

PRELIMINARY REPORT*

FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-FOURTEENTH YEAR
PITTSBURGH, PENNSYLVANIA
JULY 22 - 29, 2005

UNIFORM STATUTORY TRUST ACT

** The Drafting Committee is presenting this report in order to advise the Conference of its progress to date and to obtain comments regarding certain issues that it is considering. This report has not been reviewed by the Committee on Style and will not be read line by line.*

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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.

UNIFORM STATUTORY TRUST ACT*

The USTA Drafting Committee held its first meeting on April 30 and May 1, 2004 (Spring 2004), and its second meeting on December 4 and 5, 2004 (Fall 2004). The next meeting will be held in Fall 2005. This report summarizes the work thus far, and the plan going forward. Because the Drafting Committee does not yet have a draft of the Act in a form suitable for presentation to the Conference, this report is being submitted to the Conference for review at the 2005 Annual Meeting in lieu of a first reading.

I. Background and Rationale

The Drafting Committee was appointed in August of 2003 following a November 2002 recommendation to the Joint Editorial Board for Uniform Unincorporated Organization Acts.

Although not used as widely as other business entities, there are several highly specialized types of business activity in which business trusts—both statutory and common law—are used as an alternative mode of business organization. An increasing number of mutual funds are organized as statutory business trusts, and the statutory business trust is a preferred “special purpose vehicle” in asset securitization and other structured finance transactions. Real estate investment trusts (“REITs”) are also often formed as business trusts. The principal advantages of the business trust as a mode of business organization are: (i) the lack of federal entity taxation (unless it issues publicly-traded beneficial interests) and (ii) its extreme structural flexibility.

II. Progress Thus Far

In connection with the April and December 2004 meetings, the Drafting Committee reviewed: (a) an analysis of all existing state business trust legislation; (b) relevant law review and other commentary; (c) several relevant model and uniform acts heretofore approved by the conference or the ALI; and (d) statistical data on the use of statutory business trusts in the various states, all of which that had been circulated in advance by the Reporter.

At present, 29 states have some kind of business trust legislation. See Robert H. Sitkoff, *Trust as Uncorporation: A Research Agenda*, 2005 U. Ill. L. Rev. ____ (forthcoming). The oldest is the Massachusetts statute, which dates from 1909. The youngest is the Virginia statute, which took effect in 2003. A glance at the enactment dates of the statutes reveals that there was a flurry of business trust legislation in the early 1960s, and then again in the wake of the Delaware Business Trust Act of 1988. This suggests that there are perhaps as many as four generations of business trust legislation: the first comprises the older statutes such as the Massachusetts act; the second comprises those that were enacted in the 1960s flurry; the third comprises the legislation

* Formerly the Uniform Business Trust Act.

passed in the 1980s but before the Delaware Act; and the fourth comprises the Delaware Act and the Delaware-style statutes that have been enacted since 1988.

The Drafting Committee concluded that it is the flexible, enabling character of the fourth generation acts that has made the statutory business trust a viable and useful form of business organization. Preliminary data collected by the Reporter (and being refined for more formal presentation in the future) indicates that the number of business trusts organized under the fourth generation acts vastly exceeds the number organized under all the alternatives combined. The Drafting Committee was influenced in particular by data presented by the Reporter which showed that Delaware and Connecticut have emerged as the jurisdictions of choice for the organization of statutory business trusts (see Appendix A). The data indicate that Delaware leads all other states by an order of magnitude. Accordingly, the Drafting Committee decided to model the Act on the Delaware act.

The Delaware statute was initially enacted in 1988 as the “Delaware Business Trust Act.” In 2002, Delaware re-cast the Act as the “Delaware Statutory Trust Act”, replacing virtually every reference to “business trust” in the statute with the alternative term, “statutory trust.” The Connecticut Act, which was enacted in 1997, used the term “statutory trust” from the outset. The change addressed the concern of those who used these trusts in structured finance transactions that a “business” trust might be deemed a “person” under the Bankruptcy Code. If so, the entity could be the subject of an involuntary bankruptcy, which would defeat the expectations of the parties in asset securitization transactions, who rely upon a bankruptcy remote entity. Accordingly, the Drafting Committee requested the Executive Committee to change its name from the Uniform Business Trust Act to the Uniform Statutory Trust Act, and the Executive Committee agreed to this change in January 2005.*

The Committee also determined, as is the case in Delaware and the other fourth generation statutes, that freedom of contract should be the governing principle. For this reason the Committee determined that, except for a handful of provisions expressly made mandatory, all provisions of the Act should be default rules.

Also consistent with the Delaware Act and most (but not all) of the fourth generation statutes, the Committee agreed that the trust law rather than corporate law will fill the gaps not otherwise addressed by the statute or the trust agreement.

With agreement on those overarching policy issues, at its December 2004 meeting the Drafting Committee reviewed the Reporter’s first Draft of the Act section by section. For each section the Reporter raised specific policy questions, including those alluded to above, whereupon the Drafting Committee ventilated these issues in open discussion. Among other things, it was agreed that the next draft of the act would track the Uniform Limited Partnership Act for definitions and would defer to the Model Entity Transaction Act on issues of Merger,

* Under the Bankruptcy Code, the definition of a “debtor” eligible for bankruptcy includes a “person.” The definition of “person” includes “a corporation” and the definition of a “corporation” includes a “business trust” hence a “business trust” may qualify as an eligible “debtor” under the Bankruptcy Code. In the leading case of *In re: Secured Equipment Trust of Eastern Airlines, Inc.*, 38 F.3d 86 (2d Cir. 1994), certain trusts used in securitization transactions were held not to be “a business trust” under the Bankruptcy Code. The rationale of recasting the Business Trust Act as a Statutory Trust Act is to increase the probability of this result.

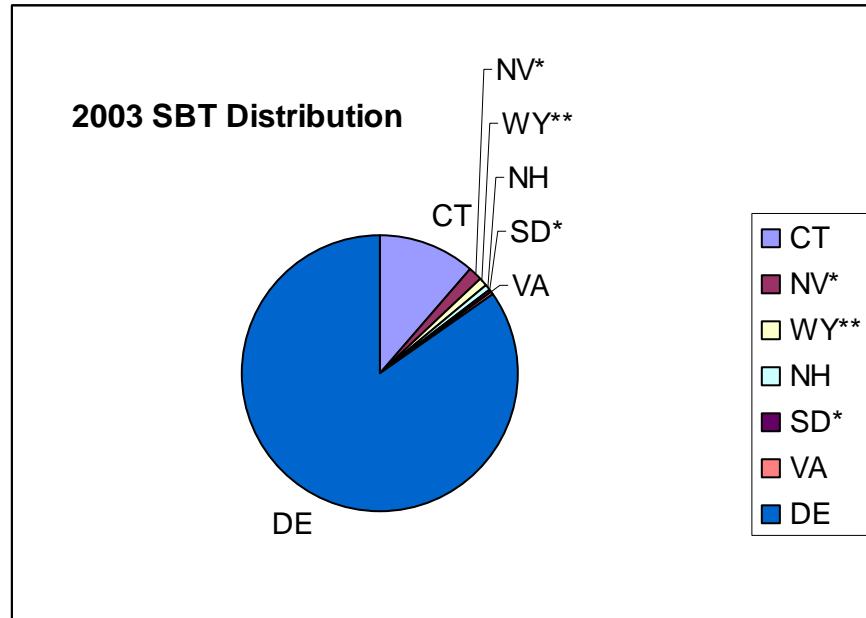
Consolidation, and Conversion.

The Drafting Committee concluded that additional observers and advisors would be helpful. Accordingly, the Committee identified and recruited additional advisors with expertise in bankruptcy, taxation, structured finance, and mutual funds. Observers from affected industries were also identified and invited.

In advance of the next meeting (to be held in Fall 2005), the Reporter will circulate a second draft of the Act consistent with the Committee's discussions. We expect to have a first reading at the 2006 conference.

Appendix A

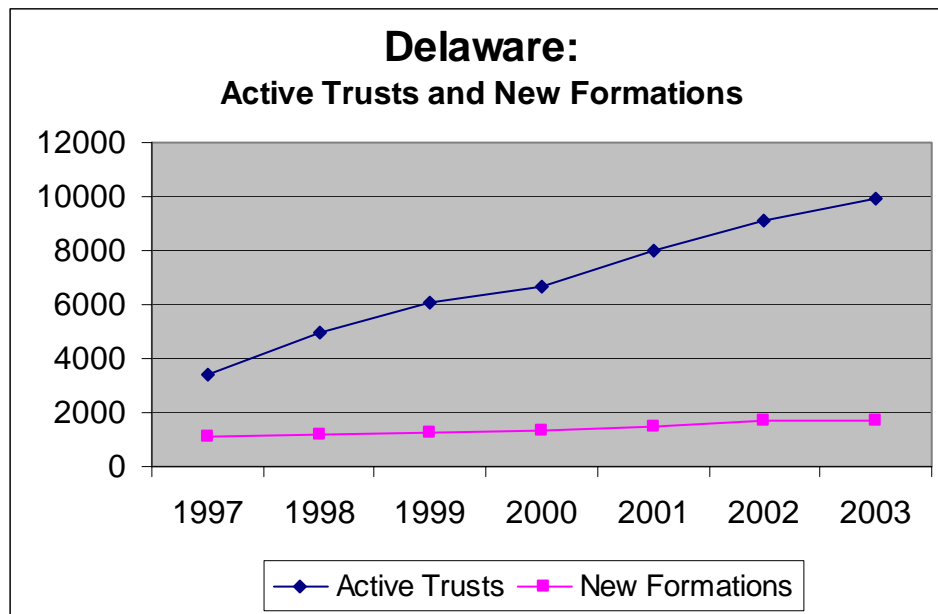
The following pie chart illustrates the distribution of active business trusts across the fourth-generation business trust states as of 2003, except for Maryland, for which data was not available. Delaware dominates.



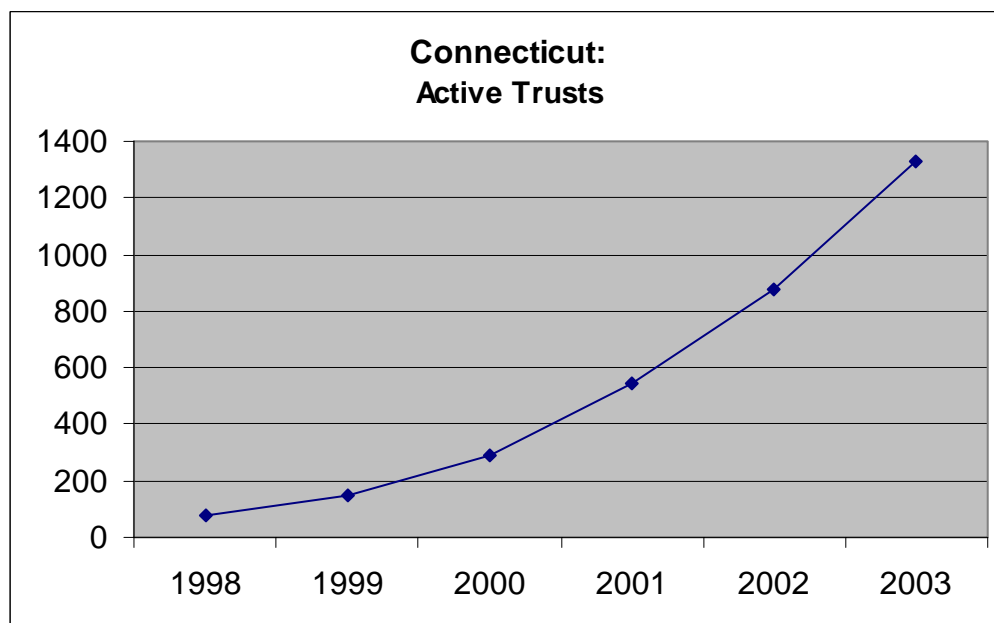
* Used 2004 data, not 2003.

* * Best guess based on number of new filings.

The following graph depicts the trend in Delaware of the number of active trusts and new trust formations each year from 1997 through 2003, inclusive.



The only other state with even 10% the volume of business trust activity as Delaware is Connecticut, which passed its Statutory Trust Act in 1997. The following graph depicts the trend in Connecticut of the number of active trusts each year from 1998 through 2003, inclusive.



Despite the obvious success of the Connecticut Act, which is substantially similar to that of Delaware's, the number of business trusts registered in Connecticut is roughly an order of magnitude less than in Delaware. The following graph shows the trend in the total number of active trusts in both states from 1998 through 2003, inclusive.

