

DRAFT
FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

| For ~~November 16-18, 2007~~ Spring 2008 Drafting Committee Meeting

With Prefatory Notes and Comments

Copyright ©2007
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

DRAFTING COMMITTEE ON UNIFORM STATUTORY TRUST ENTITY ACT

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

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

THOMAS J. BUIREWEG, 200 Renaissance Ct., Mail Code 482-B09-B11, P.O. Box 200,
Detroit, MI 48265-2000

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

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

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

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

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

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

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

ROBERT H. SITKOFF, Harvard Law School, 1575 Massachusetts Ave., ~~Hauser Hall 200~~,
Cambridge, MA 02138, *Reporter*

EX OFFICIO

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

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

AMERICAN BAR ASSOCIATION ADVISOR

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

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

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

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 211 E. Ontario St., Suite 1300, Chicago, IL 60611, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

UNIFORM STATUTORY TRUST ENTITY ACT

TABLE OF CONTENTS

[OMITTED]

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 a corporate form of organization.

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

~~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). The statutory trust has also come to be used in various tax-advantaged real estate transactions. See, e.g., Rev. Rul. 2004-86, 2004-33 *IRB* 191.~~

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 formed by delivering a certificate of trust to a public official, typically the Secretary of State, for filing in the public record. See Section 201. Moreover, a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue, be sued, and transact ~~over property~~ in its own name. See Sections 301, 307-308.

~~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.

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). The statutory trust has also come to be used in various tax-advantaged real estate transactions. See, e.g., Rev. Rul. 2004-86, 2004-33 IRB 191.

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

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

In choosing to follow Delaware, the drafting committee relied on a recent study that presents state-level data on the aggregate number of statutory trusts and the number of new statutory trust formations over the last several years. See Sitkoff, *supra*, at ___. These data indicate that the Delaware Act dominates the field. *Id.* at ___. ~~A further reason for following the Delaware model was to ensure that a statutory trust under this act would receive treatment under applicable regulatory law similar to that of a Delaware statutory trust.~~ For a general 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, several substantive provisions of this Act ~~were~~ are drawn from corporate law, ~~not from~~ rather than trust law. See, e.g., Sections 401 (management by or under the authority of the trustees); 404 (standards of conduct of trustees); 408 (interested transactions). 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) and the Revised Uniform Limited Liability Company Act (2006) as its starting points. For guidance on the

common law of trusts, the drafting committee took the Uniform Trust Code (2000) as its starting point, referencing also the Second and Third Restatements of Trusts.

Innovative Provisions. Although much of the Uniform Statutory Trust Entity Act reflects a reorganization and refinement of provisions found in the Delaware Statutory Trust Act, the Uniform Act contains several innovations including: (1) specification of rules that are not subject to override in the statutory trust's governing instrument (§103(c)); (2) exclusion of trusts with a prevaillingly donative purpose (§302); (3) clearer guidance on the applicability of ordinary trust law to statutory trust entities (§105); (4) clearer guidance on the relationship between the common law trust and statutory trust entities (§905); ~~and~~ (5) systematic treatment of conversion and merger (Article 6), and of dissolution (Article 7); and an entire article on series trusts (Article 3A [placeholder]).

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

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

There is, however, no separate body of general business law that applies ~~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 arising under the common law, even those that have a business purpose, to the extent that the common law is not displaced by the trust instrument or specialized legislation. For this reason, although the Uniform Trust Code "is directed primarily at trusts that arise in an estate planning or other donative context," the Code applies to trusts that have a business or commercial purpose to the extent that the trust instrument or other legislation do not displace the Code's provisions. 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 905(a) expressly confirms the continued applicability of the state's laws pertaining to trusts to a common law business trust.

The Uniform Statutory Trust Entity Act more closely resembles a generic corporate code

or unincorporated entity law than the Uniform Trust Code. Like a corporation, limited liability company, and limited partnership, but unlike a common law trust, a statutory trust is a juridical entity that may conduct transactions in its own name separate from that of its fiduciary and its beneficial owners. See Sections 301, 307-08. Like those entities, but unlike a common law trust, a statutory trust is formed by delivering a certificate of trust to a public official for filing. Compare Section 201 with Uniform Trust Code §401 (2000) and Restatement (Third) of Trusts §10 (2003). Further, Section 105 provides that ordinary trust law supplements this Act, but only to the extent not modified or displaced by this Act or the governing instrument—and this Act modifies or displaces a host of ordinary trust law principles including those concerning fiduciary standards of conduct (Section 404) and termination of trusts (Section 306). Section 905(b) allows an existing common law trust that does not have a prevailingly donative purpose to convert into a statutory trust by delivering a certificate of trust for filing under Section 201.

Although the drafting committee contemplated that a statutory trust under this Act will be used primarily as a mode of business organization, Section 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 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. For discussion of the nonapplicability to a statutory trust of the mandatory rules applicable to common law trusts (including Uniform Trust Code §105), see the comment to Section 103 under the heading “Relationship to Mandatory Rules Under the Uniform Trust Code” and the comments to Sections 105 and 302.

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

1 **UNIFORM STATUTORY TRUST ENTITY ACT**

2
3 **[ARTICLE] 1**

4 **GENERAL PROVISIONS**

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

7 **Comment**

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

16 The drafting committee included the word “entity” in the title for two reasons. First, the
17 creature of this act is indeed a trust entity. It has the power to sue, be sued, and transact over
18 property in its own name. A common law trust, by contrast, is not a juridical entity. Second, the
19 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 usage under the
21 Delaware Statutory Trust Act, the entity that arises under this Act is called a “statutory trust,”
22 not a “statutory trust entity.” See Section 102(14). Further, because the drafting committee
23 wanted a statutory trust under this act to receive treatment under applicable regulatory law
24 similar to that of a Delaware statutory trust, the entity features of a statutory trust under this act
25 closely resemble those of a Delaware statutory trust.
26

27 The drafting committee had three reasons for eschewing the phrase “business trust.”
28 First, under this act a statutory trust need not have a business or commercial purpose. On the
29 contrary, Section 302 confirms that a statutory trust may have any lawful purpose other than a
30 prevailingly donative purpose.
31

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

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

4
5 Third, the drafting committee was influenced by the revealed preference for “statutory
6 trust” over “business trust” among existing users of statutory business trusts as evidenced by the
7 dominant position of the Delaware Statutory Trust Act relative to the statutory or business trust
8 acts of the other states. See Robert H. Sitkoff, The Rise of the Statutory Business Trust [in
9 progress]. In 2002 Delaware recast the “Delaware Business Trust Act” as the “Delaware
10 Statutory Trust Act,” replacing nearly every reference to “business trust” with “statutory trust.”
11 See 73 Del. Laws 329 (2002). The Connecticut statute, which is the second most popular, is
12 likewise cast as a Statutory Trust Act. See Connecticut Statutory Trust Act §§34-500, 34-
13 501(2).

14 15 **SECTION 102. DEFINITIONS.**

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

18 (2) “Certificate of trust” means the record that is delivered to the [Secretary of State] for
19 filing under Section 201 and the record as amended or restated.

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

26 (4) “Designated office” means:

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

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

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

jurisdiction other than this state and is required by those laws to file a record with a public official in that jurisdiction.

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

(7) “Jurisdiction” means a state or a foreign country ~~For Discussion: Question from style about whether we do indeed mean to include “a foreign country.”~~.

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

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

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

(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; or

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

1 control of, the person.

2 (11A [placeholder]) “Series” means [For Discussion: Whether to define “series,” and
3 if so, how to do so?]

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

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

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

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

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

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

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

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

18 **Comment**

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

23
24 Paragraphs (2), (6), and (16) define “certificate of trust,” “governing instrument,” and
25 “trust instrument” respectively. The certificate of trust is the record that under Section 201 must
26 be filed with delivered to a public official under Section 201 for filing to form a statutory trust.
27 The trust instrument is the transaction document that provides for the governance of the affairs
28 of the statutory trust and that need not be made part of the public record. Together, the
29 certificate of trust and the trust instrument compose the governing instrument. The term

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

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

10
11 Paragraph (11) defines the term “related person,” which is used in Sections 408 and 505
12 concerning the legality of certain interested transactions. In using but not defining the term
13 “substantial” in Paragraph (11)(D), the drafting committee contemplated that a totality of the
14 circumstances test would apply. Section 406 defines the term “independent trustee” with respect
15 to a statutory trust that is an investment company under the Investment Company Act of 1940.

16
17 Paragraph (11A) defines “series” [Commentary re series definition, provided a
18 definition is given.]

19
20 Paragraph (17) defines “trustee” as a person designated as such in accordance with the
21 governing instrument or applicable law. For discussion of trustee appointment, see the Comment
22 to Section 401.
23

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

25 (a) Subject to subsection (c) and the terms of the governing instrument, this [act] governs
26 the management and affairs of the statutory trust and the rights, interests, duties, obligations, and
27 powers of, and the relations among, the trustees, beneficial owners, and other persons.

28 (b) Subject to subsection (c), a governing instrument may contain:

- 29 (1) any provision relating to the management and affairs of the statutory trust;
30 (2) any provision relating to the rights, interests, duties, obligations, and powers
31 of the trustees, beneficial owners, and other persons; and
32 (3) any other provision that is not inconsistent with this [act].

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

- 34 (1) [Articles] 2, 7, 8 and 9;

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

2 (3) the choice of governing law as provided in Section 303;

3 (3A [placeholder]) [For Discussion: Which provisions of Article 3A should
4 be mandatory?]

5 (4) the standards of conduct for trustees under Section 404, but the governing
6 instrument may prescribe the standards by which good faith, best interests of the statutory trust,
7 and care that a person in a like position would reasonably believe appropriate under similar
8 circumstances are determined, if the standards are not manifestly unreasonable;

9 (5) the limitations provided in Section 405(b) on direction of trustees that are
10 manifestly contrary to the terms of the governing instrument or would constitute a serious breach
11 of trust;

12 (6) the right of a trustee to information under Section 407, but the governing
13 instrument may prescribe the standards for assessing whether information is reasonably related
14 to the trustee's discharge of the trustee's duties as trustee, if the standards are not manifestly
15 unreasonable;

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

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

22 (8A[placeholder]) the right of a judgment creditor of a beneficial owner to seek a
23 charging order under Section 504A[placeholder].

(9) the right of a beneficial owner to bring a derivative action under Section 507, but the governing instrument may ~~modify the terms of Section 507 to~~ subject the right to additional standards and restrictions including the requirement that beneficial owners owning a specified amount or type of beneficial interest join in bringing the derivative action, if the additional standards and restrictions are not manifestly unreasonable; and

(10) Sections 601, 604, 605, 608, and 609. ~~[For Discussion: Excluded sections of Article 6].~~

Comment

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

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

Default Rules. Paragraphs (a) and (b) emphasizes that the Uniform Statutory Trust Entity Act is primarily a default statute. Most of the Act’s provisions may be overridden by the terms of the governing instrument.

Mandatory Rules. Paragraph (c) schedules the provisions of this act that are not subject to override in the governing instrument of a statutory trust. Most concern the rights of nonparties or public filing and notice requirements. By contrast, with two exceptions all the provisions of this Act concerning the powers and duties ~~and powers~~ of a trustee, relations among trustees, and the rights and interests of a beneficial owner may be overridden or at least altered by the terms of the governing instrument. The first exception is the mandatory prohibition of indemnification, advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless indifference in paragraph (c)(7). This exception is familiar trust law. See Restatement (Second) of Trusts §222 (1959); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees §542 (rev. 2d ed. 1993); Uniform Trust Code §1008 (2000). See also John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1121-25 (2004). The Delaware Statutory Trust Act likewise limits the permissible scope of exoneration. See Delaware Statutory Trust Act §3806(e), which provides that the “governing instrument may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing instrument may not eliminate the implied contractual covenant of good faith and fair dealing.” Limitations on permissible exoneration are also familiar corporate and alternative entity law. See, e.g., Delaware General Corporation Law §102(b)(7); Delaware Limited Liability Company

1 Act §18-1101.

2
3 The second exception is contained in paragraph (c)(5), which makes mandatory the
4 invalidity under Section 405(b) of a direction to a trustee or other person that is manifestly
5 contrary to the terms of the governing instrument or would constitute a serious breach of
6 fiduciary duty. The reference to serious breach of fiduciary duty is designed to exclude an
7 inconsequential, immaterial, or technical breach that does not harm a beneficial owner. For
8 some purposes, trust law distinguishes between serious and not serious breaches of trust. See,
9 e.g., Uniform Trust Code §706(b)(1) (2000); Austin W. Scott, William F. Fratcher, & Mark L.
10 Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed. 2006); Restatement (Second) of
11 Trusts §107 cmt. b (1959). However, the effect of paragraph (c)(5) is limited by paragraph
12 (c)(4), which allows the trustee's fiduciary duty to be altered by the governing instrument if the
13 alteration is not manifestly unreasonable.

14
15 Paragraphs (c)(4), (c)(6), (c)(8), and (c)(9) allow the governing instrument to alter the
16 nature of the trustee's fiduciary obligation, the right of a trustee to information, the right of a
17 beneficial owner to information, and the right of a beneficial owner to bring a derivative action,
18 but only if the alteration is not "manifestly unreasonable." In opting for the "manifestly
19 unreasonable" standard instead of Delaware's "good faith and fair dealing" formulation, see
20 Delaware Statutory Trust Act §3806(c) and (e), the drafting committee took notice of the use of
21 the term "manifestly unreasonable" in Revised Uniform Limited Liability Company Act §110(d)
22 (2006); Uniform Limited Partnership Act §110(b) (2001), Revised Uniform Partnership Act
23 §103(b) (1997), Uniform Limited Liability Company Act §103(b) (1996), and intended a similar
24 meaning here. See also Mark J. Loewenstein, Fiduciary Duties and Unincorporated Business
25 Entities: In Defense of the "Manifestly Unreasonable" Standard, 41Tulsa L. Rev. 411 (2006).

26
27 ~~Because paragraph (e) refers specifically to other sections of the Act, enacting~~
28 ~~jurisdictions that modify those other sections may also need to modify paragraph (e).~~
29

30 **Relationship to Mandatory Rules Under and the Uniform Trust Code.** Under
31 Section 105(a) of this act, provides that the law of this state pertaining to common-law trusts
32 supplements this act. However, Section 105(b) provides that, subject only to the mandatory
33 rules scheduled above in Section 103(c), the governing instrument of a statutory trust may
34 override or modify the application to the statutory trust of any rule pertaining to common-law
35 trusts, to the extent that such law is not displaced by this act or the governing instrument. Hence
36 Accordingly, in an enacting jurisdiction that has also enacted the Uniform Trust Code (UTC),
37 the UTC will apply to a statutory trust, but only to the extent that the Code's provisions are not
38 displaced by this act or the governing instrument. However, because paragraph (e) of this section
39 does not make Section 105 of this act mandatory, the No provision of the UTC, including the
40 rules stated in UTC §105 that are mandatory with respect to a common law trust, are not is
41 mandatory with respect to a statutory trust. Likewise, regardless of whether an enacting
42 jurisdiction has also enacted the UTC, any common law rule that is mandatory with respect to a
43 common law trust may nonetheless be overridden with respect to a statutory trust by the
44 governing instrument of the statutory trust. TIn sum, the governing instrument of a statutory
45 trust may override or alter any rule of trust law other than those scheduled in §103(c) of this act.
46 **[For Discussion: This paragraph has been reworked. But is it more clear? And can it be**

1 | improved further?]

2
3 | To prevent evasion of the public policy limitations on donative transfers that underpin the
4 UTC's mandatory rules applicable to a common-law trust, see John H. Langbein, Mandatory
5 Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105 (2004), ~~which enforce public policy~~
6 ~~limitations on donative transfers,~~ Section 302 of this Act provides that a statutory trust may not
7 have "a prevailingly donative purpose." For further discussion of the relationship between this
8 Act, the common law, and the Uniform Trust Code, see the Prefatory Note to this Act under the
9 heading "Relationship to Common Law Trusts and the Uniform Trust Code" and the comments
10 to Sections 105 and 302.

11
12 **Registered Investment Companies.** The Investment Company Act of 1940 (the "1940
13 Act") trumps this Act with respect to a statutory trust that registers as an investment company.
14 For such a statutory trust the 1940 Act imposes additional mandatory rules. See, e.g., the
15 Comments to Sections 207 (name of statutory trust), 408 (interested transactions), 410
16 (indemnification, advancement, and exoneration), 411 (delegation by trustee), and 412 (action by
17 trustees).

18 19 **SECTION 104. SCOPE OF GOVERNING INSTRUMENT.**

20 (a) Subject to Section 103(c), a governing instrument may:

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

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

24 (3) provide for one or more series under Article 3A. ~~[To be updated after series~~
25 ~~provisions are set];~~

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

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

30 (B) waiver of notice;

31 (C) action by consent without a meeting;

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

1 person, by proxy, any form of communication that creates a record, telephone, or video
2 conference, or in any other manner; or

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

4 (5) provide for any action to be taken without the vote or approval of any
5 particular trustee or beneficial owner, or any class, group, or series of trustees or beneficial
6 owners, including:

7 (A) amendment of the governing instrument;

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

9 (C) appointment of one or more trustees;

10 (D) sale, lease, exchange, transfer, pledge or other disposition of all or any
11 part of the assets of the statutory trust or the assets of any series ~~thereof~~**[To be updated after**
12 **series provisions are set]**; and

13 (E) dissolution of the statutory trust;

14 (6) provide for the present or future creation of more than one statutory trust,
15 including the creation of a future statutory trust to which all or any part of the assets, liabilities,
16 profits, or losses of any existing statutory trust may be transferred or exchanged, and for the
17 conversion of beneficial interests in an existing statutory trust, or series thereof~~[To be updated~~
18 ~~after series provisions are set]~~, into beneficial interests in the separate statutory trust, or series
19 thereof~~[To be updated after series provisions are set]~~**[For Discussion: Whether to collect**
20 **these scattered “or series thereof” references into a single section at the end of Article 3A.]**

21 (7) provide for the appointment, election, or engagement of agents or independent
22 contractors of the statutory trust or delegates of the trustees, or agents, officers, employees,
23 managers, committees, or other persons that may manage the business and affairs of the statutory

1 trust, which may have such titles and such relative rights, powers, and duties as the governing
2 instrument provides;

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

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

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

15 (11) provide that a person may comply under paragraph (10) by a representative
16 authorized by the person orally, in a record, or by conduct;

17 (12) provide that the statutory trust or the trustees, acting for and on behalf of the
18 statutory trust, are deemed to hold beneficial ownership of any income earned on securities held
19 by the statutory trust that are issued by any business entity formed, organized, or existing under
20 the laws of any jurisdiction; and

21 (13) provide for the establishment of record dates for distributions.

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

provisions relating to the governance of the affairs of the statutory trust and the conduct of its business.

Comment

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

The unusual principal sources citation reflects the drafting committee’s decision to collect in a single section various permissive rules regarding the scope of the governing instrument that are scattered throughout the Delaware and Connecticut Statutory Trust Acts. The main exceptions concern the statement of permissive rules regarding the creation of one or more series of a statutory trust in Section 309301A[~~To be updated after series provisions are set~~][Further updating may be required depending on the resolution of the discussion note embedded in paragraph (a)(6).], and the permissive rules regarding the allowable remedies for a beneficial owner’s breach in Section 501(c).

By scheduling a nonexhaustive list of provisions that may validly be included in a statutory trust’s governing instrument, this section is the permissive rule analogue to Section 103(c), which schedules the mandatory rules that cannot be overridden in the governing instrument. The drafting committee concluded that the demand of third parties and transactional planners to see language that expressly authorizes specific terms justified inclusion of a detailed list in addition to the broad statement of freedom of contract in Sections 103(a)-(b) and 106. Statutory confirmation reduces transaction costs by resolving doubts in practice over the permissibility of such provisions. Similar reasoning underlies the provision of a detailed schedule of powers in Uniform Trust Code §816 (2000) in addition to the broad general statement in Uniform Trust Code §815.

SECTION 105. APPLICABILITY OF TRUST LAW.

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

(b) Subject to section 103(c), the governing instrument may override or modify the application to the statutory trust of any law of this state pertaining to common-law trusts, except to the extent modified or displaced by this [act] or, subject only to section 103(c), the governing instrument. ~~[For Discussion: (1) Whether this edit is sufficient to address the question from the floor about the nonapplicability of the UTC/common law mandatory rules. (2) Question from the floor about “supplements.”]~~

Comment

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

3
4 **Trust Law Supplements this Act.** Consistent with the Delaware Statutory Trust Act,
5 the Uniform Statutory Trust Entity Act Paragraph (a) provides that state trust law, not corporate
6 law, supplements this Act and the terms of the governing instrument. Thus, in an enacting
7 jurisdiction that has also enacted the Uniform Trust Code, the Code will apply to a statutory trust
8 to the extent that the Code's provisions—including the mandatory rules scheduled in UTC
9 §105—are not displaced by this act or the governing instrument. Under this act, the governing
10 instrument of a statutory trust may override any otherwise applicable rule except for those
11 scheduled in §103(c). For further discussion, see the comment to Section 103 under the heading
12 "Relationship to Mandatory Rules Under the Uniform Trust Code."

13
14 —In looking to trust law to supply defaults to fill gaps in this act and the governing
15 instrument, the drafting committee was strongly influenced by the revealed preference for trust
16 law among existing users of statutory trusts as evidenced by the popularity of the Delaware
17 Statutory Trust Act, which likewise looks to trust law, as compared in comparison to the business
18 trust acts (such as those in Arizona, Indiana, Kansas, Mississippi, Montana, Oregon, Tennessee,
19 Washington, and West Virginia) that look to corporate law. See Robert H. Sitkoff, The Rise of
20 the Statutory Business Trust [in progress].

21
22 **No Mandatory Rules Other Than Those Scheduled in Section 103(c).** Paragraph (b)
23 confirms that, except for the mandatory rules scheduled in §103(c), the governing instrument
24 may override any rule or law pertaining to common-law trusts that would otherwise be
25 applicable to a statutory trust under paragraph (a). For further discussion, see the comment to
26 Section 103 under the heading "Relationship to Mandatory Rules and the Uniform Trust Code."

27
28 **Relationship to the Uniform Trust Code.** In an enacting jurisdiction that has also
29 enacted the Uniform Trust Code, the joint effect of paragraphs (a) and (b) is to make the Code
30 applicable to a statutory trust, but only to the extent that the Code's provisions—including the
31 mandatory rules scheduled in UTC §105—are not displaced by this act or the trust's governing
32 instrument. For further discussion, see the comment to Section 103 under the heading
33 "Relationship to Mandatory Rules and the Uniform Trust Code."

34
35 **Remedies.** The rules pertaining to common-law trusts that, unless the governing
36 instrument provides otherwise, are absorbed by this Section for application to a statutory trust
37 include a well-developed law of remedies for breach of trust. See 4 Austin Wakeman Scott,
38 William F. Fratcher, & Mark L. Ascher, 2 Scott and Ascher on Trusts §24.9 (5th ed. 2006);
39 Uniform Trust Code §1002 (2000). However, because a statutory trust is itself an entity, when a
40 breach of trust damages the trust rather than a beneficial owner directly, such remedies are
41 properly sought in a derivative suit under Section 507 rather than a direct suit by the beneficiary.

42
43 —[For Discussion: We received a suggestion from the floor to the effect that in this
44 comment or elsewhere we should schedule important trust law rules that are absorbed by
45 this section—for example, election of remedies. An alternative suggestion was that we
46 draft explicitly on some of those issues, particularly election of remedies and release of

1 ~~liability for trustees. Election of remedies may indeed warrant a section, as it is~~
2 ~~complicated by the entitization of the trust. Routine breaches of trust by the trustee will~~
3 ~~likely cause damage to the trust rather than to an individual beneficiary, hence a suit for~~
4 ~~redress would be derivative. But a derivative suit is a procedural mechanism unknown in~~
5 ~~the common law of trusts, and the derivative nature of the suite bears on the available~~
6 ~~remedies.]~~
7
8
9

10 SECTION 106. RULES OF CONSTRUCTION.

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

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

15 Comment

16
17 **Principal Sources** – Delaware Statutory Trust Act §3825; Connecticut Statutory Trust
18 Act §34-546; Uniform Statute and Rule Construction Act §18 (1995).
19

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

23 Paragraph (b) admonishes the courts not to apply to this Act the canon of construction
24 that statutes in derogation of the common law are to be strictly construed. The drafting
25 committee included this admonition because several of this Act's provisions are designed
26 specifically to reject the application to a statutory trust of one or more common law trust
27 principles. See, e.g., Sections [citations to be filled in after section numbers have settled].
28 Those provisions, which deliberately derogate the common law, should be interpreted in accord
29 with that purpose.

1 [ARTICLE] 2

2 FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

3 SECTION 201. CERTIFICATE OF TRUST.

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

6 (b) A certificate of trust must contain:

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

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

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

11 (4) notice if the trust might have one or more series under Section

12 301A[placeholder] ~~[To be updated after series provisions are set].~~

13 ~~—— [Placeholder Note: This schedule of requirements for the certificate of trust might~~
14 ~~require revision depending on the outcome of our discussion of the self-settled asset~~
15 ~~protection trust problem.]~~

16
17 (c) A certificate of trust may contain any information in addition to that required by
18 subsection (b) which is not inconsistent with this [act].

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

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

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

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

Comment

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

Unlike a common law trust, a statutory trust is a creature of statute that requires a filing with the state to come into existence. Filing rules are typical of limited liability entities. Such filing rules serve a notice function, alerting interested parties to creation and existence of a new limited liability juridical entity. See Section 204(b), which entitles any person to a certified copy of a filing made pursuant to this act.

A statutory trust comes into existence only if (1) a certificate of trust is prepared and delivered to the specified public official for filing, and (2) the public official files the certificate. (For more on the meaning of “filing,” see Section 204 and the comment thereto.) The certificate of trust provides notice to interested third parties of the existence of the statutory trust and the identification of the statutory trust’s initial agent for service of process. Pursuant to Section ~~309(b)~~305A(2), the certificate of trust also puts third parties on notice if the statutory trust further segregates its assets and liabilities by creating one or more series~~[To be updated after series provisions are set].~~

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

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

SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF TRUST.

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

1 (1) the name of the trust;

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

3 (3) the changes that any amendment makes to the certificate.

4 (b) A trustee that knows or has reason to know that any information in a filed certificate
5 of trust was incorrect when the certificate was filed or has become incorrect owing 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.

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

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

14 (e) Subject to Section 204(c), an amended or restated certificate is effective when filed by
15 the [Secretary of State].

16 **Comment**

17
18 **Principal Sources** – Uniform Limited Partnership Act §202 (2001); Delaware Statutory
19 Trust Act §3810; Connecticut Statutory Trust Act §34-503.

20
21 Paragraph (a) provides a mechanism for updating a statutory trust's filed certificate of
22 trust. Paragraph (b) imposes an obligation directly on the trustee rather than on the statutory
23 | trust. ~~[For Discussion: That the obligation is on the trustee, not the trust.]~~

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

27 28 **SECTION 203. SIGNING OF RECORDS.**

29 (a) A record delivered to the [Secretary of State] for filing pursuant to this [act] must be

signed by at least one of the trustees.

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

Comment

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

Paragraph (b) confirms that the signing of a public record by a trustee is a delegable act.

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

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

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

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

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

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

1 of the date and time on the record;

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

4 (3) if the record specifies a delayed effective date but not an effective time, at
5 12:01 a.m. on the earlier of:

6 (A) the specified date; or

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

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

10 (A) the specified date; or

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

12 **Comment**

13
14 **Principal Sources** – Uniform Limited Partnership Act §206 (2001); Delaware Statutory
15 Trust Act §3812; Connecticut Statutory Trust Act §34-505.

16
17 For a record prepared by a private person to become part of the public record under this
18 Act, (1) someone must put a properly prepared version of the record into the possession of the
19 public official specified in the Act as the appropriate filing officer, and (2) the filing officer must
20 determine that the record complies with the filing requirements of this Act and then officially
21 make the record part of the public record. This Act refers to the first step as “delivery to the
22 [Secretary of State] for filing” and refers to the second step as “filing.” Thus, under this Act
23 “filing” is an official act.

24
25 Under paragraph (a), the caption need only indicate the title of the record—for example,
26 “Certificate of Trust” or “Statement of Change for Statutory Trust.” Filing officers typically
27 note on a filed record the fact, date, and time of filing. Copies provided by the filing officer
28 under paragraph (a) should contain that notation. This Act does not provide a remedy if the
29 filing officer wrongfully fails or refuses to file a record.

30
31 Paragraph (c) allows most records to have a delayed effective date, up to 90 days after
32 the date the record is filed by the filing officer. A record specifying a longer delay will not be
33 rejected. Instead, under paragraph (c)(3) and (4), the delayed effective date is adjusted by
34 operation of law to the “90th day after the record is filed.” This Act does not require the filing
35 officer to notify anyone of the adjustment.

1
2 Consistent with the existing statutory trust acts, but inconsistent with most corporate
3 codes, this Act makes no provision for collecting a franchise tax. See generally Marcel Kahan &
4 Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205,
5 1218-33 (2001).

6
7 Under Section 103(c)(1), this Section is not subject to override by the governing
8 instrument.
9

10 **SECTION 205. CORRECTING FILED RECORD.**

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

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

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

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

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

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

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

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

27 **Comment**
28

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

2
3 A statement of correction is appropriate only to correct inaccuracies that existed or
4 signatures that were defective “at the time of filing.” A statement of correction may not be used
5 to amend or revise a record that was accurate when filed but has become inaccurate as a result of
6 subsequent events. ~~[For Discussion: An equivalent provision for article 8.]~~

7
8 Under paragraph (c), a statement of correction “relates back” by way of retroactive
9 application except against persons that have relied on the uncorrected record and would be
10 adversely affected if the correction related back.

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

14
15 **SECTION 206. CERTIFICATE OF EXISTENCE.**

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

20 (1) the name of the trust;

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

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

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

25 and

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

28 (b) Subject to any qualification stated in the certificate, a certificate of existence issued
29 by the [Secretary of State] may be relied upon as conclusive evidence that the statutory trust is in
30 existence.

1 **Comment**

2
3 **Principal Source** – Uniform Limited Partnership Act §209 (2001).
4

5 A certificate of existence can reveal only information present in the public record. Under
6 this Act significant information bearing on the status of a statutory trust may be outside the
7 public record. Section 806 provides for the issuance of a certificate of registration for a qualified
8 foreign statutory trust.
9

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

13 **SECTION 207. NAME OF STATUTORY TRUST.**

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

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

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

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

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

27 (1) the present user, registrant, or owner of the conflicting name consents in a
28 signed record to the use and submits an undertaking in a form satisfactory to the [Secretary of
29 State] to dissolve or to change the conflicting name to a name that complies with subsection (a)

1 and is distinguishable in the records of the [Secretary of State] from the name applied for;

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

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

7 (A) has merged with the applicant;

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

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

11 (d) Subject to Section 807, this section applies to any foreign statutory trust transacting
12 business in this state, having a certificate of qualification to transact business in this state, or
13 applying for a certificate of qualification.

14 **Comment**

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

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

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

1 **SECTION 208. RESERVATION OF NAME.**

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

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

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

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

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

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

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

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

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

1 the current reservation.

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

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

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

8 (e) Subject to Section 204(c), a transfer or termination under subsection (d) is effective
9 when the [Secretary of State] files the notice of transfer.

10 **Comment**

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

12
13 Under Section 103(c)(1), this Section is not subject to override by the governing
14 instrument.
15

16 **SECTION 209. AGENT FOR SERVICE OF PROCESS.**

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

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

22 **Comment**

23
24 **Principal Sources** – Uniform Limited Partnership Act §114 (2001); Delaware Statutory
25 Trust Act §3804; Connecticut Statutory Trust Act §34-507.
26

27 Under Section 201(a)(3), the initial designation of a statutory trust's agent for service of
28 process is made in the original certificate of trust. Under Section 802(a)(3), the initial
29 designation of a foreign statutory trust's agent for service of process is made in the original

1 application for a certificate of qualification [The term “certificate of qualification” is to be
2 updated after the Article 8 vocabulary issues are resolved. Cross-reference in this
3 comment to provisions for a FST naming an agent of process to come.]. The initial
4 designation may be changed pursuant to a statement of change under Section 210, by an
5 amendment to the certificate of trust under Section 202, or by an annual report under Section
6 213(e). ~~[Placeholder: Cross-reference to article 7?]~~

7
8 Under Section 103(c)(1), this Section is not subject to override by the governing
9 instrument.
10

11 **SECTION 210. CHANGE OF DESIGNATED OFFICE OR AGENT FOR** 12 **SERVICE OF PROCESS.**

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

- 16 (1) the name of the trust;
- 17 (2) the street and mailing addresses of the current designated office of the trust;
- 18 (3) if the designated office is to be changed, the street and mailing addresses of
19 the new designated office;
- 20 (4) the name and street and mailing addresses of the current agent of the trust for
21 service of process; and
- 22 (5) if the current agent for service of process or an address of the agent is to be
23 changed, the new information.

24 (b) A statement of change is effective as provided in Section 204(c).

25 **Comment**

26
27 **Principal Source** – Uniform Limited Partnership Act §115 (2001).
28

29 Paragraph (a) uses “may” rather than “must” because a statutory trust may also change
30 the information by an amendment to its certificate of trust under Section 202 and a qualified
31 foreign statutory trust may also change the information by an amendment to its certificate of

1 qualification under Section 805. Further, if the information currently in the public record is not
2 inaccurate, a statutory trust or qualified foreign statutory trust may change the information in an
3 annual report under Section 213(e).

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

8 **SECTION 211. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

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

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

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

19 **Comment**

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

22
23 This section provides the exclusive means for an agent to resign without cooperation
24 from the statutory trust or qualified foreign statutory trust and the only way the agent, rather than
25 the statutory trust or foreign statutory trust, can effect a change in the public record. Unlike most
26 records authorized or required to be delivered to the filing officer for filing under this Act, a
27 statement of resignation may not provide for a delayed effective date.

28
29 _____ Paragraph (e_b) mandates the effective date. An effective date included in a statement of
30 resignation is disregarded. To satisfy Section 212(a), the statutory trust or qualified foreign
31 statutory trust must designate a new agent for service of process before the effective date. If the
32 statutory trust or foreign statutory trust fails to do so, under Section 212 service on the statutory
33 trust or foreign statutory trust may be made on the Secretary of State.

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

4 **SECTION 212. SERVICE OF PROCESS.**

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

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

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

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

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

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

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

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

1 served pursuant to this section and record the time of, and the action taken regarding, the service.

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

4 **Comment**

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

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

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

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

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

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

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

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

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

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

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

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

28 (D) the name and street and mailing addresses of its agent for service of

1 process in this state.

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

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

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

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

18 **Comment**

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

20
21 A statutory trust that fails to comply with this section is subject to administrative
22 dissolution. See Section 701.

23
24 Under Section 103(c)(1), this Section is not subject to override by the governing
25 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 Under this Section, a statutory trust may be formed for “any lawful purpose except for a
25 prevailingly donative purpose.” Thus, in addition to use in a commercial transaction, a statutory
26 trust may be used in a custodial or other context that might not be for profit. See Section 307.
27 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

38 By prohibiting a statutory trust from having “a prevailingly donative purpose,” the
39 drafting committee avoided the necessity of designing a comprehensive schedule of mandatory

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

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

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

31
32 Most of the foregoing rules are referenced in Uniform Trust Code §105 (2000), the Code's
33 schedule of mandatory rules. For discussion of why the rules ~~that under the UTC~~ that are
34 mandatory with respect to a common law trust are not mandatory with respect to a statutory
35 trust, see the comments to Sections 103 and 105.

36
37 The drafting committee declined the suggestion to ~~exclude-prohibit~~ statutory trusts from
38 having a charitable purpose on the ground that a statutory trust with a charitable purpose would
39 be covered by existing regulatory law applicable to charitable entities. See Marion R. Fremont-
40 Smith, Governing Nonprofit Organizations: Federal and State Law and Regulation 187-427
41 (2004).

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

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 a beneficial owner's limited liability under 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 304. RIGHTS OF BENEFICIAL OWNER AND TRUSTEE IN TRUST

PROPERTY.

(a) A beneficial owner's beneficial interest in the statutory trust is personal property regardless of the nature of the property of the trust. A beneficial owner has no interest in specific property of the trust.

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

Comment

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

Paragraph (b) implements the concept that a statutory trust is an entity separate from its trustee and beneficial owners by confirming that a creditor of a trustee or a beneficial owner has no recourse against the property of the statutory trust. With respect to trustees, the rule of this paragraph is familiar from the operation of common law trusts. See Uniform Trust Code §507 (2000); Restatement (Third) of Trusts §42 cmt. c (2003); Restatement (Second) of Trusts §308 (1959). The protection afforded by this section is also consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. See 11 U.S.C. §541(d). With respect to beneficial owners, for discussion of the parallel provision in the Delaware Statutory Trust Act, see Wendell Fenton & Eric A. Mazie, Delaware Statutory Trusts, in 2 R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations §19.4, at 19-9 – 19-10 (3d ed. 2005 Supp.). For a general discussion of asset partitioning rules in organizational law, see Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 Yale L.J. 387

(2000); Henry Hansmann & Ugo Mattei, The Functions of Trust Law: A Comparative Legal and Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998). See also Henry Hansmann, Reinier Kraakman, & Richard Squire, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333 (2006).

SECTION 305. GOVERNING LAW. The law of this state governs:

(1) the internal affairs of a statutory trust;

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

(3) the liability of a series of a statutory trust with respect to the statutory trust and other series thereof ~~[To be updated after series provisions are set]~~ [For Discussion: Paragraph (3) and third parties (ditto for Section 801(3))].

Comment

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

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

Paragraph (2) supports Sections 303 and 304 by confirming that the liability of a beneficial owner or a trustee for the debts, obligations, or other liabilities of the statutory trust is governed by the law of this state. This paragraph is stated separately from Paragraph (1) because the liability of a beneficial owner or trustee to third parties is arguably not an internal affair. See Restatement (Second) of Conflict of Laws §307 (1971) (treating shareholders’ liability separately from the internal affairs doctrine).

Section 801(a) states rules for qualified foreign statutory trusts that parallel and are analogous in scope to those of this section.

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

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28
- 29
- 30
- 31
- 32
- 33
- 34
- 35
- 36

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

(d) A statutory trust does not terminate if the same person is the sole trustee and sole beneficial owner.

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. See also Section 701, which provides for dissolution of a statutory trust only upon the occurrence of an event or circumstance stated in the governing instrument. 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 rules of common law 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 because a statutory trust under this Act may not have a prevaillingly donative purpose. Instead, the drafting committee contemplated that pursuant to Section 104(b)(9) the governing instrument would

1 provide for termination of the statutory trust or modification of the governing instrument if such
2 provisions are desirable.

3
4 Paragraph (c) confirms that the rule of partnership law under which a partnership is
5 dissolved upon the death or incapacity of one of the partners does not apply to a statutory trust or
6 any series thereof ~~[To be updated after series provisions are set]~~.

7
8 Paragraph (d) overrides the application to a statutory trust under Section 105 of the
9 common law rule of merger whereby the legal and equitable title to the trust property merge and
10 the trust terminates if the same person is the sole trustee and sole beneficiary. See Restatement
11 (Third) of Trusts §69 (2003); Restatement (Second) of Trusts §341 (1959); Comment, The
12 Doctrine of Merger as Applied to Commercial Trusts, 29 Yale L.J. 97 (1919).
13

14 **SECTION 307. POWER TO SUE AND BE SUED.**

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

16 (b) Except as otherwise provided in [article] 3A ~~[To be updated after the series~~
17 ~~provisions are set]~~, the property of a statutory trust is subject to attachment and execution ~~for to~~
18 satisfy a debt, obligation, or other liability of the trust.

19 **Comment**

20
21 **Principal Sources** – Delaware Statutory Trust Act §§3803-3805; Connecticut Statutory
22 Trust Act §§34-518, 34-523; Uniform Limited Partnership Act §303 (2001).
23

24 Paragraph (a) implements the concept that a statutory trust is an entity separate from the
25 trustee and beneficial owner by confirming that a statutory trust has the power to sue and be sued
26 in its own name.
27

28 Paragraph (b) addresses the attachment and execution of a statutory trust's property
29 subject to the possibility that the statutory trust has formed one or more series under ~~Section 309~~
30 ~~[To be updated after series provisions are set]~~ Article 3A.
31

32 **SECTION 308. POWER TO HOLD PROPERTY; TITLE TO TRUST**

33 **PROPERTY.** A statutory trust has the power to hold or take title to property in its own name,
34 or in the name of a trustee in the trustee's capacity as trustee, whether in an active, passive, or
35 custodial capacity.

1 **Comment**

2 **Principal Source** – Delaware Statutory Trust Act §3801; Connecticut Statutory Trust
3 Act §34-502a.
4

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

10 However, this section also permits the statutory trust to take title to property in the name
11 of the trustee in the trustee's capacity as such even though the statutory trust is an entity separate
12 from the trustee and beneficial owner that can hold property in the name of the trust. The
13 drafting committee reasoned that this provision would be useful for a statutory trust that has
14 dealings in a state that has not provided for a statutory trust entity. Property ownership by a
15 trustee in the trustee's capacity as such is familiar from the use of common law trusts. To police
16 the boundary of the trustee's personal assets and the assets of the trust, the common law imposes
17 on the trustee duties to earmark trust property and not to commingle it with the trustee's own.
18 See Uniform Trust Code §810 (2000); Restatement (Third) of Trusts §84 (2007); Restatement
19 (Second) of Trusts §179 (1959). The drafting committee contemplated that under appropriate
20 circumstances Section 404(b) would be read to require similar conduct by a trustee of a statutory
21 trust that takes title to property of the statutory trust in the name of the trustee in the trustee's
22 capacity as such.

1 **[ARTICLE] 3A [FOR DISCUSSION: PLACEHOLDER NUMBERING]**

2
3 **SERIES TRUSTS**

4
5
6 **INITIAL ISSUES FOR DISCUSSION**

- 7 ~~•Should this article, and all series references in the other articles, be bracketed? There is~~
8 ~~apprehension in many states about series provisions. Bracketing our series provisions~~
9 ~~will provide guidance for those states that want to adopt the act but without the series~~
10 ~~provisions. Lani Ewart tells us, for example, that Hawaii falls into this category.~~
11 ~~•Should we restrict the applicability of this article to statutory trusts that qualify as an~~
12 ~~investment company under the 1940 Act? Limiting series trusts to 1940 Act entities~~
13 ~~eliminates many of the regulatory policy questions because such entities are already~~
14 ~~heavily regulated under federal securities laws.~~
15 ~~•Should we have a provision to guide the state-level taxation of series trusts. That is, should~~
16 ~~we address whether each series is a separate entity for tax purposes. That is a very~~
17 ~~different question from whether each series is a separate entity for state entity law~~
18 ~~purposes. On the latter, see the outline for Section 302A below.~~
19 ~~•Should one or more of the sections of this article be mandatory?~~

20
21
22 **TENTATIVE OUTLINE OF SECTIONS WITH SUGGESTED CONTENT**

23
24 **[For Discussion: Which of the provisions of this article should be added to the schedule of**
25 **mandatory rules in Section 103(c)?]**

26
27
28 **SECTION 301A. SERIES OF STATUTORY TRUST.** The governing instrument
29 may:
30 (1) provide for ~~classes, groups, or~~ series of trustees, beneficial owners, or beneficial
31 interests, having such relative rights, powers, and duties as the governing instrument may
32 provide, and provide for the creation of additional ~~classes, groups, or~~ series of trustees, beneficial
33 owners, or beneficial interests, having such relative rights, powers, and duties as may be
34 established, including rights, powers, and duties senior or subordinate to existing ~~classes, groups~~
35 ~~or~~ series of trustees, beneficial owners, or beneficial interests;
36 (2) provide for designated series of trustees, beneficial owners, or beneficial interests
37 having separate rights, powers, or duties with respect to profits and losses associated with

1 specified property or obligations, and permit the series to have a separate business purpose or
2 investment objective; and

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

6 **Comment**

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

10
11 This section confirms that a statutory trust may be organized with one or more series.
12 The organization of a master statutory trust with several series is particularly common among
13 statutory trusts that are registered investment companies under the Investment Company Act of
14 1940, as amended, 15 U.S.C. Sections 80a-1 et seq. (the “1940 Act”). Rule 18f-2 under the
15 1940 Act permits an investment company to have multiple series, provided that any matter
16 required by the 1940 Act or other applicable law to be submitted to the holders of the
17 outstanding voting securities of a series company shall not be deemed to have been effectively
18 acted upon unless approved by the holders of a majority of the outstanding voting securities of
19 each series of stock affected by such matter. Rule 18f-2 also specifies certain instances where
20 the vote is required by all of the security holders of the investment company and other instances
21 where only the security holders of a series are required to vote.

22
23
24 **SECTION 302A. SERIES NOT SEPARATE ENTITY.** A series of a statutory trust is
25 not an entity separate from the statutory trust.

26 ~~————[Proposal: Each series is not a separate entity. On this approach, a series could not hold~~
27 ~~property or sue and be sued in its own name separate from the statutory trust. Nor could a series~~
28 ~~qualify to do business in another state (the trust would do so). Nor could a certificate of~~
29 ~~existence/good standing be issued for a particular series. This is the current approach of the~~
30 ~~Delaware Statutory Trust Act, and it is strongly favored by the mutual fund industry.]~~

31 ~~————[The alternative, which is common in LLC statutes with series provisions, is separate~~
32 ~~entity treatment. See, for example, the Illinois LLC Act (805 ILCS 180/37-40(b)): “A series~~

1 with limited liability shall be treated as a separate entity to the extent set forth in the articles of
2 organization. Each series with limited liability may, in its own name, contract, hold title to
3 assets, grant security interests, sue and be sued and otherwise conduct business and exercise the
4 powers of a limited liability company under this Act. The limited liability company and any of
5 its series may elect to consolidate their operations as a single taxpayer to the extent permitted
6 under applicable law, elect to work cooperatively, elect to contract jointly or elect to be treated
7 as a single business for purposes of qualification to do business in this or any other state. Such
8 elections shall not affect the limitation of liability set forth in this Section except to the extent
9 that the series have specifically accepted joint liability by contract.”]

10 **Comment**

11
12 **Principal Source**

13
14 ~~Assuming a series is not a separate entity, the next question is whether to make this~~
15 ~~section mandatory. Allowing a separate entity series—that is, making this section~~
16 ~~default—would require considerable additional statutory infrastructure.]~~

17 [For Discussion: What, if anything, should this comment give by way of general
18 explanation or specific guidance? For example, should the comment discuss the
19 impossibility (or not) of bankruptcy by a series? Should the comment remark that not
20 treating each series as a separate entity is essential for compatibility with current practice
21 in the mutual fund industry? Should the comment observe that the Delaware act
22 (implicitly) rejects separate entity status for series?]

23
24
25 **SECTION 303A. NAME OF SERIES.** The name of each series must contain the
26 entire name of the statutory trust and must be distinguishable from the names of the other series
27 of the trust. ~~[For discussion: Should we have a reservation of name procedure for series on~~
28 ~~the model of Section 208 for statutory trusts? And how does this section relate to the~~
29 ~~(probable) lack of entity status for each series?]~~

30 **Comment**

31
32 **Principal Source** – 805 ILCS 180/37-40(c)

1
2 [For Discussion: What if any general explanation or specific guidance should the
3 comment to this section provide?]Commentary here.]
4

5 **SECTION 304A. APPORTIONMENT AMONG SERIES.**

6 {(a) A series of a statutory trust is chargeable by the trust or another series thereof for any
7 debt, obligation, or other liability incurred or otherwise existing with respect to or traceable to
8 the series to be charged.Default rule to the effect that each series is charged fully for the
9 expenses (including taxes?) traceable to each series.}

10 {(b) Each series of a statutory trust is chargeable with an equal share of any debt,
11 obligation or other liability incurred or otherwise existing with respect to the trust that is not
12 traceable to a series thereof.Default rule to the effect that each series shares pro rata (how is that
13 computed?) in the general expenses of the trust (e.g., trustee commissions, filing fees, etc.).}

14 **Comment**

15
16 **—— Principal Source ——**

17
18 [For Discussion: (1) Can we improve the language of (a)? The point of paragraph
19 (a) is to make each series responsible for debts and costs traceable to the series.
20 (2) Can we improve the language of (b)? The point of paragraph (b) is to supply a
21 default rule of for apportionment among the series for trust-level debts and costs. As
22 written, paragraph (b) creates a default of equal apportionment. Although equal
23 apportionment is unlikely to be “right” rule, the “right” rule will be transaction specific
24 and so necessarily the province of the governing instrument. Perhaps a useful analogy is to
25 the voting rights default rules of section 506. As the comment to that section explains, “The
26 drafting committee contemplated that the governing instrument typically will address
27 voting rules by providing a per capital or other share-based allocation of voting rights.
28 However, the drafting committee declined the suggestion to try to incorporate such a rule
29 as a default. Such rules are necessarily transaction-specific and hence infeasible to specify
30 in a one-size-fits-all default.”
31 (3) In addition to addressing the foregoing matters (including emphasis of the
32 default nature of this section), what other commentary, if any, should be provided
33 here?]Commentary here.]
34

35 **SECTION 305A. LIABILITY OF SERIES. [For Discussion: Should this section**

1 ~~appear earlier and section 304A appear in reverse order?~~] If the governing instrument of a
2 statutory trust ~~creates~~ has one or more series as provided in section 301A, a debt, obligation, or
3 other liability incurred, ~~contracted for,~~ or otherwise existing with respect to a particular series is
4 enforceable against the assets of the series only, and not against the assets of the trust generally
5 or any other series thereof, and none of the debts, obligations, or other liabilities incurred,
6 contracted for, or otherwise existing with respect to the trust generally or any other series thereof
7 is enforceable against the assets of the series if:

8 (1) separate and distinct records are maintained for the series and the assets associated
9 with the series are held in separate and distinct records, directly or indirectly, including through a
10 nominee or otherwise, and accounted for in separate and distinct records separately from the
11 other assets of the trust, or any other series thereof; and ~~[For Discussion: (1) Additional~~
12 ~~requirements, if any, with respect to the segregation and identification of assets among~~
13 ~~various series. (2) What result if the trustee does not earmark? Presumably the failure to~~
14 ~~earmark would be a breach of trust, remediable in a derivative or direct suit against the~~
15 ~~trustee initiated by a beneficial owner, and the creditor could recover against the trust as a~~
16 ~~whole unless the creditor was not a bona fide purchaser for value.]~~

17 (2) notice of the possibility of one or more series ~~limitation on liabilities of a series is set~~
18 ~~forth in the certificate of trust pursuant to Section 201. [For Discussion: (1) Additional~~
19 ~~disclosure requirements, if any, to limit series liability. (2) Whether to require a public~~
20 ~~filing that names the individual series, and hence subsequent filings on the creation of a~~
21 ~~new series or the dissolution of existing series. Currently Section 201 requires only notice~~
22 ~~that the trust might issue one or more series.]~~

23 Comment
24

Principal Sources – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust Act §34-518.

This section provides that if a statutory trust creates separate series under Section 301A, the debts, liabilities, and other obligations of a particular series are enforceable against the assets of that series only, but only if (1) separate records are maintained for each series and (2) notice of the limitation on liabilities of a series is set forth in the certificate of trust. ~~Under Section 201 the certificate of trust is made part of the public record and must indicate whether the statutory trust might create one or more series.~~

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

Failure to satisfy paragraph (1) through adequate earmarking exposes the property of one series to the claims of the creditors of another series. In such a case, the failure to maintain separate records would likely amount to a breach of trust under Section 404, remediable by a beneficial owner in a derivative or direct suit against the trustee.

SECTION 306A. [CAPTION] ~~[For Discussion: What would be an appropriate caption?]~~ SERIES TRUST AS INVESTMENT COMPANY. If a statutory trust is a registered investment company under the Investment Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [and any regulations issued thereunder,] any ~~class, group, or~~ series of beneficial interests established by the governing instrument of the trust is a ~~class, group, or~~ series preferred ~~as to~~ in distribution of assets or payment of dividends over all other ~~classes, groups, or~~ series ~~in~~ with respect to assets specifically allocated to the ~~class, group, or~~ series under Section 18, or any amendment or successor provision, of the Investment Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [and any regulations issued thereunder,].

Comment

1 **Principal Sources** – Delaware Statutory Trust Act §3804; Connecticut Statutory Trust
2 Act §34-518.

3
4 The section addresses Section 18 of the 1940 Act, which governs the capital structure of
5 an investment company. The 1940 Act was intended to prevent inequitable or discriminatory
6 provisions that fail to protect the preferences and privileges of the holders of shares and
7 excessive borrowing or issuance of senior securities (where there are preferences of rights
8 among classes) that expose the fund and its shareholders to additional risk. Accordingly, Section
9 18 defines and places restrictions on “senior securities” while at the same time allowing
10 segregated pools of assets (i.e., separate funds or series) to be created under a single trust, and
11 separate classes of shares representing interests in the same pool of assets with certain limited
12 instances where there are different voting rights or dividend preferences.
13

14 **SECTION 307A. DISSOLUTION OF SERIES.**

15 ~~——[For Discussion: Should series dissolution follow the template of Article 7? And~~
16 ~~should Article 7 be modified given the validation of series trusts? Our prior attempt at a~~
17 ~~Delaware Act-based series dissolution provision follows.][For Discussion: When we~~
18 discussed Article 3A at the Fall 2007 Chicago meeting, we tentatively decided to address
19 dissolution of a series in Article 7. But when we turned to article 7, we failed to take up the
20 issue. The key questions therefore remain open: (1) where should series dissolution be
21 addressed, and (2) how? The Delaware Act’s provisions on dissolution of a series (12 Del.
22 Code §3808(f)-(g)) are reproduced below:

23 (f) Except to the extent otherwise provided in the governing instrument of the
24 statutory trust, a series established in accordance with § 3804(a) of this title may be
25 dissolved and its affairs wound up without causing the dissolution of the statutory
26 trust or any other series thereof. Unless otherwise provided in the governing
27 instrument of the statutory trust, the dissolution, winding up, liquidation or
28 termination of the statutory trust or any series thereof shall not affect the limitation
29 of liability with respect to a series established in accordance with § 3804(a) of this
30 title. A series established in accordance with § 3804(a) of this title is dissolved and its
31 affairs shall be wound up at the time or upon the happening of events specified in
32 the governing instrument of the statutory trust. Except to the extent otherwise
33 provided in the governing instrument of a statutory trust, the death, incapacity,
34 dissolution, termination or bankruptcy of a beneficial owner of such series shall not
35 result in the termination or dissolution of such series and such series may not be
36 terminated or revoked by a beneficial owner of such series or other person except in

accordance with the terms of the governing instrument of the statutory trust.

(g) Upon dissolution of a series of a statutory trust, the persons who under the governing instrument of the statutory trust are responsible for winding up such series' affairs may, in the name of the statutory trust and for and on behalf of the statutory trust and such series, take all actions with respect to the series as are permitted under subsection (d) of this section and shall provide for the claims and obligations of the series and distribute the assets of the series as provided under subsection (e) of this section. Any person, including any trustee, who under the governing instrument is responsible for winding up such series' affairs who has complied with subsection (e) of this section shall not be personally liable to the claimants of the dissolved series by reason of such person's actions in winding up the series.]

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

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

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

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

~~———— (b) Any person, including a trustee, that under the governing instrument is responsible for winding up the affairs of a series under subsection (a) which has complied with this section is~~

1 not liable to the claimants of the dissolved series by reason of the person's actions in winding up
2 the series.

3 **Comment**

4 ——— **Principal Source** — Delaware Statutory Trust Act §3808.

5
6 ——— **[Commentary here.]**
7

8 **SECTION 308A. FOREIGN SERIES TRUSTS.****[For Discussion: Does Article 8, as**
9 **written, adequately address foreign series trust issues?]**

10 ——— **[For Discussion: (1) Should foreign series trusts should be addressed here or in**
11 **Article 8? (2) May a series or a foreign statutory trust qualify to do business in this state?**
12 **Presumably not if a series of a domestic statutory trust is not recognized as an entity. (3) A**
13 **foreign series trust should probably be governed by the law of its state of formation, which**
14 **raises the question of whether such a trust may have more rights than a domestic series**
15 **trust. Presumably not. Compare Section 801. (4) What other requirements, if any, are**
16 **necessary for a certificate of qualification for a foreign series trust?]**

17
18 ——— **[Here is the foreign series provision in the Illinois LLC Act (805 ILCS 180/37-40(o)):**

19 If a foreign limited liability company, as permitted in the jurisdiction of its organization, has
20 established a series having separate rights, powers or duties and has limited the liabilities of such
21 series so that the debts, liabilities and obligations incurred, contracted for or otherwise existing
22 with respect to a particular series are enforceable against the assets of such series only, and not
23 against the assets of the limited liability company generally or any other series thereof, or so that
24 the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with
25 respect to the limited liability company generally or any other series thereof are not enforceable
26 against the assets of such series, then the limited liability company, on behalf of itself or any of
27 its series, or any of its series on their own behalf may register to do business in the State in
28 accordance with Section 45-5 of this Act. The limitation of liability shall be so stated on the
29 application for admission as a foreign limited liability company and a certificate of designation
30 shall be filed for each series being registered to do business in the State by the limited liability
31 company. Unless otherwise provided in the operating agreement, the debts, liabilities and
32 obligations incurred, contracted for or otherwise existing with respect to a particular series of
33 such a foreign limited liability company shall be enforceable against the assets of such series
34 only, and not against the assets of the foreign limited liability company generally or any other
35 series thereof and none of the debts, liabilities, obligations and expenses incurred, contracted for
36 or otherwise existing with respect to such a foreign limited liability company generally or any
37 other series thereof shall be enforceable against the assets of such series.]

38
39 **Comment**

~~Principal Source ???.~~

~~————[Commentary here.]~~

SECTION 309A. ~~[CATCH-ALL]~~. Subject to the provisions of this ~~[article]~~, the provisions of this act that are generally applicable to a statutory trust, trustee, or beneficial owner are applicable to each series with respect to the operation of such series. **~~[For discussion: If the series is not a separate entity, does the rule stated in this section give the right outcome? Might this section lead to entity-like outcomes such as requiring separate votes of the shareholders of each series? If so, should we retain this section but add to this article additional provisions overriding generally applicable sections elsewhere in the act.]~~**

[For Discussion: Per earlier discussion notes, this is where we could schedule all the permissive “or series thereof” provisions.]

Comment

Principal Source – ~~805 ILCS 180/37-40(j)~~

1 [ARTICLE 4]

2 TRUSTEES AND TRUST MANAGEMENT

3 ~~[For Discussion: Article 4 was heavily revised after the Spring 2007 Salt Lake City~~
4 ~~meeting, before the summer reading. The question thus arises, do these revisions call for a~~
5 ~~reordering of the sections of article 4?]~~[For Discussion: In the Fall 2007 Chicago meeting
6 we did not give much consideration to whether the provisions of this Article should be
7 reordered. For example, sections 411 and 412 seem out of place, with section 411 perhaps
8 better located before or after section 405 and section 412 perhaps better located after
9 section 402.]

10
11 SECTION 401. MANAGEMENT OF STATUTORY TRUST. The business and
12 affairs of a statutory trust must be managed by or under the authority of its trustees.

13 Comment

14 Principal Sources – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust
15 Act §34-517; Uniform Limited Partnership Act §105 (2001); Delaware General Corporation Law
16 §141; Revised Model Business Corporation Act §8.01 (2002).

17
18 Section 102(17) defines the term “trustee” as a person designated as such in accordance
19 with the governing instrument or applicable law. Section 104(b)(5)(C) confirms that the
20 governing instrument may provide for trustee appointment. However, because no provision in
21 this Act provides default rules for trustee appointment, if the governing instrument does not
22 provide for trustee appointment, then under Section 105 the applicable law is the state’s law
23 pertaining to trustee appointment in common law trusts. For treatment of the default rules of
24 trustee appointment, removal, and succession in common law trusts, see Restatement (Third) of
25 Trusts §§31-37 (2003); Uniform Trust Code §§701-02, 704-06 (2000); Restatement (Second) of
26 Trusts §§101, 106-08 (1959).

27
28 SECTION 402. TRUSTEE POWERS. A trustee may exercise:

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

33 Comment

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

1
2 | This section is intended to grant trustees the broadest possible powers. Hence, ~~paragraph~~
3 | ~~(a) this section~~ overrides the application to a statutory trust under Section 105 of the outmoded
4 common law rule that a trustee has only those powers granted by the trust instrument. See
5 Uniform Trust Code §815 (2000); Restatement (Third) of Trusts §85 cmt. a (2007).
6

7 However, the existence of a power, regardless of its source, does not speak to the
8 question whether the exercise of that power in a particular case is consistent with the trustee's
9 fiduciary obligation. The trustee's exercise of the broad powers conferred by this section is
10 always subject to the trustee's fiduciary obligations. See Uniform Trust Code §815 cmt. (2000);
11 | Restatement (Third) of Trusts §§70, 86 (No. 4, 2007); John H. Langbein, The Contractarian
12 Basis of the Law of Trusts, 105 Yale L.J. 625, 640-43 (1995).
13

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

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

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

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

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

27 **Comment**

28 **Principal Source** – Uniform Trust Code §1012 (2000).
29

30 Paragraph (a) protects two different classes of persons: (1) a person other than a
31 beneficial owner that assists a trustee with a transaction, and (2) a person other than a beneficial

owner that deals with the trustee for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge that the trustee was exceeding or improperly exercising the trustee's powers, a third person in either category is protected in the transaction.

Paragraph (b) confirms that a third party that is acting in good faith is not charged with a duty to inquire into the extent of a trustee's power or the propriety of its exercise. The third party may assume that the trustee has the necessary power. Paragraph (b) therefore overrides the application to a statutory trust under Section 105 of the common law rule that a third party is charged with constructive notice of the trust instrument and its contents. See George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §897 (Rev. 2d ed. 1995); 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section §297 (4th ed. 1989).

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

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

~~————[For Discussion: Whether to indicate that “good faith” in this section is a trust law term of art, and that in interpretation we contemplated resort to trust law precedent (including the UTC section from which this section derives). Contrast the next section, which uses “good faith” in a corporate formulation, and for that reason should probably be interpreted in view of corporate precedents.]~~

SECTION 404. STANDARDS OF CONDUCT FOR TRUSTEES.

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

(b) A trustee shall discharge its duties with the care that a person similarly situated would reasonably believe appropriate under ~~similar~~ the circumstances.

Comment

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

To police the exercise of the trustee's broad powers under Section 402, this section subjects the trustee to fiduciary duties of loyalty (paragraph (a)) and care (paragraph (b)) akin to

1 those of a corporate director.

2
3 Under Section 103(c), the trustee's standards of conduct under this section are mandatory
4 rules that are not subject to override by the governing instrument. However, the governing
5 instrument may prescribe the standards by which "good faith," "best interests of the statutory
6 trust," and "care that a person in a like position would reasonable believe appropriate under
7 similar circumstances" are determined provided that the standards are not "manifestly
8 unreasonable." Compare Delaware Statutory Trust Act §3806(c), which provides that a trustee's
9 fiduciary duties "may be expanded or restricted or eliminated by provisions in the governing
10 instrument; provided, that the governing instrument may not eliminate the implied contractual
11 covenant of good faith and fair dealing," and §3806(e), which provides that a "governing
12 instrument may provide for the limitation or elimination of any and all liabilities for . . . breach
13 of duties (including fiduciary duties) . . .; provided, that a governing instrument may not limit or
14 eliminate liability for any act or omission that constitutes a bad faith violation of the implied
15 contractual covenant of good faith and fair dealing."
16

17 The drafting committee opted to model the trustee's duties on the corporate fiduciary
18 obligation as stated in Revised Model Business Corporation Act §8.30 (2002) rather than the
19 more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a
20 mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the
21 context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of
22 commercial actors. For a statement of the duties of loyalty and prudence in trust law, see
23 Restatement (Third) of Trusts §§77-78 (2007). For a comparison, see Robert H. Sitkoff, Trust
24 Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82 (2003). See
25 also the sources cited in the Comment to Section 408.
26

27 **SECTION 405. DIRECTION OF TRUSTEES.**

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

30 ~~——(b) If the governing instrument confers upon a person a power to direct certain actions of~~
31 ~~a trustee or other person, the trustee or other person shall act in accordance with an exercise of~~
32 ~~the power unless the direction is manifestly contrary to the terms of the governing instrument or~~
33 ~~the trustee knows or has reason to know that following the direction would constitute a serious~~
34 ~~breach of fiduciary duty by the trustee.~~

35 (be) Neither The governing instrument may provide that neither the power to direct a
36 trustee or other person nor the exercise of the power by any person, including a beneficial owner,

1 causes the person to be a trustee or imposes on the person duties, including fiduciary duties, or
2 liabilities relating thereto, to a statutory trust or to a beneficial owner thereof.

3 (c) If the governing instrument confers upon a person a power to direct certain actions of
4 a trustee or other person, the trustee or other person shall act in accordance with an exercise of
5 the power unless the direction is manifestly contrary to the terms of the governing instrument or
6 the trustee knows or has reason to know that following the direction would constitute a serious
7 breach of fiduciary duty by the trustee.

8 **Comment**

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

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

20
21 Paragraph (b) confirms that the governing instrument may provide that a person that has
22 the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to the
23 statutory trust or a beneficial owner.

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

31
32 The trustee’s determination whether a direction is “manifestly contrary to the terms of the
33 governing instrument” or “would constitute a serious breach of fiduciary duty by the trustee” is
34 subject to the trustee’s fiduciary obligations. The drafting committee contemplated that, in
35 accord with conventional trust practice, a trustee could seek judicial resolution of whether an
36 instruction falls within the exclusion of paragraph (b) by applying to the appropriate court for
37 instructions. See Restatement (Second) of Trusts §259 (1959); Restatement (Third) of Trusts
38 §71 (2007).

1
2 Under Section 103(c)(5), the limitation on direction of trustees stated in paragraph (b) is
3 not subject to override by the governing instrument.

4
5 Under paragraph (c), unless the governing instrument provides otherwise, a person that
6 has the power to direct the trustee is not a trustee and owes no duties, fiduciary or otherwise, to
7 the statutory trust or a beneficial owner. ~~[For Discussion: Paragraph (c), which comes from~~
8 ~~the Delaware statute, is convoluted (compare how much cleaner is the comment). Can't we~~
9 ~~do better?]~~

10
11 In conjunction with Section 411 [For Discussion: Shouldn't Section 411 appear
12 immediately before or after this section?], this section facilitates the current practice in
13 existing statutory trusts of creating a trusteeship with respect to some, but not all, aspects of the
14 trust—for example, in a mutual fund with an investment advisor or in a securitization transaction
15 with a person who is responsible for distribution computations or whose consent is required
16 before the statutory trust can petition for bankruptcy.
17

18 SECTION 406. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT 19 COMPANY.

20 (a) In this section, the terms “affiliated person” and “interested person” have the
21 meanings set forth in the Investment Company Act of 1940, [as amended,] 15 U.S.C. Section
22 80a-1 et seq., [and any regulations issued thereunder].

23 (b) If a statutory trust is registered as an investment company under the Investment
24 Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [and any regulations
25 issued thereunder,] [or any successor statute thereto,] ~~[Discussion/Style Issue~~ Style Question for
26 McKay: Inconsistent Citation to and Brackets in and Investment Company Act consistency
27 throughout references throughout the act.] a trustee is an independent trustee for all purposes
28 under this [act] if the trustee is not an interested person of the trust. The receipt of compensation
29 for service as an independent trustee of the trust and for service as an independent trustee of one
30 or more other investment companies managed by a single investment adviser or an affiliated
31 person of an investment adviser, does not affect the status of the trustee as an independent trustee

under this section.

Comment

Principal Source – Delaware Statutory Trust Act §3801.

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

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

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

Comment

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

By linking the trustee’s information rights to the scope of the trustee’s duties as trustee, this section makes the trustee’s right to information function specific. This section therefore

1 allows for the creation of a limited-role or directed trustee that will not have access to
2 confidential information unrelated to the trustee's limited role. At the same time, this section
3 ensures that such a trustee will have access to information reasonably related to discharging the
4 trustee's duties in connection with the trustee's limited role.

5
6 Section 503 provides a comparable rule for a beneficial owner's right to information.
7

8 **SECTION 408. INTERESTED TRANSACTIONS.**

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

15 (b) A transaction under subsection (a) is voidable by the statutory trust unless the related
16 party shows that the transaction is fair to the trust.

17 **Comment**

18 **Principal Sources** – Delaware Statutory Trust Act §3806; Delaware General Corporation
19 Law §144.
20

21 Consistent with the use of the term “best interests” instead of “sole interest” in Section
22 404(a), this section abrogates the no-further-inquiry rule of the common law of trusts, which
23 forbids self-dealing transactions even if the transaction is fair and in the best interests of the trust
24 and the beneficiaries. See Restatement (Third) of Trusts §78 (2007); Restatement (Second) of
25 Trusts §170 (1959); John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest
26 or Best Interest?, 114 Yale L.J. 929 (2005); Melanie B. Leslie, Trusting Trustees: Fiduciary
27 Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005). Instead, this section
28 follows the corporate model whereby an interested transaction is voidable by the statutory trust
29 unless the related party shows that the transaction is fair to the trust. For discussion of the
30 fairness test as applied in corporate law, see Steven M. Bainbridge, Corporation Law and
31 Economics §7.2, at pp. 315-16 (2002), citing Marciano v. Nakash, 535 A.2d 400 (Del. 1987).
32

33 ~~———[For Discussion: By “voidable,” do we mean to adopt the “entire fairness” test~~
34 ~~familiar from corporate law, and if so, shouldn't we say so in the comment? And do we~~
35 ~~need to explain what happens when the trust voids a loan? Presumably we mean that the~~

~~trust is freed from the obligation though perhaps the lender is entitled to restitution.]~~

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

SECTION 409. GOOD-FAITH RELIANCE. A trustee, officer, employee, manager, or committee of a statutory trust, or other person designated pursuant to Section 104(b)(7) is not liable to the trust or to a beneficial owner for breach of any duty, including a fiduciary duty, to the extent the breach resulted from the good-faith reliance on:

- (1) the terms of the governing instrument;
- (2) the records of the statutory trust; or
- (3) the opinions, reports, or statements of another person that are in the other person's professional or expert competence and are made or delivered to the trustee, officer, employee, manager, or committee of a statutory trust, or other person designated pursuant to Section 104(b)(7).

Comment

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

A trustee, officer, employee, manager, committee, or other such person or persons should be able to administer a statutory trust with dispatch and without concern that a reasonable reliance on (1) the terms of the governing instrument, (2) the records of the statutory trust, or (3) the opinions of experts is misplaced. This section protects a person that so relies, but only to the extent the breach of trust resulted from such reliance and only if the person's reliance was in good faith. "Taking the advice of legal counsel," for example, "evidences prudence on the part of the trustee. Reliance on the advice of counsel, however, is not a complete defense to an alleged breach of trust, because that would reward a trustee who shopped for legal advice that would support the trustee's desired course of conduct or who otherwise acted unreasonably in procuring or following legal advice. In seeking and considering advice of counsel, the trustee has a duty to act with prudence. Thus, if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, th trustee's

conduct is significantly probative of prudence.” Restatement (Third) of Trusts §77 cmt. b(2) (2007). ~~[For Discussion: Use of the term “good faith” again. An important point, perhaps worth mentioning in this comment, is that good faith prohibits shopping for an expert opinion for cover to undertake a dubious action.]~~

SECTION 410. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.

(a) A statutory trust may indemnify and hold harmless any trustee or beneficial owner or other person with respect to any claim or demand on the person by reason of the person’s relationship with the trust if the claim or demand does not arise from the person’s bad faith, willful misconduct, or reckless indifference. ~~[For Discussion: Question from the floor why this provision is permissive and not mandatory.]~~

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

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

Comment

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

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

1
2 Under Section 103(c)(7), this section’s prohibition of indemnification, advancement, or
3 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference is not
4 subject to override by the governing instrument. Prohibiting indemnification, advancement, or
5 exoneration for such conduct is consistent with traditional trust doctrine, and the drafting
6 committee contemplated that this section would be interpreted in accordance with existing trust
7 law precedent. ~~[For Discussion, addition of “and the drafting committee contemplated that~~
8 ~~this section would be interpreted in accordance with existing trust law precedent” or~~
9 ~~something in that vein.].~~ See Restatement (Second) of Trusts §222 (1959); George G. Bogert
10 & George T. Bogert, The Law of Trusts and Trustees §542 (rev. 2d ed. 1993); Uniform Trust
11 Code §1008. See also John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L.
12 Rev. 1105, 1121-25 (2004). It is also consistent with the Delaware Statutory Trust Act. See
13 Delaware Statutory Trust Act §3806(e), which provides that the “governing instrument may
14 provide for the limitation or elimination of any and all liabilities for breach of contract and
15 breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing
16 instrument may not eliminate the implied contractual covenant of good faith and fair dealing.”
17 Limitations on permissible exoneration are also familiar business entity law. See, e.g., Delaware
18 General Corporation Law §102(b)(7).
19

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

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

37 SECTION 411. DELEGATION BY TRUSTEE.

38 (a) A trustee may delegate duties and powers. The trustee must exercise the care that a
39 person similarly situated would reasonably believe appropriate under ~~similar~~ the circumstances
40 in ~~[For Discussion: (1) The move from trust language to corporate language, paralleling~~
41 ~~Section 404, and (2) the interaction of this Section with Section 409.]:~~

(1) selecting an agent;

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

(3) periodically reviewing the agent's actions in order to monitor the agent's

performance and compliance with the terms of the delegation.

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

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

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

(e) An agent submits to the jurisdiction of the courts of this State by accepting a delegation of powers or duties from the trustee of a statutory trust that is subject to the law of this state.

Comment

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

This section reverses the outmoded common law rule against delegation by a trustee. In reversing the common law rule against delegation, the drafting committee followed both the Delaware Statutory Trust Act and the modern trend with respect to common law trusts. Most states have abrogated the common law nondelegation rule with legislation based on the Uniform Prudent Investor Act, Uniform Trust Code, or the Restatement (Third) of Trusts. See Uniform Trust Code §807 (2000); Uniform Prudent Investor Act §9 (1994); Restatement (Third) of Trusts: Prudent Investor Rule §171 (1992). See also Restatement (Third) of Trusts §80 (2007); John H. Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Mo. L. Rev. 105 (1994).

Paragraphs (a), (c), (d), and (e) are patterned on Uniform Trust Code §807 (2000), which is derived from Uniform Prudent Investor Act §9 (1994). This section deviates from prior uniform acts, however, on the issue of delegation to a co-trustee. Following the Delaware Statutory Trust Act, paragraph (b) treats delegation to a co-trustee in the same manner as delegation to another person. By contrast, traditional trust law disfavors delegation by one co-trustee to another. See Restatement (Second) of Trusts §184 (1959). See also Uniform Trust Code §703(e) (2000); Restatement (Third) of Trusts §81 cmt. c(1) (2007). The traditional rule

reflects the assumption that, if the donor names more than one trustee, the donor intended each to be a check on the other(s). That policy does not fit commercial statutory trust practice, in which limited purpose or function trustees are common. ~~[For Discussion: Whether to include further explanation. The basic idea is that in an ordinary trust, we assume that if two trustees are named, the donor intended each to be a check on the other. By contrast, in commercial statutory trust practice, we have limited purpose trustees.]~~

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

SECTION 412. ACTION BY TRUSTEES. On any matter that is to be acted on by

trustees:

(1) the trustees ~~may~~ act by majority of their number;

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

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

Comment

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

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

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

1 The Investment Company Act of 1940 requires a mutual fund’s investment advisory
2 contract, underwriting contract, fidelity bond, independent public accountants, and other such
3 matters to be approved by the trustees of the mutual fund. See 15 U.S.C. § 80a-15(a); 15 U.S.C.
4 80a-31(a); 17 C.F.R. § 270.17g-1. Investment advisory and underwriting contracts, and
5 selection of independent public accountants, must be approved by the noninterested trustees at an
6 in-person meeting. See 15 U.S.C. §80a-15(c); 15 U.S.C. 80a-31(a).

1 [ARTICLE] 5

2 BENEFICIARIES AND BENEFICIAL RIGHTS

3 [For Discussion: Article 5 was heavily revised after the Spring 2007 Salt Lake City
4 meeting, before the summer reading. The question thus arises, do these revisions call for a
5 reordering of the sections of article 5?][We did not resolve this question at the Fall 2007
6 meeting in Chicago.]

7
8 SECTION 501. CONTRIBUTIONS BY BENEFICIAL OWNERS.

9 (a) A contribution of a beneficial owner to a statutory trust may be in cash, property, or
10 services rendered or a promissory note or other obligation to contribute cash or property or to
11 perform services. A person may become a beneficial owner of a statutory trust and may receive
12 a beneficial interest in a statutory trust without making a contribution or being obligated to make
13 a contribution to the trust.

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

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

26 (1) reduction or elimination of the defaulting beneficial owner's proportionate

1 interest in the statutory trust;

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

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

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

9 (5) redemption or sale of the defaulting beneficial owner's beneficial interest at a
10 value fixed by appraisal or by formula ~~and~~.

11 **Comment**

12
13 **Principal Sources** – Delaware Statutory Trust Act §3802; Connecticut Statutory Trust
14 Act §34-515.

15
16 Although statutory trusts are used primarily as a mode of business organization in
17 commercial transactions, paragraph (a) acknowledges that a beneficial owner may obtain a
18 beneficial interest without an exchange of consideration, an event that is not uncommon in
19 existing commercial practice. However, a statutory trust may not be used to effect a donative
20 transfer because Section 302 prohibits a statutory trust from having a “prevailingly donative
21 purpose.”

22
23 Paragraph (c) repudiates the hostility of traditional law to penalties, thereby resolving the
24 doubts that arose prior to statutory confirmation about the validity of particular remedies for a
25 beneficial owner's breach.

26
27 Under Section 104(b)(1), the governing instrument may provide the means by which
28 beneficial ownership is determined and evidenced. Under Section 104(b)(10)-(11), the
29 governing instrument may specify the conditions under which a person becomes a beneficial
30 owner.

31
32 **SECTION 502. REDEMPTION OF BENEFICIAL INTERESTS.** A statutory trust
33 may acquire, by purchase, redemption, or otherwise, any beneficial interest in the trust. A

beneficial interest so acquired ~~by the trust~~ is canceled.

Comment

Principal Source – Delaware Statutory Trust Act §3818.

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

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

beneficial owner has the right to information relating to the affairs of the statutory trust

reasonably related to the beneficial owner’s ability to enforce its rights as beneficial owner.

~~_____ [For Discussion: (1) Is this section exclusive—that is, does a common law right to information survive the act? (2) What happens in the event of disagreement—that is, should we provide for a summary proceeding as in other business law? (3) Should the comment observe that in this area a standard “reasonably related” in fact provides broader information rights than the rule-based, scheduling of accessible information?]~~

Comment

Principal Source – Delaware Statutory Trust Act §3819.

Under Section 103(c)(8), a beneficial owner’s right to information under this section is not subject to override by the governing instrument. However, a beneficial owner’s right to information under this section is limited to information “necessary” for the beneficial owner to enforce its rights as such, and under Section 103(c)(8) the governing instrument may prescribe the standards by which “necessary” is determined if those standards are not “manifestly unreasonable.”

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

1 Inform, 85 N.C. L. Rev. 1595 (2007).

2
3 The drafting committee declined the suggestion to include in this section a schedule of
4 accessible information on the ground that such a rule-based schedule necessarily would be over-
5 and under-inclusive. Instead, the committee contemplated that the term “reasonably related”
6 would provide a more robust and flexible right to information by allowing a court to order the
7 release of any type of information that bears on enforcement of the beneficial owner’s beneficial
8 interest.

9
10 Under Section 103(c)(8), the governing instrument may prescribe the standards by which
11 “reasonably related” is determined, provided that those standards are not “manifestly
12 unreasonable.”

13
14 Section 404 provides a comparable rule for a trustee’s right to information.
15

16 **SECTION 504. BENEFICIAL INTERESTS.**

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

18 (b) When a beneficial owner becomes entitled to receive a distribution, the beneficial
19 owner has the status of, and is entitled to all remedies available to, a creditor of the statutory
20 trust with respect to the distribution.

21 ~~(c) Unless the statutory trust is a registered investment company under the Investment~~
22 ~~Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [and any regulations~~
23 ~~issued thereunder,] a~~ A beneficial owner does not have a right to demand or to receive a
24 distribution from the trust in any form other than money. ~~[For Discussion: Section 501 uses~~
25 ~~“cash,” but here we use “money.” Reasoned difference?], except that t~~

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42

Comment

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

Paragraph (a) provides as a default rule that a beneficial owner's interest in the statutory trust is freely transferable. This paragraph therefore overrides the rule in some states, which would otherwise be applicable to a statutory trust pursuant to Section 105, that makes a common law trust spendthrift by default. See Jeffrey A. Schoenblum, 2007-2008 Multistate Guide to Estate Planning Table 9.05, Part 1, Column 2 (collecting authority). However, because the rule stated in paragraph (a) is not scheduled in Section 103(c), it is subject to override by the governing instrument. Section 104(b)(2) confirms that the governing instrument may limit a beneficial owner's right to transfer its beneficial interest. Section 504A[placeholder number] provides for a charging order against a beneficial owner's rights to distributions in the event that the beneficial owner's beneficial interest is not freely transferable.

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

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

~~[For Discussion: The possibility of a self-settled spendthrift statutory trust. Assuming that the Committee does not want to allow for such a trust, we will need to consider a charging order provision for trusts that opt out of 504(a) (that is, for trusts without freely transferable beneficial interests). Two sample charging order models follow.~~

SECTION 504A[placeholder-number] CHARGING ORDER.

[For discussion: (1) Removal of exclusivity language from the ReULLCA/Kentucky model, and (2) the meaning of "transferable."](a) If a beneficial interest is not transferable or otherwise subject to a lien by a judgment creditor of a beneficial owner, then on application by a judgment creditor of a beneficial owner, the [appropriate court] may enter a charging order

1 against the beneficial owner's right to distributions from the trust for the unsatisfied amount of
2 the judgment.

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

7 (c) To effectuate the collection of distributions pursuant to a charging order in effect
8 under paragraph (a), the court may:

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

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

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

15 (e) This [act] does not deprive any member or transferee of the benefit of any exemption
16 laws applicable to the member's or transferee's transferable interest.

17 Comment

18
19 Principal Source - Revised Uniform Limited Liability Company Act §305 (2006).

20
21 [Comment to come. Substance depends on the resolution of the discussion questions
22 noted above.]

23
24 Under Section 103(c)(8a[placeholder]), the right of a judgment creditor of a beneficial
25 owner to seek a charging order may not be eliminated by the governing instrument.

26 27 **1. ReULLCA 305 (2006)**

28 ~~(a) On application by a judgment creditor of a member or transferee, a court may~~
29 ~~enter a charging order against the transferable interest of the judgment debtor for the~~
30 ~~unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment~~

debtor's transferable interest and requires the limited liability company to pay over to the person to which the charging order was issued any distribution that would otherwise be paid to the judgment debtor.

—— (b) To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (a), the court may:

—— (1) appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made; and

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

—— (c) Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. The purchaser at the foreclosure sale only obtains the transferable interest, does not thereby become a member, and is subject to Section 502.

—— (d) At any time before foreclosure under subsection (c), the member or transferee whose transferable interest is subject to a charging order under subsection (a) may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order.

—— (e) At any time before foreclosure under subsection (c), a limited liability company or one or more members whose transferable interests are not subject to the charging order may pay to the judgment creditor the full amount due under the judgment and thereby succeed to the rights of the judgment creditor, including the charging order.

—— (f) This [act] does not deprive any member or transferee of the benefit of any exemption laws applicable to the member's or transferee's transferable interest.

—— (g) This section provides the exclusive remedy by which a person seeking to enforce a judgment against a member or transferee may, in the capacity of judgment creditor, satisfy the judgment from the judgment debtor's transferable interest.

2. Rutledge's Unified Kentucky Model

(a) This section provides the exclusive remedy by which the judgment creditor of a member or the assignee of a member may satisfy a judgment out of the judgment debtor's limited liability company interest.

(b) On application to a court of competent jurisdiction by a judgment creditor of a member or a member's assignee, a court may charge the judgment debtor's interest in the limited liability company with payment of the unsatisfied amount of the judgment. To the extent so charged, the judgment creditor has only the rights of an assignee and shall have no right to participate in the management or to cause the dissolution of the limited liability company. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the limited liability company interest and make all other orders, directions, accounts, and inquiries the judgment creditor might have made or which the circumstances of the case may require to give effect to the charging order.

(c) A charging order constitutes a lien on and the right to receive distributions made with respect to the judgment debtor's limited liability company interest. A charging order does not of itself constitute an assignment of the limited liability company interest.

(d) The court may order a foreclosure upon the limited liability company interest subject to the charging order at any time. The purchaser of the liability company interest

1 ~~at the foreclosure sale has the rights of a assignee. At any time before foreclosure, the~~
2 ~~charged limited liability company interest may be redeemed:~~

3 ~~(1) By the judgment debtor;~~

4 ~~(2) With property other than limited liability company property, by one~~

5 ~~(3) or more of the other members; and~~

6 ~~(4) With limited liability company property, by the limited liability company~~
7 ~~with the consent of all members whose interest are not so charged.~~

8 ~~—— (e) This section does not deprive a member or a member's transferee of the benefit~~
9 ~~of any exemption laws applicable to the member's or transferee's limited liability company~~
10 ~~interest.]~~

11 ~~—— Under Section 104(b)(13), the governing instrument may provide for the establishment of~~
12 ~~record dates for distributions.~~

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

15 owner or related person of a beneficial owner may lend money ~~[For Discussion: Section 501~~

16 ~~uses “cash,” but here we use “money.” Reasoned?]~~to, borrow money from, act as a surety,

17 guarantor or endorser for, guarantee or assume one or more obligations of, provide collateral for,

18 or transact other business with the statutory trust and, subject to law other than this [act], has the

19 same rights and obligations with respect to those matters as a person that is not a beneficial

20 owner.

21 **Comment**

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

25 **SECTION 506. VOTING OR CONSENT BY BENEFICIAL OWNERS.** On any

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

27 (1) The beneficial owners ~~may~~ act by majority of their number.

28 (2) The beneficial owners may take the action without a meeting, without notice, and
29 without a vote, if a consent, or consents, in a record, setting forth the action so taken, are signed
30 by beneficial owners having at least the minimum number of votes necessary to authorize or take
31 the action at a meeting at which all beneficial owners entitled to vote thereon were present and

1 voted, but prompt notice of the action must be given to those beneficial owners that did not
2 consent.

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

5 **Comment**

6
7 **Principal Source** – Delaware Statutory Trust Act §3806; Delaware General Corporation
8 Law §228.

9
10 Except for a conversion, merger, or dissolution under Article 6, nothing in this act
11 provides for the beneficial owners to act on any matter. However, because the beneficial owners
12 may be given such a right by the terms of the governing instrument, this paragraph supplies a
13 default rule requiring a majority of the number of beneficial owners. ~~Although the~~ drafting
14 committee contemplated that the governing instrument typically will address voting rules by
15 providing a per capital or other share-based allocation of voting rights. ~~However,~~ the drafting
16 committee declined the suggestion to try to incorporate such a rule as a default. ~~because~~ Such
17 rules are necessarily transaction-specific and hence infeasible to specify in a one-size-fits-all
18 default. Compare Revised Uniform Partnership Act §401(f) (1997), which provides that “[e]ach
19 partner has equal rights in the management and conduct of the partnership business.”

20
21 The Investment Company Act of 1940, as amended, specifies the percentage of vote
22 necessary to approve certain actions related to the investment company. In other instances, 1940
23 Act requires the action to be approved at a shareholders’ meeting called for that purpose. In such
24 instances, approval of the action by written consent without notice would not be valid. For
25 example, Section 16(a) of the 1940 Act provides that “no person shall serve as a director of an
26 investment company unless elected to that office by the holders of the outstanding voting
27 securities of such company, at an annual or a special meeting duly called for that purpose.” In
28 addition, investment companies seeking the vote of shareholders on specific actions must comply
29 with rules governing the communication to, and solicitation of, their shareholders. See Rules
30 14a-1 to 14b-2 under the Securities Exchange Act of 1934, as amended. These rules are
31 significantly more comprehensive than most state statutes and rules governing communications
32 to shareholders and other aspects of a shareholder meeting.

33
34 Section 104(b)(4) confirms that the rules stated in this Section are subject to override by
35 the governing instrument.

36 37 **SECTION 507. DERIVATIVE ACTION.**

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

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

4 (2) a demand would be futile.

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

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

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

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

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

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

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

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

20 (2) if the derivative plaintiff receives any proceeds, it shall immediately remit
21 them to the trust. ~~[For Continued Discussion: Election of remedies.]~~

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

costs, from the recovery by the trust. ~~[For Discussion: The common fund doctrine.]~~

(f) A derivative action on behalf of a statutory trust may not be voluntarily dismissed or settled without the court's approval. ~~[For Discussion: The intersection of the collusive settlement problem and the limited mandatory nature of this provision under Section 103(c)(9).]~~

Comment

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

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

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

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

1 [ARTICLE] 6

2 CONVERSION AND MERGER

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~~law” means the ~~statute~~law that governs the organization’s internal
12 affairs.

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

18 ~~————[For discussion: This definition of “organization” excludes a common law trust and~~
19 ~~hence excludes a Massachusetts business trust. This issue was flagged in Salt Lake City,~~
20 ~~but we did not have time for discussion about how to address it. The issue was also raised~~
21 ~~independently from the floor at the summer reading. It appears that we have at least three~~
22 ~~options:~~

23 ~~(1) continue to exclude common law business trusts from conversion and merger~~
24 ~~(though per Section 905 such a trust could become a statutory trust by filing a~~
25 ~~certification of trust pursuant to Section 201);~~

26 ~~(2) alter the definition of organization to include common law trusts and then~~
27 ~~modify the references to “governing statute” throughout; or~~

28 ~~(3) add a domestication provision.~~

29 ~~Each option has pros and cons that require ventilation and then a policy decision by the~~

1 | ~~committee.]~~

2
3 (8) “Organizational documents” means the basic records that create the organization and
4 determine its internal governance and the relations among the persons that own it, have an
5 interest in it, or are members of it.

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

9 **Comment**

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

11
12 This section contains definitions specific to this Article.

13
14 Paragraph (7) includes a common law trust within the definition of “organization.”
15 Hence, a common law trust may convert to or merge with a statutory trust under this Article if
16 such a conversion or merger is permitted by the trust’s governing law. Unlike the formation of a
17 new statutory trust by filing a certificate of trust under Section 201 (an option expressly afforded
18 to a common law trust under Section 905), conversion or merger under this Article preserves
19 continuity in the organization’s relationships with third parties. See Sections 605 and 609 and
20 the comments thereto. [For Discussion: (1) Does this comment fairly represent our
21 discussed rational for changing “governing statute” to “governing law” and altering
22 appearances of “entity” to “organization”? (2) Can this comment be made more clear?)

23
24 Under Section 103(c)(10), this definitions stated in this Section is-are not subject to
25 override by the governing instrument.
26

27 **SECTION 602. CONVERSION.**

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

31 (1) the conversion is not prohibited by the law of the jurisdiction that enacted the
32 other organization’s governing law-statute [Note “governing statute”; here is a nice example

1 | ~~of the problem with absorbing Massachusetts trusts into the existing conversion~~
2 | ~~infrastructure.];~~ and

3 | (2) the other organization complies with its governing ~~statute-law~~ in effecting the
4 | conversion.

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

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

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

8 | (3) the terms and conditions of the conversion, including the manner and basis for
9 | converting interests in the converting organization into any combination of money, interests in
10 | the converted organization, and other consideration; and

11 | (4) the organizational documents of the converted organization.

12 | **Comment**

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

14 |
15 | In a statutory conversion an existing ~~entity-organization~~ changes its form, the jurisdiction
16 | of its governing ~~statute-law~~, or both. For example, a statutory trust formed under the laws of one
17 | jurisdiction might convert to a corporation, limited liability company, or limited partnership
18 | under the laws of the same or another jurisdiction (referred to in some statutes as
19 | “domestication”).
20 |

21 | In contrast to a merger, which involves at least two entities, a conversion involves only
22 | one. The converting and converted organization are the same ~~entity-organization~~. See Section
23 | 605(a). For this Act to apply to a conversion, either the converting or converted organization
24 | must be a statutory trust subject to this Act.
25 |

26 | A plan of conversion may provide that some persons with interests in the converting
27 | organization will receive interests in the converted organization while other persons with
28 | interests in the converting organization will receive some other form of consideration. Thus, a
29 | “squeeze out” conversion is possible.
30 |

31 | For a general discussion of conversion and its effect, see Model Entity Transactions Act
32 | §406 (2006) and comment 1 thereto.
33 |

**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.

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

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

Comment

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

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)(5)(B). Hence, the governing instrument may state a different quantum of consent or provide a different approval mechanism. Varying this subsection’s rule means that a beneficial owner might be subject to a conversion (including a “squeeze out” conversion) without consent and with no appraisal remedy. If the converting organization is a statutory trust subject to this Act, the trustee of the converting organization is subject to the duties and obligations stated in this Act. Those duties would apply to the process and terms under which the conversion occurs. However, if the governing instrument allows for a conversion with less than unanimous consent, the mere fact that a beneficial owner objects to a conversion does not mean that a trustee that is favoring, arranging, consenting to, or effecting the conversion has breached a duty under this Act.

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

SECTION 604. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.

1 (a) After a conversion is approved:

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

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

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

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

8 (D) a statement that the conversion is not prohibited by the governing
9 ~~statute~~law of the converted organization; and

10 (E) if the converted organization is a foreign organization not authorized
11 to transact business in this state, the street and mailing addresses of an office that the [Secretary
12 of State] may use for the purposes of Section 605(c); and

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

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

17 (B) the name and form of the converting organization and the jurisdiction
18 of its governing ~~statute~~law; and

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

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

23 **Comment**

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

1
2 Under paragraph (b) the effective date of a conversion is determined under the governing
3 ~~statute-law~~ of the converted organization.

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

7
8 **SECTION 605. EFFECT OF CONVERSION.**

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

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

12 (1) all property owned by the converting organization remains vested in the
13 converted organization;

14 (2) all debts, obligations, and other liabilities of the converting organization
15 continue as debts, obligations, or other liabilities of the converted organization;

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

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

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

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

25 (c) A converted organization that is a foreign organization consents to the jurisdiction of
26 the courts of this state to enforce any debt, obligation, or other liability for which the converting

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

7 **Comment**

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

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

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

18 19 **SECTION 606. MERGER.**

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

22 (1) the governing ~~statute law~~ of each of the other organizations authorizes the
23 merger;

24 (2) the merger is not prohibited by the law of a jurisdiction that enacted any of the
25 governing ~~statutes law~~; and

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

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

- 1 (1) the name and form of each constituent organization;
- 2 (2) the name and form of the surviving organization and, if the surviving
- 3 organization is to be created by the merger, a statement to that effect;
- 4 (3) the terms and conditions of the merger, including the manner and basis for
- 5 converting or exchanging the interests in each constituent organization into any combination of
- 6 money, interests in the surviving organization, and other consideration;
- 7 (4) if the surviving organization is to be created by the merger, the surviving
- 8 organization's organizational documents; and
- 9 (5) if the surviving organization is not to be created by the merger, any
- 10 amendments to be made by the merger to the surviving organization's organizational documents.

11 **Comment**

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

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

16
17 A plan of merger may provide that some persons with interests in a constituent
18 organization will receive interests in the surviving organization, while other persons with
19 interests in the same constituent organization will receive some other form of consideration.
20 Thus, a “squeeze out” merger is possible. As noted in the comment to Section 603, the duties
21 and obligations stated in this Act apply to a trustee of a constituent organization that is a
22 statutory trust subject to this Act. Those duties would apply to the process and terms under
23 which a “squeeze out” merger occurs.
24

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

26 **STATUTORY TRUST.**

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

29 (b) After a merger is approved, and at any time before a filing is made under Section 608,

1 a constituent statutory trust may amend the plan or abandon the planned merger:

2 (1) as provided in the plan; and

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

5 **Comment**

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

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

19
20 For the reasons discussed in the comment to Section 603, a mutual fund generally does
21 not afford dissenting rights to its shareholders because any shareholder of an acquired mutual
22 fund may redeem acquired fund shares at net asset value prior to the closing date of the proposed
23 reorganization of the acquired fund.
24

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

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

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

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

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

32 (1) the name and form of each constituent organization and the jurisdiction of its

governing ~~statute~~law;

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

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

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

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

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

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

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

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

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

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

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

(A) ~~compliance with subsection (c)~~ filing of the articles of merger by the

Secretary of State; or

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

merger; or

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

~~governing statute~~ law of the surviving organization.

Comment

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

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

SECTION 609. EFFECT OF MERGER.

(a) When a merger becomes effective:

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

(2) each constituent organization that merges with the surviving organization

ceases to exist as a separate ~~entity~~ organization;

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

in the surviving organization;

(4) all debts, obligations, and other liabilities of each constituent organization that

ceases to exist continue as debts, obligations, or other liabilities of the surviving organization;

(5) an action or proceeding pending by or against any constituent organization

that ceases to exist continues as if the merger had not occurred;

(6) except as prohibited by other law, all of the rights, privileges, immunities,

1 powers, and purposes of each constituent organization that ceases to exist vest in the surviving
2 organization;

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

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

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

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

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

12 (b) A surviving organization that is a foreign organization consents to the jurisdiction of
13 the courts of this state to enforce any debt, obligation, or other liability owed by a constituent
14 organization if, before the merger, the constituent organization was subject to suit in this state on
15 the obligation. A surviving organization that is a foreign organization not authorized to transact
16 business in this state appoints the [Secretary of State] as its agent for service of process for the
17 purposes of enforcing a debt, obligation, or other liability under this subsection. Service on the
18 [Secretary of State] under this subsection is made in the same manner and with the same
19 consequences as provided in Section 213(c) and (d).

20 **Comment**

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

22
23 Under Section 103(c)(10), this Section is not subject to override by the governing
24 instrument.
25

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

Comment

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

1 [ARTICLE] 7

2 DISSOLUTION AND WINDING UP

3 ~~[Introductory Notes: (1) This Article, which derives from ReULLCA, is not as polished as~~
4 ~~the rest of the act because it has never been vetted in a drafting session. It was quickly~~
5 ~~assembled for the summer reading after our Spring 2007 Salt Lake City meeting. It is~~
6 ~~therefore not surprising that this article was the most heavily commented upon from the~~
7 ~~floor during the summer reading. (2) Several provisions in this Article may require~~
8 ~~revision to account for series trusts.]~~
9

10 SECTION 701. EVENTS CAUSING DISSOLUTION. A statutory trust is dissolved,
11 and its activities must be wound up, upon the occurrence of:

- 12 (1) an event or circumstance that the governing instrument states causes dissolution; or
- 13 (2) an administrative dissolution under Section 705. ~~[For Discussion, three related~~
14 ~~questions that were raised during the summer meeting: (1) whether we should allow~~
15 ~~dissolution as a remedy for oppression; (2) whether a statutory trust could be dissolved by~~
16 ~~a court as a remedy, perhaps for fraud or in some other non-oppression context; (3)~~
17 ~~whether we need a comment here or elsewhere (perhaps in Section 105) that addresses~~
18 ~~election of remedies.]~~

19 Comment

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

21
22 Consistent with Section 306, which provides as a default rule that a statutory trust has
23 perpetual existence, this Section provides that a statutory trust is dissolved ~~only~~ upon the
24 occurrence of an event or circumstance stated in the governing instrument. ~~Thus, in contrast~~
25 ~~with almost all other unincorporated business organizations, in a statutory trust dissolution is not~~
26 ~~available as a remedy for alleged oppressive conduct.~~
27

28 Under Section 103(c)(1), the provisions of this section are not subject to override by the
29 governing instrument. However, the governing instrument need not provide for an event or
30 circumstance that causes dissolution. See Section 306.
31

1 **SECTION 702. WINDING UP.**

2 (a) A dissolved statutory trust shall wind up its activities, and the trust continues after
3 dissolution only for the purpose of winding up.

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

5 (1) ~~shall~~ discharge the trust's debts, obligations, and other liabilities, settle and
6 close the trust's activities, and marshal and distribute the assets of the trust; and

7 (2) ~~may~~:

8 _____ (A) deliver to the [Secretary of State] for filing a statement of dissolution
9 stating the name of the trust and that the trust is dissolved;

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

11 (B~~1~~) preserve the trust's activities and property as a going concern for a
12 reasonable time;

13 (C~~2~~) institute, maintain, and defend actions and proceedings, whether
14 civil, criminal, or administrative;

15 (D~~3~~) transfer the trust's property;

16 (E~~4~~) settle disputes; ~~by mediation or arbitration~~ **[For Discussion, two**
17 **comments from the summer reading: (1) that we should say "by alternative dispute**
18 **resolution" instead of "by mediation or arbitration," and (2) that we should delete (b)(2)(E)**
19 **on the theory that it is redundant of (b)(1).];**

20 _____ (F) deliver to the [Secretary of State] for filing a statement of termination
21 ~~stating the name of the trust and that the trust is terminated; and~~

22 (G~~5~~) perform other acts necessary or appropriate to the winding up.

23 (ed) On application of any person that shows good cause, the [appropriate court] may

1 appoint a person to be a receiver for a dissolved statutory trust with the power to undertake any
2 action that might have been done by the trust during its winding up if the action is necessary for
3 final settlement of ~~unfinished business~~ of the trust.

4 **Comment**

5 **Principal Source** – Revised Uniform Limited Liability Company Act §702 (2006);
6 Delaware Limited Liability Company Act §18-805.

7
8 If the governing instrument of a statutory trust provides for the dissolution of the trust,
9 then upon the event or circumstance that triggers dissolution, the statutory trust may continue
10 only for the purpose of winding up.

11
12 In winding up the statutory trust within a reasonable time, the trustees are neither
13 required to undertake a fire sale of the assets of the statutory trust on unfavorable terms nor
14 permitted to continue the trust endlessly under the guise of winding down. The question of what
15 period of time is “reasonable” under paragraph ~~(b)(21)(B)~~ turns on the totality of the
16 circumstances.

17
18 Paragraph ~~(ed)~~ provides for the possibility that after dissolution additional unfinished
19 business of the statutory trust is discovered. ~~[For Discussion: Whether paragraph (e) should~~
20 ~~be broader than “unfinished” business.]~~

21
22 Under Section 103(c)(1), the provisions of this section are not subject to override by the
23 governing instrument.
24

25 **SECTION 703. KNOWN CLAIMS AGAINST DISSOLVED STATUTORY** 26 **TRUST.**

27 (a) Except as provided in subsection (d), a dissolved statutory trust may give notice of a
28 known claim under subsection (b), which has the effect provided in subsection (c).

29 (b) A dissolved statutory trust may ~~[For Discussion: Because 703(b) is permissive, the~~
30 ~~question arose in the summer meeting whether a trust could opt instead to use newspaper~~
31 ~~notice under 704 to kill off a known claim.]~~ in a record notify its known claimants of the
32 dissolution. The notice must:

33 (1) specify the information required to be included in a claim;

(2) provide a mailing address to which the claim is to be sent;

(3) state the deadline for receipt of the claim, which may not be less than 120 days after the date the notice is received by the claimant; and

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

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

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

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

(A) the trust ~~causes~~ notifies the claimant ~~to receive a notice~~ in a record ~~stating~~ that the claim is rejected and will be barred unless the claimant commences an action against the trust to enforce the claim within 90 days after the claimant receives the notice; and

(B) the claimant does not commence the required action within the 90 days. ~~[For Discussion: The rationale for why this section—section 703—does not have an analogue to Section 704(d).]~~

(d) This section does not apply to a claim based on an event occurring after the effective date of dissolution or a liability that on that date is unmatured or contingent. ~~[For Discussion: Question from the floor whether “contingent” is broad enough to include “unmatured” or “unliquidated” claims”?]~~

Comment

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

[For Discussion: (1) The difference in paragraph (d) between “unmatured” and “contingent” claims and whether that difference should be addressed in the comment. (2) Whether to include here or elsewhere (if elsewhere, where?) a summary of the interaction of Sections 703 and 704 and the operation of article 7 more generally.]

_____ -Under Section 103(c)(1), the provisions of this section are not subject to override by the

governing instrument.

~~[For Discussion: Based on the comments from the floor, we need at least two additional types of commentary. First, either a prefatory note or a comment to 701 that outlines the dissolution process. Second, a comment to 703 and/or 704 that outlines the process of barring known and unknown claims and the reasons for making these sections permissive (i.e., if you don't give notice, the claim isn't barred).]~~

SECTION 704. ~~OTHER UNKNOWN~~ CLAIMS AGAINST DISSOLVED STATUTORY TRUST. ~~[For Discussion: Ambiguity in the caption to this Section.]~~

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

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

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

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

(3) state that a claim against the trust is barred unless an action to enforce the claim is commenced within [five] years after publication of the notice.

(c) If a dissolved statutory trust publishes a notice in accordance with subsection (b), unless the claimant commences an action to enforce the claim against the trust within five years

~~[For Discussion: The five year window. We received many questions about why five years.]~~ after the publication date of the notice, the claim of each of the following claimants is barred:

(1) a claimant that did not receive notice in a record under Section 703; ~~[For Discussion: Whether a trust could use this provision to kill off a known claim by use of a~~

1 ~~newspaper notice.]~~

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

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

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

6 (1) against a dissolved statutory trust, to the extent of its undistributed assets; and

7 (2) if assets of the trust have been distributed after dissolution, against a beneficial
8 owner to the extent of that person's proportionate share of the assets distributed to the beneficial
9 owner after dissolution, but a beneficial owner's total liability for all claims under this paragraph
10 does not exceed the total amount of assets distributed to the beneficial owner after dissolution.

11 **Comment**

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

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

16
17 ~~[For Discussion, two more questions from the summer reading: (1) Should we have~~
18 ~~commentary here and/or to 703 to the effect that a secured party is not barred from~~
19 ~~enforcing the security, though to the extent the debt is undersecured, the undersecured~~
20 ~~part can be bared; (2) Do we want the trustees to have any “zone of insolvency” duties to~~
21 ~~creditors?]~~[For Discussion: At the Fall 2007 meeting in Chicago, I was instructed to
22 examine the role of the courts in the Delaware dissolution provisions. But after reviewing
23 the Delaware Statutory Trust Act, I haven't found any such provisions. Perhaps I've
24 missed something obvious, but in all events we need to discuss the issue.]
25

26 **SECTION 705. ADMINISTRATIVE DISSOLUTION.** ~~[For Discussion, two~~
27 ~~questions from the floor: (1) how might this section be harmonized with Section 808, and~~
28 ~~(2) should the effective date of a dissolution depend on whether the dissolution was~~
29 ~~administrative or triggered by an event stated in the governing instrument?]~~

30 (a) The [Secretary of State] may dissolve a statutory trust administratively if the trust

does not:

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

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

(3) file an annual report; or

(4) pay, within 60 days after the due date, any fee, tax, or penalty due to the [Secretary of State].

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

~~_____ (2) deliver, within 60 days after the due date, its annual report to the [Secretary of State].~~

(b) If the [Secretary of State] determines that a ground exists for administratively dissolving a statutory trust, the [Secretary of State] must prepare, sign, and file a notice of dissolution and send a copy to the trust's agent for service of process, or if the trust does not appoint and maintain a proper agent in this state, to the trust's designated office. The notice must state:

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

(2) the basis for the revocation.

(c) Unless a statutory trust cures the failures to comply with subsection (a) stated in the notice of dissolution before the date state in the notice, the [Secretary of State] shall dissolve the trust administratively by preparing, signing, and filing a declaration of dissolution that states the grounds for dissolution. The [Secretary of State] shall prepare, sign, and file a notice of

dissolution and send a copy to the trust's agent for service of process, or if the trust does not appoint and maintain a proper agent in this state, to the trust's designated office.

~~—— (b) If the [Secretary of State] determines that a ground exists for administratively dissolving a statutory trust, the [Secretary of State] shall file a record of the determination and serve [For Discussion: Send/serve.] the trust with a copy of the filed record.~~

~~—— (c) If within 60 days after service of the copy pursuant to subsection (b) a statutory trust does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the [Secretary of State] that each ground determined by the [Secretary of State] does not exist, the [Secretary of State] shall dissolve the trust administratively by preparing, signing, and filing a declaration of dissolution that states the grounds for dissolution. The [Secretary of State] shall serve [For Discussion: Send/serve.] the trust with a copy of the filed declaration.~~

(d) A statutory trust that has been administratively dissolved continues in existence but, subject to Section 706, may carry on only activities necessary to wind up its activities and liquidate its assets under Sections 702 and 708 and to notify claimants under Sections 703 and 704.

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

Comment

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

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

SECTION 706. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION.

1 (a) A statutory trust that has been administratively dissolved may apply to the [Secretary
2 of State] for reinstatement within [two] years after the effective date of dissolution. The
3 application must be delivered to the [Secretary of State] for filing and state:

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

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

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

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

12 (c) When a reinstatement becomes effective, it relates back to and takes effect as of the
13 effective date of the administrative dissolution and the statutory trust may resume its activities as
14 if the dissolution had not occurred. ~~[For Discussion: There is no requirement for the~~
15 ~~secretary of state to act within a particular time. What happens if the secretary of state~~
16 ~~just sits on the application? One option is to deem the application approved if the~~
17 ~~secretary of state fails to act within a specified period of time.]~~[For Discussion: We should
18 reconsider the question of what happens if the SecState just sits on the application?]

19 Comment

20 **Principal Source** – Revised Uniform Limited Liability Company Act §706 (2006).

21
22 Under Section 103(c)(1), the provisions of this section are not subject to override by the
23 governing instrument.
24

25 **SECTION 707. APPEAL FROM REJECTION OF REINSTATEMENT.**

(a) If the [Secretary of State] rejects a statutory trust's application for reinstatement following administrative dissolution, the [Secretary of State] shall prepare, sign, and file a notice that explains the reason for rejection and send a copy to the trust's agent for service of process~~serve [send/serve again]~~ the trust with a copy of the notice. _____

(b) Within 30 days after service of a notice of rejection of reinstatement under subsection (a), a statutory trust may appeal from the rejection by petitioning the [appropriate court] to set aside the dissolution. The petition must be ~~served on~~send/serve~~delivered to~~ the [Secretary of State] and contain a copy of the [Secretary of State's] declaration of dissolution, the trust's application for reinstatement, and the [Secretary of State's] notice of rejection.

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

Comment

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

Under Section 103(c)(1), the provisions of this section are not subject to override by the governing instrument. ~~[For Discussion: A comment from the summer meeting – “If a trust has no right to appeal an administrative dissolution, but only a right to appeal a denial of reinstatement, I think you need a provision allowing the agency or a court to stay the limitation on the conduct of activities provided by 705(b) pending a decision of the application for reinstatement. This may obviate the need to impose time limits on applications for reinstatement and may avoid potential constitutional problems.”]~~

SECTION 708. DISTRIBUTION OF ASSETS IN WINDING UP STATUTORY TRUST'S ACTIVITIES.

(a) In winding up its activities, a statutory trust shall first apply its assets to discharge its obligations to creditors. [For discussion: This section will be affected by the addition, if any, of a court process per the discussion note in section 704 above.]

(b) After a statutory trust complies with subsection (a), any surplus must be distributed to

1 the beneficial owners in proportion to their beneficial interests.

2 **Comment**

3 **Principal Source** – Revised Uniform Limited Liability Company Act §708 (2006).

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

1 [ARTICLE] 8

2 FOREIGN STATUTORY TRUSTS

3 [FOR DISCUSSION: We have made numerous changes to the vocabulary of this section,
4 changing more and more of the original language and structure of the ULPA model from
5 meeting to meeting. Because these ad hoc changes have come incrementally, it was not
6 surprising when at the last meeting we discovered inconsistencies throughout the Article. I
7 tried to clean up those inconsistencies, clipping an errant thread here and there, but on
8 each attempt, the whole Article began to unravel. Accordingly, we will need to give this
9 Article attention.]

10
11 SECTION 801. GOVERNING LAW.

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

- 14 (1) the internal affairs of the trust;
- 15 (2) the liability of a beneficial owner as beneficial owner and trustee as trustee for
16 the debts, obligations, or other liabilities of the trust or any series thereof; and
- 17 (3) the liability of a series of a foreign statutory trust with respect to the trust and
18 other series thereof.

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

22 (c) A certificate of qualification does not authorize a foreign statutory trust to engage in
23 any business or exercise any power that a statutory trust may not engage in or exercise in this
24 state.

25 **Comment**

26
27 **Principal Sources** – Revised Uniform Limited Liability Company §801 (2006); Uniform
28 Limited Partnership Act §901 (2001); Delaware Statutory Trust Act §3851; Connecticut
29 Statutory Trust Act §34-530.
30

Paragraph (a) parallels and is analogous in scope and effect to Section 305 for a domestic statutory trust. Paragraph (b) allows for a foreign statutory trust to operate domestically even if the law governing it is different from the laws governing domestic statutory trusts, but under paragraph (c) a foreign statutory trust cannot engage in any business or exercise any power that a domestic statutory trust could not.

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

SECTION 802. APPLICATION FOR CERTIFICATE OF QUALIFICATION.

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

(1) the name of the trust and, if the name does not comply with Section 209, an alternate name adopted pursuant to Section 807(a).

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

(3) the street and mailing addresses of the trust's principal office and, if the laws of the jurisdiction under which the 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 trust's initial agent for service of process in this state.

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

Comment

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

1 A certificate of qualification applied for under this section is different than a certificate of
2 existence furnished under Section 207 or a certificate of registration under Section 806. [Article
3 2 cross-references (e.g., 205, 209), to come after resolution of the global Article 8 issues are
4 resolved.]

5
6 Under Section 103(c)(1), this Section is not subject to override by the governing
7 instrument.
8

9 **SECTION 803. AMENDMENT OR RESTATEMENT OF CERTIFICATE.**

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

12 (1) the name of the trust;

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

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

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

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

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

22 (c) A certificate of qualification of a foreign statutory trust may be amended at any time
23 for any purpose as determined by the trustees.

24 (d) An amendment or restated certificate of qualification of a foreign statutory trust is
25 effective as provided in Section 204(c).

26 **Comment**

27 **Principal Source** – Uniform Limited Partnership Act §202 (2001).
28

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

5
6 Under Section 103(c)(1), this Section is not subject to override by the governing
7 instrument.
8

9 **SECTION 804. ACTIVITIES NOT CONSTITUTING TRANSACTING**
10 **BUSINESS.**

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

- 13 (1) maintaining, defending, or settling an action or proceeding;
14 (2) holding meetings of its trustees or carrying on any other activity concerning
15 its internal affairs;
16 (3) maintaining accounts in financial institutions;
17 (4) maintaining offices or agencies for the transfer, exchange, and registration of
18 the trust's own beneficial interests or securities or maintaining trustees or depositories with
19 respect to those beneficial interests or securities;
20 (5) selling through independent contractors;
21 (6) soliciting or obtaining orders, whether by mail or electronic means or through
22 employees or agents or otherwise, if the orders require acceptance outside this state before they
23 become contractual obligations;
24 (7) creating or acquiring indebtedness, mortgages, or security interests in real or
25 personal property;
26 (8) securing or collecting debts or enforcing mortgages or other security interests
27 in property securing the debts, and holding, protecting, or maintaining property so acquired;

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

(10) transacting business in interstate commerce. ~~[For Discussion: What about ownership of property that is not income producing, or doing business as a member of an LLC or a limited partner in a LLP?]~~

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

(c) A person does not do business in the state solely by reason of being a trustee or a beneficial owner of a foreign statutory trust that does ~~do~~ transact business in this state.

Comment

Principal Sources – Uniform Limited Partnership Act §903 (2001).

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

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

SECTION 805. APPLICATION FOR ~~CERTIFICATE OF QUALIFICATION~~. If all filing fees have been paid, unless the [Secretary of State] determines that an application for a ~~certificate of qualification~~ of a foreign statutory trust does not comply with the filing requirements of this [act], the [Secretary of State] shall file the application.

Comment

Principal Source – Uniform Limited Partnership Act §904 (2001).

An application for certificate of qualification filed under this section is different than a

1 certificate of registration under Section 806.

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

5
6 **SECTION 806. CERTIFICATE OF ~~REGISTRATION~~QUALIFICATION.**

7 (a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish a
8 certificate of ~~registration~~qualification for a foreign statutory trust if the records filed in the
9 [office of the Secretary of State] show that the [Secretary of State] has filed a certificate of
10 qualification, has not revoked the certificate of qualification, and has not filed a notice of
11 cancellation. A certificate of registration must state:

12 (1) the name of the trust and any alternate name adopted under Section 807 for
13 use in this state;

14 (2) that all fees and penalties due to the [Secretary of State] have been paid;

15 (3) that the [Secretary of State] has not ~~revoked its certificate of qualification and~~
16 ~~has not~~ filed a notice of cancellation; and

17 (4) whether the foreign statutory trust's most recent annual report required by
18 Section 214 has been filed by the [Secretary of State].

19 (b) Subject to any ~~qualification~~limitation stated in the certificate, a certificate of
20 ~~registration~~qualification issued by the [Secretary of State] to a foreign statutory trust may be
21 relied upon as conclusive evidence that the trust is authorized to transact business in this state.

22 **Comment**

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

24 The provisions of this section, which concern the issuance of a certificate of ~~registration~~
25 qualification for a qualified foreign statutory trust, are analogous to the provisions of Section 206
26 concerning the issuance of a certificate of existence for a statutory trust.
27

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

4 **SECTION 807. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.**

5 (a) A foreign statutory trust whose name does not comply with Section 207 may not
6 obtain a certificate of qualification until it adopts, for the purpose of transacting business in this
7 state, an alternate name that complies with Section 207. A foreign statutory trust that adopts an
8 alternate name under this subsection and obtains a certificate of qualification with the name need
9 not comply with [fictitious or assumed name statute]. After obtaining a certificate of
10 qualification with an alternate name, a foreign statutory trust shall transact business in this state
11 under the name unless the trust is authorized under [fictitious or assumed name statute] to
12 transact business in this state under another name.

13 (b) If a qualified foreign statutory trust changes its name to one that does not comply with
14 Section 107, it may not thereafter transact business in this state until it complies with subsection
15 (a) and obtains an amended certificate of qualification.

16 **Comment**
17

18 **Principal Source** – Uniform Limited Partnership Act §905 (2001).
19

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

23 **SECTION 808. REVOCATION OF CERTIFICATE OF QUALIFICATION.** [For
24 Discussion: This section is perhaps the clearest example of the nomenclature problem
25 flagged above.]

26 (a) A certificate of qualification of a qualified foreign statutory trust to transact business
27 in this state may be revoked by the [Secretary of State] in the manner provided in subsections (b)

1 and (c) if the trust does not:

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

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

5 (3) file an annual report; or

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

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

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

14 (2) the basis for the revocation.

15 (c) Unless a foreign statutory trust cures the failures to comply with subsection (a) stated
16 in the notice of revocation before the date state in the notice, the authority of the trust to transact
17 business in this state ceases on that date.

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

22 **Comment**

23 **Principal Source** – Uniform Limited Partnership Act §906 (2001).
24
25

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

4 **SECTION 809. CANCELLATION OF CERTIFICATE OF QUALIFICATION.**

5 (a) To cancel its certificate of qualification ["certificate of qualification" is one of the
6 key vocabulary problems] to transact business in this state, a qualified foreign statutory trust
7 must deliver to the [Secretary of State] for filing a notice of cancellation that states:

8 (1) the name of the trust;

9 (2) the date of filing of its initial certificate of qualification;

10 (3) that the certificate of qualification is being canceled; and

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

12 (b) A certificate of qualification under subsection (a) is canceled when the notice of
13 cancellation becomes effective under Section 204.

14 **Comment**

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

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

21 **SECTION 810. EFFECT OF FAILURE TO HAVE CERTIFICATE.**

22 (a) A foreign statutory trust transacting business in this state may not maintain an action
23 or proceeding in this state unless it has a certificate of qualification to transact business in this
24 state.

25 (b) The failure of a foreign statutory trust to have a certificate of qualification to transact
26 business in this state does not impair the validity of a contract or act of the trust or prevent the
27 trust from defending an action or proceeding in this state.

1 (c) A trustee or beneficial owner of a statutory trust is not liable for the debts,
2 obligations, or other liabilities of the trust solely because the trust transacted business in this
3 state without a certificate of qualification.

4 (d) If a foreign statutory trust transacts business in this state without a certificate of
5 qualification or cancels its certificate of qualification, ~~the trust appoints the [Secretary of State]~~
6 ~~as is~~ its agent for service of process for actions arising out of the transaction of business in this
7 state.

8 **Comment**

9
10 **Principal Source** – Uniform Limited Partnership Act §907 (2001).

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

15 **SECTION 811. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]
16 may maintain an action to enjoin a foreign statutory trust from transacting business in this state
17 in violation of this [article].

18 **Comment**

19
20 **Principal Source** – Uniform Limited Partnership Act §908 (2001).

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

1 **[ARTICLE] 9**

2 **MISCELLANEOUS PROVISIONS**

3 **SECTION 901. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
4 applying and construing this uniform act, consideration must be given to the need to promote
5 uniformity of the law with respect to its subject matter among states that enact it.

6 **Comment**

7
8 **Principal Source** – Uniform Limited Partnership Act §1201 (2001).

9
10 Under Section 103(c)(1), this Section is not subject to override by the governing
11 instrument.
12

13 **SECTION 902. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
14 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the federal
15 Electronic Signatures in Global and National Commerce Act[, 15 U.S.C. Section 7001 et seq.],
16 but this [act] does not modify, limit, or supersede Section 101(c) of that act or authorize electronic
17 delivery of any of the notices described in Section 103(c) of that act.

18 **Comment**

19
20 **Principal Source** – Uniform Limited Partnership Act §1203 (2001).

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

25
26 **SECTION 903. SAVING CLAUSE.** This [act] does not affect an action commenced,
27 proceeding brought, or right accrued before this [act] takes effect.

28 **Comment**

29
30 **Principal Source** – Uniform Limited Partnership Act §1207 (2001).
31

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

4 **SECTION 904. RESERVATION OF POWER TO AMEND OR REPEAL.** The
5 [name of state legislature] has power to amend or repeal all or part of this [act] at any time and all
6 statutory trusts and foreign statutory trusts subject to this [act] are governed by the amendment or
7 repeal.

8 **Comment**
9

10 **Principal Source** – Revised Model Business Corporation Act §1.02 (2002).
11

12 ~~————[For Discussion: (1) Necessity of an explanatory comment, and (2) other models~~
13 ~~besides the RMBCA. At the summer reading we were urged to look at Section 103 of the~~
14 ~~new Uniform Cooperative Association Act, which says “A limited cooperative association~~
15 ~~governed by this [act] is subject to any amendment or repeal of this [act].”]~~
16

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

20 **SECTION 905. APPLICATION TO EXISTING RELATIONSHIPS.**

21 (a) This [act] does not limit, prohibit, or invalidate the existence, acts, or obligations of any
22 common-law trust created or doing business in this state before or after [the effective date of the
23 act]. The laws of this state other than this [act] pertaining to trusts apply to common-law trusts.

24 (b) A common-law trust arising under the law of this state before or after [the effective date
25 of this [act]] that does not have a prevaillingly donative purpose may elect to be governed by this
26 [act] by filing of a certificate of trust under Section 201.

27 [(c) A trust created pursuant to a statute of this state that was required by that statute to file
28 a certificate of trust with [the Secretary of State] before [the effective date of this [act]] may elect
29 to be governed by the provisions of this [act] by filing an amendment to its certificate of trust
30 under Section 202.]

1 [(d) On [two years] after [the effective date of this [act]], this [act] governs the organization
2 and internal affairs of all trusts created pursuant to a statute of this state that was required by that
3 statute to file a certificate of trust with the [Secretary of State] before the effective date of this
4 [act].]

5 **Comment**

6
7 **Principal Source** – Uniform Limited Partnership Act §1206 (2001).

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

13
14 Paragraphs (a) and (b) confirms that this act does not govern a common law trust unless the
15 trust ~~elects to be governed by the terms of this act by~~ forms a statutory trust by filing a certificate of
16 trust under Section 201. However, consistent with Section 302, paragraph (b) of this Section
17 prohibits a common law trust with a prevailingly donative purpose from becoming a statutory
18 trust. An alternative mode for a common law trust to become a statutory trust is provided by the
19 conversion provisions of Article 6. Unlike the formation of a new statutory trust by filing a
20 certificate of trust under Section 201, the conversion provisions of Article 6 allow for the
21 conversion of another organization into the statutory trust form while preserving continuity in the
22 converting organization’s relationships with third parties. See the Comments to Sections 601 and
23 605.

24
25 The drafting committee contemplated that some enacting jurisdictions might modify this
26 section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not
27 expected—to address other transition problems arising from differences between this Act and prior
28 law. For example, an enacting jurisdiction might choose to allow trusts formed under a prior
29 statute to remain governed by the prior statute for longer than the two years suggested in paragraph
30 (d).

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

34
35 **SECTION 906. REPEALS.** On [all-inclusive date], the following acts are repealed:

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

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

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

Comment

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

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

Paragraph (3) supplies model language for enacting jurisdictions that have previously enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a REIT, is not a type of trust but rather is a tax status awarded to any entity that qualifies under 26 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under 26 U.S.C. §860D. Although the Internal Revenue Code at one time favored the trust form for the organization of a REIT, the code today does not regulate the form of entity. Accordingly, there is no longer any reason why a REIT must be organized as a trust, whether statutory or common law. Indeed, in contemporary practice most publicly-traded REITs are organized as Maryland corporations, not as trusts. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* __ [citation]. Nonetheless, prior to the liberalization of the tax code, a number of states enacted REIT statutes that authorize the creation of a trust entity designed to qualify as a REIT under the code. Because a statutory trust under this Act could serve the same purpose, the drafting committee contemplated that enacting jurisdictions might take the occasion of enacting this act to repeal their REIT statutes.

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

SECTION 907. EFFECTIVE DATE. This [act] takes effect

Comment

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

Section 905 specifies how this Act affects statutory trusts, with special provisions pertaining to statutory trusts formed before the Act's effective date. Section 804 contains no comparable provisions for foreign statutory trusts. Therefore, once this Act is effective, it applies immediately to all foreign statutory trusts, whether formed before or after the Act's effective date.

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

1 instrument.