percent or more of the equity interest.

1 • ***RMBCA 8.60*** –

2 ○ **(5) “Related person” means:**

- 3     ▪ (i) the director’s spouse;
- 4     ▪ (ii) a child, stepchild, grandchild, parent, step parent, grandparent, sibling,
- 5     step sibling, half sibling, aunt, uncle, niece or nephew (or spouse of any
- 6     thereof) of the director or of the director’s spouse;
- 7     ▪ (iii) an individual living in the same home as the director;
- 8     ▪ (iv) an entity (other than the corporation of an entity controlled by the
- 9     corporation) controlled by the director or any person specified above in this
- 10    subdivision (5);
- 11    ▪ (v) a domestic or foreign (A) business or nonprofit corporation (other than
- 12    the corporation or an entity controlled by the corporation) of which the
- 13    director is a director, (B) unincorporated entity of which the director is a
- 14    general partner or a member of the governing body, or (C) individual, trust,
- 15    or estate for whom or of which the director is a trustee, guardian, personal
- 16    representative or like fiduciary; or
- 17    ▪ (vi) a person that is, or an entity that is controlled by, an employer of the
- 18    director.

19 ○ **Official Comment 5 to RMBCA 8.60:**

20         Six categories of “related person” of the director are set out in

21         subdivision (5). These categories are specific, exclusive and preemptive.

22         The first three categories involved closely related family, or near-

23         family, individuals as specified in clauses (i) through (iii). The causes are

24         exclusive insofar as family relationships are concerned and include adoptive

25         relationships. The references to a “spouse” include a common-law spouse.

26         Clause (iii) covers personal, as opposed to business, relationships; for

27         example, clause (iii) does not cover a lessee.

28         Regarding the subcategories of persons described in clause (v) from

29         the perspective of *X Co.*, certain of *D*’s relationships with other entities and

30         *D*’s fiduciary relationships are always a sensitive concern, separate and

31         apart from whether *D* has a financial interest in the transaction. Clause (v)

32         reflects the policy judgment that *D* cannot escape *D*’s legal obligation to act

33         in the best interests of another person for whom *D* has such a relationship

34         and, accordingly, that such a relationship (without regard to any financial

35         interest on *D*’s parts) should cause the relevant entity to have “related

36         person” status.

37         The term “employer” as used in subdivision (5)(vi) is not separately

38         defined that should be interpreted sensibly in light of the purpose of the

39         subdivision. The relevant inquiry is whether *D*, because of employment

40         relationship with an employer who had significant stake in the outcome of

41         the transaction, is likely to be influenced to act in the interest of that

42         employer rather than in the interest of *X Co.*

43

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

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

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

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

(14) “Statutory trust” means an unincorporated entity formed under this [act].**[For discussion: Style would like us to delete “unincorporated.” But the term is used in the RMBCA and elsewhere.]**

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

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

#### **Comment**

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

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

Paragraphs (2), (6), and (15) define “certificate of trust,” “governing instrument,” and “trust instrument” respectively. The certificate of trust is the record that must be filed with a public official under Section 201 to form a statutory trust. The trust instrument is the transaction document that provides for the governance of the affairs of the statutory trust and that need not be made part of the public record. Together, the certificate of trust and the trust instrument compose the governing instrument. The term “governing instrument” is in the singular to conform with standard commercial usage. Conflicts between the certificate of trust and the governing instrument are resolved pursuant to Section 201(d). Although Paragraph (15) is phrased in the singular, consistent with current commercial practice the drafting committee

1 contemplated that there would often be more than one “trust instrument.” Section 104(c) makes  
2 the authorization of multiple instruments explicit.

3  
4 In using but not defining the term “substantial” in Paragraph (11)(D), the drafting  
5 committee contemplated that a totality of the circumstances test would apply.  
6

7 **[Depending on how we resolve the discussion question in the comment to Section**  
8 **101, commentary on 102(14) and the 2004 revenue ruling might go here.]**  
9

10 Paragraph (16) defines trustee as a person designated as such in accordance with the  
11 governing instrument or applicable law. For discussion of trustee appointment, see the Comment  
12 to Section 401.  
13

### 14 **SECTION 103. DEFAULT AND MANDATORY RULES.**

15  
16 (a) Except as otherwise provided in the governing instrument, this [act] governs the  
17 management and affairs of the statutory trust and the rights, interests, duties, obligations, powers,  
18 and relations between and among the trustees, beneficial owners, and other persons..

19 (b) The terms of the governing instrument prevail over any provision of this [act] except:  
20 (1) the provisions of [Articles] 2, 7, and 8;  
21 (2) the exclusion of a prevailingly donative purpose under Section 302;  
22 (3) the choice of governing law as provided in Section 303;  
23 (4) the standards of conduct for trustees under Section 404, but the governing  
24 instrument may prescribe the standards by which good faith, best interests of the statutory trust,  
25 and care that a person in a like position would reasonably believe appropriate under similar  
26 circumstances are determined, if the standards are not manifestly unreasonable;

27 (5) the limitations on direction of trustees provided in Section 405(b);  
28 (6) the right of a trustee to information under Section 407, but the governing  
29 instrument may prescribe the standards for assessing whether information is reasonably related



1 to the trustee's discharge of the trustee's duties as trustee if the standards are not manifestly  
2 unreasonable;

3 (7) the prohibition under Section 410 of indemnification, advancement, or  
4 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference;

5 (8) the right of a beneficial owner to information under Section 503, but the  
6 governing instrument may prescribe the standards for assessing whether information is  
7 reasonably related to the beneficial owner's ability to enforce its rights as a beneficial owner if  
8 the standards are not manifestly unreasonable;

9 (9) the right of a beneficial owner to bring a derivative action under Section 508,  
10 but the governing instrument may modify the terms of Section 508 to subject the right to  
11 additional standards and restrictions including the requirement that beneficial owners owning a  
12 specified amount or type of beneficial interest join in bringing the derivative action, provided  
13 that the additional standards and restrictions are not manifestly unreasonable;

14 (10) Sections 601, 604, 605, 608, and 609; and

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

## 16 **Comment**

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

21  
22 Paragraph (a) emphasizes that the Uniform Statutory Trust Entity Act is primarily a  
23 default statute. Most of the Act's provisions may be overridden by the terms of the governing  
24 instrument.

25  
26 Paragraph (b) lists the provisions of this act that are not subject to override in the  
27 governing instrument of a statutory trust. Most concern the rights of nonparties or public filing  
28 and notice requirements. By contrast, with two exceptions all the provisions of this Act

1 concerning the duties and powers of a trustee, relations among trustees, and the rights and  
2 interests of a beneficial owner may be overridden or at least altered by the terms of the  
3 governing instrument. The first exception is the mandatory prohibition of indemnification,  
4 advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless  
5 indifference in paragraph (b)(7). This exception is familiar law. See Restatement (Second) of  
6 Trusts §222 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees*  
7 §542 (rev. 2d ed. 1993); Uniform Trust Code §1008 (2000). See also John H. Langbein,  
8 *Mandatory Rules in the Law of Trusts*, 98 Nw. U.L. Rev. 1105, 1121-25 (2004). In 2006, the  
9 Delaware Statutory Trust Act was revised in a similar vein. See 2006 Delaware Laws Ch. 418  
10 §7, revising Delaware Statutory Trust Act §3806(e). As revised, §3806(e) provides that the  
11 “governing instrument may provide for the limitation or elimination of any and all liabilities for  
12 breach of contract and breach of duty (including fiduciary duties) of a trustee . . . ; provided, that  
13 the governing instrument may not eliminate the implied contractual covenant of good faith and  
14 fair dealing.”

15  
16 **[This paragraph was moved up from later in this comment, but with tracking off so**  
17 **that changes within the paragraph would be indicated.]** There second exception is contained  
18 in paragraph (b)(5), which makes mandatory the invalidity under Section 405(b) of a direction to  
19 a trustee or other person that is manifestly contrary to the terms of the governing instrument or  
20 would constitute a serious breach of fiduciary duty. The reference to serious breach of fiduciary  
21 duty is designed to exclude an inconsequential, immaterial, or technical breach that does not  
22 harm a beneficial owner. For some purposes, trust law distinguishes between serious and not  
23 serious breaches of trust.. See, e.g., Uniform Trust Code §706(b)(1) (2000); Austin W. Scott,  
24 William F. Fratcher, & Mark L. Ascher, 2 *Scott and Ascher on Trusts* §11.10, p. 661 (5th ed.  
25 2006); Restatement (Second) of Trusts §107 cmt. b (1959). However, the effect of paragraph  
26 (b)(5) is limited by paragraph (b)(4), which allows the trustee’s fiduciary duty to be altered by  
27 the governing instrument if the alteration is not manifestly unreasonable.

28  
29 Paragraphs (b)(4), (b)(6), (b)(8), and (b)(9) allow the governing instrument to alter the  
30 nature of the trustee’s fiduciary obligation, the right of a trustee to information, the right of a  
31 beneficial owner to information, and the right of a beneficial owner to bring a derivative action,  
32 but only if the alteration is not “manifestly unreasonable.” In opting for a “manifestly  
33 unreasonable” standard instead of Delaware’s “good faith and fair dealing” formulation, see  
34 2006 Delaware Laws Ch. 418 §5, revising Delaware Statutory Trust Act §3806(c), the drafting  
35 committee took notice of the use of “manifestly unreasonable” in Revised Uniform Limited  
36 Liability Company Act §110(d) (2006); Uniform Limited Partnership Act §110(b) (2001),  
37 Revised Uniform Partnership Act §103(b) (1997), Uniform Limited Liability Company Act  
38 §103(b) (1996), and intended a similar meaning here. See generally Mark J. Loewenstein,  
39 *Fiduciary Duties and Unincorporated Business Entities: In Defense of the “Manifestly*  
40 *Unreasonable” Standard*, \_\_Tulsa L. Rev. \_\_ (2006). The term is also used variously in  
41 Uniform Commercial Code §§1-201(28); 1-302(b); 2A-103(u); 4-103(a); 8-402(c)(1); 8-403(c);  
42 9-603(a).

43  
44 **[This paragraph has been moved up.]**

1           The Investment Company Act of 1940 (the “1940 Act”) trumps this Act with respect a  
2 statutory trust that registers as an investment company. For such a statutory trust the 1940 Act  
3 imposes additional mandatory rules. See, e.g., the Comments to Sections 209 (name of statutory  
4 trust), 408 (interested transactions), 410 (indemnification, advancement, and exoneration), 411  
5 (delegation by trustee), and 412 (action by trustees).

6  
7           Because paragraph (b) refers specifically to other sections of the Act, enacting  
8 jurisdictions that modify those other sections may also need to modify paragraph (b).  
9

#### 10           **SECTION 104. SCOPE OF GOVERNING INSTRUMENT.**

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

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

13                   (2) any provision relating to the rights, interests, duties, obligations, and powers  
14 of the trustees, beneficial owners, and other persons; and

15                   (3) any other provision that is not inconsistent with this [act]. **[This paragraph is**  
16 **redundant with Section 103(a).]**

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

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

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

21           **[The series provisions have been moved to Section 306.]**

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

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

26                           (B) waiver of notice;

1 (C) action by consent without a meeting;

2 (D) establishment of record dates, quorum requirements, or voting in

3 person, by proxy, recorded transmission, telephone, or video conference, or in any other manner;

4 or

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

6 (4) provide for any action to be taken without the vote or approval of any

7 particular trustee or beneficial owner, or any class, group, or series of trustees or beneficial

8 owners, including:

9 (A) amendment of the governing instrument;

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

11 (C) appointment of one or more trustees;

12 (D) sale, lease, exchange, transfer, pledge or other disposition of all or any

13 part of the assets of the statutory trust or the assets of any series;

14 (E) dissolution of the statutory trust. **[For discussion: This provision is**

15 **in tension with Section 103(b)(11), which makes Section 612 mandatory.]**

16 **[For discussion: Is not this provision mooted by Section 306(a)?]**

17 (5) provide for the present or future creation of more than one statutory trust,

18 including the creation of a future statutory trust to which all or any part of the assets, liabilities,

19 profits, or losses of any existing statutory trust may be transferred or exchanged, and for the

20 conversion of beneficial interests in an existing statutory trust, or series thereof, into beneficial

21 interests in the separate statutory trust, or series thereof;

22 (6) provide for the appointment, election, or engagement of agents or independent

1 contractors of the statutory trust or delegates of the trustees, or agents, officers, employees,  
2 managers, committees, or other persons that may manage the business and affairs of the statutory  
3 trust, which may have such titles and such relative rights, powers, and duties as the governing  
4 instrument provides;

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

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

13 (9) provide that a person becomes a beneficial owner, acquires a beneficial  
14 interest, and is bound by the governing instrument if the person complies with the conditions for  
15 becoming a beneficial owner set forth in the governing instrument such as payment to the  
16 statutory trust or to a previous beneficial owner;

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

21 (11) provide that the statutory trust or the trustees, acting for and on behalf of the  
22 statutory trust, are deemed to hold beneficial ownership of any income earned on securities held

1 by the statutory trust that are issued by any business entity formed, organized, or existing under  
2 the laws of any jurisdiction, including the laws of any foreign country; and

3 (12) provide for the establishment of record dates for allocations and  
4 distributions.

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

### 9 **Comment**

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

12  
13 The unusual principal sources citation reflects the drafting committee’s decision to  
14 collect in a single section—that is, in paragraphs (b) and (c) of this Section—the various  
15 permissive rules regarding the scope of the governing instrument that are scattered throughout  
16 the Delaware and Connecticut Statutory Trust Acts. The main exceptions concern the  
17 permissive rules regarding the creation of one or more series of a statutory trust in Section  
18 306(a), and the permissive rules regarding the allowable remedies for a beneficial owner’s  
19 breach in Section 501(c).

20  
21 Paragraph (a) emphasizes the freedom of contract afforded to transactional planners by  
22 the Uniform Statutory Trust Entity Act, which is primarily a default statute.

23  
24 Paragraph (b) enumerates a nonexhaustive list of provisions that may validly be included  
25 in a statutory trust’s governing instrument. The drafting committee concluded that the demand  
26 of third parties and transactional planners to see language that expressly authorizes specific  
27 terms justified inclusion of a detailed list. Prior to statutory confirmation, doubts sometimes  
28 arose in opinion letters. Similar reasoning underlies the provision of a detailed schedule of  
29 powers in Uniform Trust Code §816 (2000) notwithstanding the broad general statement in  
30 Uniform Trust Code §815.

31  
32  
33 **SECTION 105. APPLICABILITY OF TRUST LAW.** The law of this state pertaining  
34 to common law trusts supplements this [act], except to the extent modified or displaced by the

governing instrument.

## Comment

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

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

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

## SECTION 106. RULES OF CONSTRUCTION.

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

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

## Comment

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

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

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



1 [ARTICLE] 2

2 FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

3 SECTION 201. CERTIFICATE OF TRUST.

4 (a) To form a statutory trust, a person must deliver a certificate of trust 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 209;

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

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

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

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

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

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

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

21 (2) the certificate of trust, statement of cancellation, or change or articles of  
22 conversion or merger prevails as to a person other than a trustee or a beneficial owner that

1 reasonably relies to its detriment on the filed record.

## 2 **Comment**

3  
4 **Principal Sources** – Uniform Limited Partnership Act §201 (2001); Delaware Statutory  
5 Trust Act §3810; Connecticut Statutory Trust Act §34-503.

6  
7 Unlike a common law trust, a statutory trust is a creature of statute that requires a filing  
8 with the state to come into existence. Filing rules are typical of limited liability entities. Such  
9 filing rules serve a notice function, alerting interested parties to creation and existence of a new  
10 limited liability juridical entity.

11  
12 A statutory trust comes into existence only if (1) a certificate of trust is prepared and  
13 delivered to the specified public official for filing, and (2) the public official files the certificate.  
14 (For more on the meaning of “filing,” see Section 205 and the comment thereto.) The certificate  
15 of trust provides notice to interested third parties of the existence of the statutory trust and the  
16 identification of the statutory trust’s initial agent for service of process. Pursuant to Section  
17 304(d)(2), the certificate of trust also puts third parties on notice if the statutory trust further  
18 segregates its assets and liabilities by creating one or more series.

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

28  
29 Under Section 103(b)(1), this Section is not subject to override by the governing  
30 instrument.

## 31 32 **SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF** 33 **TRUST.**

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

36 (1) the name of the statutory trust;

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

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

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

(1) cause the certificate to be amended; or

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

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

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

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

### **Comment**

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

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

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

### **SECTION 203. STATEMENT OF CANCELLATION.**

(a) A terminated statutory trust that has completed winding up shall deliver to the

1 [Secretary of State] for filing a statement of cancellation that states:

2 (1) the name of the statutory trust;

3 (2) the date of filing of its initial certificate of trust;

4 (3) that the statutory trust has completed winding up; and

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

6 (b) Subject to Section 205(c), a statement of cancellation is effective when filed by the

7 [Secretary of State].**[This paragraph was moved to Section 611.]**

8 **Comment**

9  
10 **Principal Sources** – Uniform Limited Partnership Act §203 (2001); Delaware Statutory  
11 Trust Act §3810; Connecticut Statutory Trust Act §34-503.

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

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

18  
19 **SECTION 204. SIGNING OF RECORDS.** A record delivered to the [Secretary of  
20 State] for filing pursuant to this [act] must be signed by at least one of the trustees.**[For**  
21 **discussion: Style says that “This is redundant of the law of agency.”]**

22 **Comment**

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

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

29  
30 **SECTION 205. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY**  
31 **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 206 and 214, 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

1 specified time on the earlier of:

2 (A) the specified date; or

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

4 **Comment**

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

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

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

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

28  
29 Consistent with the existing statutory trust acts, but inconsistent with most corporate  
30 codes, this Act makes no provision for collecting a franchise tax. See generally Marcel Kahan &  
31 Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205,  
32 1218-33 (2001).

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

36  
37 **SECTION 206. CORRECTING FILED RECORD.**

38 (a) A statutory trust or qualified foreign statutory trust may deliver to the [Secretary of

State] for filing a statement of correction to correct a filed record if at the time of filing the record contained incorrect information or was defectively or erroneously signed.

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

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

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

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

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

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

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

#### **Comment**

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

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

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

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

1 instrument.  
2

3 **SECTION 207. CERTIFICATE OF EXISTENCE OR REGISTRATION.**

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

8 (1) the name of the statutory trust;

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

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

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

15 (5) whether the most recent annual report of the statutory trust required by  
16 Section 215 has been filed by the [Secretary of State]].

17 (b) The [Secretary of State], upon request and payment of the requisite fee, shall furnish a  
18 certificate of registration for a foreign statutory trust if the records filed in the [office of the  
19 Secretary of State] show that the [Secretary of State] has filed a certificate of authority, has not  
20 revoked the certificate of authority, and has not filed a notice of cancellation. A certificate of  
21 registration must state: **[For Discussion: Because Style believes that (b) and part of (c)**  
22 **should be moved to Article 7, it asks that we reconsider our decision last time not to do so.**  
23 **To that end, it has supplied Sitkoff and Vigdor with a revision of this section, and a new**



1 **section for Article 7 (called “Certificate of Registration”).]**

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

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

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

8 (4) whether the foreign statutory trust’s most recent annual report required by  
9 Section 215 has been filed by the [Secretary of State]].

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

#### 14 **Comment**

15  
16 **Principal Source** – Uniform Limited Partnership Act §209 (2001).

17  
18 A certificate of existence or registration can reveal only information present in the public  
19 record. Under this Act significant information bearing on the status of a statutory trust may be  
20 outside the public record.

21  
22 Section 205(b) provides a mechanism for obtaining a certified copy of a certificate of  
23 trust even if the trust has been terminated.

24  
25 A certificate of registration furnished under paragraph (b) is different than a certificate of  
26 authority under Section 705.

27  
28 Paragraphs (a)(5) and (b)(4) are bracketed in recognition of the diversity of approaches  
29 among the states with respect to annual reports. Uniformity is not expected.

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

1 instrument.  
2

3 **SECTION 208. ADMINISTRATIVE DISSOLUTION.**

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

6 (1) pay, within 60 days after the due date, any fee, tax, or penalty due to the  
7 [Secretary of State];

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

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

11 (4) file the annual report required by Section 215].

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

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

18 (2) the basis for the cancellation under subsection (a).

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

22 (d) If a statutory trust cures the failures stated in the notice of cancellation under  
23 subsection (c), the [Secretary of State] shall indicate that the statutory trust is reinstated on the

1 filed notice. The reinstatement of the statutory trust relates back for all purposes to the date of  
2 the notice of cancellation. **[For discussion: (1) Rutledge’s letter to Sitkoff of April 2, 2007**  
3 **regarding administrative dissolution, and (2) ReULLCA §§705-707. Both were circulated**  
4 **with this draft.]**

#### 5 **Comment**

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

8  
9 Under Section 103(b)(1), this Section is not subject to override by the governing  
10 instrument.  
11

#### 12 **SECTION 209. NAME OF STATUTORY TRUST.**

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

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

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

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

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

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

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

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

10 (A) has merged into the applicant;

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

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

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

## 17 **Comment**

18  
19 **Principal Sources** – Uniform Limited Partnership Act §108 (2001); Delaware Statutory  
20 Trust Act §3814.

21  
22 The drafting committee opted not to require a traditional limited liability appellation.  
23 Such a requirement would be inconsistent with current practice under the Delaware Act, though  
24 the drafting committee contemplated that enacting jurisdictions with a strong policy regarding  
25 names of limited liability entities might modify this Section accordingly. Moreover, other  
26 regulatory law will sometimes limit the range of permissible names notwithstanding this Section.  
27 For example, the names of mutual funds typically do not contain a limited liability appellation,  
28 but Section 35(d) of the Investment Company Act of 1940, which is applicable to a statutory

1 trust that is a registered investment company, prohibits “materially deceptive or misleading”  
2 names. 15 U.S.C. §80a-34(d). See also Rule 35d-1, 17 C.F.R. §270.35d-1 (listing types of  
3 names that have been deemed “materially deceptive or misleading”).  
4

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

## 8 **SECTION 210. RESERVATION OF NAME.**

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

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

13 (2) a statutory trust or a qualified foreign statutory trust intending to adopt the  
14 name;

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

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

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

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

23 (b) A person may apply to reserve a name under subsection (a) by delivering to the  
24 [Secretary of State] for filing an application that states the name to be reserved and the paragraph  
25 of subsection (a) that applies. If the [Secretary of State] finds that the name is available for use

1 by the applicant, the [Secretary of State] shall file a statement of name reservation and thereby  
2 reserve the name for the exclusive use of the applicant for a 120-day period.

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

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

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

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

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

### 15 **Comment**

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

17  
18 Under Section 103(b)(1), this Section is not subject to override by the governing  
19 instrument.  
20

### 21 **SECTION 211. AGENT FOR SERVICE OF PROCESS.**

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

24 (b) An agent for service of process of a statutory trust or qualified foreign statutory trust

1 must be an individual who is a resident of this state or a person authorized to do business in this  
2 state which maintains an office in this state.

3 **Comment**  
4

5 **Principal Sources** – Uniform Limited Partnership Act §114 (2001); Delaware Statutory  
6 Trust Act §3804; Connecticut Statutory Trust Act §34-507.  
7

8 Under Section 201(a)(3), the initial designation of a statutory trust's agent for service of  
9 process is made in the original certificate of trust. Under Section 702(a)(3), the initial  
10 designation of a foreign statutory trust's agent for service of process is made in the original  
11 application for a certificate of authority. The initial designation may be changed pursuant to a  
12 statement of change under Section 213, by an amendment to the certificate of trust under Section  
13 202, or by an annual report under Section 215(e) if the jurisdiction has adopted Section 215.  
14

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

18 **SECTION 212. CHANGE OF DESIGNATED OFFICE OR AGENT FOR**  
19 **SERVICE OF PROCESS.**

20 (a) A statutory trust or qualified foreign statutory trust may change its agent for service of  
21 process, the address of its agent for service of process, or its designated office by delivering to  
22 the [Secretary of State] for filing a statement of change containing:

23 (1) the name of the statutory trust or qualified foreign statutory trust;

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

26 (3) if the designated office is to be changed, the street and mailing addresses of  
27 the new designated office;

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

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

(b) A statement of change is effective as provided in Section 205(c).

#### **Comment**

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

Paragraph (a) uses “may” rather than “must” because a statutory trust may also change the information by an amendment to its certificate of trust under Section 202 and a qualified foreign statutory trust may also change the information by an amendment to its certificate of authority under Section 703. Further, if the information currently in the public record is not inaccurate, a statutory trust or qualified foreign statutory trust may change the information in an annual report under Section 215(e) if the jurisdiction has enacted Section 215.

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

### **SECTION 213. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

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

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

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

#### **Comment**



1  
2 **Principal Source** – Uniform Limited Partnership Act §116 (2001).  
3

4 This section provides the exclusive means for an agent to resign without cooperation  
5 from the statutory trust or qualified foreign statutory trust and the only way the agent, rather than  
6 the statutory trust or foreign statutory trust, can effect a change in the public record. Unlike most  
7 records authorized or required to be delivered to the filing officer for filing under this Act, a  
8 statement of resignation may not provide for a delayed effective date. Paragraph (c) mandates  
9 the effective date. An effective date included in a statement of resignation is disregarded. To  
10 satisfy Section 212(a), the statutory trust or qualified foreign statutory trust must designate a new  
11 agent for service of process before the effective date. If the statutory trust or foreign statutory  
12 trust fails to do so, under Section 214 service on the statutory trust or foreign statutory trust may  
13 be made on the [Secretary of State].  
14

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

18 **SECTION 214. SERVICE OF PROCESS.**

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

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

28 (c) Service of any process, notice, or demand on the [Secretary of State] under subsection  
29 (b) may be made by delivering to and leaving with the [Secretary of State] two copies of the  
30 process, notice, or demand. If a process, notice, or demand is served on the [Secretary of State],

1 the [Secretary of State] shall forward one of the copies by registered or certified mail, return  
2 receipt requested, to the statutory trust or qualified foreign statutory trust at its designated office.

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

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

6 (2) the date shown on the return receipt, if signed on behalf of the statutory trust  
7 or qualified foreign statutory trust; or

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

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

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

#### 15 **Comment**

16  
17 **Principal Source** – Uniform Limited Partnership Act §117 (2001).

18  
19 Paragraph (f) confirms that the authority of the Secretary of State to accept process under  
20 a state long-arm statute exists independently of paragraphs (b) through (e) of this Section.

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

25 **[SECTION 215. ANNUAL REPORT FOR [SECRETARY OF STATE]. [NOTE:**  
26 **This Section, which was 211 in the prior draft, has been moved here and bracketed per our**  
27 **last drafting session. The move was made without the tracking on, so that changes within**

1 **the section since last time would be indicated.]**

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

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

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

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

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

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

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

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

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

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

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

1 report must be delivered to the [Secretary of State] between [January 1 and April 1] of each  
2 subsequent calendar year.

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

8 (e) If an annual report under this section contains an address of a designated office or the  
9 name or address of an agent for service of process which differs from the information shown in  
10 the records of the [Secretary of State] immediately before the filing, the differing information in  
11 the annual report is considered a statement of change under Section 212.]

#### 12 **Comment**

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

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

1 [ARTICLE] 3

2 AUTHORIZATION; GOVERNING LAW; DURATION; POWERS

3 SECTION 301. STATUTORY TRUST AUTHORIZED. A statutory trust is an entity  
4 separate from its trustees and beneficial owners.

5 Comment

6  
7 Principal Sources – Delaware Statutory Trust Act §§3810; Connecticut Statutory Trust  
8 Act §§34-502.

9  
10 Because this Section implements an entity conception of the statutory trust, it confirms  
11 that any prior judicial decision that holds that a common law business trust violates the state’s  
12 corporate law, trust law, or public policy is not applicable to a statutory trust created under this  
13 Act. Examples of such decisions, which reflect the now outmoded concern that a business trust  
14 could be used to evade regulatory limitations on the corporate form, are collected in Robert H.  
15 Sitkoff, The Rise of the Statutory Business Trust [in progress].  
16

17 SECTION 302. PERMISSIBLE PURPOSES. A statutory trust may have any lawful  
18 purpose except a prevailingly donative purpose.

19 Comment

20  
21 Principal Sources – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust  
22 Act §34-502a.  
23

24 This Section provides that a statutory trust may be formed for “any lawful purpose except  
25 for a prevailingly donative purpose.” Thus, in addition to use in a commercial transaction, a  
26 statutory trust may be used in a custodial or other context that need not be for profit. See Section  
27 307. The limitation to “lawful” activity addresses the concern that some states limit the type of  
28 organizations that may be used in regulated industries such as banking and insurance.  
29

30 The exclusion of “a prevailingly donative purpose” addresses the concern that a statutory  
31 trust might be used in an estate planning or other donative context to evade public policy  
32 limitations on donative transfers and common law trusts. See, e.g., Uniform Trust Code §105  
33 (2000); John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105  
34 (2004). The word “prevailingly” was included to account for the possibility that a donative  
35 transfer might be structured to look otherwise in form but still be a donative transfer in  
36 substance.  
37

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

9  
10 Examples of mandatory rules applicable to common law trusts that drafters might have  
11 tried to avoid by using a statutory trust include the following:

- 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 assets 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 scheduled in Uniform Trust Code §105 (2000), the Code’s  
35 schedule of mandatory rules.

36  
37 The drafting committee declined the suggestion to exclude statutory trusts from having a  
38 charitable purpose on the ground that a statutory trust with a charitable purpose would covered  
39 by existing regulatory law applicable to charitable entities. See generally Marion R. Fremont-  
40 Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* (2004).

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

1  
2       **SECTION 303. GOVERNING LAW.** The law of this state governs:

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

4       (2) the liability of a beneficial owner as beneficial owner and a trustee as trustee for the  
5 debts, obligations, or other liabilities of a statutory trust; and

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

8                               **Comment**  
9

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

13       Under paragraph (1) the internal affairs of a statutory trust formed under this act are  
14 governed by the laws of this state no matter in which state the statutory trust operates. Although  
15 the term “internal affairs” may be indeterminate at its edges, the concept certainly includes  
16 interpretation and enforcement of the governing instrument and relations among the trustees,  
17 beneficial owners, and the statutory trust. See generally Restatement (Second) of Conflict of  
18 Laws §302 cmt. a(1971) (defining “internal affairs” with reference to corporate law as “the  
19 relations inter se of the corporation, its shareholders, directors, officers or agents”).  
20

21       Paragraph (2) supports Sections 413 and 506 by confirming that the liability of a  
22 beneficial owner or a trustee for the debts, obligations, or other liabilities of the statutory trust is  
23 governed by the law of this state. This paragraph is stated separately from Paragraph (1) because  
24 the liabilities of a beneficial owner or trustee to third parties is arguably not an internal affair.  
25 See, e.g., Restatement (Second) of Conflict of Laws §307 (1971) (treating shareholders’ liability  
26 separately from the internal affairs doctrine).  
27

28       Section 701(a) states rules for qualified foreign statutory trusts that parallel and are  
29 analogous in scope to those of this section.  
30

31       Under Section 103(b)(3), this Section is not subject to override by the governing  
32 instrument.  
33

34       **SECTION 304. DURATION.**

35       (a) A statutory trust has perpetual existence.

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

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

### Comment

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

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

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

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

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





1 statutory trust in the name of the trustee in the trustee's capacity as such.  
2

### 3 **SECTION 306. SERIES OF STATUTORY TRUST.**

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

6 (1) provide for classes, groups, or series of trustees, beneficial owners, or  
7 beneficial interests, having such relative rights, powers, and duties as the governing instrument  
8 may provide, and provide for the creation of additional classes, groups, or series of trustees,  
9 beneficial owners, or beneficial interests, having such relative rights, powers, and duties as may  
10 be established, including rights, powers, and duties senior or subordinate to existing classes,  
11 groups or series of trustees, beneficial owners, or beneficial interests;

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

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

20 (b) If the governing instrument of a statutory trust creates one or more series as provided  
21 in subsection (a), the debts, obligations, liabilities, and expenses incurred, contracted for, or  
22 otherwise existing with respect to a particular series are enforceable against the assets of the  
23 series only, and not against the assets of the statutory trust generally or any other series thereof,

1 and none of the debts, obligations, or other liabilities, or expenses incurred, contracted for, or  
2 otherwise existing with respect to the statutory trust generally or any other series thereof are  
3 enforceable against the assets of the series if:

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

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

10 (c) If a statutory trust is a registered investment company under the Investment Company  
11 Act of 1940, as amended, 15 U.S.C. Section 80a-1 et seq., any class, group, or series of  
12 beneficial interests established by the governing instrument of the statutory trust is a class,  
13 group, or series preferred as to distribution of assets or payment of dividends over all other  
14 classes, groups, or series in respect to assets specifically allocated to the class, group, or series  
15 under Section 18, or any amendment or successor provision, of the Investment Company Act of  
16 1940[, 15 U.S.C. Section 80a-18], as amended, and any regulations issued thereunder.

## 17 **Comment**

18  
19 **Principal Sources** – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust  
20 Act §34-518.

21  
22 Paragraph (a) confirms that a statutory trust may be organized with one or more series.  
23 The organization of a master statutory trust with several series is particularly common among  
24 statutory trusts that are registered investment companies under the Investment Company Act of  
25 1940, as amended, 15 U.S.C. Sections 80a-1 et seq.

26  
27 Paragraph (b) provides that if a statutory trust that has created separate series under  
28 paragraph (a), the debts, liabilities, and other obligations of a particular series are enforceable

1 against the assets of that series only, but only if (1) separate records are maintained for each  
2 series and (2) notice of the limitation on liabilities of a series is set forth in the certificate of trust.  
3 Under Section 201 the certificate of trust is made part of the public record and must indicate  
4 whether the statutory trust might create one or more series.

5  
6 Paragraph (c) [Assistance on this portion of the comment is invited, particularly from  
7 Bibb and Victor.]

8  
9 Section 612 provides for the dissolution of a series.  
10

11 **SECTION 307. POWER TO HOLD PROPERTY.** A statutory trust has the power to  
12 hold or take title to property its own name whether in an active, passive, or custodial capacity.

13 **Comment**

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

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

1 [ARTICLE 4]

2 TRUSTEES AND TRUST MANAGEMENT

3 SECTION 401. MANAGEMENT OF STATUTORY TRUST. The business and  
4 affairs of a statutory trust must be 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 Trust Code §815 (2000); Uniform Limited Partnership Act §105 (2001);  
8 Delaware General Corporation Law §141.

9  
10 Section 102(16) defines trustee as a person designated as such in accordance with the  
11 governing instrument or applicable law. Section 104(b)(4)(C) confirms that the governing  
12 instrument may provide for trustee appointment. However, because no provision in this Act  
13 provides default rules for trustee appointment, if the governing instrument does not provide for  
14 trustee appointment, then under Section 105 the applicable law is the state’s law pertaining to  
15 trustee appointment in common law trusts. For treatment of the default rules of trustee  
16 appointment, removal, and succession in common law trusts, see Restatement (Third) of Trusts  
17 §§31-37 (2003); Uniform Trust Code §§701-02, 704-06 (2000); Restatement (Second) of Trusts  
18 §§101, 106-08 (1959).

19  
20 SECTION 402. TRUSTEE POWERS.

21 (a) A trustee may exercise:

22 (1) powers conferred by the governing instrument;

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

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

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

28 Comment

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

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

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

#### **SECTION 403. PROTECTION OF PERSON DEALING WITH TRUSTEE.**

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

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

**[For discussion: Whether to include also the following paragraphs (c), (d), and (e), which are also taken from UTC 1012:**

**(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.**

**(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the**



1 person delivering property to a trustee is liable if at the time of the delivery the person had notice  
2 that the trustee was misapplying or intending to misapply the property.  
3

4 Subsection (d) extends the protections afforded by the section to assistance provided to or  
5 dealings for value with a former trustee. The third party is protected the same as if the former  
6 trustee still held the office.  
7

8 Subsection (e) clarifies that a statute relating to commercial transactions controls  
9 whenever both it and this section could apply to a transaction. Consequently, the protections  
10 provided by this section are superseded by comparable protective provisions of these other laws.  
11 The principal statutes in question are the various articles of the Uniform Commercial Code,  
12 including Article 8 on the transfer of securities, as well as the Uniform Simplification of  
13 Fiduciary Securities Transfer Act. **End discussion note.]**  
14  
15

#### 16 **SECTION 404. STANDARDS OF CONDUCT FOR TRUSTEES.**

17 (a) In discharging the duties of trusteeship, a trustee of a statutory trust shall act in good  
18 faith and in a manner that the trustee reasonably believes to be in the best interests of the  
19 statutory trust.

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

#### 22 **Comment**

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

24 To police the exercise of the trustee’s broad powers under Section 402, this section  
25 subjects the trustee to fiduciary duties of loyalty (paragraph (a)) and care (paragraph (b)) akin to  
26 those of a corporate director.  
27

28 Under Section 103(b), the trustee’s standards of conduct under this section are mandatory  
29 rules that are not subject to override by the governing instrument. However, the governing  
30 instrument may prescribe the standards by which “good faith,” “best interests of the statutory  
31 trust,” and “care that a person in a like position would reasonable believe appropriate under  
32 similar circumstances” are determined provided that the standards are not “manifestly  
33 unreasonable.” See also Delaware Statutory Trust Act §3806(c), which as revised in 2006  
34 provides that a trustee’s fiduciary duties “may be expanded or restricted or eliminated by  
35 provisions in the governing instrument; provided, that the governing instrument may not  
36 eliminate the implied contractual covenant of good faith and fair dealing.”



1  
2 The drafting committee opted to model the trustee's duties on the corporate fiduciary  
3 obligation as stated in Revised Model Business Corporation Act §8.30 (2002) rather than the  
4 more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a  
5 mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the  
6 context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of  
7 commercial actors. For a statement of the duties of loyalty and prudence in trust law, see  
8 Restatement (Third) of Trusts §§77-78 (T.D. No. 4, 2005). For a comparison, see Robert H.  
9 Sitkoff, Trust Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82  
10 (2003). See also sources cited in the Comment to Section 408.

11  
12 Because the standards of conduct stated in this section are drawn from corporate law, the  
13 drafting committee contemplated that by default the business judgment rule would apply in  
14 litigation under paragraph (b) unless the governing instrument provides otherwise. **[For**  
15 **discussion: RMBCA 8.31, Standards of Liability for Directors, which says:**

16  
17 **(a) A director shall not be liable to the corporation or its shareholders for any decision**  
18 **to take or not to take action, or any failure to take any action, as a director, unless the**  
19 **party asserting liability in a proceeding establishes that:**

20 **(1) any provision in the articles of incorporation authorized by section 2.02(b)(4) or**  
21 **the protection afforded by section 8.61 for action taken in compliance with section**  
22 **8.62 or 8.63, if interposed as a bar to the proceeding by the director, does not**  
23 **preclude liability; and**

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

25 **(i) action not in good faith; or**

26 **(ii) a decision**

27 **(A) which the director did not reasonably believe to be in the best interests**  
28 **of the corporation, or**

29 **(B) as to which the director was not informed to an extent the director**  
30 **reasonably believed appropriate in the circumstances; or**

31 **(iii) a lack of objectivity due to the director's familial, financial or business**  
32 **relationship with, or a lack of independence due to the director's domination or**  
33 **control by, another person having a material interest in the challenged conduct**

34 **(A) which relationship or which domination or control could reasonably be**  
35 **expected to have affected the director's judgment respecting the challenged**  
36 **conduct in a manner adverse to the corporation, and**

37 **(B) after a reasonable expectation to such effect has been established, the**  
38 **director shall not have established that the challenged conduct was**  
39 **reasonably believed by the director to be in the best interests of the**  
40 **corporation; or**

41 **(iv) a sustained failure of the director to devote attention to ongoing oversight of the**  
42 **business and affairs of the corporation, or a failure to devote timely attention, by**  
43 **making (or causing to be made) appropriate inquiry, when particular facts and**  
44 **circumstances of significant concern materialize that would alert a reasonably**  
45 **attentive director to the need therefore; or**

- 1 (v) receipt of a financial benefit to which the director was not entitled or any other  
2 breach of the director's duties to deal fairly with the corporation and its  
3 shareholders that is actionable under applicable law.
- 4 (b) The party seeking to hold the director liable:
- 5 (1) for money damages, shall also have the burden of establishing that:
- 6 (i) harm to the corporation or its shareholders has been suffered, and
- 7 (ii) the harm suffered was proximately caused by the director's challenged
- 8 conduct; or
- 9 (2) for other money payment under a legal remedy, such as compensation for the
- 10 unauthorized use of corporate assets, shall also have whatever persuasion burden
- 11 may be called for to establish that the payment sought is appropriate in the
- 12 circumstances; or
- 13 (3) for other money payment under an equitable remedy, such as profit recovery by
- 14 or disgorgement to the corporation, shall also have whatever persuasion burden
- 15 may be called for to establish that the equitable remedy sought is appropriate in the
- 16 circumstances.
- 17 (c) Nothing contained in this section shall (1) in any instance where fairness is at issue,
- 18 such as consideration of the fairness of a transaction to the corporation under section
- 19 8.61(b)(3), alter the burden of proving the fact or lack of fairness otherwise applicable,
- 20 (2) alter the fact or lack of liability of a director under another section of this Act, such
- 21 as the provisions governing the consequences of an unlawful distribution under section
- 22 8.33 or a transactional interest under section 8.61, or (3) affect any rights to which the
- 23 corporation or a shareholder may be entitled under another statute of this state or the
- 24 United States.]
- 25
- 26
- 27

28 **SECTION 405. DIRECTION OF TRUSTEES. [NOTE: In the prior draft this was**

29 **section 409, but per our last meeting it has been moved here, right after the section on**

30 **fiduciary duties. The cut-and-past was made with the tracking off so that the changes**

31 **made within the section and its comment would be indicated differently from the language**

32 **that was not changed.]**

33 (a) The governing instrument may authorize any person, including a beneficial owner, to

34 direct a trustee or other person in the management of the statutory trust.

35 (b) If the terms of a statutory trust confer upon a person a power to direct certain actions

36 of a trustee or other person, the trustee or other person shall act in accordance with an exercise of

1 the power unless the direction is manifestly [For discussion: Style would like us to drop  
2 “manifestly.”] contrary to the terms of the governing instrument or the trustee knows or has  
3 reason to know that following the direction would constitute a serious breach of fiduciary duty  
4 by the trustee.

5 (c) Neither the power to direct a trustee or other person nor the exercise of the power by  
6 any person, including a beneficial owner, causes the person to be a trustee or imposes on the  
7 person duties, including fiduciary duties, or liabilities relating thereto, to a statutory trust or to a  
8 beneficial owner thereof.

#### 9 **Comment**

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

12  
13 Paragraph (a) ratifies the use of a directed trustee, meaning a trustee that must act in  
14 accordance with the directions of another person. Under paragraph (b), however, the trustee  
15 must not follow a direction that is manifestly contrary to the terms of the governing instrument  
16 or that the trustee knows or has reason to know would constitute a serious breach of fiduciary  
17 duty. Cf. Restatement (Third) of Trusts §75 (T.D. No. 4, 2005); Restatement (Second) of Trusts  
18 §185 (1959).

19  
20 The reference in paragraph (b) to “serious” breach of fiduciary duty is designed to  
21 exclude an inconsequential, immaterial, or technical breach that does not harm a beneficial  
22 owner. For some purposes, trust law distinguishes between “serious” and not serious breaches of  
23 trust. See, e.g., Uniform Trust Code §706(b)(1) (2000); Austin Wakeman Scott, William F.  
24 Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed. 2006);  
25 Restatement (Second) of Trusts §107 cmt. b (1959).

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

34  
35 Under Section 103(b)(5), the limitation on direction of trustees stated in paragraph (b) is

1 not subject to override by the governing instrument.

2  
3 Under paragraph (c), unless the governing instrument provides otherwise, a person that  
4 has the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to  
5 the statutory trust or the beneficial owners.

6  
7 In conjunction with Section 411, this section facilitates the current practice in existing  
8 statutory trusts of creating a trusteeship with respect to some, but not all, aspects of the trust—  
9 for example, in a mutual fund with an investment advisor or in a securitization transaction with a  
10 person whose consent is required before the statutory trust can petition for bankruptcy.  
11

12 **SECTION 406. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT**  
13 **COMPANY.**

14 (a) In this section, the terms “affiliated person” and “interested person” have the  
15 meanings set forth in the Investment Company Act of 1940, as amended, 15 U.S.C. Section 80a-  
16 1 et seq., or any rule adopted thereunder.

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

25 **Comment**

26  
27 **Principal Source** – Delaware Statutory Trust Act §3801.

28  
29 It is not uncommon for a director of a mutual fund to serve on multiple mutual fund  
30 boards. This Section addresses the question of trustee independence in such circumstances,

1 rejecting *Strougo v. Padegs*, 964 F. Supp. 783 (S.D.N.Y. 1997) (applying Maryland law). In  
2 *Strougo* the plaintiffs brought a derivative suit against a fund’s investment advisor alleging  
3 excessive fees. The plaintiffs did not, however, make a demand on the directors prior to filing  
4 suit. The court held that the plaintiffs were excused from the demand requirement because the  
5 fund’s directors served on multiple boards within the same fund complex, receiving “substantial  
6 remuneration,” and hence were not independent from the adviser. *Id.* at 793-95.

7  
8 In 1998 the Maryland legislature effectively overruled *Strougo* by amending the  
9 Maryland corporate code to provide that directors who are not “interested persons” under the  
10 Investment Company Act of 1940 also would be deemed disinterested under Maryland law. See  
11 Md. Code (Corporations & Associations) §2-405.3. A similar provision took effect in  
12 Massachusetts in 1999, see Mass. Laws. 182, § 2B, and in Delaware in 2000, see Delaware  
13 Statutory Trust Act §3801(h). Almost all mutual funds are organized as Maryland corporations,  
14 Massachusetts trusts, or Delaware statutory trusts. See Robert H. Sitkoff, *The Rise of the*  
15 *Statutory Business Trust* [in progress].

16  
17 **[For discussion: Are there further suggested changes to this comment, perhaps**  
18 **from Bibb and Victor?]**  
19

20 **SECTION 407. TRUSTEE’S RIGHT TO INFORMATION.** A trustee has the right  
21 to information relating to the affairs of the statutory trust reasonably related to the trustee’s  
22 discharge of the trustee’s duties as trustee.

### 23 **Comment**

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

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

37  
38 Section 503 provides a comparable rule for a beneficial owner’s right to information.  
39



1 Restatement (Second) of Trusts §170 (1959); John H. Langbein, Questioning the Trust Law Duty  
2 of Loyalty: Sole Interest or Best Interest?, 114 Yale L.J. 929 (2005); Melanie B. Leslie, Trusting  
3 Trustees: Fiduciary Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005).  
4

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

#### 11 **SECTION 409. GOOD-FAITH RELIANCE ON GOVERNING INSTRUMENT.**

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

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

#### 19 **Comment**

20 **Principal Source** – Uniform Trust Code §1006 (2000); Delaware Statutory Trust Act  
21 §3806; Connecticut Statutory Trust Act §34-517.  
22

23 A trustee, officer, employee, manager, committee, or other such person or persons should  
24 be able to administer a statutory trust with dispatch and without concern that a reasonable  
25 reliance on the terms of the governing instrument is misplaced. This section protects a person  
26 that so relies on a trust instrument, but only to the extent the breach of trust resulted from such  
27 reliance and only if the person’s reliance was in good faith.  
28

29 The drafting committee contemplated that a trustee’s good faith reliance on the records of  
30 the statutory trust, or on a report made by a person that is within the person’s professional or  
31 expert competence, would be protected from liability under Section 404(b) by the business  
32 judgment rule. **[For discussion: Delaware Statutory Trust Act §3806(k), which as revised in**  
33 **2006 now says, “A trustee, beneficial owner or an officer, employee, manager or other**  
34 **person designated in accordance with paragraph (b)(7) of this section shall be fully**

1   protected in relying in good faith upon the records of the statutory trust and upon  
2   information, opinions, reports or statements presented by another trustee, beneficial owner  
3   or officer, employee, manager or other person designated in accordance with paragraph  
4   (b)(7) of this section, or by any other person as to matters the trustee, beneficial owner or  
5   officer, employee, manager or other person designated in accordance with paragraph (b)(7)  
6   of this section reasonably believes are within such other person's professional or expert  
7   competence, including information, opinions, reports or statements as to the value and  
8   amount of the assets, liabilities, profits or losses of the statutory trust, or the value and  
9   amount of assets or reserves or contracts, agreements or other undertakings that would be  
10   sufficient to pay claims and obligations of the statutory trust or to make reasonable  
11   provision to pay such claims and obligations, or any other facts pertinent to the existence  
12   and amount of assets from which distributions to beneficial owners or creditors might  
13   properly be paid.”]

#### 15           **SECTION 410. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.**

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

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

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

29                           **Comment**



1  
2       **Principal Sources** – Delaware Statutory Trust Act §3817; Connecticut Statutory Trust  
3 Act §34-524; Delaware General Corporation Law §145; Uniform Trust Code §§105, 1008  
4 (2000).  
5

6       In *Nakahara v. The NS 1991 American Trust*, 739 A.2d 770 (Del. Ch. 1998), the court  
7 held that a Delaware statutory trust had the power to advance litigation expenses, but denied the  
8 trustees’ request for indemnification on the ground of unclean hands.  
9

10       Under Section 103(b)(7), this section’s prohibition of indemnification, advancement, or  
11 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference is not  
12 subject to override by the governing instrument. Prohibiting indemnification, advancement, or  
13 exoneration for such conduct is consistent with traditional trust doctrine. See Restatement  
14 (Second) of Trusts §222 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and*  
15 *Trustees* §542 (rev. 2d ed. 1993); Uniform Trust Code §1008. See also John H. Langbein,  
16 *Mandatory Rules in the Law of Trusts*, 98 Nw. U.L. Rev. 1105, 1121-25 (2004). It is also  
17 consistent with the Delaware Statutory Trust Act. As revised in 2006, Delaware Statutory Trust  
18 Act §3806(e) provides that the “governing instrument may provide for the limitation or  
19 elimination of any and all liabilities for breach of contract and breach of duty (including  
20 fiduciary duties) of a trustee . . . ; provided, that the governing instrument may not eliminate the  
21 implied contractual covenant of good faith and fair dealing.” See 2006 Delaware Laws Ch. 418  
22 §7.  
23

24       Any indemnification provision in the governing instrument of a statutory trust operating  
25 as a mutual fund is subject to Section 17(h) of the Investment Company Act of 1940, which  
26 generally prohibits a fund from including in its organizational documents any provision that  
27 protects a trustee or officer of a fund against liability to the fund or its shareholders by reason of  
28 “willful misfeasance, bad faith, gross negligence, or reckless disregard” of the person’s duties as  
29 trustee or officer. 15 U.S.C. § 80a-17(h).  
30

31       The SEC has taken the position that, before advancing legal fees to a trustee of a mutual  
32 fund, the fund’s “board must either (1) obtain assurances, such as by obtaining insurance or  
33 receiving collateral provided by the [trustee], that the advance will be repaid if the trustee is  
34 found to have engaged in disabling conduct, or (2) have a reasonable belief that the [trustee] has  
35 not engaged in disabling conduct and ultimately will be entitled to indemnification.” SEC  
36 Interpretation: Matters Concerning Independent Directors of Investment Companies, Investment  
37 Company Act Rel. No. 24083 (Oct. 14, 1999), 1999 WL 820629, \*10. The SEC has also taken  
38 the position that there is a rebuttable presumption that an independent trustee (see Section 406)  
39 has not engaged in disabling conduct. *Id.*  
40

41       **[Moved to paragraph (c) of Section 305.]**  
42

43       **[Now Section 405.]**  
44

1           **SECTION 411. DELEGATION BY TRUSTEE.**

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

5                   (1) selecting an agent;

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

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

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

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

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

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

16  
17                                   **Comment**

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

20  
21           This section reverses the outmoded common law rule against delegation by a trustee. In  
22 reversing the common law rule against delegation, the drafting committee followed both the  
23 Delaware Statutory Trust Act and the modern trend with respect to common law trusts. Most  
24 states have abrogated the common law nondelegation rule with legislation based on the Uniform  
25 Prudent Investor Act, Uniform Trust Code, or the Restatement (Third) of Trusts. See Uniform  
26 Trust Code §807 (2000); Uniform Prudent Investor Act §9 (1994); Restatement (Third) of  
27 Trusts: Prudent Investor Rule §171 (1992). See also Restatement (Third) of Trusts §80 (T.D.  
28 No. 4, 2005). See generally John H. Langbein, Reversing the Nondelegation Rule of Trust-

1 Investment Law, 59 Mo. L. Rev. 105 (1994).

2  
3 Paragraphs (a), (c), (d), and (e) track the language of Uniform Trust Code §807 (2000),  
4 which is derived from Uniform Prudent Investor Act §9 (1994). Following the Delaware  
5 Statutory Trust Act, however, paragraph (b) treats delegation to a co-trustee in the same manner  
6 as delegation to another agent. By contrast, traditional trust law disfavors delegation by one co-  
7 trustee to another. See Restatement (Second) of Trusts §184 (1959). See also Uniform Trust  
8 Code §703(e) (2000); Restatement (Third) of Trusts §81 cmt. c(1) (T.D. No. 4, 2005).

9  
10 Mutual funds often receive a common set of services from an organization that  
11 specializes in operating mutual funds, which is typically the investment adviser or an affiliate.  
12 The trustees monitor the service providers and the Investment Company Act of 1940 requires the  
13 trustees to approve the contracts with the adviser and distributor. See 15 U.S.C. § 80a-15.  
14

15 **SECTION 412. ACTION BY TRUSTEES.** On any matter that is to be acted on by  
16 trustees:

- 17 (1) the trustees act by majority of their number;
- 18 (2) the trustees may take the action without a meeting, without previous notice, and  
19 without a vote, if a consent or consents, in a record, setting forth the action so taken, are signed  
20 by trustees having at least the minimum number of trustees necessary to authorize or take the  
21 action at a meeting at which all trustees entitled to vote thereon were present and voted, but  
22 prompt notice of the action must be given to those trustees that did not consent; and
- 23 (3) a trustee may vote in person or by proxy, but if by proxy, the proxy must be contained  
24 in a signed record.

25 **Comment**

26  
27 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust  
28 Act § 34-517; Delaware General Corporation law §228; Uniform Trust Code §703 (2000).  
29

30 In accord with Uniform Trust Code §703(a) (2000) and Restatement (Third) of Trusts  
31 §39 (2003), paragraph (a)(1) rejects the common law rule requiring unanimity among the  
32 trustees of a private trust, replacing it with a default rule requiring a majority.  
33

1 The remainder of this section allows for maximum flexibility in the mechanics of  
2 allowing the trustees to act or vote on actions. Section 104(b)(3) confirms that the rules stated in  
3 this Section are subject to override by the governing instrument.  
4

5 The Investment Company Act of 1940 requires a mutual fund's investment advisory  
6 contract, underwriting contract, fidelity bond, independent public accountants, and other such  
7 matters to be approved by the trustees of the mutual fund. See 15 U.S.C. § 80a-15(a); 15 U.S.C.  
8 80a-31(a); 17 C.F.R. § 270.17g-1. Investment advisory and underwriting contracts, and  
9 selection of independent public accountants, must be approved by the noninterested trustees at an  
10 in-person meeting. See 15 U.S.C. §80a-15(c); 15 U.S.C. 80a-31(a).  
11

## 12 **SECTION 413. NO RIGHTS OF TRUSTEE'S CREDITORS IN TRUST**

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

14 In the event that the trustee becomes insolvent or bankrupt, the trustee's creditors have no claim  
15 upon the assets of the statutory trust.

### 16 **Comment**

17 **Principal Sources** – Uniform Trust Code §507 (2000); Delaware Statutory Trust Act  
18 §3805.  
19

20 This section confirms that the personal creditors of a trustee have no recourse against the  
21 assets of the statutory trust. The rule of this section is familiar from the operation of common  
22 law trusts. See Uniform Trust Code Restatement §507 (2000); Restatement (Third) of Trusts  
23 §42 cmt. c (2003); Restatement (Second) of Trusts §308 (1959). The protection afforded by this  
24 section is also consistent with that provided by the Bankruptcy Code. Property in which the  
25 trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. See 11 U.S.C.  
26 §541(d). For a general discussion of asset partitioning rules in organizational law, see Henry  
27 Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 Yale L.J. 387  
28 (2000); Henry Hansmann & Ugo Mattei, The Functions of Trust Law: A Comparative Legal and  
29 Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998). See also Henry Hansmann, Reinier  
30 Kraakman, & Richard Squire, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333 (2006).  
31

## 32 **SECTION 414. TRUSTEE NOT LIABLE FOR ACTS, OMISSIONS, OR**

33 **OBLIGATIONS OF STATUTORY TRUST.** An obligation of a statutory trust, whether

34 arising in contract or tort or otherwise, is not an obligation of a trustee. A trustee, by reason of

1 being a trustee, is not liable to any person other than the statutory trust or a beneficial owner for  
2 any act, omission, or obligation of the statutory trust or any series thereof.

3 **Comment**

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

5 This section implements the concept that the statutory trust is an entity separate from its  
6 trustee by confirming that a trustee, as a manager of the statutory trust, is not liable for the debts,  
7 obligations, and liabilities of the statutory trust. As such, this section overrides the outmoded  
8 common law rule that held the trustee liable for the debts of the trust but that gave the trustee a  
9 right to indemnity out of the trust fund. Compare Restatement (Second) of Trusts §§244, 261  
10 (1959) (stating the old rule), with Uniform Trust Code §1010 (2000) (eliminating the personal  
11 liability of the trustee for debts, obligations, and liabilities arising in the trustee’s fiduciary  
12 capacity).

13  
14 Nothing in this Section limits the personal liability of the trustee to the statutory trust for  
15 breach of duty under Section 404.

16  
17 **SECTION 415. AGENTS, OFFICERS, EMPLOYEES, MANAGERS,**  
18 **COMMITTEES AND AGENTS NOT LIABLE FOR ACTS, OMISSIONS, OR**  
19 **OBLIGATIONS OF STATUTORY TRUST.** Any person acting pursuant to Section 104(b)(6)  
20 is not liable, by reason of acting in that capacity, to any person other than the statutory trust or a  
21 beneficial owner for any act, omission, or obligation of the statutory trust or any series thereof.

22 **Comment**

23  
24 **Principal Sources** – Delaware Statutory Trust Act §3803; Connecticut Statutory Trust  
25 Act §34-523.

26  
27 A statutory trust acts through agents. This section confirms that the statutory trust, not  
28 the statutory trust’s agents, is liable for the acts, omissions, and obligations of agents acting on  
29 the statutory trust’s behalf.

1 [ARTICLE] 5

2 BENEFICIARIES AND BENEFICIAL RIGHTS

3 SECTION 501. CONTRIBUTIONS BY BENEFICIAL OWNERS.

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

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

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

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

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

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

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

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

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

#### **Comment**

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

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

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

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

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

1 An interest so acquired by a statutory trust is canceled.

2 **Comment**

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

5  
6 A registered investment company organized as an open-end mutual fund generally is  
7 obligated to honor redemption requests by its shareholders at the net asset value per share next  
8 calculated after receipt of the request, with payment to be made in cash (or, in some cases, in  
9 kind) within seven days of the request. See 15 U.S.C. §80a-22(e); 17 CFR §270.22c-1. In  
10 narrowly defined circumstances, this redemption right and obligation may be postponed. See 15  
11 U.S.C. §80a-22(e). The redemption proceeds may be reduced by various fees retained by the  
12 fund and/or its selling agent (i.e., sales loads and redemption fees). See 17 CFR §§270.22c-2;  
13 270.6c-10.  
14

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

16 beneficial owner has the right to information relating to the affairs of the statutory trust  
17 reasonably related to the beneficial owner’s ability to enforce its rights as beneficial owner.

18 **Comment**

19 **Principal Source** – Delaware Statutory Trust Act §3819.

20  
21 Under Section 103(b)(8), a beneficial owner’s right to information under this section is  
22 not subject to override by the governing instrument. However, a beneficial owner’s right to  
23 information under this section is limited to information “necessary” for the beneficial owner to  
24 enforce its rights as such, and under Section 103(b)(8) the governing instrument may prescribe  
25 the standards by which “necessary” is determined if those standards are not “manifestly  
26 unreasonable.” Imposing a mandatory right to information critical to the beneficiary’s ability to  
27 enforce the trust is familiar law. See Restatement (Second) of Trusts §173 cmt. c (1959).  
28

29 Section 404 provides a comparable rule for a trustee’s right to information.  
30

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

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

34 (b) A beneficial interest in the statutory trust is personal property regardless of the nature



1 of the property of the statutory trust. A beneficial owner does not have any interest in specific  
2 property of the statutory trust.

3 (c) A beneficial interest in the statutory trust is freely transferable.

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

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

9 **[Moved to article 3's new section on series.]**  
10 **Comment**  
11

12 **Principal Source** – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust  
13 Act §34-516.  
14

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

22 Paragraph (c) provides as a default rule that a beneficial owner's interest in the statutory  
23 trust is freely transferable. Thus, this paragraph overrides the rule in some states, which would  
24 otherwise be applicable to a statutory trust pursuant to Section 105, that makes a common law trust  
25 spendthrift by default. See Jeffrey A. Schoenblum, 2007 Multistate Guide to Estate Planning Table  
26 9.05, Part 1, Column 2 (collecting authority). However, because the rule stated in paragraph (c) is  
27 not scheduled in Section 103(b), it is subject to override by the governing instrument. Section  
28 104(b)(2) confirms that the governing instrument may limit a beneficial owner's right to transfer  
29 its beneficial interest.  
30

31 Under Section 104(b)(12), the governing instrument may provide for the establishment of  
32 record dates for allocations and distributions.  
33

34 **SECTION 505. TRANSACTION WITH BENEFICIAL OWNER.** A beneficial

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

#### **Comment**

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

**SECTION 506. LIMITED LIABILITY OF BENEFICIAL OWNERS.** A beneficial owner has the same limitation of liability accorded to a shareholder of a domestic business corporation.

#### **Comment**

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

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

**SECTION 507. VOTING OR CONSENT BY BENEFICIAL OWNERS.** On any matter that is to be acted on by beneficial owners, the following rules apply:

(1) The beneficial owners act by majority of their vote. [For discussion: “majority of

1 **their vote” is unclear. What “vote” rights do the beneficial owners have? Per capita? Per**  
2 **capital?]**

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

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

#### 11 **Comment**

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

15  
16 Except for a conversion, merger, or dissolution under Article 6, nothing in this act  
17 provides for the beneficial owners to act on any matter. However, because the beneficial owners  
18 may be given such a right by the terms of the governing instrument, paragraph (a) supplies a  
19 default rule requiring a majority of the number of beneficial interests.

20  
21 Section 104(b)(3) confirms that the rules stated in this Section are subject to override by  
22 the governing instrument.

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

#### 27 28 **SECTION 508. DERIVATIVE ACTION.**

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

31 (1) the beneficial owner first makes a demand on the trustees, requesting that the

1 trustees cause the statutory trust to bring an action to enforce the right, and the trustees do not  
2 bring the action within a reasonable time; or

3 (2) a demand would be futile.

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

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

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

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

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

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

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

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

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

21 (e) If a derivative action on behalf of a statutory trust is successful in whole or in part, the  
22 court may award the plaintiff reasonable expenses, including reasonable attorney's fees and

1 costs, from the recovery by the statutory trust.

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

#### 4 **Comment**

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

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

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

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

1 [ARTICLE] 6

2 CONVERSION, MERGER, AND DISSOLUTION

3 SECTION 601. 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 602 through 605.

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

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

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

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

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

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

1 **Comment**

2 **Principal Source** – Uniform Limited Partnership Act §1101 (2001).  
3

4 This section contains definitions specific to this Article. Under Section 103(b)(10), this  
5 Section is not subject to override by the governing instrument.  
6

7 **SECTION 602. CONVERSION.**

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

11 (1) the other organization's governing statute authorizes the conversion;

12 (2) the conversion is not prohibited by the law of the jurisdiction that enacted the  
13 other organization's governing statute; and

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

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

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

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

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

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

23 **Comment**

24 **Principal Sources** – Uniform Limited Partnership Act §1102 (2001).  
25

26 In a statutory conversion an existing entity changes its form, the jurisdiction of its

governing statute, or both. For example, a statutory trust formed under the laws of one jurisdiction might convert to a corporation, limited liability company, or limited partnership under the laws of the same or another jurisdiction (referred to in some statutes as “domestication”).

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

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

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

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

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

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

(1) as provided in the plan; and

(2) except as prohibited by the plan, by the same consent as was required to approve the plan. **[For discussion: Style asks, “When does the authority to amend or abandon a plan end?”]**

**Comment**



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

2  
3           The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries  
4 is a default rule that may be overridden by the governing instrument. See Section 104(b)(4)(B).  
5 Hence, the governing instrument may state a different quantum of consent or provide a different  
6 approval mechanism. Varying this subsection’s rule means that a beneficial owner might be  
7 subject to a conversion (including a “squeeze out” conversion) without consent and with no  
8 appraisal remedy. If the converting organization is a statutory trust subject to this Act, the  
9 trustee of the converting organization is subject to the duties and obligations stated in this Act.  
10 Those duties would apply to the process and terms under which the conversion occurs.  
11 However, if the governing instrument allows for a conversion with less than unanimous consent,  
12 the mere fact that a beneficial owner objects to a conversion does not mean that a trustee that is  
13 favoring, arranging, consenting to, or effecting the conversion has breached a duty under this  
14 Act.  
15

16           In the case of a statutory trust that is a registered investment company organized as an  
17 open-end mutual fund, a shareholder may elect to redeem any or all beneficial interests in the  
18 statutory trust at the current net asset value per share, see 17 C.F.R. §270.22c-1, which is a price  
19 that is akin to an appraisal value. Except for limited circumstances, a mutual fund is required to  
20 pay proceeds to the redeeming shareholder within seven days of the date of redemption request.  
21 See 15 U.S.C. §80a-22(e). Thus, a mutual fund generally does not afford dissenting rights to its  
22 shareholders because any shareholder of a mutual fund being converted may redeem fund shares  
23 at net asset value prior to the closing date of the proposed conversion.  
24

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

26           (a) After a conversion is approved:

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

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

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

33  
34                           (C) a statement that the conversion was approved as required by this [act];

1 (D) a statement that the conversion is not prohibited by the governing  
2 statute of the converted organization; and

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

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

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

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

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

15 (b) A conversion becomes effective:

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

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

## 20 **Comment**

21 **Principal Source** – Uniform Limited Partnership Act §1104 (2001).  
22

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

1  
2 Under Section 103(b)(10), this Section is not subject to override by the governing  
3 instrument.  
4

5 **SECTION 605. EFFECT OF CONVERSION.**

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

8 (b) When a conversion takes effect:

9 (1) all property owned by the converting organization remains vested in the  
10 converted organization;

11 (2) all debts, obligations, or other liabilities of the converting organization  
12 continue as debts, obligations, or other liabilities of the converted organization;

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

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

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

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

22 (c) A converted organization that is a foreign organization consents to the jurisdiction of  
23 the courts of this state to enforce any debt, obligation, or other liability for which the converting  
24 statutory trust is liable, if, before the conversion, the converting statutory trust was subject to suit

1 in this state on the debt, obligation, or other liability. A converted organization that is a foreign  
2 organization and not authorized to transact business in this state appoints the [Secretary of State]  
3 as its agent for service of process for purposes of enforcing a debt, obligation, or other liability  
4 under this subsection. Service on the [Secretary of State] under this subsection is made in the  
5 same manner and with the same consequences as in Section 214(c) and (d).

#### 6 **Comment**

7 Principal Source – Uniform Limited Partnership Act §1105 (2001).  
8

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

14 Under Section 103(b)(10), this Section is not subject to override by the governing  
15 instrument.  
16

#### 17 **SECTION 606. MERGER.**

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

- 20 (1) the governing statute of each of the other organizations authorizes the merger;  
21 (2) the merger is not prohibited by the law of a jurisdiction that enacted any of the  
22 governing statutes; and  
23 (3) each of the other organizations complies with its governing statute in effecting  
24 the merger.

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

- 26 (1) the name and form of each constituent organization;  
27 (2) the name and form of the surviving organization and, if the surviving

1 organization is to be created by the merger, a statement to that effect;

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

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

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

#### 9 **Comment**

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

11  
12 For this Act to apply to a merger, at least one of the constituent organizations must be a  
13 statutory trust subject to this Act.

14  
15 A plan of merger may provide that some persons with interests in a constituent  
16 organization will receive interests in the surviving organization, while other persons with  
17 interests in the same constituent organization will receive some other form of consideration.  
18 Thus, a "squeeze out" merger is possible. As noted in the comment to Section 603, the duties  
19 and obligations stated in this Act apply to a trustee of a constituent organization that is a  
20 statutory trust subject to this Act. Those duties would apply to the process and terms under  
21 which a "squeeze out" merger occurs.

#### 22 **SECTION 607. ACTION ON PLAN OF MERGER BY CONSTITUENT**

##### 23 **STATUTORY TRUST.**

24  
25 (a) A plan of merger must be consented to by all trustees and beneficial owners of a  
26 constituent statutory trust.

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

29 (1) as provided in the plan; and

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

### **Comment**

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

The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries is a default rule that may be overridden by the governing instrument. See Section 104(b)(4)(B). Hence, the governing instrument may state a different quantum of consent or provide a completely different approval mechanism. Varying this subsection’s rule means that a beneficial owner might be subject to a merger (including a “squeeze out” merger) without consent and with no appraisal remedy. The trustee of a constituent statutory trust is subject to the duties and obligations stated in this Act, and those duties would apply to the process and terms under which the merger occurs. However, if the governing instrument allows for a merger with less than unanimous consent, the mere fact a beneficial owner objects to a merger does not mean that a trustee that is favoring, arranging, consenting to, or effecting the merger has breached a duty under this Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15                   (7) any additional information required by the governing statute of any  
16 constituent organization.

17                   (c) The articles of merger shall be filed in the [office of the Secretary of State].

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

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

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

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

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

3 **Comment**

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

5  
6 Under Section 103(b)(10), this Section is not subject to override by the governing  
7 instrument.  
8

9 **SECTION 609. EFFECT OF MERGER.**

10 (a) When a merger becomes effective:

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

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

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

16 (4) all debts, obligations, or other liabilities of each constituent organization that  
17 ceases to exist continue as debts, obligations, or other liabilities of the surviving organization;

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

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

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



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

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

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

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

8 (b) A surviving organization that is a foreign organization consents to the jurisdiction of  
9 the courts of this state to enforce any debt, obligation, or other liability owed by a constituent  
10 organization, if before the merger the constituent organization was subject to suit in this state on  
11 the obligation. A surviving organization that is a foreign organization and not authorized to  
12 transact business in this state appoints the [Secretary of State] as its agent for service of process  
13 for the purposes of enforcing a debt, obligation, or other liability under this subsection. Service  
14 on the [Secretary of State] under this subsection is made in the same manner and with the same  
15 consequences as in Section 215(c) and (d).

16 **Comment**

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

18  
19 Under Section 103(b)(10), this Section is not subject to override by the governing  
20 instrument.  
21

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

24 **Comment**

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

1  
2           **SECTION 611. DISSOLUTION OF STATUTORY TRUST. [For discussion, the**  
3 **four notes on this section that were circulated with this draft on a separate page styled**  
4 **“discussion notes regarding USTEA Section 611 (Dissolution of Statutory Trust).”]**

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

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

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

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

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

12                   (4) discharge or make reasonable provision for the liabilities of the statutory trust;

13  
14           and

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

16           (c) A statutory trust that has dissolved shall pay or make reasonable provision to pay all  
17 claims and obligations, including all contingent, conditional, and unmatured claims and  
18 obligations, known to the statutory trust and all claims and obligations that are known to the  
19 statutory trust but for which the identity of the claimant is unknown, in accordance with the  
20 following rules:

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

23                   (2) If there are insufficient assets, the claims and obligations must be paid or

1 provided for according to their priority and, among claims and obligations of equal priority,  
2 ratably to the extent of assets available therefor.

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

4 (d) Any person, including any trustee, that under the governing instrument is responsible  
5 for winding up a statutory trust's affairs which has complied with this section is not liable to the  
6 claimants of the statutory trust by reason of the person's actions in winding up the statutory trust.

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

11 **Section 203.]**

## 12 **Comment**

13  
14 **Principal Source** – Delaware Statutory Trust Act §3808; Delaware Limited Liability  
15 Company Act §18-805.

16  
17 Paragraph (a) provides as a default rule that a statutory trust may be dissolved by  
18 agreement of all the trustees and all the beneficiaries.

19  
20 Paragraph (e) provides for the possibility that after dissolution additional unfinished  
21 business of the statutory trust is discovered.

22  
23 Under Section 103(b)(11), this Section is not subject to override by the governing  
24 instrument.

25  
26 **[As noted above, we have four discussion issues on this section that were circulated with**  
27 **this draft on a separate page styled “discussion notes regarding USTEA Section 611**  
28 **(Dissolution of Statutory Trust).”]**

## 29 **SECTION 612. DISSOLUTION OF SERIES.**

30  
31 (a) A series may be dissolved and its affairs wound up without causing the dissolution of

1 the statutory trust or any other series thereof in accordance with the following rules:

2 (1) The dissolution, winding up, liquidation, or termination of any series does not  
3 affect the limitation of liability with respect to a series.

4 (2) A series is dissolved and its affairs must be wound up at the time or upon the  
5 happening of events specified in the governing instrument of the statutory trust.

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

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

15 **[For discussion: (1) The omission in this Section of several paragraphs in the**  
16 **comparable Section 611. (2) Whether this section should be moved into Section 306 on**  
17 **series.]**

## 18 **Comment**

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

20  
21 This section parallels and is analogous in scope and effect to Section 604, except that it  
22 applies to a series rather than the entire statutory trust. On the series concept, see the Comment  
23 to Section 306.

1 [ARTICLE] 7

2 FOREIGN STATUTORY TRUSTS

3 SECTION 701. GOVERNING LAW.

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

6 (1) the internal affairs of the foreign statutory trust;

7 (2) the liability of a beneficial owner as beneficial owner and trustee as trustee for  
8 the debts, obligations, or other liabilities of the foreign statutory trust; and

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

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

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

16 Comment

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

21  
22 Paragraph (a) parallels and is analogous in scope and effect to Section 303 for a domestic  
23 statutory trust. Paragraph (b) allows for a foreign statutory trust to operate domestically even if  
24 the law governing it is different from the laws governing domestic statutory trusts, but under  
25 paragraph (c) a foreign statutory trust cannot engage in any business or exercise any power that a  
26 domestic statutory trust could not.

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

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**SECTION 702. APPLICATION FOR CERTIFICATE OF AUTHORITY. A**

delivering an application to the [Secretary of State] for filing. The application must contain:

- (1) the name of the foreign statutory trust and, if the name does not comply with Section 209, an alternate name adopted pursuant to Section 706(a).
- (2) the name of the state or other jurisdiction under whose law the foreign statutory trust is formed;
- (3) the street and mailing addresses of the foreign statutory trust's principal office and, if the laws of the jurisdiction under which the foreign statutory trust is formed require it to maintain an office in that jurisdiction, the street and mailing address of the required office; and
- (4) the name and street and mailing addresses of the foreign statutory trust's initial agent for service of process in this state.

## Comment

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

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

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

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

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

- (1) the name of the qualified foreign statutory trust;

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

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

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

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

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

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

12 (d) An amendment or restated certificate of authority of a foreign statutory trust is  
13 effective as provided in Section 205(c).

#### 14 **Comment**

15  
16 **Principal Source** – Uniform Limited Partnership Act §202 (2001).

17  
18 Paragraph (a) provides a mechanism for updating a statutory trust's certificate of  
19 authority. Paragraph (b) imposes an obligation directly on the trustee rather than on the statutory  
20 trust.

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

#### 25 **SECTION 704. ACTIVITIES NOT CONSTITUTING TRANSACTING** 26 **BUSINESS.**

27 (a) Activities of a foreign statutory trust which do not constitute transacting business in

1 this state within the meaning of this [article] include:

2 (1) maintaining, defending, or settling an action or proceeding;

3 (2) holding meetings of its trustees or carrying on any other activity concerning  
4 its internal affairs;

5 (3) maintaining accounts in financial institutions;

6 (4) maintaining offices or agencies for the transfer, exchange, and registration of  
7 the foreign statutory trust's own beneficial interests or securities or maintaining trustees or  
8 depositories with respect to those beneficial interests or securities;

9 (5) selling through independent contractors;

10 (6) soliciting or obtaining orders, whether by mail or electronic means or through  
11 employees or agents or otherwise, if the orders require acceptance outside this state before they  
12 become contractual obligations;

13 (7) creating or acquiring indebtedness, mortgages, or security interests in real or  
14 personal property;

15 (8) securing or collecting debts or enforcing mortgages or other security interests  
16 in property securing the debts, and holding, protecting, or maintaining property so acquired;

17 (9) conducting an isolated transaction that is completed within 30 days and is not  
18 in the course of similar transactions; and

19 (10) transacting business in interstate commerce.

20 (b) This section does not apply in determining the contacts or activities that may subject a  
21 foreign statutory trust to service of process, taxation, or regulation under law of this state other  
22 than this [act].



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

3 **Comment**

4  
5 **Principal Sources** – Uniform Limited Partnership Act §903 (2001).  
6

7 The schedule of activities that in paragraph (a) that do not constitute transacting business  
8 in the state are illustrative and not exhaustive. As revised in 2006, the Delaware Statutory Trust  
9 Act contains a similar schedule. See 2006 Delaware Laws Ch. 418 §20 (H.B. 445), adding  
10 Delaware Statutory Trust Act §3863.

11  
12 Under Section 103(b)(1), this Section is not subject to override by the governing  
13 instrument.  
14

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

21 **Comment**

22  
23 **Principal Source** – Based on Uniform Limited Partnership Act §904 (2001).  
24

25 A certificate of authority filed under this section is different than a certificate of  
26 registration under Section 207.  
27

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

31 **SECTION 706. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.**

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

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

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

#### 11 **Comment**

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

14  
15 Under Section 103(b)(1), this Section is not subject to override by the governing  
16 instrument.  
17

#### 18 **SECTION 707. REVOCATION OF CERTIFICATE OF AUTHORITY.**

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

22 (1) appoint and maintain an agent for service of process;

23 (2) deliver for filing a statement of change within 30 days after a change has  
24 occurred in the name or address of the agent[;

25 (3) file an annual report; or

1 (4) pay, within 60 days after the due date, any fee, tax or penalty due to the  
2 [Secretary of State]].

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

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

10 (2) the basis for the revocation.

11 (c) Unless a foreign statutory trust cures the failures to comply with subsection (a) stated  
12 in the notice of revocation before the date state in the notice, the authority of the foreign  
13 statutory trust to transact business in this state ceases on that.

14 (d) If a foreign statutory trust cures the failures stated in the notice of revocation under  
15 subsection (c), the [Secretary of State] shall indicate that the foreign statutory trust is reinstated  
16 on the filed notice. The reinstatement of the statutory trust relates back for all purposes to the  
17 date of the notice of revocation.

18 **Comment**

19  
20 **Principal Source** – Uniform Limited Partnership Act §906 (2001).

21  
22 Paragraph (a)(3)-(4) is bracketed in recognition of the diversity of approaches among the  
23 states with respect to annual reports ((a)(3)) and taxes and other fees ((a)(4)). Uniformity is not  
24 expected.

25  
26 Under Section 103(b)(1), this Section is not subject to override by the governing  
27 instrument.

1  
2           **SECTION 708. CANCELLATION OF CERTIFICATE OF AUTHORITY;**  
3 **EFFECT OF FAILURE TO HAVE CERTIFICATE.**

4           (a) To cancel its certificate of authority to transact business in this state, a qualified  
5 foreign statutory trust must deliver to the [Secretary of State] for filing a notice of cancellation  
6 that states:

7                   (1) the name of the foreign statutory trust;

8                   (2) the date of filing of its initial certificate of authority;

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

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

11           (b) A certificate of authority under subsection (a) is canceled when the notice of  
12 cancellation becomes effective under Section 205. **[For discussion, whether to split this**  
13 **section into two, with (a) and (b) as cancellation of certificate of authority, and the rest as**  
14 **effect of failure to have a certificate.]**

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

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

20           **[For discussion, whether to add a provision based on ReULLCA 808(c), which says**  
21 **“A member or manager of a foreign limited liability company is not liable for the debts,**  
22 **obligations, or other liabilities of the company solely because the company transacted**

1 **business in this state without a certificate of authority.”]**

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

5 **Comment**

6  
7 **Principal Source** – Uniform Limited Partnership Act §907 (2001).

8  
9 Under Section 103(b)(1), this Section is not subject to override by the governing  
10 instrument.  
11

12 **SECTION 709. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]  
13 may maintain an action to enjoin a foreign statutory trust from transacting business in this state  
14 in violation of this [article].

15 **Comment**

16  
17 **Principal Source** – Uniform Limited Partnership Act §908 (2001).

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

1 [ARTICLE] 8

2 MISCELLANEOUS PROVISIONS

3 [For discussion: Rutledge urges that we include a reservation of power to amend or  
4 repeal clause. Such a clause appeared in an earlier draft, but was later removed when the  
5 conference dropped the clause from its routine boilerplate.]

6 SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In  
7 applying and construing this uniform act, consideration must be given to the need to promote  
8 uniformity of the law with respect to its subject matter among states that enact it.

9 Comment

10  
11 Principal Source – Uniform Limited Partnership Act §1201 (2001).

12  
13 Under Section 103(b)(1), this Section is not subject to override by the governing  
14 instrument.  
15

16 SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL  
17 AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the federal  
18 Electronic Signatures in Global and National Commerce Act[, 15 U.S.C. Section 7001 et seq.],  
19 but this [act] does not modify, limit, or supersede Section 101(c) of that act or authorize  
20 electronic delivery of any of the notices described in Section 103(b) of that act.

21 Comment

22  
23 Principal Source – Uniform Limited Partnership Act §1203 (2001).

24  
25 Under Section 103(b)(1), this Section is not subject to override by the governing  
26 instrument.  
27  
28



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

3  
4 **Comment**

5  
6 **Principal Source** – Uniform Limited Partnership Act §1206 (2001).

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

12  
13 Consistent with Section 302, paragraph (b) of this Section prohibits a common law trust  
14 with a prevailingly donative purpose from converting to a statutory trust.

15  
16 The drafting committee contemplated that some enacting jurisdictions might modify this  
17 section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not  
18 expected—to address other transition problems arising from differences between this Act and  
19 prior law. **[For discussion: States that lack a reserved power clause. Perhaps the answer is**  
20 **simply to remark the problem in this comment?]**  
21

22 **SECTION 805. REPEALS.** On [all-inclusive date], the following acts are repealed:

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

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

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

29 **Comment**

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

31  
32 Paragraphs (1) and (2) supply model language for enacting jurisdictions that have  
33 previously enacted a Statutory Trust Act or a Business Trust Act.  
34



1 Paragraph (3) supplies model language for enacting jurisdictions that have previously  
2 enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a  
3 REIT, is not a type of trust but rather is a tax status awarded to any business entity that qualifies  
4 under 26 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit  
5 under 26 U.S.C. §860D. In spite of the use of the word “trust” in its title, there is no reason why  
6 a REIT must be organized as a trust, whether statutory or common law. Indeed, in contemporary  
7 practice nearly all publicly-traded REITs are organized as Maryland corporations, not as trusts.  
8 See Robert H. Sitkoff, The Rise of the Statutory Business Trust \_\_ [citation]. Nonetheless, a  
9 number of states have enacted REIT statutes that authorize the creation of a REIT-specific entity  
10 designed to qualify as a REIT under the Internal Revenue Code. Because a statutory trust under  
11 this Act could serve the same purpose, the drafting committee contemplated that enacting  
12 jurisdictions might take the occasion of enacting this act to repeal their REIT statutes.

13  
14 Under Section 103(b)(1), this Section is not subject to override by the governing  
15 instrument.  
16

17 **SECTION 806. EFFECTIVE DATE.** This [act] takes effect . . . .

18 **Comment**  
19

20 **Principal Source** – Uniform Limited Partnership Act §1204 (2001).  
21

22 Section 804 specifies how this Act affects statutory trusts, with special provisions  
23 pertaining to statutory trusts formed before the Act’s effective date. Section 804 contains no  
24 comparable provisions for foreign statutory trusts. Therefore, once this Act is effective, it  
25 applies immediately to all foreign statutory trusts, whether formed before or after the Act’s  
26 effective date.  
27

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