

D R A F T  
FOR DISCUSSION ONLY

# UNIFORM STATUTORY TRUST ENTITY ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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For February 27 – March 1, 2009 Drafting Committee Meeting

*With Prefatory Notes and Comments*

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# UNIFORM STATUTORY TRUST ENTITY ACT

## Prefatory Note

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

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

A statutory trust differs from a common-law trust in several important respects. A common-law trust, whether its purpose is donative or commercial, arises from private action without the involvement of a public official. See Uniform Trust Code §401 (2000); Restatement (Third) of Trusts §10 (2003). Because a common-law trust is not a juridical entity, it must sue, be sued, and transact in the name of the trustee in the trustee’s capacity as such. By contrast, a statutory trust is formed by delivering a certificate of trust to a public official, typically the Secretary of State, for filing in the public record. See Section 201. Moreover, a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue, be sued, and transact in its own name. See Sections 301, 307-308.

Existing state business trust statutes do not prohibit use of the common-law trust for a commercial purpose. Instead, the modern statutes offer transactional planners an additional option, 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 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 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 the statutory trust acts of Connecticut, Delaware, Maryland, New Hampshire, Nevada, South Dakota, Wyoming, and Virginia, all of which were consulted in the drafting of the Uniform Act. However, in drafting the substantive provisions of the Uniform Statutory Trust Entity Act, the drafting committee was influenced primarily by the Delaware Statutory Trust Act.

In choosing to take the Delaware Statutory Trust Act as its starting point, the drafting committee relied on a recent study that presents state-level 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 \_\_\_. 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.).

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

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 Restatements (Third) of Trusts (2003, 2007) and Restatement (Second) of Trusts (1959).

**Innovative Provisions.** Although much of the Uniform Statutory Trust Entity Act reflects a reorganization and refinement of provisions found in the Delaware Statutory Trust Act, the Uniform Act contains several innovations including: (1) specification of rules that are not subject to override in the statutory trust's governing instrument (§103(c)); (2) clearer guidance on the applicability of ordinary trust law to statutory trust entities (§105); (3) exclusion of trusts with a prevailingly donative purpose (§302); (4) an entire article on series trusts (Article 4); (5) a charging order provision (§606); (6) systematic treatment of conversion and merger (Article 7), and of dissolution (Article 8); and (7) clearer guidance on the relationship between the common-



law trust and statutory trust entities (§1005).

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

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

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

There is, however, no separate body of general business law that applies to a common-law trust that has a business purpose. The common law of trusts applies to all trusts arising under the common law, even those that have a business purpose, to the extent that the common law is not displaced by the trust instrument or specialized legislation. For this reason, although the Uniform Trust Code "is directed primarily at trusts that arise in an estate planning or other donative context," the Code 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 1005(a) expressly confirms the continued applicability of the state's laws pertaining to trusts to a common law business trust.

The Uniform Statutory Trust Entity Act more closely resembles a generic corporate code or unincorporated entity law than the Uniform Trust Code. Like a corporation, limited liability company, and limited partnership, but unlike a common-law trust, a statutory trust is a juridical entity that may conduct transactions in its own name separate from that of the trustee and the beneficial owners. See Sections 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 505) and termination of trusts (Section 306). Section 1005(b)

allows an existing common-law trust that does not have a prevailingly donative purpose to convert into a statutory trust by delivering a certificate of trust for filing under Section 201.

Although the drafting committee contemplated that a statutory trust under this Act will be used primarily as a mode of business organization, Section 603(a) confirms that a person may become a beneficial owner of a statutory trust without an exchange of consideration. It is therefore possible that a statutory trust could be used as a substitute for the common-law trust in noncommercial contexts. However, to ensure that a statutory trust is not used to evade mandatory rules applicable to common-law trusts that enforce public policy limitations on donative transfers, Section 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 in its  
18 own name. A common-law trust, by contrast, is not a juridical entity. Second, the word “entity”  
19 in the title differentiates this act from the Uniform Trust Code, which is a codification of the  
20 common law of trusts. However, to conform with prevailing usage under the Delaware Statutory  
21 Trust Act, the entity that arises under this Act is called a “statutory trust,” not a “statutory trust  
22 entity.” See Section 102(15). Further, because the drafting committee wanted a statutory trust  
23 under this act to receive treatment under applicable regulatory law similar to that of a Delaware  
24 statutory trust, the entity features of a statutory trust under this act closely resemble those of a  
25 Delaware statutory trust.  
26

27                   The drafting committee had three reasons for eschewing the phrase “business trust.”  
28 First, under this act a statutory trust need not have a business or commercial purpose. On the  
29 contrary, Section 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 on whether a  
33 statutory trust would qualify as a “business trust” under the bankruptcy code. Under the  
34 bankruptcy code, the definition of a “debtor” eligible for bankruptcy includes a “person,” 11  
35 U.S.C. §101(13), the definition of “person” includes a “corporation,” id. §101(41), and the  
36 definition of “corporation” includes a “business trust.” Id. §101(9). Hence, a “business trust”  
37 might qualify as an eligible “debtor.” Bankruptcy eligibility is a significant issue for trusts used  
38 as special purpose entities in structured finance transactions, a principal use of the modern  
39 statutory trust in practice. Such trusts are often designed to be “bankruptcy remote.” Thus, as in

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

5 Third, the drafting committee was influenced by the revealed preference for “statutory  
6 trust” over “business trust” among existing users of statutory business trusts 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 has been filed by the Secretary of State  
19 under Section 201. The term includes the record as amended or restated.

20 (3) “Common-law trust” means a fiduciary relationship with respect to property arising  
21 from a manifestation 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) for a statutory trust, the mailing address that it is required to designate under  
28 Section 201(a)(2); or

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

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

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

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

(7) “Jurisdiction” means a state, a foreign country, or a subdivision of 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) “Property” means all property, whether real, personal, or mixed, or tangible or intangible, or any interest therein.

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

(11) “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.

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

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

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

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

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

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

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

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

## 16 **Comment**

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

21  
22 Paragraphs (2), (6), and (17) define “certificate of trust,” “governing instrument,” and  
23 “trust instrument” respectively. The certificate of trust is the record that under Section 201 must  
24 be delivered to a public official for filing to form a statutory trust. The trust instrument is the  
25 transaction document that provides for the governance of the statutory trust and that need not be  
26 made part of the public record. Together, the certificate of trust and the trust instrument  
27 compose the governing instrument. The term “governing instrument” is in the singular to  
28 conform with standard commercial usage. Conflicts between the certificate of trust and the  
29 governing instrument are resolved pursuant to Section 201(d). Although the term “trust  
30 instrument” is phrased in the singular, consistent with current commercial practice the drafting  
31 committee contemplated that there would often be more than one such instrument. Section

1 104(b) makes authorization of multiple instruments explicit.

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

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

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

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

18 (a) Except as otherwise provided in subsection (c) and the terms of the governing  
19 instrument, this [act] governs the management and affairs of a statutory trust and the rights,  
20 interests, duties, obligations, and powers of, and the relations among, the trustees, the beneficial  
21 owners, and other persons.

22 (b) Except as otherwise provided in subsection (c), a governing instrument may contain:

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

24 (2) any provision relating to the rights, interests, duties, obligations, and powers  
25 of the trustees, the beneficial owners, and other persons.

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

27 (1) the provisions of [Articles] 2, 8 except for section 808(b), 9, and 10;

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

29 (3) the choice of governing law as provided in Section 30\_\_;

30 (4) the provisions pertaining to series trusts in Sections 401(a), 402(b) and (c),  
31 404, and 406.

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

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

9                   (7) the prohibition under Section 509 of indemnification, advancement, or  
10 exoneration for conduct involving bad faith, willful misconduct, or reckless indifference;

11                  (8) the limitations in Section 510(c) on direction of trustees that is manifestly  
12 contrary to the terms of the governing instrument or would constitute a serious breach of trust;

13                  (9) the right of a judgment creditor of a beneficial owner to seek a charging order  
14 under Section 606;

15                  (10) the right of a beneficial owner to information under Section 608, but the  
16 governing instrument may prescribe the standards for assessing whether information is  
17 reasonably related to the beneficial owner's ability to enforce its rights as a beneficial owner, if  
18 the standards are not manifestly unreasonable;

19                  (11) the right of a beneficial owner to bring an action under Section 609, but the  
20 governing instrument may subject the right to additional standards and restrictions including the  
21 requirement that beneficial owners owning a specified amount or type of beneficial interest join  
22 in bringing the action, if the additional standards and restrictions are not manifestly  
23 unreasonable; and



(12) the provisions pertaining to conversion and merger stated in Sections 701, 704, 705, 708, and 709.

### 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.

**Default Rules.** Paragraphs (a) and (b) emphasize 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. The provisions included in this schedule are the only rules that have mandatory application to a statutory trust.

Most of the provisions scheduled in paragraph (c) 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 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 Uniform Trust Code §1008 (2000); Restatement (Second) of Trusts §222 (1959); 4 Austin Wakeman Scott, William Franklin Fratcher, and Mark L. Ascher, Scott and Ascher on Trusts §24.27.3 (5th ed. 2007). For a general discussion, see John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1121-25 (2004); Melanie B. Leslie, Trusting Trustees: Fiduciary Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005).

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 Act §18-1101; **[To come: Citation to MBCA 2.02(b)(4) and/or other uniform acts]**.

The second exception is contained in paragraph (c)(8), which makes mandatory the invalidity under Section 510(c) of a direction to a trustee or other person that is manifestly contrary to the terms of the governing instrument or would constitute a serious breach of fiduciary duty. The reference to serious breach of fiduciary duty is designed to exclude an

1 inconsequential, immaterial, or technical breach that does not harm a beneficial owner. For  
2 some purposes, trust law distinguishes between serious and not serious breaches of trust. See,  
3 e.g., Uniform Trust Code §706(b)(1) (2000); 2 Austin W. Scott, William F. Fratcher, & Mark L.  
4 Ascher, 2 Scott and Ascher on Trusts §11.10, p. 661 (5th ed. 2006); Restatement (Second) of  
5 Trusts §107 cmt. b (1959). However, the effect of paragraph (c)(5) is limited by paragraph  
6 (c)(4), which allows the trustee's fiduciary duty to be altered by the governing instrument if the  
7 alteration is not manifestly unreasonable.

8  
9 Paragraphs (c)(5), (c)(6), (c)(10), and (c)(11) allow the governing instrument to alter the  
10 nature of the trustee's fiduciary obligation, the right of a trustee to information, the right of a  
11 beneficial owner to information, and the right of a beneficial owner to bring an action, but only if  
12 the alteration is not "manifestly unreasonable." In opting for the "manifestly unreasonable"  
13 standard instead of Delaware's "good faith and fair dealing" formulation, see Delaware Statutory  
14 Trust Act §3806(c) and (e), the drafting committee took notice of the use of the term "manifestly  
15 unreasonable" in Revised Uniform Limited Liability Company Act §110(d) (2006); Uniform  
16 Limited Partnership Act §110(b) (2001), Revised Uniform Partnership Act §103(b) (1997),  
17 Uniform Limited Liability Company Act §103(b) (1996), and intended a similar meaning here.  
18 See Mark J. Loewenstein, Fiduciary Duties and Unincorporated Business Entities: In Defense of  
19 the "Manifestly Unreasonable" Standard, 41 Tulsa L. Rev. 411 (2006).

20  
21 **Relationship to Mandatory Rules and the Uniform Trust Code.** Section 105(a)  
22 provides that the law of this state pertaining to common-law trusts supplements this act.  
23 However, Section 105(b) provides that, except for the mandatory rules scheduled above in  
24 Section 103(c), the governing instrument of a statutory trust may override or modify the  
25 application to the statutory trust of any rule pertaining to common-law trusts. Accordingly, in an  
26 enacting jurisdiction that has also enacted the Uniform Trust Code (UTC), the UTC will apply to  
27 a statutory trust, but only to the extent that the Code's provisions are not displaced by this act or  
28 the governing instrument. No provision of the UTC, including the rules stated in UTC §105 that  
29 are mandatory with respect to a common-law trust, is mandatory with respect to a statutory trust.  
30 Likewise, any common law rule that is mandatory with respect to a common-law trust may  
31 nonetheless be overridden with respect to a statutory trust by the governing instrument of the  
32 statutory trust. In sum, the governing instrument of a statutory trust may override or alter any  
33 rule of trust law other than those scheduled in §103(c) of this act.

34  
35 To prevent evasion of the public policy limitations on donative transfers that underpin the  
36 mandatory rules applicable to a common-law trust, see John H. Langbein, Mandatory Rules in  
37 the Law of Trusts, 98 Nw. U.L. Rev. 1105 (2004), Section 302 of this Act provides that a  
38 statutory trust may not have "a prevailingly donative purpose." For further discussion of the  
39 relationship between this Act, the common law, and the Uniform Trust Code, see the Prefatory  
40 Note to this Act under the heading "Relationship to Common-law trusts and the Uniform Trust  
41 Code" and the comments to Sections 105 and 302.

42  
43 **Registered Investment Companies.** The Investment Company Act of 1940 (the "1940  
44 Act") supersedes this Act with respect to a statutory trust that registers as an investment  
45 company. For such a statutory trust the 1940 Act imposes additional mandatory rules. See, e.g.,  
46 the Comments to Sections 207 (name of statutory trust), \_\_\_\_ (interested transactions), \_\_\_\_

(indemnification, advancement, and exoneration), \_\_\_\_ (delegation by trustee), and \_\_\_\_ (action by trustees).

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

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

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

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

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

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

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

(B) waiver of notice;

(C) action by consent without a meeting;

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

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

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

(A) amendment of the governing instrument;

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

(C) appointment of one or more trustees;

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

3 (E) dissolution of the statutory trust;

4 (6) provide for the present or future creation of more than one statutory trust,  
5 including the creation of a future statutory trust to which all or any part of the property,  
6 liabilities, profits, or losses of any existing statutory trust may be transferred or exchanged, and  
7 for the conversion of beneficial interests in an existing statutory trust, or series thereof, into  
8 beneficial interests in the separate statutory trust, or series thereof;

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

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

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

22 (10) provide that a person becomes a beneficial owner, acquires a beneficial  
23 interest, and is bound by the governing instrument if the person complies with the conditions for

1 becoming a beneficial owner set forth in the governing instrument such as payment to the  
2 statutory trust or to a previous beneficial owner;

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

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

9 (13) provide for the establishment of record dates.

10 (b) The governing instrument may include one or more instruments, agreements,  
11 declarations, bylaws, or other records and refer to or incorporate any record containing  
12 provisions relating to the governance of the affairs of the statutory trust and the conduct of its  
13 business.

#### 14 **Comment**

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

17  
18 The unusual principal sources citation reflects the drafting committee’s decision to  
19 collect in a single section the various permissive rules regarding the scope of the governing  
20 instrument that are scattered throughout the Delaware and Connecticut Statutory Trust Acts. The  
21 main exception concerns the allowable remedies for a beneficial owner’s breach in Section  
22 603(c).  
23

24 **[Comment to be expanded to explain that this section implements Section 103(b)**  
25 **without limiting the generality of 103(b).]** The drafting committee concluded that the demand  
26 of third parties and transactional planners to see language that expressly authorizes specific  
27 terms justified inclusion of a detailed list in addition to the broad statement of freedom of  
28 contract in Sections 103(a)-(b) and 106. Statutory confirmation reduces transaction costs by  
29 resolving doubts in practice over the permissibility of such provisions. Similar reasoning  
30 underlies the provision of a detailed schedule of powers in Uniform Trust Code §816 (2000) in  
31 addition to the broad general statement in Uniform Trust Code §815.  
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(b) Except as otherwise provided in section 103(c), the governing instrument may alter or modify application to the statutory trust of any law of this state pertaining to non-law trusts.

### Comment

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

**Trust Law Supplements this Act.** Paragraph (a) provides that state trust law supplements this Act and the terms of the governing instrument. In looking to trust law to supplement this act and the governing instrument, the drafting committee was strongly influenced by the preference for trust law among existing users of statutory trusts. This preference is evidenced by the popularity of the Delaware Statutory Trust Act, which likewise looks to trust law, in comparison to the business trust acts (such as those in Arizona, Indiana, Kansas, Mississippi, Montana, Oregon, Tennessee, Washington, and West Virginia) that look to corporate law. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* [in progress].

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

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

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

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

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1 [ARTICLE] 2

2 FORMATION; CERTIFICATE OF TRUST AND OTHER FILINGS; PROCESS

3 SECTION 201. CERTIFICATE OF TRUST.

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

6 (b) A certificate of trust must contain:

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

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

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

11 (4) notice whether the trust may create one or more series under Section 401.

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

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

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

19 **Comment**

20  
21 **Principal Sources** – Uniform Limited Partnership Act §201 (2001); Delaware Statutory  
22 Trust Act §3810; Connecticut Statutory Trust Act §34-503.

23  
24 Unlike a common-law trust, a statutory trust is a creature of statute that requires a filing  
25 with the state to come into existence. Filing rules are typical of limited liability entities. Such  
26 filing rules serve a notice function, alerting interested parties to creation and existence of a new  
27 limited liability juridical entity. See Section 204(b), which entitles any person to a certified copy  
28 of a filing made pursuant to this act.



1  
2 A statutory trust comes into existence only if (1) a certificate of trust is prepared and  
3 delivered to the specified public official for filing, and (2) the public official files the certificate.  
4 For more on the meaning of “filing,” see Section 204 and the comment thereto. The certificate  
5 of trust provides notice to interested third parties of the existence of the statutory trust and the  
6 identification of the statutory trust’s initial agent for service of process. Pursuant to Section \_\_\_\_,  
7 the certificate of trust also puts third parties on notice if the statutory trust further segregates its  
8 property and liabilities by creating one or more series.  
9

10 Although formed by making a public filing, a statutory trust is also a creature of contract.  
11 As such, it will be possible, though improper, for the trust instrument to be inconsistent with the  
12 certificate of trust or other public filings relating to the statutory trust. Paragraph (d) provides  
13 that in such circumstances the public filing controls.  
14

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

## 18 **SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF** 19 **TRUST.**

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

22 (1) the name of the trust;

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

24 (3) the changes to the certificate.

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

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

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

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

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

2 **Comment**

3  
4 **Principal Sources** – Uniform Limited Partnership Act §202 (2001); Delaware Statutory  
5 Trust Act §3810; Connecticut Statutory Trust Act §34-503.

6  
7 Paragraph (a) provides a mechanism for updating a statutory trust’s filed certificate of  
8 trust. Paragraph (b) imposes an obligation directly on the trustee rather than on the statutory  
9 trust.

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

13  
14 **SECTION 203. SIGNING OF RECORDS.**

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

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

18 **Comment**

19  
20 **Principal Sources** – Uniform Limited Partnership Act §204 (2001); Delaware Statutory  
21 Trust Act §3811; Connecticut Statutory Trust Act §34-504.

22  
23 Paragraph (b) confirms that the signing of a public record by a trustee is a delegable act,  
24 ensuring that the discredited common law nondelegation rule will not apply. See Uniform Trust  
25 Code §807 (2000); Restatement (Third) of Trusts §80 (2007).

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

29  
30 **SECTION 204. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY**  
31 **OF STATE]; EFFECTIVE TIME AND DATE.**

32 (a) A record authorized or required to be delivered to the [Secretary of State] for filing  
33 under this [act] must be captioned to describe the record’s purpose, be in a medium permitted by  
34 the [Secretary of State], and be delivered to the [Secretary of State]. If all filing fees have been

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

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

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

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

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

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

17 (A) the specified date; or

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

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

21 (A) the specified date; or

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

23 **Comment**  
24

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

3  
4       For a record prepared by a private person to become part of the public record under this  
5 Act, (1) someone must put a properly prepared version of the record into the possession of the  
6 public official specified in the Act as the appropriate filing officer, and (2) the filing officer must  
7 determine that the record complies with the filing requirements of this Act and then officially  
8 make the record part of the public record. This Act refers to the first step as “delivery to the  
9 [Secretary of State] for filing” and refers to the second step as “filing.” Thus, under this Act  
10 “filing” is an official act.

11  
12       Under paragraph (a), the caption need only indicate the title of the record—for example,  
13 “Certificate of Trust” or “Statement of Change for Statutory Trust.” Filing officers typically  
14 note on a filed record the fact, date, and time of filing. Copies provided by the filing officer  
15 under paragraph (a) should contain that notation. This Act does not provide a remedy if the  
16 filing officer wrongfully fails or refuses to file a record.

17  
18       Paragraph (c) allows most records to have a delayed effective date, up to 90 days after  
19 the date the record is filed by the filing officer. A record specifying a longer delay will not be  
20 rejected. Instead, under paragraphs (c)(3) and (4), the delayed effective date is adjusted by  
21 operation of law to the “90th day after the record is filed.” This Act does not require the filing  
22 officer to notify anyone of the adjustment.

23  
24       Consistent with the existing statutory trust acts, but inconsistent with most corporate  
25 codes, this Act makes no provision for collecting a franchise tax. See generally Marcel Kahan &  
26 Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205,  
27 1218-33 (2001).

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

## 31 32       **SECTION 205. CORRECTING FILED RECORD.**

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

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

38               (1) describe the record to be corrected, including its filing date, or attach a copy

1 of the record as filed;

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

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

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

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

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

#### 11 **Comment**

12  
13 **Principal Source** – Uniform Limited Partnership Act §207 (2001).

14  
15 A statement of correction is appropriate only to correct inaccuracies that existed or  
16 signatures that were defective “at the time of filing.” A statement of correction may not be used  
17 to amend or revise a record that was accurate when filed but has become inaccurate as a result of  
18 subsequent events.

19  
20 Under paragraph (c), a statement of correction “relates back” by way of retroactive  
21 application except against persons that have relied on the uncorrected record and would be  
22 adversely affected if the correction related back.

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

#### 26 27 **SECTION 206. CERTIFICATE OF GOOD STANDING.**

28 (a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish  
29 to the person making the request a certificate of good standing for a statutory trust if the records  
30 filed in the [office of the Secretary of State] show that:

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

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

3 (3) the most recent annual report of the trust required by Section 215 has been  
4 filed by the [Secretary of State];

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

7 (5) the [Secretary of State] has not filed a notice of administrative dissolution  
8 under Section 805 or, if the [Secretary of State] has filed such a notice, that the [Secretary of  
9 State] has filed a declaration of reinstatement under Section 806.

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

11 (1) the name of the trust;

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

13 and

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

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

## 18 **Comment**

19  
20 **Principal Source** – Uniform Limited Partnership Act §209 (2001).

21  
22 A certificate of good standing can reveal only information present in the public record.  
23 Under this Act significant information bearing on the status of a statutory trust may be outside  
24 the public record. Section 905 provides for the issuance of a certificate of registration for a  
25 qualified foreign statutory trust.

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

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

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

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

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

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

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

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

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

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

1 (A) has merged with the applicant;  
2 (B) has been converted into the applicant; or  
3 (C) has transferred substantially all of its property, including the  
4 conflicting name, to the applicant.

5 (d) Subject to Section 906, this section applies to any foreign statutory trust doing  
6 business in this state, having a certificate of qualification to do business in this state, or applying  
7 for a certificate of qualification.

### 8 **Comment**

9  
10 **Principal Sources** – Uniform Limited Partnership Act §108 (2001); Delaware Statutory  
11 Trust Act §3814.

12  
13 The drafting committee opted not to require that the name of a statutory trust contain a  
14 traditional limited liability appellation. Such a requirement would be inconsistent with current  
15 practice under the Delaware Act, though the drafting committee contemplated that an enacting  
16 jurisdiction with a strong policy regarding names of limited liability entities might modify this  
17 Section accordingly. Moreover, other regulatory law will sometimes limit the range of  
18 permissible names notwithstanding this Section. For example, the names of mutual funds  
19 typically do not contain a limited liability appellation, but Section 35(d) of the Investment  
20 Company Act of 1940, which is applicable to a statutory trust that is a registered investment  
21 company, prohibits “materially deceptive or misleading” names. 15 U.S.C. §80a-34(d). See also  
22 Rule 35d-1, 17 C.F.R. §270.35d-1 (listing types of names that have been deemed “materially  
23 deceptive or misleading”).  
24

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

### 28 **SECTION 208. RESERVATION OF NAME.**

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

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

33 (2) a statutory trust or a qualified foreign statutory trust intending to adopt the



1 name;

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

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

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

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

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

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

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

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

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

2 (e) A transfer or termination under subsection (d) is effective as provided in Section  
3 204(c).

4 **Comment**

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

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

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

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

13 (b) An agent for service of process of a statutory trust or qualified foreign statutory trust  
14 must be an individual who is a resident of this state or a person incorporated, organized, formed,  
15 or authorized to do business in this state which maintains an office in this state.

16 **Comment**

17  
18 **Principal Sources** – Uniform Limited Partnership Act §114 (2001); Delaware Statutory  
19 Trust Act §3804; Connecticut Statutory Trust Act §34-507.  
20

21 Under Section 201(a)(3), the initial designation of a statutory trust's agent for service of  
22 process is made in the original certificate of trust. Under Section 902(a)(4), the initial  
23 designation of a foreign statutory trust's agent for service of process is made in the original  
24 application for a certificate of qualification. The initial designation may be changed pursuant to  
25 a statement of change under Section 210, by an amendment to the certificate of trust under  
26 Section 202, or by an annual report under Section 213(e).  
27

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

31 **SECTION 210. CHANGE OF DESIGNATED OFFICE OR AGENT FOR**  
32 **SERVICE OF PROCESS.** A statutory trust or qualified foreign statutory trust may change its

1 agent for service of process, the address of its agent for service of process, or its designated  
2 office by delivering to the [Secretary of State] for filing a statement of change containing:  
3 (1) the name of the trust;  
4 (2) the street and mailing addresses of the current designated office of the trust;  
5 (3) if the designated office is to be changed, the street and mailing addresses of the new  
6 designated office;  
7 (4) the name and street and mailing addresses of the current agent of the trust for service  
8 of process; and  
9 (5) if the current agent for service of process or an address of the agent is to be changed,  
10 the new information.

#### 11 **Comment**

12  
13 **Principal Source** – Uniform Limited Partnership Act §115 (2001).  
14

15 This section uses the term “may” rather than “must” in the first sentence because a  
16 statutory trust may also change the information by an amendment to its certificate of trust under  
17 Section 202. Further, if the information currently in the public record is accurate, a statutory  
18 trust or qualified foreign statutory trust may change the information in an annual report under  
19 Section 213(e).  
20

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

#### 24 **SECTION 211. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

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

28 (1) the name of the trust;

29 (2) the name of the agent;

1 (3) a statement that the agent resigns as agent for service of process.

2 (b) The resigning agent must transmit a copy of the statement of resignation to the  
3 designated office of the statutory trust or qualified foreign statutory trust and another copy to the  
4 principal office if the address of the office appears in the records of the [Secretary of State] and  
5 is different from the address of the designated office.

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

8 **Comment**  
9

10 **Principal Source** – Uniform Limited Partnership Act §116 (2001).  
11

12 This section provides the exclusive means for an agent to resign without cooperation  
13 from the statutory trust or qualified foreign statutory trust and the only way the agent, rather than  
14 the statutory trust or foreign statutory trust, can effect a change in the public record. Unlike most  
15 records authorized or required to be delivered to the filing officer for filing under this Act, a  
16 statement of resignation may not provide for a delayed effective date.  
17

18 Paragraph (c) mandates the effective date of the agent's resignation. An effective date  
19 included in a statement of resignation is disregarded. To satisfy Section 212(a), the statutory  
20 trust or qualified foreign statutory trust must designate a new agent for service of process before  
21 the effective date. If the statutory trust or foreign statutory trust fails to do so, under Section 212  
22 service on the statutory trust or foreign statutory trust may be made on the Secretary of State.  
23

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

27 **SECTION 212. SERVICE OF PROCESS.**

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

31 (b) If a statutory trust or qualified foreign statutory trust does not appoint or maintain an  
32 agent for service of process in this state or the agent for service of process cannot with

1 reasonable diligence be found at the agent's address on file with the [Secretary of State], the  
2 [Secretary of State] is an agent of the trust for service of process.

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

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

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

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

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

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

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

### 19 **Comment**

20  
21 **Principal Source** – Uniform Limited Partnership Act §117 (2001).

22  
23 Paragraph (f) confirms that the authority of the Secretary of State to accept process under  
24 a state long-arm statute exists independently of paragraphs (b) through (e) of this Section.

25  
26 Under Section 103(c)(1), this Section is not subject to override by the governing  
27 instrument.  
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 10 **Comment**

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

13 A statutory trust that fails to comply with this section is subject to administrative  
14 dissolution. See Section 805.  
15

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

1 [ARTICLE] 3

2 GOVERNING LAW; AUTHORIZATION; DURATION; POWERS

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

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

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

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

11 Comment

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

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

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

30  
31 Paragraph (3) [to come].

32  
33 Section 901 states rules for qualified foreign statutory trusts that parallel and are  
34 analogous in scope to those of this section.

35  
36 Under Section 103(c)(3), this Section is not subject to override by the governing



1 instrument.

2  
3  
4 **SECTION 302. STATUTORY TRUST AUTHORIZED.** A statutory trust is an entity

5 separate from its trustees and beneficial owners.

6 **Comment**

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

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

17  
18 **SECTION 303. PERMISSIBLE PURPOSES.** A statutory trust may have any lawful

19 purpose except a prevailingly donative purpose.

20 **Comment**

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

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

30  
31 The exclusion of “a prevailingly donative purpose” addresses the concern that a statutory  
32 trust might be used in an estate planning or other donative context to evade public policy  
33 limitations on donative transfers and common-law trusts. See, e.g., Uniform Trust Code §105  
34 (2000); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U.L. Rev. 1105  
35 (2004). The drafting committee declined the suggestion to prohibit a statutory trusts from  
36 having a charitable purpose on the ground that a statutory trust with a charitable purpose would  
37 be covered by existing regulatory law applicable to charitable entities. See Marion R. Fremont-  
38 Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* 187-427  
39 (2004).

40  
41 By prohibiting a statutory trust from having “a prevailingly donative purpose,” the

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

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

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

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

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

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

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

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

## Comment

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

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

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

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

Third, this section confirms the limited liability of a beneficial owner and trustee by providing that the beneficial owner or trustee of a statutory trust is not liable for the debts, obligations, or liabilities of the statutory trust. An agent of the beneficial owner or trustee is likewise not liable for the debts, obligations, or liabilities of the statutory trust. This section therefore confirms that the “control test” of *Williams v. Inhabitants of Milton*, 102 N.E. 355 (Mass. 1913), and Restatement (Second) of Agency §14B (1958), is not applicable to a statutory trust. Under the control test, if a beneficial owner of a common law business trust had a say in the administration of the trust or the right to remove and replace the trustees, the beneficial owner might be held liable for the debts of the trust. By contrast, under this section a beneficial owner may participate in the management of the statutory trust without exposure to liability for

the debts of the statutory trust. For discussion of 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.). **[Placeholder: Update cite.]**

**SECTION 305. 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 beneficial owner or a trustee 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 rule of this section is also consistent with bankruptcy law. 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.). However, **[cross-reference to charging order provision to come.]**

For a general discussion of asset partitioning rules in organizational law, see Henry

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

## 6 **SECTION 306. DURATION.**

7 (a) A statutory trust has perpetual existence.

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

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

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

## 14 **Comment**

15  
16 **Principal Sources** – Delaware Statutory Trust Act §3808; Connecticut Statutory Trust  
17 Act §34-518.  
18

19 Paragraph (a) provides a default rule of perpetual existence for a statutory trust. See also  
20 Section 801, which provides for dissolution of a statutory trust only upon the occurrence of an event  
21 or circumstance stated in the governing instrument, and Section 805, which provides for  
22 administrative dissolution. The duration of a common-law trust, by contrast, is curtailed by the Rule  
23 Against Perpetuities. See Restatement (Second) of Property: Donative Transfers § 2.1 (1983).  
24 Accordingly, unless the governing instrument provides otherwise, under this section a statutory trust  
25 is exempt from the Rule Against Perpetuities. Without taking a position on the policy soundness of  
26 the tax-driven movement to abolish the Rule Against Perpetuities with respect to donative trusts, see  
27 Max M. Schanzenbach & Robert H. Sitkoff, Perpetuities or Taxes? Explaining the Rise of the  
28 Perpetual Trust, 27 Cardozo L. Rev. 2465 (2006), the drafting committee concluded that the dead-  
29 hand worries that underpin the Rule do not apply to a statutory trust. Under Section 302, a  
30 statutory trust may not have a prevailing donative purpose.  
31

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

35 Those rules are concerned with mediating the tension between the donor's intent and subsequent  
36 contrary preferences of the beneficiaries, see Robert H. Sitkoff, An Agency Costs Theory of Trust  
37 Law, 89 Cornell L. Rev. 621, 658-63 (2004), an issue that is not applicable to a statutory trust

1 because a statutory trust under this Act may not have a prevailingly donative purpose. Instead, the  
2 drafting committee contemplated that pursuant to Section 104(b)(9) the governing instrument would  
3 provide for termination of the statutory trust or modification of the governing instrument if such  
4 provisions are desirable.

5  
6 Paragraph (c) confirms that the rule of partnership law under which a partnership is  
7 dissolved upon the death or incapacity of one of the partners does not apply to a statutory trust.  
8 Section 405(c) provides a similar rule for the series of a statutory trust.

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

## 15 16 **SECTION 307. POWER TO HOLD PROPERTY; TITLE TO TRUST**

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

### 20 **Comment**

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

23  
24 This Section implements the concept that a statutory trust is an entity separate from its  
25 trustee and beneficial owners by confirming that a statutory trust may transact in its own name.  
26 The property of a common-law trust, by contrast, must be held in the name of the trustee as such.

27  
28  
29 However, this section also permits the statutory trust to take title to property in the name  
30 of the trustee in the trustee's capacity as such even though the trust can hold property in its own  
31 name. The drafting committee reasoned that this provision would be useful for a statutory trust  
32 that has dealings in a state that has not provided for a statutory trust entity. Property ownership  
33 by a trustee in the trustee's capacity as such is familiar from the use of common-law trusts.

34  
35 To police the boundary of the trustee's personal property and the property of the trust, the  
36 common law imposes on the trustee duties to earmark trust property and not to commingle it  
37 with the trustee's own. See Uniform Trust Code §810 (2000); Restatement (Third) of Trusts §84  
38 (2007); Restatement (Second) of Trusts §179 (1959). The drafting committee contemplated that  
39 under appropriate circumstances Section 505(b) would be read to require similar conduct by a  
40 trustee of a statutory trust that takes title to property of the statutory trust in the name of the

1 trustee in the trustee's capacity as such.  
2  
3

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

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

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

9 **Comment**  
10

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

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

18 Paragraph (b) addresses the attachment and execution of a statutory trust's property subject to  
19 the possibility that the statutory trust has formed one or more series under Article 4.  
20

1 [ARTICLE 4]

2  
3 SERIES TRUSTS

4  
5  
6 SECTION 401. SERIES OF STATUTORY TRUST.

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

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

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

14 Comment

15  
16 Principal Sources – Delaware Statutory Trust Act §3806.

17  
18 Paragraph (a) of this section confirms that a statutory trust may be organized with one or  
19 more series. **[To come: Commentary explaining that the inclusion of “trustees” in**  
20 **paragraph (a) is meant to account for the possibility of a series-specific trustee. Such a**  
21 **trustee might favor the series even to the detriment of the trust as a whole. Put otherwise,**  
22 **inclusion of the term “trustees” is meant to address the problem of a conflict between the**  
23 **best interests of a series and the best interests of the trust in a case where the governing**  
24 **instrument provides that the trustee has duties only to a series of the trust. See also the**  
25 **changes to Sections 403 and 505.]**

26  
27 Paragraph (b) **[discussion of non-entity status to come, including the points that we**  
28 **are making explicit what is implicit in the Delaware act, that we decided against specifying**  
29 **entity type powers that are not granted (such as the power to sue and be sued in its own**  
30 **name) to avoid a negative implication, and that entity status for tax purposes is a separate**  
31 **question not addressed here (analogy is to common law trust, which is not an entity under**  
32 **state trust law but is for federal tax purposes)].**

33  
34 Paragraph (c) **[discussion and cross-reference to Section 302 to come.]**

35  
36 Under Section 103(c)(4), paragraphs (b) and (c) of this Section are not subject to override  
37 by the governing instrument.



1           **SECTION 402. LIABILITY OF SERIES.**

2           (a) Subject to subsection (b), if a statutory trust has one or more series as provided in  
3 Section 401:

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

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

10          (b) Section (a) applies only if:

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

15                   (2) notice of series is set forth in the certificate of trust pursuant to Section  
16 201(b)(4).

17          (c) Property of the statutory trust or any series thereof may not be associated,  
18 disassociated, or reassociated with the trust or a series thereof if the association, disassociation,  
19 or reassociation would be a fraudulent transfer under [Uniform Fraudulent Transfers Act or other  
20 state fraudulent transfer statute] if the statutory trust and each series thereof were separate  
21 persons. **[For Discussion: Is this paragraph, as rewritten, better? Are we there yet?]**

22                                   **Comment**  
23

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

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

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

The earmarking requirement of paragraph (b)(1) safeguards the separate interests of the beneficial owners of each series by clarifying the boundaries between the property 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 (b)(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 (b) exposes the property of one series to the creditors of another series and the creditors of the trust generally. In such a case, the failure to maintain separate records would likely amount to a breach of trust under Section 505, remediable by a beneficial owner in a derivative or direct suit against the trustee. **[Placeholder for possible further discussion of trust versus series-level buckets to come.]**

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

Under Section 103(c)(4), paragraphs (b) and (c) of this Section are not subject to override by the governing instrument.

### **SECTION 403. GOVERNANCE OF SERIES TRUST.**

(a) The governing instrument may limit the duties of a trustee under Section 505 to one or more series of the statutory trust provided that there is at least one trustee that owes fiduciary duties to the statutory trust without limitation to one or more series thereof. **[For Discussion: Is this provision sufficient? Can we do better, that is, design a more elegant provision? Should we drop "under Section 505"?]**

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

**Comment**

**Principal Sources** – [to come].

[Default rule notation and discussion of section to come.]

**SECTION 404. 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., [or any successor statute thereto,] [and any regulations issued thereunder,] any series of beneficial interests established by the governing instrument of the trust is a series preferred in distribution of property or payment of dividends over all other series with respect to property specifically allocated to the series under Section 18 of the Investment Company Act of 1940, [as amended,] 15 U.S.C. Section 80a-1 et seq., [or any amendment or successor provision,] [and any regulations issued thereunder].

**Comment**

**Principal Sources** – Delaware Statutory Trust Act §3805.

The organization of a master statutory trust with several series is particularly common among statutory trusts that are registered as investment companies under the Investment Company Act of 1940, as amended, 15 U.S.C. Sections 80a-1 et seq. (the “1940 Act”).

[Remainder of comment to come.]

**SECTION 405. DISSOLUTION OF SERIES.**

(a) A series of a statutory trust may be dissolved or its property distributed without

1 causing the dissolution of the trust or any other series thereof.

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

4 (c) Upon dissolution of a series, the persons that under the governing instrument are  
5 responsible for winding up the affairs of the series may cause the statutory trust to take all  
6 actions as are permitted under Section 802(c), shall provide for the claims and obligations of the  
7 series as provided in Sections 803 and 804, and distribute the property of the series as provided  
8 in Section 808.

9 (d) Any person, including a trustee, that under the governing instrument is responsible for  
10 winding up the affairs of a series under subsection (a) is not liable to the claimants of the  
11 dissolved series by reason of the person's actions in winding up the series if the person complied  
12 with this section.

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

16 **Comment**

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

19  
20 Under Section 103(c)(4), paragraph (c) of this Section is not subject to override by the  
21 governing instrument.  
22  
23  
24

1 [ARTICLE 5]

2 TRUSTEES AND TRUST MANAGEMENT

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

5 Comment

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

9  
10 Section 102(18) defines the term “trustee” as a person designated as such in accordance  
11 with the governing instrument or applicable law. Section 104(b)(5)(C) confirms that the  
12 governing instrument may provide for trustee appointment. However, because no provision in  
13 this Act provides default rules for trustee appointment, if the governing instrument does not  
14 provide for trustee appointment, then under Section 105 the applicable law is the state’s law  
15 pertaining to trustee appointment in common-law trusts.

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

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

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

27 Comment

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

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

However, the existence of a power, regardless of its source, does not speak to the question whether the exercise of that power in a particular case is consistent with the trustee's fiduciary obligation. The trustee's exercise of the broad powers conferred by this section is always subject to the trustee's fiduciary obligations. See Uniform Trust Code §815 cmt. (2000); Restatement (Third) of Trusts §§70, 86 (2007); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 640-43 (1995).

**SECTION 503. ACTION BY TRUSTEES.** On any matter that is to be acted on by trustees:

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

(2) the trustees may act without a meeting **[For discussion: The inherent awkwardness of the meeting clause and this entire paragraph, per Haynsworth from the floor.]**, 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.

The Investment Company Act of 1940 requires a mutual fund's investment advisory contract, underwriting contract, fidelity bond, independent public accountants, and other such matters to be approved by the trustees of the mutual fund. See 15 U.S.C. § 80a-15(a); 15 U.S.C.

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

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

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

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

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

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

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

22 **Comment**

23 **Principal Source** – Uniform Trust Code §1012 (2000).  
24

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

1 transaction.

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

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

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

## 20 21 **SECTION 505. STANDARDS OF CONDUCT FOR TRUSTEES.**

22 (a) Subject to Section 403, in discharging the duties of trusteeship, a trustee shall act in  
23 good faith and in a manner that the trustee reasonably believes to be in the best interests of the  
24 statutory trust.

25 (b) Subject to Section 403, a trustee shall discharge its duties with the care that a person  
26 in a similar position would reasonably believe appropriate under similar circumstances. **[For**  
27 **discussion, duty to be reasonably informed and the rest of RMBCA 8.30, based on a**  
28 **question from the floor.]**

### 29 30 **Comment**

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

32 To police the exercise of the trustee's broad powers under Section 502, this section  
33 subjects the trustee to fiduciary duties of loyalty (paragraph (a)) and care (paragraph (b)) akin to  
34 those of a corporate director.



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

2  
3 Under Section 103(c)(5), the trustee’s standards of conduct under this section are  
4 mandatory rules that are not subject to override by the governing instrument. However, the  
5 governing instrument may prescribe the standards by which good faith, best interests of the  
6 statutory trust, and care that a person in a similar position would reasonably believe appropriate  
7 under similar circumstances are determined provided that the standards are not manifestly  
8 unreasonable.  
9

10 Delaware Statutory Trust Act §3806(c) provides that a trustee’s fiduciary duties “may be  
11 expanded or restricted or eliminated by provisions in the governing instrument; provided, that  
12 the governing instrument may not eliminate the implied contractual covenant of good faith and  
13 fair dealing,” and §3806(e), which provides that a “governing instrument may provide for the  
14 limitation or elimination of any and all liabilities for . . . breach of duties (including fiduciary  
15 duties) . . .; provided, that a governing instrument may not limit or eliminate liability for any act  
16 or omission that constitutes a bad faith violation of the implied contractual covenant of good  
17 faith and fair dealing.”  
18

19 The drafting committee opted to model the trustee’s duties on the corporate fiduciary  
20 obligation as stated in Revised Model Business Corporation Act §8.30 (2005) rather than the  
21 more restrictive trust law fiduciary obligation because the statutory trust is used chiefly as a  
22 mode of business organization. Unlike the trust law fiduciary obligation, which evolved in the  
23 context of donative transfers, the corporate law fiduciary obligation evolved to serve the needs of  
24 commercial actors. For a statement of the duties of loyalty and prudence in trust law, see  
25 Restatement (Third) of Trusts §§77-78 (2007). For a comparison, see Robert H. Sitkoff, Trust  
26 Law, Corporate Law, and Capital Market Efficiency, 28 J. Corp. L. 565, 572-82 (2003). See  
27 also the sources cited in the Comment to Section \_\_\_\_ [interested transactions].  
28  
29

30 **SECTION 506. GOOD-FAITH RELIANCE.** A trustee, officer, employee, manager,  
31 or committee of a statutory trust, or other person designated pursuant to Section 104(a)(7), is not  
32 liable to the trust or to a beneficial owner for breach of any duty, including a fiduciary duty, to  
33 the extent the breach resulted from the good-faith reliance on:

34 (1) the terms of the governing instrument;

35 (2) the records of the statutory trust; or

36 (3) the opinions, reports, or statements of another person that are in the other person’s  
37 professional or expert competence and are made or delivered to the trustee, officer, employee,  
38 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, the trustee's conduct is significantly probative of prudence." Restatement (Third) of Trusts §77, cmt. b(2) (2007).

[For discussion: Haynsworth's concern that this provision isn't mandatory and the role of Section 505 as a backstop. Ditto for Section 507.]

## SECTION 507. INTERESTED TRANSACTIONS.

(a) In this section, "related party" means a trustee, officer, employee, or manager of a statutory trust, or a related person of a trustee, officer, employee, or manager.

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

(c) A transaction under subsection (b) is voidable by the statutory trust unless the related party shows that the transaction is fair to the trust. [For Discussion: (1) Per a comment from the floor, should we use a "best interests of the trust" standard instead? (2) Note that there

1 is a new paragraph (a), which neatened up the section.]

2 **Comment**

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

5  
6 Consistent with the use of the term “best interests” instead of “sole interest” in Section  
7 505(a), this section abrogates the no-further-inquiry rule of the common law of trusts, which  
8 forbids self-dealing transactions even if the transaction is fair and in the best interests of the trust  
9 and the beneficiaries. See Restatement (Third) of Trusts §78 (2007); Restatement (Second) of  
10 Trusts §170 (1959); John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest  
11 or Best Interest?, 114 Yale L.J. 929 (2005); Melanie B. Leslie, Trusting Trustees: Fiduciary  
12 Duties and the Limits of Default Rules, 94 Georgetown L.J. 67 (2005). Instead, this section  
13 follows the corporate model whereby an interested transaction is voidable by the statutory trust  
14 unless the related party shows that the transaction is fair to the trust. For discussion of the  
15 fairness test as applied in corporate law, see Steven M. Bainbridge, Corporation Law and  
16 Economics §7.2, at pp. 315-16 (2002), citing Marciano v. Nakash, 535 A.2d 400 (Del. 1987).  
17 **[Change to/add ALI Principles?]**  
18

19 **[To come: possible additional commentary on the point that this section is not**  
20 **scheduled in 103(c), hence ratification and related ideas may be addressed/alterd in the**  
21 **governing instrument; and that the purpose of this section is to override the no-further-**  
22 **inquiry rule, not to validate all self-dealing transactions]**  
23

24 The application of this section to a statutory trust that is registered as an investment  
25 company is preempted by the Investment Company Act of 1940, which generally prohibits a  
26 trustee, officer, employee, manager, and their related persons from lending money to, borrowing  
27 money from, and engaging in other transactions with the mutual fund without exemptive relief  
28 from the Securities and Exchange Commission. See 15 U.S.C. §80a-17(a), (d).  
29

30 **SECTION 508. TRUSTEE’S RIGHT TO INFORMATION.** A trustee has the right  
31 to information relating to the affairs of the statutory trust reasonably related to the trustee’s  
32 discharge of the trustee’s duties as trustee.

33 **Comment**

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

1  
2 By linking the trustee's information rights to the scope of the trustee's duties as trustee,  
3 this section makes the trustee's right to information function specific. This section therefore  
4 allows for the creation of a limited-role or directed trustee that will not have access to  
5 confidential information unrelated to the trustee's limited role. At the same time, this section  
6 ensures that such a trustee will have access to information reasonably related to discharging the  
7 trustee's duties in connection with the trustee's limited role.  
8

9 Section 608 provides for a beneficial owner's right to information.  
10

## 11 **SECTION 509. INDEMNIFICATION, ADVANCEMENT, AND EXONERATION.**

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

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

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

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

28 (a) Except as otherwise provided in the governing principles, an

**unincorporated nonprofit association shall reimburse a member or manager for authorized expenses reasonably incurred in the course of the member's or manager's activities on behalf of the association.**

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

**(c) If a person is made or threatened to be made a party in an action based on that person's activities on behalf of an unincorporated nonprofit association and the person makes a request in a record to the association, a majority of the disinterested managers may approve in a record advance payment, or reimbursement, by the association, of all or a part of the reasonable expenses, including attorney's fees and costs, incurred by the person before the final disposition of the proceeding. To be entitled to an advance payment or reimbursement, the person must state in a record that the person has a good faith belief that the criteria for indemnification in subsection (b) have been satisfied and that the person will repay the amounts advanced or reimbursed if the criteria for payment have not been satisfied. The governing principles in a record may broaden or limit the advance payments or reimbursements.**

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

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

### 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.

Under Section 103(c)(7), this section’s prohibition of indemnification, advancement, or exoneration for conduct involving bad faith, willful misconduct, or reckless indifference is not

1 subject to override by the governing instrument. Prohibiting indemnification, advancement, or  
2 exoneration for such conduct is consistent with traditional trust doctrine, and the drafting  
3 committee contemplated that this section would be interpreted in accordance with existing trust  
4 law precedent. See Uniform Trust Code §1008 (2000); Restatement (Second) of Trusts §222  
5 (1959); 4 Austin Wakeman Scott, William Franklin Fratcher, and Mark L. Ascher, Scott and  
6 Ascher on Trusts §24.27.3 (5th ed. 2007).

7  
8 The Delaware Statutory Trust Act likewise limits the permissible scope of exoneration.  
9 See Delaware Statutory Trust Act §3806(e), which provides that the “governing instrument may  
10 provide for the limitation or elimination of any and all liabilities for breach of contract and  
11 breach of duty (including fiduciary duties) of a trustee . . . ; provided, that the governing  
12 instrument may not eliminate the implied contractual covenant of good faith and fair dealing.”  
13

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

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

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

## 37 **SECTION 510. DIRECTION OF TRUSTEES.**

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

40 (b) The governing instrument may provide that neither the power to direct a trustee or  
41 other person nor the exercise of the power by any person, including a beneficial owner, causes

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

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

### Comment

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

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

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

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

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

Under Section 103(c)(8), the limitation on direction of trustees stated in paragraph (c) is

1 not subject to override by the governing instrument.

2  
3 In conjunction with Section 511, this section facilitates the current practice in existing  
4 statutory trusts of creating a limited purpose trustee—for example, in a mutual fund with an  
5 investment advisor or in a securitization transaction with a person who is responsible for  
6 distribution computations or whose consent is required before the statutory trust can petition for  
7 bankruptcy.

8  
9  
10 **SECTION 511. DELEGATION BY TRUSTEE.**

11 (a) A trustee may delegate duties and powers. The trustee must exercise the care a  
12 person in a similar position would reasonably believe appropriate under similar circumstances in:

13 (1) selecting an agent;

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

15 (3) periodically reviewing the agent’s actions in order to monitor the agent’s  
16 performance and compliance with the terms of the delegation.

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

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

20 (d) A trustee that complies with subsection (a) is not liable to the beneficial owners or to  
21 the statutory trust for an act or omission of the agent to which the function was delegated. **[For**  
22 **discussion: Question from the floor, what about third parties? Note addition of “or**  
23 **omission” based on suggestion from the floor.]**

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

27 **Comment**

28 **Principal Sources** – Delaware Statutory Trust Act §3806; Connecticut Statutory Trust



1 Act §34-517; Uniform Trust Code §807 .  
2

3 This section reverses the outmoded common law rule against delegation by a trustee. In  
4 reversing the common law rule against delegation, the drafting committee followed both the  
5 Delaware Statutory Trust Act and the modern trend with respect to common-law trusts. Most  
6 states have abrogated the common law nondelegation rule with legislation based on the Uniform  
7 Prudent Investor Act, Uniform Trust Code, or the Restatement (Third) of Trusts. See Uniform  
8 Trust Code §807 (2000); Uniform Prudent Investor Act §9 (1994); Restatement (Third) of Trusts  
9 §80 (2007). See also John H. Langbein, Reversing the Nondelegation Rule of Trust-Investment  
10 Law, 59 Mo. L. Rev. 105 (1994).  
11

12 Paragraphs (a), (c), (d), and (e) are patterned on Uniform Trust Code §807 (2000), which  
13 is derived from Uniform Prudent Investor Act §9 (1994). This section deviates from prior  
14 uniform acts, however, on the issue of delegation to a co-trustee. Following the Delaware  
15 Statutory Trust Act, paragraph (b) treats delegation to a co-trustee in the same manner as  
16 delegation to another person. By contrast, traditional trust law disfavors delegation by one co-  
17 trustee to another. See Restatement (Second) of Trusts §184 (1959). See also Uniform Trust  
18 Code §703(e) (2000); Restatement (Third) of Trusts §81 cmt. c(1) (2007). The traditional rule is  
19 based on the assumption that, if the donor named more than one trustee, the donor intended each  
20 to be a check on the other(s). That policy does not fit commercial statutory trust practice, in  
21 which limited purpose or function trustees are common.  
22

23 **[For discussion: the next four paragraphs, which are derived from the comment to**  
24 **UPIA §9, are new.]** There is an intrinsic tension in trust law between granting trustees broad  
25 powers that facilitate flexible and efficient trust administration, on the one hand, and protecting  
26 trust beneficiaries from the misuse of such powers on the other hand. Delegation, which is a  
27 species of trustee power, raises the same tension. If the trustee delegates effectively, the  
28 beneficiaries obtain the advantage of the agent's specialized investment skills or whatever other  
29 attributes induced the trustee to delegate. But if the trustee delegates to a knave or an  
30 incompetent, the delegation can work harm upon the beneficiaries.  
31

32 This section is designed to strike the appropriate balance between the advantages and the  
33 hazards of delegation. It authorizes delegation under the limitations of paragraphs (a) and (c).  
34 Paragraph (a) requires the trustee to exercise the care a person in a similar position would  
35 reasonably believe appropriate under similar circumstances in selecting the agent, in establishing  
36 the terms of the delegation, and in reviewing the agent's compliance with the terms of the  
37 delegation.  
38

39 The trustee's duty of care in framing the terms of the delegation should protect the  
40 beneficial owners against overbroad delegation. For example, a trustee could not prudently agree  
41 to a delegation agreement containing an exculpation clause that leaves the statutory trust without  
42 recourse against reckless action or bad faith by the agent. Leaving the trust remediless against  
43 willful wrongdoing is inconsistent with the trustee's duty of care in formulating the terms of the  
44 delegation.  
45

1 Although paragraph (d) exonerates the trustee from personal responsibility for the agent's  
2 conduct when the delegation satisfies the standards of paragraph (a), paragraph (c) makes the  
3 agent responsible to the statutory trust. The beneficial owners can, therefore, rely upon the  
4 trustee to enforce the terms of the delegation.

5  
6 Mutual funds often receive a common set of services from an organization that  
7 specializes in operating mutual funds, which is typically the investment adviser or an affiliate.  
8 The trustees monitor the service providers and the Investment Company Act of 1940 requires the  
9 trustees to approve the contracts with the adviser and distributor. See 15 U.S.C. § 80a-15.  
10

## 11 **SECTION 512. INDEPENDENT TRUSTEE IN REGISTERED INVESTMENT** 12 **COMPANY.**

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

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

### 24 **Comment**

25  
26 **Principal Source** – Delaware Statutory Trust Act §3801.  
27

28 It is not uncommon for a director of a mutual fund to serve on multiple mutual fund  
29 boards. This section addresses the question of trustee independence in such circumstances,  
30 rejecting *Strougo v. Scudder, Stevens & Clark*, 964 F. Supp. 783 (S.D.N.Y. 1997) (applying  
31 Maryland law). In *Strougo* the plaintiffs claimed that directors serving on multiple boards within  
32 a mutual fund complex became “interested” by virtue of their close financial relationship with

1 the investment advisor. The plaintiffs brought a derivative suit against a fund’s investment  
2 advisor alleging excessive fees. The plaintiffs did not, however, make a demand on the directors  
3 prior to filing suit. The court excused the plaintiffs from the demand requirement because the  
4 fund’s directors served on multiple boards within the same fund complex, receiving “substantial  
5 remuneration,” and hence were not independent from the adviser. *Id.* at 793-95.  
6

7 In 1998 the Maryland legislature effectively overruled *Strougo* by amending the  
8 Maryland corporate code to provide that directors who are not “interested persons” under the  
9 Investment Company Act of 1940 also would be deemed disinterested under Maryland law. See  
10 Md. Code (Corporations & Associations) §2-405.3. A similar provision took effect in  
11 Massachusetts in 1999, see Mass. Laws. 182, § 2B, and in Delaware in 2000, see Delaware  
12 Statutory Trust Act §3801(h). Almost all mutual funds are organized as Maryland corporations,  
13 Massachusetts trusts, or Delaware statutory trusts. See Robert H. Sitkoff, *The Rise of the*  
14 *Statutory Business Trust* [in progress]. Consistent with the Maryland, Massachusetts, and  
15 Delaware legislation, this section rejects *Strougo* by deeming a trustee to be independent if he or  
16 she is not an interested person under the Investment Company Act of 1940, as amended.  
17

1 [ARTICLE] 6

2 BENEFICIARIES AND BENEFICIAL RIGHTS

3  
4 SECTION 601. BENEFICIAL INTEREST.

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

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

8 Comment

9  
10 Principal Source – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust  
11 Act §34-516; Revised Uniform Limited Liability Company Act §404 (2006).

12  
13 Paragraph (a) provides as a default rule that a beneficial owner’s interest in the statutory  
14 trust is freely transferable. This paragraph therefore overrides the rule in some states, which  
15 would otherwise be applicable to a statutory trust pursuant to Section 105, that makes a common-law  
16 trust spendthrift by default. See Jeffrey A. Schoenblum, 2008 Multistate Guide to Estate Planning  
17 Table 9.05, Part 1, Column 2 (collecting authority). However, because the rule stated in paragraph  
18 (a) is not scheduled in Section 103(c), it is subject to override by the governing instrument. Section  
19 104(b)(2) confirms that the governing instrument may limit a beneficial owner’s right to transfer  
20 its beneficial interest. Section 606 provides for a charging order against a beneficial owner’s  
21 rights to distributions in the event that the beneficial owner’s beneficial interest is not freely  
22 transferable.

23  
24 [Commentary for paragraph (b) to come.]

25  
26 Under Section 104(b)(13), the governing instrument may provide for the establishment of  
27 record dates for distributions.

28  
29  
30 SECTION 602. VOTING OR CONSENT BY BENEFICIAL OWNERS.

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

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

33 (2) The beneficial owners may take the action without a meeting, without notice,  
34 and without a vote, if a consent, or consents, in a record, setting forth the action so taken, are  
35 signed by beneficial owners having at least the minimum number of votes necessary to authorize

1 or take the action at a meeting at which all beneficial owners entitled to vote thereon were  
2 present and voted, but prompt notice of the action must be given to those beneficial owners that  
3 did not consent.

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

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

### 7 **Comment**

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

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

22  
23 Paragraph (b) provides a default rule that the governing instrument may be amended by  
24 unanimous agreement of the beneficial owners. As with the voting rule of paragraph (a), the  
25 drafting committee contemplated that the governing instrument will provide for amendment.  
26 This paragraph provides for an amendment mechanism in circumstance where the governing  
27 instrument does not already do so. **[For discussion: 1. Paragraph (b) is new, per our**  
28 **conference call on dissolution. 2. Does it belong in this section? 3. Should the section title be**  
29 **changed?]**

30  
31 The Investment Company Act of 1940, as amended, specifies the percentage of vote  
32 necessary to approve certain actions related to the investment company. In other instances, 1940  
33 Act requires the action to be approved at a shareholders’ meeting called for that purpose. In such  
34 instances, approval of the action by written consent without notice would not be valid. For  
35 example, Section 16(a) of the 1940 Act provides that “no person shall serve as a director of an  
36 investment company unless elected to that office by the holders of the outstanding voting  
37 securities of such company, at an annual or a special meeting duly called for that purpose.” In  
38 addition, investment companies seeking the vote of shareholders on specific actions must comply  
39 with rules governing the communication to, and solicitation of, their shareholders. See Rules  
40 14a-1 to 14b-2 under the Securities Exchange Act of 1934, as amended. These rules are

1 significantly more comprehensive than most state statutes and rules governing communications  
2 to shareholders and other aspects of a shareholder meeting.

3  
4 Section 104(b)(4) confirms that the rules stated in this Section are subject to override by  
5 the governing instrument.  
6

### 7 **SECTION 603. CONTRIBUTION BY BENEFICIAL OWNER.**

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

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

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

25 (1) reduction or elimination of the defaulting beneficial owner's proportionate  
26 interest in the statutory trust or series thereof;

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

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

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

and

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

#### **Comment**

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

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

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

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

#### **SECTION 604. DISTRIBUTION TO BENEFICIAL OWNER.**

(a) When a beneficial owner becomes entitled to receive a distribution, the beneficial owner has the status of, and is entitled to all remedies available to, a creditor of the statutory

1 trust with respect to the distribution.

2 (b) A beneficial owner does not have a right to demand or to receive a distribution from  
3 the trust in any form other than money.

4 (c) The trust may distribute an asset in-kind if each part of the asset is fungible with each  
5 other part and each beneficial owner receives a percentage of the asset equal in value to the  
6 beneficial owner's share of the distribution.

#### 7 **Comment**

8  
9 **Principal Source** – Delaware Statutory Trust Act §3805; Connecticut Statutory Trust  
10 Act §34-516; Revised Uniform Limited Liability Company Act §404 (2006).

11  
12 [For comment: In the case of a statutory trust that is a registered investment company  
13 organized as an open-end mutual fund, a shareholder (beneficial owner) may request a  
14 redemption of any or all of his shares (beneficial interests) and the statutory trust is obligated to  
15 honor the redemption request and pay the redemption proceeds within seven days (except under  
16 limited circumstances such as an emergency). See 15 U.S.C. Sec.80(a)-22(e). The redemption  
17 proceeds must be in the form of cash unless the open-end mutual fund has filed with the  
18 Securities and Exchange Commission a notification of election on Form N-18F-1. See 17  
19 C.F.R. Sec. 270.18f-1. In such a case, the open-end mutual fund may pay the redemption in-kind  
20 (i.e., pay assets of the fund instead of cash) to a shareholder who during the previous 90-day  
21 period has redeemed \$250,000 or more of shares or shares equal to one or more percent of the  
22 net asset value of the fund. Id.]

23  
24 Under Section 104(b)(13), the governing instrument may provide for the establishment of  
25 record dates for distributions.  
26

27 **SECTION 605. REDEMPTION OF BENEFICIAL INTEREST.** A statutory trust  
28 may acquire, by purchase, redemption, or otherwise, any beneficial interest in the trust or series  
29 thereof. A beneficial interest so acquired is canceled.

#### 30 **Comment**

31  
32 **Principal Source** – Delaware Statutory Trust Act §3818.

33  
34 A registered investment company organized as an open-end mutual fund generally is  
35 obligated to honor redemption requests by its shareholders at the net asset value per share next  
36 calculated after receipt of the request, with payment to be made in cash (or, in some cases, in



1 kind) within seven days of the request. See 15 U.S.C. §80a-22(e); 17 CFR §270.22c-1. In  
2 narrowly defined circumstances, this redemption right and obligation may be postponed. See 15  
3 U.S.C. §80a-22(e). The redemption proceeds may be reduced by various fees retained by the  
4 fund and/or its selling agent (i.e., sales loads and redemption fees). See 17 CFR §§270.22c-2;  
5 270.6c-10.

## 6 7 8 **SECTION 606. CHARGING ORDER.**

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

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

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

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

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

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

24 (e) A statutory trust or beneficial owner that is not subject to the charging order may pay  
25 to the judgment creditor the full amount due under the judgment lien and thereby succeed to the  
26 rights of a judgment creditor, including the charging order.

27 (f) This [act] does not deprive a beneficial owner or a transferee of the beneficial interest

1 of any exemption laws applicable to the beneficial interest.

2 **Comment**

3  
4 **Principal Source** - Revised Uniform Limited Liability Company Act §503 (2006).

5  
6 [Comment to come.]

7  
8 Under Section 103(c)(9), the right of a judgment creditor of a beneficial owner to seek a  
9 charging order may not be eliminated by the governing instrument.  
10

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

17 **Comment**

18  
19 **Principal Source** – Delaware Statutory Trust Act §3806.  
20

21 **SECTION 608. BENEFICIAL OWNER’S RIGHT TO INFORMATION.** A  
22 beneficial owner has the right to receive or to obtain by summary proceeding in the [appropriate  
23 court] information relating to the affairs of the statutory trust reasonably related to the beneficial  
24 owner’s ability to enforce its rights as beneficial owner.

25 **Comment**

26 **Principal Source** – Delaware Statutory Trust Act §3819; Delaware Limited Liability  
27 Company Act §18-305.  
28

29 Under Section 103(c)(10), a beneficial owner’s right to information under this section is  
30 not subject to override by the governing instrument. However, a beneficial owner’s right to  
31 information under this section is limited to information “reasonably related to the beneficial  
32 owner’s ability to enforce its rights as a beneficial owner,” and under Section 103(c)(8) the

governing instrument may prescribe the standards by which reasonably related 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. 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 Inform, 85 N.C. L. Rev. 1595 (2007).

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

Section 508 provides for a trustee's right to information.

#### **SECTION 609. ACTION BY BENEFICIAL OWNER.**

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

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

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

(2) a demand would be futile.

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

(1) was a beneficial owner when the conduct giving rise to the action occurred; or  
(2) whose status as a beneficial owner devolved upon the person by operation of law or pursuant to the terms of the governing instrument from a person that was a beneficial owner at the time of the conduct.

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

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

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

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

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

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

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

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

#### **Comment**

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

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

7  
8 In preserving a mandatory right to bring suit, but allowing that right to be subjected to  
9 additional standards and restrictions that are not manifestly unreasonable, this section balances  
10 two policy aims that are in tension. On the one hand, without the right to bring an action, a  
11 beneficial owner might have no recourse in the event of trustee misconduct. On the other hand,  
12 without appropriate safeguards, a meritless action might be brought with the aim of extracting a  
13 quick settlement. See, e.g., Reinier Kraakman, Hyun Park, & Steven Shavell, *When Are*  
14 *Shareholder Suits in Shareholder Interests?*, 82 *Georgetown L.J.* 1733 (1994).

15  
16 For a discussion of remedies, see the comment to Section 105.  
17

1 [ARTICLE] 7

2 CONVERSION AND MERGER

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

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

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

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

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

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

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

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

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

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

23 Comment

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

2  
3           This section contains definitions specific to this Article.

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

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

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

17  
18           **SECTION 702. CONVERSION.**

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

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

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

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

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

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

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

(4) the organizational documents of the converted organization.

## **Comment**

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

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

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

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

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

## **SECTION 703. 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).



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

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

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

24 (a) After a conversion is approved:

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

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

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

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

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

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

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

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

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

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

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

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

#### 12 **Comment**

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

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

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

#### 21 **SECTION 705. EFFECT OF CONVERSION.**

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

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

25 (1) all property owned by the converting organization remains vested in the  
26 converted organization;

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

1 continue as debts, obligations, or other liabilities of the converted organization;

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

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

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

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

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

### 19 **Comment**

20  
21 Principal Source – Uniform Limited Partnership Act §1105 (2001).  
22

23 Paragraph (a) confirms that conversion changes an organization's legal type, but does not  
24 create a new organization. Unlike a merger, a conversion involves a single organization.  
25 Therefore under paragraph (b) a conversion does not transfer any of the organization's rights or  
26 obligations. For further discussion, see Model Entity Transactions Act §406 (2006) and  
27 comment 1 thereto.  
28

1 Under Section 103(c)(12), this Section is not subject to override by the governing  
2 instrument.  
3

#### 4 **SECTION 706. MERGER.**

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

7 (1) the governing law of each of the other organizations authorizes the merger;

8 (2) the merger is not prohibited by the law of a jurisdiction that enacted any of the  
9 governing law; and

10 (3) each of the other organizations complies with its governing law in effecting  
11 the merger.

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

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

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

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

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

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

#### 23 **Comment**

24 **Principal Source** – Uniform Limited Partnership Act §1106 (2001).  
25

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

3  
4 A plan of merger may provide that some persons with interests in a constituent  
5 organization will receive interests in the surviving organization, while other persons with  
6 interests in the same constituent organization will receive some other form of consideration.  
7 Thus, a “squeeze out” merger is possible. As noted in the comment to Section 703, the duties  
8 and obligations stated in this Act apply to a trustee of a constituent organization that is a  
9 statutory trust subject to this Act. Those duties would apply to the process and terms under  
10 which a “squeeze out” merger occurs.  
11

## 12 **SECTION 707. ACTION ON PLAN OF MERGER BY CONSTITUENT**

### 13 **STATUTORY TRUST.**

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

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

18 (1) as provided in the plan; and

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

### 21 **Comment**

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

23  
24 The requirement in paragraph (a) of unanimous consent by all trustees and beneficiaries  
25 is a default rule that may be overridden by the governing instrument. See Section 104(b)(5)(B).  
26 Hence, the governing instrument may state a different quantum of consent or provide a  
27 completely different approval mechanism. Varying this subsection’s rule means that a beneficial  
28 owner might be subject to a merger (including a “squeeze out” merger) without consent and with  
29 no appraisal remedy. The trustee of a constituent statutory trust is subject to the duties and  
30 obligations stated in this Act, and those duties would apply to the process and terms under which  
31 the merger occurs. However, if the governing instrument allows for a merger with less than  
32 unanimous consent, the mere fact a beneficial owner objects to a merger does not mean that a  
33 trustee that is favoring, arranging, consenting to, or effecting the merger has breached a duty  
34 under this Act.  
35

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 15 **Comment**

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

17  
18 Under Section 103(c)(12), this Section is not subject to override by the governing  
19 instrument.  
20

## 21 **SECTION 709. EFFECT OF MERGER.**

22 (a) When a merger becomes effective:

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

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

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

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

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

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

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

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

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

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

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

19                  (b) A surviving organization that is a foreign organization consents to the jurisdiction of  
20 the courts of this state to enforce any debt, obligation, or other liability owed by a constituent  
21 organization if, before the merger, the constituent organization was subject to suit in this state on  
22 the obligation. A surviving organization that is a foreign organization not authorized to do  
23 business in this state appoints the [Secretary of State] as its agent for service of process for the



1 purposes of enforcing a debt, obligation, or other liability under this subsection. Service on the  
2 [Secretary of State] under this subsection is made in the same manner and with the same  
3 consequences as provided in Section 213(c) and (d).

4 **Comment**

5 **Principal Source** – Uniform Limited Partnership Act §1109 (2001).  
6

7 Under Section 103(c)(12), this Section is not subject to override by the governing  
8 instrument.  
9

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

12 **Comment**

13 **Principal Source** – Uniform Limited Partnership Act §1113 (2001).  
14

1 [ARTICLE] 8

2  
3 DISSOLUTION AND WINDING UP

4  
5 SECTION 801. EVENTS CAUSING DISSOLUTION. A statutory trust may only be

6 dissolved upon the occurrence of:

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

8 (2) consent by all the beneficial owners; or

9 (3) an administrative dissolution under Section 806.

10 Comment

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

12  
13 This Section provides that a statutory trust may be dissolved only upon the occurrence of  
14 an event or circumstance stated in the governing instrument, by unanimous consent of all the  
15 beneficial owners, or by administrative dissolution. However, as confirmed by Section 306, the  
16 governing instrument need not provide for an event or circumstance that causes dissolution.  
17 [For discussion, paragraph (2) and mandatory rules.]

18  
19 Under Section 103(c)(1), the provisions of this section are not subject to override by the  
20 governing instrument.

21  
22  
23 SECTION 802. ARTICLES OF DISSOLUTION.

24 (a) If dissolution of a statutory trust is authorized under paragraphs (1) or (2) of Section  
25 801, the trust must deliver to the [Secretary of State] for filing articles of dissolution setting  
26 forth:

27 (1) the name of the trust; and

28 (2) the date of the dissolution.

29 (b) Except as otherwise provided in Section 204(c), a statutory trust is dissolved when  
30 articles of dissolution that comply with subsection (b) are filed by the [Secretary of State].

31 Comment

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

2  
3           **[For Discussion: Do we want a section here based on RMBCA §14.04, something**  
4 **like—**

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

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

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

12               (1) the name of the trust;

13               (2) the effective date of the dissolution that was revoked;

14               (3) the date that the revocation of dissolution was authorized; and

15               (4) a statement of the authorization to revoke the dissolution.

16           (d) Revocation of dissolution is effective upon the effective date of the articles of  
17 dissolution.

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

21  
22           **SECTION 803. WINDING UP.**

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

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

26               (1) discharge the trust's debts, obligations, and other liabilities, settle and close  
27 the trust's activities, and marshal and distribute the property of the trust;

28               (2) first apply its property to discharge its obligations to creditors; and

29               (3) distribute any surplus property after complying with subsection (b)(2) to the  
30 beneficial owners in proportion to their beneficial interests.

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

32               (1) preserve the trust's activities and property as a going concern for a reasonable  
33 time;

1 (2) institute, maintain, and defend actions and proceedings, whether civil,  
2 criminal, or administrative;  
3 (3) transfer the trust's property;  
4 (4) settle disputes;  
5 (5) perform other acts necessary or appropriate to the winding up.

6 (d) On application of any person that shows good cause, the [appropriate court] may  
7 appoint a person to be a receiver for a dissolved statutory trust with the power to undertake any  
8 action that might have been done by the trust during its winding up if the action is necessary for  
9 final settlement of the trust.

#### 10 **Comment**

11 **Principal Source** – Revised Uniform Limited Liability Company Act §§702, 708 (2006);  
12 Delaware Limited Liability Company Act §18-805.

13  
14 If the governing instrument of a statutory trust provides for the dissolution of the trust,  
15 then upon the event or circumstance that triggers dissolution, the statutory trust may continue  
16 only for the purpose of winding up.

17  
18 In winding up the statutory trust within a reasonable time, the trustees are neither  
19 required to undertake a fire sale of the property of the statutory trust on unfavorable terms nor  
20 permitted to continue the trust endlessly under the guise of winding down. The question of what  
21 period of time is “reasonable” under paragraph (c)(1) turns on the totality of the circumstances.

22  
23 Paragraph (d) provides for the possibility that after dissolution additional unfinished  
24 business of the statutory trust is discovered.

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

#### 28 29 **SECTION 804. KNOWN CLAIMS AGAINST DISSOLVED STATUTORY** 30 **TRUST.**

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

(b) A dissolved statutory trust may dispose of the known claims against it by notifying its known claimants in a record of the dissolution of the trust. **[For discussion: this sentence has**

**been revised to track the RMBCA.]** The notice must:

(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 notifies the claimant in a record 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.

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

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

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

### **Comment**

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

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

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

5 **SECTION 805. OTHER CLAIMS AGAINST DISSOLVED STATUTORY TRUST.**

6  
7 (a) A dissolved statutory trust may publish notice of its dissolution and request persons  
8 having claims against the trust to present them in accordance with the notice. **[For discussion:**  
9 **removal of “other” in line with RMBCA model.]**

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

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

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

16 (3) state that a claim against the trust is barred unless an action to enforce the  
17 claim is commenced within [three] years after publication of the notice. **[For discussion: note**  
18 **the change to three years from five, per our conference call and RMBCA.]**

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

- 23 (1) a claimant that did not receive notice in a record under Section 804;  
24 (2) a claimant whose claim was timely sent to the trust but not acted on; and  
25 (3) a claimant whose claim is contingent at, or based on an event occurring after,

1 the effective date of dissolution.

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

3 (1) against a dissolved statutory trust, to the extent of its undistributed property;

4 and

5 (2) if property of the trust has been distributed after dissolution, against a

6 beneficial owner to the extent of that beneficial owner's proportionate share of the property

7 distributed to the beneficial owner after dissolution, but a beneficial owner's total liability for all

8 claims under this paragraph does not exceed the total amount of property distributed to the

9 beneficial owner after dissolution.

#### 10 **Comment**

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

12  
13 **[To come:** Excerpt of the commentary from the RMBCA, on which the RULLCA  
14 provision was based. Commentary to include discussion of the three year bracketed limit.]

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

18  
19 **[For Discussion, whether we want a court proceedings provision, like RMBCA**  
20 **§14.08:**

21 (a) A dissolved corporation that has published a notice under section 14.07  
22 may file an application with the [name or describe] court of the county where the  
23 dissolved corporation's principal office (or, if none in this state, its registered office)  
24 is located for a determination of the amount and form of security to be provided for  
25 payment of claims that are contingent or have not been made known to the  
26 dissolved corporation or that are based on an event occurring after the effective  
27 date of dissolution but that, based on the facts known to the dissolved corporation,  
28 are reasonably estimated to arise after the effective date of dissolution. Provision  
29 need not be made for any claim that is or is reasonably anticipated to be barred  
30 under section 14.07(c).

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

34 (c) The court may appoint a guardian ad litem to represent all claimants  
35 whose identities are unknown in any proceeding brought under this section. The  
36 reasonable fees and expenses of such guardian, including all reasonable expert

1 witness fees, shall be paid by the dissolved corporation.

2 (d) Provision by the dissolved corporation for security in the amount and the  
3 form ordered by the court under section 14.08(a) shall satisfy the dissolved  
4 corporation's obligations with respect to claims that are contingent, have not been  
5 made known to the dissolved corporation or are based on an event occurring after  
6 the effective date of dissolution, and such claims may not be enforced against a  
7 shareholder who received assets in liquidation.]  
8  
9

10 [For Discussion, RMBCA 14.09:

11 (a) Directors shall cause the dissolved corporation to discharge or make  
12 reasonable provision for the payment of claims and make distributions of assets to  
13 shareholders after payment or provision for claims.

14 (b) Directors of a dissolved corporation which has disposed of claims under  
15 sections 14.06, 14.07, or 14.08 shall not be liable for breach of section 14.09(a) with  
16 respect to claims against the dissolved corporation that are barred or satisfied  
17 under sections 14.06, 14.07, or 14.08.]  
18

## 19 SECTION 806. ADMINISTRATIVE DISSOLUTION.

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

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

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

24 (3) the trust does not file an annual report within 30 days after it is due; or

25 (4) the trust does not pay, within 30 days after the due date, any fee, tax, or  
26 penalty due to the [Secretary of State].

27 [For discussion: Whether to add a provision, based on RMBCA 14.20(5), to the  
28 effect "the trust's period of duration stated in its certificate of trust expires."]

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



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

3 (2) the basis for the revocation.

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

10 (d) A statutory trust that has been administratively dissolved continues in existence but,  
11 subject to Section 806, may carry on only activities necessary to wind up its activities and  
12 liquidate its property under Sections 802 and 808 and to notify claimants under Sections 803 and  
13 804.

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

#### 16 **Comment**

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

18  
19 Under Section 103(c)(1), the provisions of this section are not subject to override by the  
20 governing instrument.  
21

#### 22 **SECTION 807. REINSTATEMENT FOLLOWING ADMINISTRATIVE** 23 **DISSOLUTION.**

24 (a) A statutory trust that has been administratively dissolved may apply to the [Secretary  
25 of State] for reinstatement. The application must be delivered to the [Secretary of State] for

filing and state:

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

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

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

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

(c) When a reinstatement becomes effective, it relates back to and takes effect as of the effective date of the administrative dissolution as if the dissolution had not occurred. **[For discussion: (1) whether and if so how to carve out third parties who rely on dissolution to their detriment, (2) whether to include a provision based on Ky Stat 271B.14-220(4), "Notwithstanding any other provision to the contrary, any corporation which was administratively dissolved or revoked and has taken the action necessary to wind up and liquidate its business and affairs under \_\_\_, and notify claimants under \_\_ and \_\_, shall be prohibited from reinstatement."]**

#### **Comment**

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

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

#### **SECTION 808. 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 send a notice that explains the

1 reason for rejection to the trust's agent for service of process.

2 (b) A statutory trust may appeal from the rejection by petitioning the [appropriate court]  
3 to set aside the dissolution. The petition must be delivered to the [Secretary of State] and contain  
4 a copy of the [Secretary of State's] declaration of dissolution, the trust's application for  
5 reinstatement, and the [Secretary of State's] notice of rejection.

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

8 **Comment**

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

10  
11 Under Section 103(c)(1), the provisions of this section are not subject to override by the  
12 governing instrument.  
13  
14

1 [ARTICLE] 9

2 FOREIGN STATUTORY TRUSTS

3  
4 SECTION 901. GOVERNING LAW.

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

7 (1) the internal affairs of the trust;

8 (2) the liability of a beneficial owner as beneficial owner and trustee as trustee for  
9 the debts, obligations, or other liabilities of the trust or any series thereof; and

10 (3) the enforceability of a debt, obligation, or other liability against the property  
11 of the trust or any series thereof. [For discussion: problem solved?]

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

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

18 Comment

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

23  
24 Paragraph (a) parallels and is analogous in scope and effect to Section 30\_ for a domestic  
25 statutory trust. Paragraph (b) allows for a foreign statutory trust to operate domestically even if  
26 the law governing it is different from the laws governing domestic statutory trusts, but under  
27 paragraph (c) a foreign statutory trust cannot engage in any business or exercise any power that a  
28 domestic statutory trust could not.

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

1 instrument.  
2

### 3 **SECTION 902. APPLICATION FOR CERTIFICATE OF QUALIFICATION.**

4 (a) A foreign statutory trust may apply for a certificate of qualification to transact  
5 business in this state by delivering an application to the [Secretary of State] for filing. The  
6 application must contain:

7 (1) the name of the trust and, if the name does not comply with Section 207, an  
8 alternate name adopted pursuant to Section 906(a).

9 (2) the name of the state or other jurisdiction under whose law the trust is formed;

10 (3) the street and mailing addresses of the trust's principal office and, if the laws  
11 of the jurisdiction under which the trust is formed require it to maintain an office in that  
12 jurisdiction, the street and mailing address of the required office; and

13 (4) the name and street and mailing addresses of the trust's initial agent for  
14 service of process in this state.

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

#### 19 **Comment**

20  
21 **Principal Source** – Uniform Limited Partnership Act §902 (2001).  
22

23 A certificate of qualification applied for under this section is different than a certificate of  
24 registration under Section 905. A certificate of qualification confirms that a foreign statutory  
25 trust may do business in the state. A certificate of registration provides conclusive evidence that  
26 a foreign statutory trust has a valid certificate of qualification on file as of the date of the  
27 certificate of registration. A certificate of registration for a foreign statutory trust is akin to a  
28 certificate of good standing for a statutory trust under Section 206.[**Further commentary to**  
29 **come.**]

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

5 **SECTION 903. ACTIVITIES NOT CONSTITUTING TRANSACTING**  
6 **BUSINESS.**

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

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

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

12 (3) maintaining accounts in financial institutions;

13 (4) maintaining offices or agencies for the transfer, exchange, and registration of  
14 the trust's own beneficial interests or securities or maintaining trustees or depositories with respect  
15 to those beneficial interests or securities;

16 (5) selling through independent contractors;

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

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

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

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

1 (10) transacting business in interstate commerce.

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

5 (c) A person does not do business in the state solely by reason of being a trustee or a  
6 beneficial owner of a foreign statutory trust that does transact business in this state.

7 **Comment**

8  
9 **Principal Sources** – Uniform Limited Partnership Act §903 (2001).

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

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

18  
19 **SECTION 904. FILING OF CERTIFICATE OF QUALIFICATION.** Unless the  
20 [Secretary of State] determines that an application for a certificate of qualification does not comply  
21 with the filing requirements of this [Act], the [Secretary of State], upon payment of all filing fees,  
22 shall file the application, prepare, sign and file a certificate of qualification to transact business in  
23 this State, and send a copy of the filed certificate, together with a receipt for the fees, to the foreign  
24 statutory trust or its representative.

25 **Comment**

26  
27 **Principal Source** –Uniform Limited Partnership Act §904 (2001).

28  
29 For discussion of the certificate of qualification and its differences from a certificate of  
30 registration, see the comment to Section 902.

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

1

2           **SECTION 905. CERTIFICATE OF REGISTRATION.**

3           (a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish a  
4 certificate of registration for a qualified foreign statutory trust if the records filed in the [office of  
5 the Secretary of State] show that the [Secretary of State] has filed a certificate of qualification, has  
6 not revoked the certificate of qualification, and has not filed a notice of cancellation.

7           (b) Subject to any limitation stated in the certificate, a certificate of registration issued by  
8 the [Secretary of State] to a foreign statutory trust may be relied upon as conclusive evidence that  
9 the trust is authorized to transact business in this state as of the date of the certificate.

10                           **Comment**

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

12           The provisions of this section, which concern the issuance of a certificate of registration for  
13 a qualified foreign statutory trust, are analogous to the provisions of Section 206 concerning the  
14 issuance of a certificate of good standing for a statutory trust.

15           Under Section 103(c)(1), this Section is not subject to override by the governing  
16 instrument.  
17  
18

19           **SECTION 906. NONCOMPLYING NAME OF FOREIGN STATUTORY TRUST.**

20           (a) A foreign statutory trust whose name does not comply with Section 207 may not obtain  
21 a certificate of qualification until it adopts, for the purpose of transacting business in this state, an  
22 alternate name that complies with Section 207. A foreign statutory trust that adopts an alternate  
23 name under this subsection and obtains a certificate of qualification with the name need not  
24 comply with [fictitious or assumed name statute]. After obtaining a certificate of qualification  
25 with an alternate name, a foreign statutory trust shall transact business in this state under the name  
26 unless the trust is authorized under [fictitious or assumed name statute] to transact business in this



1 state under another name.

2 (b) If a qualified foreign statutory trust changes its name to one that does not comply with  
3 Section 207, it may not thereafter transact business in this state until it complies with subsection  
4 (a) and obtains an amended certificate of qualification.

5 **Comment**

6  
7 **Principal Source** – Uniform Limited Partnership Act §905 (2001).

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

12 **SECTION 907. REVOCATION OF CERTIFICATE OF QUALIFICATION.**

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

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

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

19 (3) file an annual report pursuant to Section 213; or

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

22 (b) To revoke a certificate of qualification of a foreign statutory trust, the [Secretary of  
23 State] must prepare, sign, and file a notice of revocation and send a copy to the trust's agent for  
24 service of process in this state, or if the trust does not appoint and maintain a proper agent in this  
25 state, to the trust's designated office. The notice must state:

26 (1) the effective date of the revocation, which must be at least 60 days after the date

1 the [Secretary of State] sends the copy; and

2 (2) the basis for the revocation.

3 (c) Unless a foreign statutory trust cures the failures to comply with subsection (a) stated in  
4 the notice of revocation before the date stated in the notice, the authority of the trust to transact  
5 business in this state ceases on that date.

6 (d) If a foreign statutory trust cures the failures stated in the notice of revocation under  
7 subsection (c), the [Secretary of State] shall indicate that the trust is reinstated on the filed notice.  
8 The reinstatement of the trust relates back for all purposes to the date of the notice of revocation.

9 **Comment**

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

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

16 **SECTION 908. CANCELLATION OF CERTIFICATE OF QUALIFICATION.**

17 (a) To cancel its certificate of qualification to transact business in this state, a qualified  
18 foreign statutory trust must deliver to the [Secretary of State] for filing a notice of cancellation that  
19 states:

20 (1) the name of the trust;

21 (2) the date of filing of its initial certificate of qualification;

22 (3) that the certificate of qualification is being canceled; and

23 (4) any other information as determined by the trustee filing the statement.

24 (b) A certificate of qualification under subsection (a) is canceled when the notice of  
25 cancellation becomes effective under Section 204.

26 **Comment**  
27

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

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

## SECTION 909. EFFECT OF FAILURE TO HAVE CERTIFICATE.

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

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

(c) A trustee or beneficial owner of a statutory trust is not liable for the debts, obligations, or other liabilities of the trust solely because the trust transacted business in this state without a certificate of qualification.

(d) If a foreign statutory trust transacts business in this state without a certificate of qualification or cancels its certificate of qualification, the [Secretary of State] is its agent for service of process for actions arising out of the transaction of business in this state.

### Comment

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

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

**SECTION 910. ACTION BY [ATTORNEY GENERAL].** The [Attorney General] may maintain an action to enjoin a foreign statutory trust from transacting business in this state in violation of this [article].

### Comment

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

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

1 **[ARTICLE] 10**

2 **MISCELLANEOUS PROVISIONS**

3 **SECTION 1001. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In  
4 applying and construing this uniform act, consideration must be given to the need to promote  
5 uniformity of the law with respect to its subject matter among states that enact it.

6 **Comment**

7  
8 **Principal Source** – Uniform Limited Partnership Act §1201 (2001).

9  
10 Under Section 103(c)(1), this Section is not subject to override by the governing  
11 instrument.  
12

13 **SECTION 1002. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**  
14 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the federal  
15 Electronic Signatures in Global and National Commerce Act[, 15 U.S.C. Section 7001 et seq.],  
16 but this [act] does not modify, limit, or supersede Section 101(c) of that act or authorize electronic  
17 delivery of any of the notices described in Section 103(c) of that act.

18 **Comment**

19  
20 **Principal Source** – Uniform Limited Partnership Act §1203 (2001).

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

25  
26 **SECTION 1003. SAVING CLAUSE.** This [act] does not affect an action commenced,  
27 proceeding brought, or right accrued before this [act] takes effect.

28 **Comment**

29  
30 **Principal Source** – Uniform Limited Partnership Act §1207 (2001).

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

**SECTION 1004. RESERVATION OF POWER TO AMEND OR REPEAL.** The

[name of state legislature] has power to amend or repeal all or part of this [act] at any time and all statutory trusts and foreign statutory trusts subject to this [act] are governed by the amendment or repeal.

### Comment

**Principal Source** – Revised Model Business Corporation Act §1.02 (2005).

This paragraph address the concern that under the Constitution a subsequent amendment to this act could not be applied to an existing statutory trust or foreign statutory trust. The official comment to Revised Model Business Corporation Act §1.02 (2005), on which this section is based, explains: **[For discussion: whether to paraphrase rather than block quote.]**

Provisions similar to section 1.02 have their genesis in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to section 1.02. The purpose of section 1.02 is to avoid any possible argument that a corporation has contractual or vested rights in any specific statutory provision and to ensure that the state may in the future modify its corporation statutes as it deems appropriate and require existing corporations to comply with the statutes as modified.

All articles of incorporation or certificates of authority granted under the Model Act are subject to the reservation of power set forth in section 1.02. Further, corporations “governed” by this Act—which includes all corporations formed or qualified under earlier, general incorporation statutes that contain a reservation of power—are also subject to the reservation of power of section 1.02 and bound by subsequent amendments to the Act.

Many states have constitutional provisions mandating the reservation of power to amend or modify corporate statutes and charters. In these states section 1.02 is also supported by specific constitutional authorization.

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

## SECTION 1005. APPLICATION TO EXISTING RELATIONSHIPS.

1 (a) This [act] does not limit, prohibit, or invalidate the existence, acts, or obligations of any  
2 common-law trust created or doing business in this state before or after [the effective date of the  
3 act]. The laws of this state other than this [act] pertaining to trusts apply to common-law trusts.

4 (b) A common-law trust arising under the law of this state before or after [the effective date  
5 of this [act]] that does not have a prevailingly donative purpose may elect to be governed by this  
6 [act] by filing of a certificate of trust under Section 201.

7 [(c) A trust created pursuant to a statute of this state that was required by that statute to file  
8 a certificate of trust with [the Secretary of State] before [the effective date of this [act]] may elect  
9 to be governed by the provisions of this [act] by filing an amendment to its certificate of trust  
10 under Section 202.]

11 [(d) On [two years] after [the effective date of this [act]], this [act] governs the organization  
12 and internal affairs of all trusts created pursuant to a statute of this state that was required by that  
13 statute to file a certificate of trust with the [Secretary of State] before the effective date of this  
14 [act].]

## 15 **Comment**

16  
17 **Principal Source** – Uniform Limited Partnership Act §1206 (2001).

18 This Act governs all statutory trusts formed on or after the Act's effective date. For pre-  
19 existing statutory trusts, this section establishes an optional "elect in" period and a mandatory, all-  
20 inclusive date of two years following the effective date. Beginning on the all-inclusive date, each  
21 pre-existing statutory trust that has not previously elected in becomes subject to this Act—  
22 including the schedule of mandatory rules in Section 103(c)—by operation of law.  
23

24 Paragraphs (a) and (b) confirm that this act does not govern a common-law trust unless the  
25 trust forms a statutory trust by filing a certificate of trust under Section 201. However, consistent  
26 with Section 302, paragraph (b) of this Section prohibits a common-law trust with a prevailingly  
27 donative purpose from becoming a statutory trust. An alternative mode for a common-law trust to  
28 become a statutory trust is provided by the conversion provisions of Article 6. Unlike the  
29 formation of a new statutory trust by filing a certificate of trust under Section 201, the conversion  
30 provisions of Article 6 allow for the conversion of another organization into the statutory trust  
31 form while preserving continuity in the converting organization's relationships with third parties.

1 See the Comments to Sections 701 and 705.

2  
3 The drafting committee contemplated that some enacting jurisdictions might modify this  
4 section—particularly paragraphs (c) and (d), which are bracketed to signal that uniformity is not  
5 expected—to address other transition problems arising from differences between this Act and prior  
6 law. For example, an enacting jurisdiction might choose to allow trusts formed under a prior  
7 statute to remain governed by the prior statute for longer than the two years suggested in paragraph  
8 (d).

9  
10 Under Section 103(c)(1), this Section is not subject to override by the governing  
11 instrument.  
12

13 **SECTION 1006. REPEALS.** On [all-inclusive date], the following acts are repealed:

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

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

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

## 20 **Comment**

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

22  
23 Paragraphs (1) and (2) supply model language for enacting jurisdictions that have  
24 previously enacted a Statutory Trust Act or a Business Trust Act.  
25

26 Paragraph (3) supplies model language for enacting jurisdictions that have previously  
27 enacted a Real Estate Investment Trust statute. A real estate investment trust, also known as a  
28 REIT, is not a type of trust but rather is a tax status awarded to any entity that qualifies under 26  
29 U.S.C. §§856 et seq., or that qualifies as a real estate mortgage investment conduit under 26 U.S.C.  
30 §860D. Although the Internal Revenue Code at one time favored the trust form for the  
31 organization of a REIT, the code today does not regulate the form of entity. Accordingly, there is  
32 no longer any reason why a REIT must be organized as a trust, whether statutory or common law.  
33 Indeed, in contemporary practice most publicly-traded REITs are organized as Maryland  
34 corporations, not as trusts. See Robert H. Sitkoff, *The Rise of the Statutory Business Trust* \_\_  
35 [citation]. Nonetheless, prior to the liberalization of the tax code, a number of states enacted REIT  
36 statutes that authorize the creation of a trust entity designed to qualify as a REIT under the code.  
37 Because a statutory trust under this Act could serve the same purpose, the drafting committee



1 contemplated that enacting jurisdictions might take the occasion of enacting this act to repeal their  
2 REIT statutes.

3  
4 Under Section 103(c)(1), this Section is not subject to override by the governing  
5 instrument.  
6

7 **SECTION 1007. EFFECTIVE DATE.** This [act] takes effect . . . .

8 **Comment**  
9

10 **Principal Source** – Uniform Limited Partnership Act §1204 (2001).  
11

12 Section 1005 specifies how this Act affects statutory trusts, with special provisions  
13 pertaining to statutory trusts formed before the Act's effective date. Section \_\_\_\_ [article 9  
14 problem] contains no comparable provisions for foreign statutory trusts. Therefore, once this Act  
15 is effective, it applies immediately to all foreign statutory trusts, whether formed before or after the  
16 Act's effective date.  
17

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