The Uniform Statutory Trust Entity Act: A Review

By Thomas E. Rutledge and Ellisa O. Habbart***

The Uniform Statutory Trust Entity Act, the most recent product of the National Conference of Commissioners on Uniform State Laws in the area of business entity legislation, is intended to render uniform the statutory (i.e., "business") trust across the various states. Currently, business trust legislation is widely disparate across the various states, and many of the existing statutes are at best skeletal. This Act has the objective of rendering the business trust more effective as a form of organization by addressing many issues that are typically seen in other business entity laws, while at the same time seeking to minimize both unexpected and, in certain places, undesirable results otherwise dictated by applicable trust law. This Article both reviews the workings of this new uniform act and identifies issues and deficiencies therein.

As part of the continued efforts of the National Conference of Commissioners on Uniform State Laws ("NCCUSL") to provide up-to-date uniform acts for business organizations, it approved the Uniform Statutory Trust Entity Act ("USTA" or "the Act") at its 2009 Annual Meeting.[1]

The Act is an important development for statutory trusts which, to date, have not been governed in the various states by uniform or even similar statutes, and in states such as Massachusetts, have been based solely on the common law. Given that we believe the statutory trust should be part of any choice-of-entity analysis, our objectives in this Article are twofold. Our first aim is to help readers garner an understanding of the Act by examining the language employed and placing both procedural and policy determinations embodied in USTA in the context of

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1. In recent years, NCCUSL has promulgated the Uniform Partnership Act (1997), 6 U.L.A. 1 (2001) ("RUPA"), succeeding the Uniform Partnership Act (1914), 6 U.L.A. 275 (2001) ("UPA"); the Uniform Limited Partnership Act (2001), 6A U.L.A. 325 (2008) ("ULPA"), succeeding the Revised Uniform Limited Partnership Act (amended 1985), 6B U.L.A. 1 (2008) ("RULPA"), which superseded the Uniform Limited Partnership Act (1916), 6B U.L.A. 405 (2008); the Revised Uniform Limited Liability Company Act (2006), 6B U.L.A. 407 (2008) ("RULLCA"), succeeding the Uniform Limited Liability Company Act (1996), 6B U.L.A. 545 (2008) ("ULLCA"); and, of more recent vintage and without a predecessor act, the Uniform Limited Cooperative Association Act, 6A U.L.A. 141 (2008) ("ULCAA").

comparable provisions in other forms of business organizations.[2] Our second objective, and that which we hope will be most useful to state drafting committees that in future years will be considering the adoption of USTA, is to address certain policy decisions made in the drafting of USTA that have led to determinations that, in our assessment, deserve further consideration.[3]

The Drafting Process

In 2003, NCCUSL approved the appointment of the Drafting Committee to prepare a uniform business trust act for consideration by the Commissioners. The Drafting Committee met approximately five times for weekend-long drafting sessions before its first reading[4] to the Commissioners at NCCUSL's 2006 Annual Meeting. An additional seven drafting meetings took place before the Act's second and final reading in July 2009.

A variety of sources were considered during the drafting process including state business trust acts, model and uniform acts, and statistical data on the use of statutory trusts in various states.[5] The Drafting Committee concluded that the Delaware Statutory Trust Act,[6] adopted in 1988, and similar state acts adopted after 1988 would guide the drafting process. During the review, the Drafting Committee determined that, consistent with the 2002 change of the name of Delaware's act from Business Trust Act to Statutory Trust Act, a similar change to the name of the Act was required. The Drafting Committee made the request and NCCUSL approved the name change in January 2005 conditioned upon the addition of the word "Entity" to its title.

The Drafting Committee would have been prepared for a second reading at NCCUSL's 2008 Annual Meeting but for its decision to address the concept of the series in the Act.[7] Given the array of issues raised by the series concept, the Drafting Committee understood the challenges posed by its decision. In addition,

2. Expressly not addressed herein is the tax classification and treatment of the statutory trust. As to that topic, see James S. Eustice, Bittker & Eustice's Federal Income Taxation of Corporations and Shareholders ¶ 2.03 (2009); Carter G. Bishop, *Trusts, Taxes and Business*, Bus. L. Today, Nov./Dec. 2003, at 23. For a further explanation of the difficulty in application of the existing classification scheme and recommendations for its modification, see Carter G. Bishop, *Forgotten Trust: A Check-the-Box Achilles Heel*, 43 Suffolk U. L. Rev. (forthcoming 2010).

3. Both of the authors were active in the drafting of USTA. Habbart served as the advisor from the American Bar Association ("ABA") to the Drafting Committee, while Rutledge served as an advisor from the ABA Section of Business Law. All views expressed herein are entirely those of the authors and do not necessarily reflect those of other participants in the drafting of USTA.

4. A reading is the line-by-line presentation of a proposed act to the Commissioners for their review and consideration. *See* Ellisa O. Habbart & Thomas E. Rutledge, *Sneak Previews: Will the Uniform Statutory Trust Act Be Next Summer's Blockbuster Hit?*, Del. Banker, Summer 2008, at 10, 11.

5. *See* Drafting Comm. of the Unif. Statutory Trust Act, Nat'l Conf. of Comm'rs on Unif. State Laws, Uniform Statutory Trust Act—Preliminary Report 1 (July 2005), *available at* http://www.law.upenn.edu/bll/archives/ulc/UBTA/2005AMTrustReport.pdf [hereinafter 2005 USTA Preliminary Report].

6. Delaware Statutory Trust Act, Del. Code Ann. tit. 12, §§ 3801–3863 (2007).

7. *See infra* notes 109–42 and accompanying text.

as the first uniform act to tackle the series concept, the Committee understood that its decisions would play an important role in the future deliberations of other uniform act drafting committees. Additional meeting time to consider and draft such provisions was crucial. The Drafting Committee requested additional time and NCCUSL authorized the additional time with the understanding that the process would be completed in time for the Act's second reading at NCCUSL's 2009 Annual Meeting.

USTA has since received "approval" by the American Bar Association.[8]

The Common Understanding of the Statutory Trust and Its Place in the Choice-of-Entity Calculus

The "business trust" arose as a vehicle for avoiding rules that precluded corporations from owning real property.[9] As rules constraining the corporate form began to fall,[10] the need for the business trust as a gap-filler in the menu of organizational forms diminished.[11] Still, the business trust was adopted as the form of organization for the earliest investment companies,[12] and that application continues to this day. Over time, the business trust has come to be utilized for asset securitization and the organization of real estate investment trusts.[13]

Assuming one is not constrained by the historical experience of the parties, when considering a statutory trust it is helpful to begin with the premise that a statutory trust is structurally analogous to other business forms where management and control are separated from equity ownership. Similar to the limited liability company and limited partnership structures, the statutory trust offers significantly more contractual flexibility as compared to the corporation, while requiring less observance of formalities. With appropriate drafting, the same results

8. At its February 8–9, 2010, meeting, the ABA House of Delegates approved the following resolution:

> RESOLVED, That the American Bar Association approves the Uniform Statutory Trust Entity Act, promulgated by the National Conference of Commissioners of Uniform State Laws in 2009, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

Am. Bar Ass'n, Resolution Adopting USTA (Feb. 8–9, 2010), *available at* http://www.abanet.org/leadership/2010/midyear/daily_journal/111D.pdf.

NCCUSL identifies various of its products as having been "approved" by the ABA. This is an overstatement as to what is the actual action of the ABA. A careful reading of the language shows that the ABA does not endorse the act for adoption. Rather, if a state desires to adopt an act that conforms to the uniform act, the ABA deems it appropriate to adopt the uniform act.

9. *See* Sheldon A. Jones, Laura M. Moret & James M. Storey, *The Massachusetts Business Trust and Registered Investment Companies*, 13 Del. J. Corp. L. 421, 426 (1988). Similarly, the business trust avoided (now archaic) limitations upon maximum capital. *Id*. at 426–27.

10. *See*, *e.g.*, Model Bus. Corp. Act Ann. § 3.02(4) (4th ed. 2008) (powers of corporation include power to own real property).

11. *See* 16A William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 8232 (2003).

12. *See* Jones, Moret & Storey, *supra* note 9, at 446.

13. *See*, *e.g.*, William A. Kelley, Jr., *Real Estate Investment Trusts After Seven Years*, 23 Bus. Law. 1001 (1968).

in terms of risk sharing, management, voting rights, limits on duties and liabilities, and bankruptcy remoteness may be obtained whether using a statutory trust, a limited partnership,[14] or a limited liability company.[15] Absent contrary private ordering, a statutory trust under USTA:

- Is organized by filing a certificate of trust with the secretary of state;[16]
- Affords the beneficial owners and trustees limited liability from the debts and obligations of the trust;[17]
- Is governed by trustees;[18]
- Divides ownership among beneficial owners who have voting and economic rights relative to their capital contributions;[19]
- Allows for transferability of the beneficial interest;[20]
- Has continuity of life;[21]
- Is classified as an entity;[22]
- May have series;[23] and
- To the extent not addressed in the governing agreement or USTA, looks to trust law for the applicable rule.[24]

Generally speaking, there is greater flexibility as to internal structure than is available under business corporation laws. The rule on transferability of beneficial interest is the reverse of the default rule in other unincorporated association law.[25] Uniquely, the law of trusts serves as the gap-filler.

Whether a statutory trust is the best vehicle in a particular instance depends upon a careful review of the desired characteristics, issues of taxation,[26] and the degree to which the form may be customized with minimal transaction costs to meet the requirements of that particular transaction.[27]

14. For purposes of this statement, we assume the limited partnership is a limited liability limited partnership and that the liability shield enjoyed by the general partners will be respected in foreign jurisdictions. *But see* Thomas E. Rutledge & Thomas Earl Geu, *Practical Guide to the Limited Liability Limited Partnership*, *in* 1 STATE LIMITED PARTNERSHIP ACTS LLLP-1, LLLP-14 to LLLP-15 (2007).

15. *See* Ellisa Opstbaum Habbart & Andrew G. Kerber, *Getting the Right Fit: Some Suggestions on Finding the Best Way to Structure a Financing Transaction*, BUS. L. TODAY, Nov./Dec. 2001, at 32, 33. To date the statutory trust has not received broad acceptance as a means of organization outside the traditional applications of the investment company and asset securitization, an issue addressed in Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 CARDOZO L. REV. 325 (2001).

16. *See infra* notes 57–63 and accompanying text.

17. *See infra* notes 91–94 and accompanying text.

18. *See infra* notes 143–48 and accompanying text.

19. *See infra* notes 207–10 and accompanying text.

20. *See infra* note 207 and accompanying text.

21. *See infra* note 99 and accompanying text.

22. *See infra* note 86 and accompanying text.

23. *See infra* notes 109–42 and accompanying text.

24. *See infra* note 52 and accompanying text.

25. *See infra* notes 207, 231–41 and accompanying text.

26. *See supra* note 2.

27. *See, e.g.*, LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 26–28 (2010); Thomas E. Rutledge, *The Lost Distinction Between Agency and Decisional Authority: Unfortunate Consequences of the Member-Managed Versus Manager-Managed Distinction in the Limited Liability Company*, 93 KY. L.J. 737, 759–60 (2004–2005).

While USTA is substantially based upon the Delaware and Connecticut statutory trust acts, it is a better solution for a state than simply adopting the Delaware or Connecticut act. In the course of its preparation, the USTA Drafting Committee addressed and as appropriate modified otherwise applicable rules of trust law that may be unfamiliar to many business entity practitioners. As contrasted with those laws, USTA is in many respects more detailed and less reliant on (sometimes) uncertain principles of common law. Provisions such as USTA section 104, detailing the outer limits of the degree to which the otherwise applicable law may be modified, build upon a now accepted model[28] and provide certainty as to the propriety of private ordering. Further, USTA fits within the range of unincorporated business entity acts adopted in many states. USTA answers innumerable questions as to the operation of a statutory trust, questions that may not be apparent to one not already schooled in trust law, as contrasted with corporate and partnership laws. While, as detailed herein, the authors do not believe that USTA should be adopted without a careful consideration of its terms and in certain cases changes in its language, USTA is the appropriate starting point for any state desiring a modern statutory trust act.

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Our review of USTA will proceed on a sequential section-by-section basis following the order of the provisions in the Act as approved in summer 2009. As of the drafting of this Article, USTA has not been released in the Uniform Laws Annotated ("ULA"), and for that reason references to the ULA citations are not included herein.[29]

Article 1—General Provisions
Article 2—Formation; Certificate of Trust and Other Filings; Process
Article 3—Governing Law; Authorization; Duration; Powers
Article 4—Series Trusts
Article 5—Trustees and Trust Management
Article 6—Beneficiaries and Beneficial Rights
Article 7—Conversion and Merger
Article 8—Dissolution and Winding Up
Article 9—Foreign Statutory Trusts
Article 10—Miscellaneous Provisions

28. *See* RUPA § 103(b), 6 U.L.A. 73 (2001); ULPA § 110(b), 6A U.L.A. 378–79 (2008); RULLCA § 110(c), 6B U.L.A. 442–43 (2008); ULLCA § 103(b), 6B U.L.A. 563 (2008). *See also* ULCAA § 113, 6A U.L.A. 176–78 (2008).

29. The text of USTA, as approved by NCCUSL, is available at http://www.law.upenn.edu/bll/archives/ulc/ubta/2009final.pdf. Different from many uniform acts, the notes of the reporter, in this instance Professor Robert Sitkoff, were in part drafted over the course of the preparation of the Act. Those comments, however, are those of the reporter and are not part of the Act as approved by NCCUSL.

Article 1—General Provisions

Unfortunately, the substantive review of USTA must begin with a criticism. The official name of the Act is the Uniform Statutory Trust Entity Act.[30] The word "Entity" was added in order (a) to provide greater differentiation between this Act and the Uniform Trust Code,[31] and (b) purportedly to augment the identification of a business organization created under the Act as being a legal "entity" with, consequentially, certain characteristics such as the capacity to sue and be sued and to hold and convey property in its own name.

We do not view the addition of "Entity" to the name of the Act as either necessary or efficacious. The effort to differentiate the Act from the Uniform Trust Code is contrary to the manner in which NCCUSL has handled the names of its other uniform acts. For instance, there is no differentiation between the names of the Uniform Partnership Act passed in 1914[32] and the Uniform Partnership Act finalized in 1997[33] even though the latter defines a partnership as an "entity."[34] Further, the identification of a form of business organization as an "entity" does not, in and of itself, define any of its characteristics; rather, "entity" is a label that conveys no information.[35] Last, the addition is confusing; the Act authorizes the organization of a statutory trust, not a statutory entity trust.[36] The organization created under the Act should not be individually titled something different than the Act itself.[37] It is our recommendation that states eliminate "Entity" from their enactment of section 101 so that the organization created under the Act does not have a different title than that of the Act itself.

The designation of the business organization created under the Act as a "statutory trust," in contrast to the more traditional "business trust," was the result of the desire to conform to the practice currently utilized in Delaware and Connecticut, leading states for the organization commonly known as the business trust, wherein the entity is designated as a statutory trust.[38] This explanation,

30. USTA § 101 (2009) ("This [act] may be cited as the Uniform Statutory Trust Entity Act.").

31. Unif. Trust Code § 101 (2000), 7C U.L.A. 411 (2006) ("This [act] may be cited as the Uniform Trust Code.").

32. UPA, 6 U.L.A. 373 (2001). *See id.* § 1, 6 U.L.A. 374 ("This act may be cited as the Uniform Partnership Act.").

33. RUPA, 6 U.L.A. 56 (2001). *See also id.* § 1202, 6 U.L.A. 265 ("This [act] may be cited as the Uniform Partnership Act (1997).").

34. RUPA § 201(a), 6 U.L.A. 91 (2001). The name of the 1997 act is *not* the Uniform Partnership Entity Act.

35. *See*, *e.g.*, Thomas E. Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, 42 Suffolk U. L. Rev. 655, 680–82 (2009) [hereinafter Rutledge, *External Entities*]; J. William Callison, *Indeterminacy, Irony and Partnership Law*, 2 Stanford Agora 73–76 (2001), *available at* http://agora.stanford.edu/agora/libArticles2/agora2v1.pdf; David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 Stanford Agora 38, 58 (2001), *available at* http://agora.stanford.edu/agora/libArticles2/agora2v1.pdf.

36. *See* USTA § 102(16) (2009) ("'Statutory trust' . . . means an entity formed under this [act].").

37. Similar confusion exists in Indiana, wherein a limited liability company is organized pursuant to the Indiana Business Flexibility Act. Ind. Code Ann. § 23-18-1-1 (West 2005).

38. Delaware adopted a Business Trust Act in 1988, referring to an organization created thereunder as a "business trust." In 2001 the name of the act was changed to the Delaware Statutory Trust Act

however, begs the question of why the term "statutory trust" is used in those states. The change to "statutory trust" followed the decision rendered in *In re Secured Equipment Trust of Eastern Airlines, Inc.*,[39] in which the court held that certain trusts utilized for securitizations were not "business trusts" as contemplated by the Bankruptcy Code.[40] Given that business/statutory trusts are often utilized for financing structures where bankruptcy remoteness is desired,[41] this relabeling, it may be argued, further removes a "statutory trust" from the ambit of organizations that may file for protection under the Bankruptcy Code. This "rose by any other name"[42] issue has not been addressed in a published opinion to date.

Section 102 sets forth the various defined terms that are utilized throughout USTA, and those defined terms will be considered as they are individually utilized.[43]

Section 103 defines the effect of the governing instrument,[44] its permissible scope, the limitations thereon, and the default rule with respect to its amendment.[45] If a governing instrument is silent on a matter, the applicable provisions of USTA will govern.[46] The governing instrument may include provisions addressing:

(1) the management, affairs, and conduct of the business of a statutory trust; and
(2) the rights, interests, duties, obligations, and powers of, and the relations among, the trustees, the beneficial owners, the statutory trust, and other persons.[47]

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and the name of an organization created thereunder was changed to a "statutory trust." *See* DEL. CODE ANN. tit. 12, § 3801(g) (2007). The amendment was not intended as a substantive change in Delaware law. Rather, it was made to "address[] the concern of those who used these trusts in structured finance transactions that a "business trust" might be deemed a "person" [and therefore a "debtor" under the Federal] Bankruptcy Code. If so, the entity could be the subject of an involuntary bankruptcy, which would defeat the expectations of the parties in asset securitization transactions, who rely upon a bankruptcy remote entity." *See* 2005 USTA PRELIMINARY REPORT, *supra* note 5, at 2; *see also* Habbart & Rutledge, *supra* note 4. The Connecticut act, which was enacted in 1997, used the term "statutory trust" from the outset. *See* CONN. GEN. STAT. ANN. § 34-500 (West 2005). The label "statutory trust" is utilized as well in Wyoming. *See* WYO. STAT. ANN. § 17-23-202(g) (2009). Herein "statutory" and "business" trust are used interchangeably.

39. 38 F.3d 86 (2d Cir. 1994).

40. *Id.* at 90–91. A "debtor" eligible to file bankruptcy includes a "person," 11 U.S.C. § 101(13) (2006), which is defined to include a "corporation," *id.* § 101(41), which is, in turn, defined to include a "business trust." *Id.* § 101(9)(A)(v). *See also In re* May, 405 B.R. 443, 450 (Bankr. E.D. Mich. 2008); *In re* Gurney's Inn Corp. Liquidating Trust, 215 B.R. 659, 660–61 (Bankr. E.D.N.Y. 1997); Kenneth N. Klee & Brendt C. Butler, *Asset-Backed Securitization, Special Purpose Vehicles and Other Securitization Issues*, 35 UCC L.J. 23, 46–48 (2002). *See also In re* Gen. Growth Props., Inc., 409 B.R. 43, 71–72 (Bankr. S.D.N.Y. 2009) ("Illinois Land Trust" with a purpose that went "beyond merely conserving a trust res or holding title to land" classified as a "business trust eligible to file Chapter 11").

41. *See, e.g.*, Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559, 564 (2003).

42. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2, l. 1–2.

43. USTA § 102 (2009).

44. *See also id.* § 102(6) (defining "governing instrument").

45. *Id.* § 103. Except as to reciting the default rule for the amendment of the governing instrument, section 103 of USTA is substantially equivalent in function to section 103 of RUPA, section 110 of ULPA, and section 110 of RULLCA. *See* RUPA § 103, 6 U.L.A. 73 (2001); ULPA § 110, 6A U.L.A. 378–79 (2008); RULLCA § 110, 6B U.L.A. 442–44 (2008).

46. USTA § 103(b).

47. *Id.* § 103(a).

The governing instrument need not be set forth in a single integrated document,[48] and in accordance with the default rule may be amended with the approval of all of the beneficial owners.[49] While there is a long recitation of items that may be addressed in the governing instrument,[50] section 104 recites certain matters dictated by USTA that are not subject to modification by private ordering.[51] As a default rule, the common law of the jurisdiction of organization of a statutory trust as it relates to law trusts will supplement USTA.[52] However, section 105 expressly provides that such applicable common law may be modified or even superseded in the governing instrument;[53] for example, the instrument could provide that corporate or partnership law will govern.[54] The foregoing reflects the Act's policy in favor of giving maximum effect to the principles of freedom of contract and the

48. *Id*. § 103(c). The governing instrument may "refer to or incorporate any record." *Id*. As such, the ability of a USTA-governing instrument to incorporate by reference is substantially broader than the ability of articles of incorporation to incorporate by reference as permitted in section 1.20 of the Model Business Corporation Act. MODEL BUS. CORP. ACT ANN. § 1.20 (4th ed. 2008). The default rule of unanimous approval to amend the governing agreement is consistent with other laws governing unincorporated associations. *See* RUPA § 401(j), 6 U.L.A. 133 (2001); RULLCA § 407(b)(5), 6B U.L.A. 484 (2008); ULPA § 406(b)(1), 6A U.L.A. 434 (2008). But contrast the rule with laws governing business corporations, *see*, *e.g.*, MODEL BUS. CORP. ACT ANN. § 10.03 (amendment of articles of incorporation by majority of the shareholders), and cooperative law, *see* ULCAA § 405, 6A U.L.A. 203–05 (2008).

49. USTA § 103(d). This amendment threshold may be modified to a different threshold in the governing instrument, *see id*. § 103(e)(6)(A), 103(e)(10), and may, conceivably, also require the approval of the trustees, thereby imposing, in effect, the "two house" rule required in corporate law for amendment of the articles of incorporation. *See*, *e.g.*, MODEL BUS. CORP. ACT ANN. § 10.03.

50. USTA § 103(e). Note that USTA section 103(e) is not an all encompassing list of the matters that may be addressed in a governing instrument. For example, USTA section 510 addresses provisions for directed trustees that may appear in the governing instrument even as USTA section 103(e) is silent as to directed trustees. *See id*. § 510.

51. *See id*. § 104. Except as to reciting the default rule for the amendment of the governing instrument, section 104 of USTA is substantially equivalent in function to section 103 of RUPA, section 110 of ULPA, and section 110 of RULLCA. *See* RUPA § 103, 6 U.L.A. 73 (2001); ULPA § 110, 6A U.L.A. 378–79 (2008); RULLCA § 110, 6B U.L.A. 442–44 (2008). Those particular limitations on modifiability of the rules set forth in USTA will be addressed in concert with the discussion of the substantive rules.

52. *Id*. § 105. The statutory trust acts of Delaware and Connecticut refer to the law of common law trust when the act is silent. *See* DEL. CODE ANN. tit. 12, § 3809 (2007); CONN. GEN. STAT. ANN. § 34-519 (West 2005). This reference to trust law for guidance can be at best frustrating. For example, the *Restatement (Third) of Trusts* excludes from its scope business trusts. *See* RESTATEMENT (THIRD) OF TRUSTS 4 (2003) ("The Restatement of Trusts does not deal with such devices as business trusts . . . ."); *id*. § 1 cmt. b. *See also* 1 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 2.1.2 (5th ed. 2006) ("[B]ecause the use of the trust as a substitute for incorporation, as in the case of the so-called business trust or Massachusetts trust, necessarily differs in important ways from the use of the trust as a gratuitous transfer, each of the Restatements [of Trusts] leaves these trusts for discussion along with other business organizations. So does this treatise." (footnotes omitted)); 1 AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 2.2 (1939).

53. USTA § 105.

54. *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 10-1879 (2004) ("Any business trust shall be subject to such applicable provisions of law from time to time in effect with respect to domestic and foreign corporations, respectively.").

enforcement of governing instruments,[55] as well as the Act's admonition against the rule of strict construction of statutes in derogation of common law.[56]

Article 2—Formation; Certificate of Trust and Other Filings; Process

A statutory trust is formed by the filing of a certificate of trust with the secretary of state.[57] The certificate of trust must set forth:

- The name of the statutory trust;[58]
- The street and, if different, the mailing address of the trust's "designated office";[59]
- The name, street, and, if different, the mailing address of the initial agent for service of process;[60] and
- A statement as to whether the trust will have one or more series.[61]

The certificate of trust may contain such additional information as is desired.[62] A statutory trust is formed when the certificate of trust is filed with the secretary of state.[63] A filed certificate of trust, including as amended by a statement of change or qualification or by articles of merger or conversion, will control over an inconsistent

55. USTA § 106(a). *Accord* Del. Code Ann. tit. 6, § 18-1101(b) (2005) (limited liability company agreements); *id*. § 17-1101(c) (limited partnership agreements); Ky. Rev. Stat. Ann. § 275.003 (LexisNexis 2003) (operating agreements); Ky. Rev. Stat. Ann. § 362.1-104(3) (LexisNexis 2008) (partnership agreements); *id*. § 362.2-107(3) (limited partnership agreements).

56. USTA § 106(b). *Accord* Del. Code Ann. tit. 6, § 18-1101(a) (2005). RUPA does not contain a similar provision given, as explained in the commentary, that the "principle is now so well established that [it] is not necessary to so state it in the Act." *See* RUPA § 104 cmt., 6 U.L.A. 79 (2001).

57. USTA § 201(a). Since the statutory trust is formed by a filing with the state, it will constitute a "registered organization" within the scope of U.C.C. § 9-102(a)(70) (2008) (" 'Registered organization' means an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized.").

58. USTA § 201(b)(1). The requirements as to the name of a statutory trust are addressed in USTA section 207.

59. *Id*. § 201(b)(2). Under the Act, the designated office has minimal functionality. This office: (1) determines where notice of the resignation of the registered agent is sent, *id*. § 211(b); (2) identifies the county in which notice of dissolution is published, *id*. § 805(b)(1); (3) determines where notice of administrative dissolution is sent, *id*. § 806(b); and (4) determines where notice of the revocation of a certificate of authority is sent, *id*. § 907(b). *See also infra* note 81 and accompanying text. In the case of a foreign statutory trust, the designated office is the principal place of business address. *Id*. § 102(4)(B). State drafting committees may find it easier to change the title "designated office" to "the principal place of business address."

60. *Id*. § 201(b)(3). *See also infra* notes 81–82 and accompanying text.

61. *Id*. § 201(b)(4).

62. *Id*. § 201(c).

63. *Id*. § 201(d). *See also id*. § 204(c)(1). State drafting committees, in light of the general applicable rule as to the effective time and date of filed documents set forth in USTA section 204(c)(1), may want to delete from their enactment of USTA section 201(d) because the latter is redundant and in its place substitute the appropriate cross-reference.

term in a trust instrument.[64] A certificate of trust may be amended or restated.[65] The requirements as to the contents of the certificate of trust or any amendment or restatement thereof are not subject to modification by private ordering.[66]

A document delivered for filing on behalf of a statutory trust must be signed by or on behalf of one of the trustees.[67] Given that this directive applies to the initial certificate of trust, a problem arises from the fact that the statutory trust and the authority of any trustee will come into existence only upon the filing of the certificate of trust. Prior to the filing, who are the "trustees" purporting to sign and deliver the certificate? It is difficult to see how this may be resolved within the mechanism provided by USTA. States considering the adoption of USTA may want to add the equivalent of an "incorporator" or "organizer" provision similar to those utilized in many business corporation and limited liability company acts.[68] Following such a model, the "organizer" would be authorized to execute and deliver a certificate of trust to the secretary of state, and upon the filing the trust comes into existence and the persons intended to be the trustees become its trustees. Alternatively, adopting the model utilized in limited partnerships,[69] a state could require that the certificate of trust identify and be signed by each trustee.[70]

64. *Id*. § 201(e). This provision sets forth a different rule than that in ULPA and RULLCA, which provide that as to third-party reliance on the entity, the publicly filed record controls, but as between the equity owners and their transferees, the private ordering documents control over the filed documents. *See* ULPA § 201(d), 6A U.L.A. 392 (2008); RULLCA § 112(d), 6B U.L.A. 450 (2008).

65. USTA § 202. *See also id*. § 103(d) (default rule requiring unanimous consent of the beneficial owners in order to amend the governing instrument, which by definition includes the certificate of trust).

66. *See id*. § 104(1).

67. *Id*. § 203(a). Curiously, USTA section 203(b) permits the delegation of a trustee's authority to execute a document intended for filing, *id*. § 203(b), and such right to delegate is not subject to modification in the governing instrument. *Id*. § 104(1). Consequently, a provision of a governing instrument dictating that a trustee may not delegate the authority to sign a document, ab initio, would be ineffective. A state considering the enactment of USTA may want to consider whether some flexibility with respect to the ability to restrict delegation is appropriate and, if so desired, make the necessary modifications to both sections 203 and 104(a)(1) of USTA.

68. *See*, *e.g.*, MODEL BUS. CORP. ACT ANN. § 2.01 (4th ed. 2008); RULLCA § 201(a), 6B U.L.A. 456 (2008) ("One or more persons may act as organizers to form a[n] [LLC] by signing and delivering to the Secretary of State for filing a certificate of organization."); KY. REV. STAT. ANN. § 275.020(1) (LexisNexis Supp. 2009) ("One (1) or more persons may serve as the organizer and form a[n] [LLC] by delivering articles of organization to the Secretary of State for filing."); RULLCA § 201(a), 6B U.L.A. 456 (2008) ("One or more persons may act as organizers to form a[n] [LLC] for signing and delivering to the [secretary of state] for filing a certificate of organization."). *See also* RULLCA § 111(c), 6B U.L.A. 449 (2008) ("Two or more persons intending to become the initial members of a[n] [LLC] may make an agreement providing that upon the formation of the company the agreement will become the operating agreement.").

69. A certificate of limited partnership must be executed by each person who will be a general partner of the limited partnership being organized. ULPA § 204(a)(1), 6A U.L.A. 399 (2008). *See also id*. § 201(a)(3), 6A U.L.A. 392 (requiring that certificate of limited partnership set forth the name and address of each general partner).

70. If this mechanism is used, the state drafting committee will need to provide an obligation to update that information. *See*, *e.g.*, ULPA § 202(b)(1), 6A U.L.A. 395 (2008); *id*. § 204(a)(5)(B), 6A U.L.A. 399.

Documents filed with the secretary of state may have a delayed effective time and date provided that the delayed effective date is not more than the ninety days after the document is filed.[71] Absent a document setting forth a delayed effective time or date, the document is effective upon filing with the secretary of state.[72] Filed records may be corrected.[73] The secretary of state, provided the necessary conditions are satisfied, may issue a certificate of good standing with respect to a statutory trust.[74]

The name of a statutory trust, in addition to being distinguishable upon the records of the secretary of state,[75] may, but is not required to, contain any of "company," "association," "club," "foundation," "fund," "institute," "society," "union," "syndicate," "limited," or "trust."[76] There is no requirement in USTA that the name of a statutory trust include "trust" or "statutory," and there is no other requirement that the organization otherwise identify in its name its form of organization.[77] The same name standards and requirements also apply to foreign statutory trusts applying for authority to transact business.[78]

Every statutory trust is required to designate and maintain an agent for service of process,[79] and the Act addresses matters such as the change of the agent for service of process and the resignation of such agent.[80] Given that most states have integrated consistent rules with respect to the registered agent into its

71. USTA § 204(c)(3), (4). *Accord* RULLCA § 205(c), 6B U.L.A. 462–63 (2008); ULCAA § 203(c), 6A U.L.A. 189 (2008).

72. USTA § 204(c)(1).

73. *Id*. § 205. *Accord* RULLCA § 206, 6B U.L.A. 463–64 (2008); ULCAA § 204, 6A U.L.A. 190 (2008).

74. USTA § 206. While a statutory trust may be organized into one or more series, a certificate of good standing cannot be issued with respect to an individual series. *See infra* note 122 and accompanying text.

75. USTA § 207(a). The "distinguishable upon the records of the Secretary of State" standard is used in numerous other uniform acts and in some business/statutory trust acts. *See*, *e.g.*, ULPA § 108(d), 6A U.L.A. 370 (2008); RULLCA § 108(b), 6B U.L.A. 440 (2008); ULCAA § 111(b), (c), 6A U.L.A. 174 (2008); DEL. CODE ANN. tit. 12, § 3814(a) (2007); KY. REV. STAT. ANN. § 386.382(1) (LexisNexis Supp. 2009); VA. CODE ANN. § 13.1-1214(C) (2006). Cognizant of the fact that the various states have their own terminology and procedures in place, it is expected that USTA section 207(a) in a typical state adoption of USTA will be substantially or entirely replaced. For the same reasons, the provision addressing name reservations, USTA section 208, will likely be revised by state drafting committees.

76. USTA § 207(b). *Accord* DEL. CODE ANN. tit. 12, § 3814(c) (2007); VA. CODE ANN. § 13.1-1214(A) (2006).

77. In contrast, the name of a statutory trust organized in Connecticut must contain "Statutory Trust," "Limited Liability Trust," "Limited," "LLT," "L.L.T.," or "Ltd." CONN. GEN. STAT. ANN. § 34-506(c) (West 2005).

78. USTA § 207(d). Curiously, while the defined term "qualified foreign statutory trust," *id*. § 102(10), is utilized in USTA section 208, it is noticeably absent from section 207, which refers to a "foreign statutory trust" that "has a certificate of registration to do business in this state." *See id*. § 207(d). State drafting committees may want to utilize the defined term. In a similar vein, "intending it become a qualified foreign statutory trust" may be a better formulation in section 208(a)(4) than the current "intending to organize a foreign statutory trust." *Id*. § 208(a)(4).

79. *Id*. § 209(a).

80. *Id*. §§ 210, 211.

other business organization statutes, it is expected that each state will replace the Act's provisions with provisions consistent with its existing practices and procedures.

A statutory trust may change its designated office either by amending its certificate of trust or by filing a statement of change.[81]

While it is anticipated that a statutory trust will be obligated to file an annual or other periodic report with the secretary of state,[82] this is another instance where state drafting committees will want to establish rules that conform to their respective state's existing practices and procedures.

Article 3—Governing Law; Authorization; Duration; Powers

The laws of the state under which the certificate of trust is filed will govern the internal affairs of the statutory trust and the liability of its beneficial owners and trustees for any debt or other obligation of either the statutory trust or a series thereof, as well as the enforceability of a debt or similar liability of the trust or one of its series (if any) against the property of the trust or the property of a series (if any).[83] While there is certainly authority for the proposition that the scope of "internal affairs" includes the responsibility of constituents of a business organization for its debts and obligations,[84] the rules are addressed in separate sections of USTA just as they are addressed in separate sections of the *Restatement (Second) of Conflict of Laws*.[85]

81. *Id*. § 210. States that typically require that a change of principal office address be on a form filing and not by direct amendment of the organic filing, *see*, *e.g.*, Ky. Rev. Stat. Ann. § 275.040 (LexisNexis 2003), may want to conform their adoptions of USTA to this procedure.

82. *Id*. § 213.

83. *Id*. § 301. *See also id*. § 304(a) (providing for no personal liability of beneficial owners, trustees, or agents of either). As is reviewed below, there is no liability of a series. *See infra* notes 125–27 and accompanying text. Rather, there is a liability of the statutory trust that is recourse only against the assets associated with a series. To that extent, the language of USTA section 301(2) is less precise than it might be.

84. *See* Bayless Manning, A Concise Textbook on Legal Capital 6 (2d ed. 1981). As Manning stated:

> History aside, it is important to understand that modern corporation law does not "provide for" limited liability; what it does is provide that in the case of creditor claims against an enterprise in corporate form, *the corporation is the debtor* rather than those who hold claim to the proprietorship capital in the enterprise. Once that step is taken, the creditor law of the corporation exactly parallels the law of individual indebtedness and of creditors of individuals.

Id. It needs to be recognized as well that, in addition to protecting the owners from exposure in excess of the amounts invested in the venture, the corollary of limited liability, namely that the assets of the venture will not be available to satisfy claims against the owners in their individual capacities, assures a defined pool of assets available to satisfy venture creditor claims. 1 William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 38 (2006). This aspect of limited liability has been labeled "defensive asset partitioning." *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387, 394–95 (2000).

85. *See* Restatement (Second) of Conflict of Laws §§ 302, 307 (1971).

A statutory trust is an entity separate from its trustees and beneficial owners.[86] A statutory trust may have any lawful purpose, including a not-for-profit purpose, provided it does not have a "predominantly" donative purpose.[87] When state drafting committees consider USTA for adoption, they will want to review existing limitations on the use of the business trust in their state and determine whether to incorporate them into the new act or, conversely, decide that the policy bases for those limitations no longer exist.[88]

The restriction against a statutory trust with a primarily donative purpose exists to ensure that the statutory trust is not used to avoid the application of policy-based mandatory limitations imposed upon traditional trusts, such as those recited in section 105 of the Uniform Trust Code.[89] The requirement that the statutory trust be treated as an entity is not listed as a mandatory provision in USTA; it is therefore conceivable that it could be subject to waiver and, presumably, notice of this waiver would be set forth in the certificate of trust in order to put third parties on notice.[90]

The limited liability of the trust's constituents with respect to any debt or obligation of the trust or a series thereof is stated in USTA both affirmatively (debt is that of the trust or the series) and negatively (no beneficial owner, trustee, or any agent thereof is personally liable for a debt or obligation of the trust or of a series).[91] As such, a statutory trust achieves the "asset partitioning" that has been

86. USTA § 302. *Accord* DEL. CODE ANN. tit. 12, § 3810(a)(2) (2007) ("A statutory trust formed under this chapter shall be a separate legal entity, the existence of which as separate legal entity shall continue until cancellation of the statutory trust's certificate of trust."); VA. CODE ANN. § 13.1-1208 (2006) ("A business trust established in accordance with the provisions of this chapter is a separate legal entity."). As previously noted, the mere identification of a statutory trust as an "entity" does little if anything to advance the analysis. *See supra* note 35 and accompanying text. Rather, a characteristic-by-characteristic analysis is necessary.

87. USTA § 303. This provision is consistent with the existing law in Connecticut. *See* CONN. GEN. STAT. ANN. § 34-502a (West 2005). Certain other existing business trust acts do not expressly exclude a trust with a predominantly donative purpose. *See*, *e.g.*, VA. CODE ANN. § 13.1-1209 (2006). The law is ambiguous in other states. *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 10-1873 (2004) ("A business trust is permitted as a recognized form of association for the conduct of business within this state."). In contrast, Delaware explicitly authorizes the formation of a statutory trust for donative purposes. DEL. CODE ANN. tit. 12, § 3801 (2007). On a state-by-state basis, constitutional limitations on "business trusts" may be held applicable to a USTA statutory trust. For example, the Oklahoma constitution forbids the issuance of an alcoholic beverage package store or distributor license to a "business trust." *See* OKLA. CONST. art. XVIII, § 10(a).

88. For example, under current Indiana law, a business trust may not be utilized for the organization of a railroad. *See* IND. CODE ANN. § 23-5-1-8 (West 2005).

89. UNIF. TRUST CODE § 105 (2000), 7C U.L.A. 428–29 (2006).

90. As it is unclear which characteristics, if any, a statutory trust has from its identification as an entity, it is equally unclear as to what would be the consequences of the trust electing to be treated as an aggregate. *See supra* note 35 and accompanying text. *See also* DEL. CODE ANN. tit. 6, § 15-201(c) (Supp. 2009) (permitting a Delaware partnership, otherwise classified as an entity, to elect in either a statement of partnership existence or a statement of qualification to be treated as an aggregate).

91. USTA § 304(a). *Accord* RUPA § 306(c), 6 U.L.A. 117 (2001); MODEL BUS. CORP. ACT ANN. § 6.22 (4th ed. 2008); RULLCA § 304(a), 6B U.L.A. 475 (2008); ULPA § 303(2), 6A U.L.A. 418 (2008); *id.* § 404(4), 6 U.L.A. 432. At one time the trustee was liable for the debts and obligations of the trust with a corresponding right of contribution out of trust assets. *See* RESTATEMENT (SECOND) OF TRUSTS

typically associated with the corporation and limited liability company.[92] The application of the limited liability rule with respect to agents assumes that, in the discharge of the agent's functions, there has been an appropriate identification of the principal on whose behalf the agent is acting.[93] Additionally, no creditor of a trustee or beneficial owner may seek to collect a debt against any specific property of the statutory trust.[94]

Section 304(b) of USTA provides that except to the extent property has been "associated" with a particular series,[95] the property of a statutory trust, whether held in the name of the trust or in the name of a trustee, is subject to attachment and execution to satisfy a debt or other obligation of the trust.[96] That section is rather confusing and there is a problem with respect to terminology. The reference to trust property "held in the name of the trustee or by the trustee in the trustee's capacity as trustee" is already addressed in USTA section 307 and does not need to be referenced again. In addition, the reference to article 4 of USTA, an oblique reference to the creation of a series and the association of property to a series, may well be too inferential for practitioners and the courts. Therefore, we would recommend that USTA section 304(b) be rewritten to read as follows:

§§ 244, 261 (1959). *See also* WILLIAM C. DUNN, TRUSTS FOR BUSINESS PURPOSES § 115 (1922). This rule was revised and indeed reversed in the Uniform Trust Code, which provides that a trustee is not personally liable for the debts, obligations, and liabilities arising in the trustee's fiduciary capacity. UNIFORM TRUST CODE § 1010 (2000), 7C U.L.A. 657–58 (2006). The Act does not include the rule of the *Restatement (Third) of the Law of Agency* and of the Model Business Corporation Act to the effect that limited liability applies "except that he may become personally liable by reason of his own acts or conduct." RESTATEMENT (THIRD) OF AGENCY § 7.01 (2006); MODEL BUS. CORP. ACT. ANN. § 6.22(b). State drafting committees may want to consider such an addition.

92. *See*, *e.g.*, KY. REV. STAT. ANN. § 275.240(1) (LexisNexis 2003) ("Property transferred to or otherwise acquired by a[n] [LLC] shall be the property of the [LLC] and not of the members individually."); Hansmann & Kraakman, *supra* note 84, at 393; Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253, 256. As is reviewed below, a series itself has no debt, obligation, or liability, but rather there is property associated with a series that is recourse in satisfaction of a debt, obligation, or liability. *See infra* notes 125–27 and accompanying text. To that extent the language of USTA section 304(a) is less than precise.

93. *See* RESTATEMENT (THIRD) OF AGENCY § 6.03.

94. USTA § 305. *See also id.* § 601(c) (beneficial owner's interest in the statutory trust is not an interest in any specific property of the statutory trust). As approved by NCCUSL, USTA section 305 began as follows: "Except as otherwise provided in section 606"; this provision was deleted from the final version of the Act. In fact, even when USTA section 606 is applied, the creditor succeeds to no interest, legal or equitable, in the trust's property. Rather, the creditor receives only a lien upon the distributions declared in favor of the judgment debtor. The "Except as otherwise provided in section 606" language created the incorrect implication that a USTA section 606 charging order caused the judgment creditor of a beneficial owner to come into an interest in the statutory trust's property.

95. *See infra* notes 125–27 and accompanying text.

96. USTA § 304(b). This provision states:

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

Id.

> The property of a statutory trust that has not been associated with a series is subject to attachment and execution to satisfy a debt, obligation, or other liability of the trust. Property of a statutory trust associated with a series is subject to attachment and execution to satisfy a debt, obligation, or other liability incurred with respect to the property associated with that series.[97]

With these changes, the arguably overly broad cross-reference to article 4 is avoided and the rules with respect to which assets are, and are not, available to satisfy the obligations of a statutory trust or any series thereof are recited in an integrated manner.

As a default rule modifiable in the governing instrument,[98] a statutory trust has perpetual existence.[99] This rule is directly opposite to the rule of limited duration applied to common law trusts by the Rule Against Perpetuities.[100] Although a statutory trust or a series thereof may be terminated or revoked, USTA provides that such a termination or revocation may be accomplished only in accordance with the terms of the governing instrument.[101] This exclusive reference to the governing instrument eliminates the application of existing common law that seeks to strike a balance, over time, between the desires of the settlor and the desires and expectations of the beneficiaries. Neither a statutory trust nor any series thereof shall be terminated because of the "death, incapacity, dissolution, termination, or bankruptcy" of either a beneficial owner or of a trustee.[102] Overriding the "merger doctrine" that exists under the common law of trusts whereby legal and equitable title would otherwise merge,[103] the Act provides that neither a trust nor a series thereof will terminate merely because the same person is both the only trustee and the only beneficial owner of the trust.[104]

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97. With respect to the reference to a debt "incurred with respect to the property associated with that series" rather than a seemingly more direct "debt of that series," see *infra* notes 125–27 and accompanying text.

98. *See id.* § 103(a)(6) (defining "governing instrument").

99. *Id.* § 306(a). *Accord* ULPA § 104(c), 6A U.L.A. 366 (2008); RULLCA § 104(c), 6B U.L.A. 437 (2008); ULCAA § 105(c), 6A U.L.A. 168 (2008).

100. The common law Rule Against Perpetuities, which continues to be followed by a number of states, requires that all interests vest no later than twenty-one years after the end of a life (or lives) in being at the creation of the trust. *See*, *e.g.*, IOWA CODE ANN. § 558.68 (West 1992 & Supp. 2010) (Iowa); N.Y. EST. POWERS & TRUSTS § 9-1.1 (McKinney 2002) (New York); TEX. PROP. CODE ANN. § 112.036 (Vernon 2007) (Texas). Thus, in those states that follow the common law rule, a trust has a limited life span. However, many states have repealed the common law rule entirely, at least as to personal property. *See*, *e.g.*, DEL. CODE ANN. tit. 25, § 503 (2009) (Delaware); N.J. STAT. ANN. § 46:2F-9 (West 2003) (New Jersey); S.D. CODIFIED LAWS § 43-5-8 (2004) (South Dakota). Others have extended the allowed life of a trust by adopting, for example, the Uniform Statutory Rule Against Perpetuities, 8B U.L.A. 223 (2001) ("USRAP"). *See*, *e.g.*, CONN. GEN. STAT. ANN. § 45a-491 (West 2004) (Connecticut); FLA. STAT. ANN. § 689.225 (West Supp. 2010) (Florida). USRAP adopts both the common law rule as well as an alternative rule that all interests will be valid if they actually vest within ninety years. USRAP § 1(a) (amended 1990), 8B U.L.A. 236 (2001).

101. USTA § 306(b).

102. *Id.* This is in contrast with the traditional rule in partnership law. *See* UPA §§ 29, 30, 31, 6 U.L.A. 349, 354, 370 (2001).

103. *See* RESTATEMENT (THIRD) OF TRUSTS § 69 (2003); UNIFORM TRUST CODE § 402(a)(5) (2000), 7C U.L.A. 481 (2006).

104. USTA § 306(d).

A statutory trust may hold and take title to property in its own name; alternatively, property may be held in the name of a trustee in any of an active, passive, or custodial capacity.[105] Although it is anticipated that consistent with the treatment of a statutory trust as a legal entity it will hold property in its own name whenever possible,[106] USTA provides flexibility and authorizes the trustee to hold property in his or her name on behalf of the trust. Consistent with the traditional law of trusts, such flexibility permits a statutory trust to operate in states that may not recognize the statutory trust as an entity and, as a result, require the trustee to hold title to property. The "property" of a statutory trust may be real, personal, tangible, or intangible.[107]

Pursuant to USTA section 308, a statutory trust may sue and be sued in its own name.[108]

Article 4—Series Trusts

In order to consider properly the series provisions of USTA, it is important to understand the history of the series concept. The series arose in the context of statutory trusts utilized for asset securitization[109] and the organization of investment companies.[110] In addition to Delaware, the series concept appears in

105. *Id.* § 307. In contrast, a series of a statutory trust does not, in its own name, have the capacity to take title to property.

106. *See* Rutledge, *External Entities*, *supra* note 35, at 671–72.

107. USTA § 102(9) (defining "property"). *See also* RUPA § 101(11), 6 U.L.A. 61 (2001). "Property" is not defined in RULLCA, ULPA, or ULCAA.

108. USTA § 308. *Accord* RUPA § 307(a), 6 U.L.A. 124 (2001); ULPA § 105, 6A U.L.A. 367 (2008); ULCAA § 106, 6A U.L.A. 169 (2008); RULLCA § 105, 6B U.L.A. 438 (2008); Model Bus. Corp. Act Ann. § 3.02(1) (4th ed. 2008). Blackstone described one of the characteristics of a corporation, which was the prototypical entity of his age, as being the power to sue or be sued in the corporate name. 1 William Blackstone, Commentaries on the Laws of England 475 (9th ed. 1783). In contrast, an individual series of a statutory trust does not, in its own name, have the capacity to sue or be sued.

109. *Cf.* Schwarcz, *supra* note 41, at 559 ("[T]rusts have come to dominate certain types of modern business and financial transactions. For example, '[a] large fraction of all mortgage, credit card, automobile, and student loan debt,' perhaps 'number[ing] in the trillions of dollars,' is financed through asset securitization trusts." (quoting John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 172 (1989))). For an introduction to asset securitization, see Steven L. Schwarcz, Structured Finance: A Guide to the Principles of Asset Securitization (3d ed. 2002); Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 Stan. J.L. Bus. & Fin. 133 (1994).

110. *See, e.g.*, Gordon Altman Butowsky Weitzen Shalov & Wein, A Practical Guide to the Investment Company Act 2–3 (1996) ("A series company or fund is an investment company composed of separate portfolios of investments organized under the umbrella of a single corporate or trust entity. . . . Each portfolio of the series company has distinct objectives and policies, and interests in each portfolio are represented by a separate class or series of shares. Shareholders of each series participate solely in the investment results of that series. In effect, each series operates as a separate investment company."); Thomas A. Humphreys, Limited Liability Companies § 1.04 (2006) ("The series fund concept is useful because it permits the formation of only one legal entity. For example, a series mutual fund formed as a corporation under state law has only one board of directors, one set of officers, etc. It files a single registration under the Investment Company Act of 1940. The use of the series is thus designed to save expenses for the fund's shareholders." (footnote omitted)). *See also* Investment Company Act § 18(f)(2), 15 U.S.C. § 80a-18(f)(2) (2006); SEC Rule 18f-2(a), 17 C.F.R. § 270.18f-2(a) (2009) ("For purposes of

the statutory/business trust acts of Connecticut, Virginia, and Wyoming.[111] In the context of mutual funds, a series is an administrative subunit of an investment company.[112] Assuming that the investment company is organized as a statutory trust, only it, on behalf of the "fund family," will register with the U.S. Securities & Exchange Commission on Form N-8A, and register its shares, for example, on Form N1-A.[113] Thereafter, the trust organizes a series for each of the various sponsored funds.[114] The business trust has a single trustee, typically embodied in a board, overseeing all of the series even as distinct fund managers are retained on behalf of each series-organized fund. Further, typically all of the series organized by a single investment company operate under one set of service documents executed with various service providers such as transfer agents, custodians, principal underwriter(s), numerous broker-dealer firms, and so on. In the context of securitization, distinct series are organized for classes of securitized assets and securities are issued with respect to each series.

Today, the series concept continues to be used for mutual funds and asset securitizations. However, the use of the series for other applications is being seen. For example, it has been suggested that the series be used as a mechanism by which an integrated oil company could organize liability shields between different oil fields and other assets,[115] in real estate,[116] and there is at least one instance where a series of an limited liability company was utilized to own a personal speedboat.[117]

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this [rule] a series company is a registered open-end investment company which, in accordance with the provisions of Section 18(f)(2) of the Act, issues two or more classes or series of preferred or special stock each of which is preferred over all other classes or series in respect of assets specifically allocated to that class or series.").

111. Conn. Gen. Stat. Ann. §§ 34-517(b)(2), 34-502b (West 2005); Del. Code Ann. tit. 12, § 3806(h) (2007); Va. Code Ann. §§ 13.1-1219(B), 13.1-1231(d), 13.1-1240 (2006); Wyo. Stat. Ann. §§ 17-23-108(b)(ii), 17-23-106(b) (2009). Delaware has series provisions in its limited liability company act, Del. Code Ann. tit. 6, § 18-215 (Supp. 2008), and limited partnership act, *id*. § 17-218. Series also appear in the limited liability company acts of Illinois, 805 Ill. Comp. Stat. Ann. 180/37-40 (West Supp. 2009); Iowa, Iowa Code Ann. § 490A.305 (West Supp. 2010) (until Jan. 1, 2009); Iowa Code Ann. §§ 489.1201–489.1206 (West 2009) (after Jan. 1, 2009); Nevada, Nev. Rev. Stat. Ann. § 86.296(3) (LexisNexis Supp. 2007); Oklahoma, Okla. Stat. Ann. tit. 18, § 2054.4 (West Supp. 2010); Tennessee, Tenn. Code Ann. § 48-249-309 (Supp. 2009); Texas, Tex. Bus. Orgs. Code Ann. §§ 101.601–101.621 (Vernon 2009); and Utah, Utah Code Ann. § 48-2c-606 (2007).

112. *See* Humphreys, *supra* note 110, § 104.

113. *See* Batra v. Investors Research Corp., No. 89-0528-CV-W-6, 1992 WL 278688, at *2–3 (W.D. Mo. Oct. 4, 1991). *See also* Tamar Frankel, The Regulation of Money Managers § 21.13[A], at 21-112 (2d ed. 2010).

114. *See id*.

115. *See*, *e.g.*, Terence Floyd Cuff, *Series LLCs and the Abolition of the Tax System*, Bus. Entities, Jan./Feb. 2000, at 26, 31. It has been suggested as well that an organic farm that raises livestock, grows the grain fed to the livestock, and owns the real property on which the operations are conducted might distribute its various business segments among separate series. *See* Dominick T. Gattuso, *Series LLCs—Let's Give the Frog a Little Love*, Bus. L. Today, July/Aug. 2008, at 33, 36.

116. *See*, *e.g.*, Nick Marsico, *Current Status of the Series LLC: Illinois Series LLC Improves Upon Delaware Series LLC but Many Open Issues Remain*, J. Passthrough Entities, Nov./Dec. 2006, at 35, 38–39; John C. Murray, A Real Estate Practitioner's Guide to Delaware Series LLCs (with Form) (2007), *available at* http://www.firstam.com/listReference.cfm?id=5574.

117. *See* GxG Mgmt. LLC v. Young Bros., Civil No. 05-162-B-K, 2007 WL 551761, at *1 (D. Me. Feb. 21, 2007).

RULLCA expressly does not include series limited liability companies.[118] As such, the incorporation of series into USTA constitutes a patent change of course for both NCCUSL and uniform acts. Still, as incorporated in USTA, there is "a" notion of what is a series, a notion that, consequent to path dependency resulting from the use of the Delaware Statutory Trust Act's concept of a series for the structuring of investment companies and structured finance transactions, conforms to existing Delaware statutory trust law. Rather than presenting the opportunity to set forth a paradigm shift of the series concept in business trust law, USTA incorporates the existing format. The authors consider this utilization of the series concept in USTA a major failing of the Act when considered against the desire, through USTA, to expand the use of the statutory trust beyond its traditional applications in investment companies and asset securitization and the freedom of contract that would exist were a different model of the series to be utilized. In fairness to the USTA Drafting Committee, the series provisions in USTA were drafted after consideration of the many statutory trusts formed—most notably, pursuant to the Delaware Statutory Trust Act—by the investment company and asset securitization industries. Representatives from those industries requested that the series provisions of USTA track those in the Delaware Statutory Trust Act, and the final document satisfied this request. We will first review the series as it appears in USTA, then turn to our criticism thereof.

118. As set forth in the prefatory note to RULLCA:

> The new Act also has a very noteworthy omission; it does not authorize "series LLCs." Under a series approach, a single limited liability company may establish and contain within itself separate series. Each series is treated as an enterprise separate from each other and from the LLC itself. Each series has associated with it specified members, assets, and obligations, and—due to what have been called "internal shields"—the obligations of one series are not the obligation of any other series or of the LLC.
>
> Delaware pioneered the series concept, and the concept has apparently been quite useful in structuring certain types of investment funds and in arranging complex financing. Other states have followed Delaware's lead, but a number of difficult and substantial questions remain unanswered, including:
>
> - *conceptual*—How can a series be—and expect to be treated as—a separate legal person for liability and other purposes if the series is defined as part of another legal person?
> - *bankruptcy*—Bankruptcy law has not recognized the series as a separate legal person. If a series becomes insolvent, will the entire LLC and the other series become part of the bankruptcy proceedings? Will a bankruptcy court consolidate the assets and liabilities of the separate series?
> - *efficacy of the internal shields in the courts of other states*—Will the internal shields be respected in the courts of states whose LLC statutes do not recognize series? Most LLC statutes provide that "foreign law governs" the liability of members of a foreign LLC. However, those provisions do not apply to the series question, because those provisions pertain to the liability of a member for the obligations of the LLC. For a series LLC, the pivotal question is entirely different—namely, whether some assets of an LLC should be immune from some of the creditors of the LLC.
> - *tax treatment*—Will the IRS and the states treat each series separately? Will separate returns be filed? May one series "check the box" for corporate tax classification and the others not?
> - *securities law*—Given the panoply of unanswered questions, what types of disclosures must be made when a membership interest is subject to securities law?

The authority for a series comes from a combination of public notice and private ordering. The certificate of trust, in addition to containing the information otherwise required,[119] must provide notice that the statutory trust will have one or more series.[120] USTA requires the governing instrument to provide that records be maintained on behalf of each series that "reasonably identify the property of the series" in an "objectively determinable" manner.[121] The levels of detail, timeliness,

The Drafting Committee considered a series proposal at its February 2006 meeting, but, after serious discussion, no one was willing to urge adoption of the proposal, even for the limited purposes of further discussion. Given the availability of well-established alternate structures (e.g., multiple single member LLCs, an LLC "holding company" with LLC subsidiaries), it made no sense for the Act to endorse the complexities and risks of a series approach.

6B U.L.A. 412–13 (2008). While the determination was made to include series provisions within USTA, the areas of uncertainty and ambiguity identified in the comment to RULLCA remain, and the language with respect to series included in USTA does not, within the context of a statutory trust, resolve those issues.

119. *See* USTA § 201(b) (2009).

120. *Id.* § 401(a)(2); *see also id.* § 201(b)(4). The requirement of public notice of the existence of, or the capacity to organize, a series is universal across the various statutes providing for their formation. *See*, *e.g.*, CONN. GEN. STAT. ANN. § 34-502b (West 2005) (providing that, in order for a series to enjoy limited liability, "notice of the limitation on liabilities of series as referenced in this sentence is set forth in the certificate of trust of the statutory trust"); DEL. CODE ANN. tit. 6, § 17-218(b) (Supp. 2008) (certificate of limited partnership must set forth that limited partnership is a series limited partnership as a precondition to series limited liability); *id.* § 18-215(b) (certificate of formation must set forth that the LLC is a series LLC as a precondition to series limited liability); DEL. CODE ANN. tit. 12, § 3804(a) (2007) (in order for series to enjoy limited liability, notice of the limited liability of the series must be set forth in the certificate of trust); IOWA CODE ANN. § 489.1201(2)(d) (West 2009) (requiring as a condition to inter-series limited liability that "[n]otice of the establishment of the series and of the limitation on liabilities of the series is set forth in the certificate of organization"); NEV. REV. STAT. ANN. § 86.161(1)(e) (LexisNexis Supp. 2007) (requiring that the articles of organization of a series LLC set forth that it is a series LLC and either the "relative rights, powers and duties of the series" or that such are set forth in or established by the operating agreement); UTAH CODE ANN. § 48-2c-606(3)(d) (2007) (articles of organization must set forth notice of series limited liability as a precondition thereto); VA. CODE ANN. § 13.1-1231(D) (2006) (in order for series to enjoy limited liability, notice of limited liability of the series must be set forth in the articles of trust); WYO. STAT. ANN. § 17-23-106(b)(iii) (2009) (requiring as a condition to series limited liability that "notice of the limitation on liabilities of a series as referenced in this subsection is set forth in the certificate of trust of the statutory trust").

121. USTA § 401(a)(1). *See also* DEL. CODE ANN. tit. 6, § 17-218(b) (Supp. 2008) (requiring as a precondition of series limited liability that there be maintained records accounting for the assets associated with each series as distinct from those held otherwise by the limited partnership or any other series thereof); 805 ILL. COMP. STAT. ANN. 180/37-40(b) (West Supp. 2009) (providing as a precondition to series limited liability that "separate and distinct records are maintained for any such series and [that] the assets associated with any such series are held (directly or indirectly, including through a nominee or otherwise) and accounted for separately from the other assets of the [LLC], or any other series thereof"); IOWA CODE ANN. § 489.1201(2)(b) (West 2009) ("Separate and distinct records are maintained for that series and separate and distinct records account for the assets associated with that series. The assets associated with a series must be accounted for separately from the other assets of the limited liability company, including another series."); NEV. REV. STAT. ANN. § 86.296(3)(a) (LexisNexis Supp. 2007) (providing as a precondition to series limited liability that "[s]eparate and distinct records are maintained for the series and [that] the assets associated with the series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately from the other assets of the [LLC], or any other series"); OKLA. STAT. ANN. tit. 18, § 2054.4(B) (West Supp. 2010) (providing as a precondition to series limited liability that "separate and distinct records are maintained for any such series and [that] the assets associated with any such series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately from the other

and formality that will or will not be deemed sufficient to satisfy these requirements have not yet been reviewed by the courts. A series "is not an entity separate from the statutory trust"[122] even though it may have a separate purpose from the statutory trust, provided that purpose is lawful and is not predominantly donative.[123] Given that these mandates are referenced in USTA section 104(4), they are not subject to modification by private agreement.[124]

The rules of limited liability afforded to a statutory trust having a series, as well as the rules with respect to the association of property with a series, are addressed in USTA section 402. Initially, debts, obligations, and liabilities incurred with respect to the property associated with a particular series are enforceable only against the property and assets associated with that series.[125] Property associated with another series or held by the statutory trust itself and not associated with the series are not subject to claims against the property of the particular series.[126] Debts, obligations, and liabilities of either the statutory trust generally or with respect to property associated with another series are not enforceable against the property associated with a particular series.[127]

assets of the [LLC], or any other series thereof"); TENN. CODE ANN. § 48-249-309(b)(1)(B) (Supp. 2009) (requiring that, in order for series limited liability to be available, that separate and distinct records be maintained for each series reflecting the assets associated with each series, accounting for in separate and distinct records the other assets of the limited liability company and the assets of any other series of the limited liability company); TEX. BUS. ORGS. CODE ANN. §§ 101.602(b)(1), 101.603(b) (Vernon 2009); UTAH CODE ANN. § 48-2c-606(3)(b), (c) (2007) (limited liability is conditioned upon the maintenance on behalf of the series of separate and distinct records and that the assets associated with each series be held and accounted for separately from the other assets of the limited liability company or of any other series thereof); VA. CODE ANN. § 13.1-1231(D) (2006) (requiring as a precondition of series limited liability that there be maintained records accounting for the assets associated with each series as distinct from those held otherwise by the trust or any other series thereof); WYO. STAT. ANN. § 17-23-106(b)(i), (ii) (2009).

122. USTA § 401(b).

123. *Id.* § 401(c). *See also id.* § 303(b).

124. *Id.* § 104(4). For example, pursuant to USTA section 401(b), the governing instrument may not provide that a series of a statutory trust will be treated as an entity. *But cf.* 805 ILL. COMP. STAT. ANN. § 180/37-40(b) (West Supp. 2009) ("A series with limited liability shall be treated as a separate entity to the extent set forth in the articles of organization. Each series with limited liability may, in its own name, contract, hold title to assets, grant security interests, sue and be sued and otherwise conduct business and exercise the powers of an [LLC]."); IOWA CODE ANN. § 489.1201(3) (West 2009) ("A series meeting all of the conditions of subsection 2 shall be treated as a separate entity to the extent set forth in the certificate of organization.").

125. USTA § 402(a)(1). Attention should be paid to the language employed, namely that a debt or other obligation is incurred "with respect to the property of a particular series." *Id.* This formula should be contrasted with debts incurred with respect to a particular series. Because a series is not a distinct legal entity, *id.* § 401(b), and lacks the capacity to contract on its own behalf and in its own name, a necessary distinction has been drawn between the property associated with the series and the series itself.

126. *Id.* § 402(a)(1).

127. *Id.* § 402(a)(2). Since they are not referenced in USTA section 104, the governing instrument may modify the rules of limited liability set forth in section 402(a). Section 402(a) refers to property "of" a series. While this is a convenient shorthand, it glosses over the fact that property is "associated" with a series and that a series does not have the capacity to hold title to property. *See supra* note 125. State drafting committees may want to clarify the language in the adoption of USTA section 402(a) by substituting "associated with" for "of."

The association of property of the statutory trust with a particular series thereof and the "disassociation"[128] or the reassociation of property within a statutory trust and between the trust and any series thereof will be subject to state fraudulent conveyance laws.[129] By way of example, if an asset is disassociated from a series, it becomes an asset of the statutory trust (unless and until it is reassociated with another series) and is not available as an asset of the series to satisfy a claim against its assets. To the extent the disassociation poses a detriment to a creditor of the series, the disassociation would need to pass scrutiny under fraudulent conveyance laws.

USTA section 403 provides that if there is a trustee obligated to consider the interests of the statutory trust itself and all of the series, the governing instrument may provide for additional trustees of that series who may consider the needs of only the trust or of one or more of the series.[130] While the phraseology employed is less than clear, the capacity of a series to have, for example, a trustee whose duties and obligations run exclusively to the assets and beneficial owners associated with that series is contingent upon there being at least one trustee of that series whose duties and obligations are not so limited.[131]

An individual series of a statutory trust will be dissolved and wound up as provided in the governing instrument and upon the dissolution of the trust itself.[132] The dissolution of an individual series does not compel the dissolution of the statutory trust as a whole or of any other series.[133] Upon dissolution, the winding-up process will be under the control of the persons to whom that responsibility has been delegated by the governing instrument,[134] and the individual series of a trust will be treated as if it were a trust subject to USTA sections 803 through 805.[135] The trustee or other person charged with oversight of the winding-up process of a series is not, by reason of serving in that role, liable for the debts and obligations of that series.[136] After dissolution, the activities of a series are restricted to those appropriate for the purposes of winding up.[137] Consequently, if a trustee or other person responsible for the winding up of a series undertakes activities beyond those appropriate for the winding up, he or she could be subject to personal liability.[138]

128. The meaning of "disassociation" as utilized in USTA section 402(b) is different from that of the term as utilized in RUPA. *See, e.g.*, RUPA § 601, 6 U.L.A. 163 (2001).

129. USTA § 402(b).

130. *Id.* § 403.

131. *See also id.* § 104(4) (providing that section 403 is not subject to modification in the governing instrument).

132. *Id.* § 404(b). *See also id.* § 306(c) (the death, incapacity, dissolution, termination, or bankruptcy of a beneficial owner associated with a series will not necessitate the dissolution of the series).

133. *Id.* § 404(a).

134. *Id.* § 404(c).

135. *Id.*

136. *Id.* § 404(d).

137. *Id.* § 803(a).

138. *See* Restatement (Third) of Agency § 6.10 (2006); *see also* Thomas E. Rutledge, *Limited Liability (or Not): Reflections on the Holy Grail*, 51 S.D. L. Rev. 417, 431–33 (2006).

Initially, state drafting committees, in their consideration of USTA, need to appreciate that the inclusion of series provisions has not remedied or resolved the numerous questions and uncertainties that revolve around series.[139] Irrespective of the formula utilized, especially in the realm of a multi-state operating venture with the risk of tort liability, there are significant risks. Consequently, assuming series are desired, particular attention needs to be given to article 4 and a determination made as to whether it embodies the concept of the series desired for that state. State drafting committees should keep in mind that, to a certain degree, the series provisions in USTA fail to include provisions that have been adopted with respect to series in other acts, including those in Delaware. For example, a USTA series cannot either contract or hold and convey property in its own name.[140] Conversely, numerous other series provisions do permit an individual series to sue and be sued and to hold and convey property in its own name.[141] While such provisions will no doubt have ancillary implications under bankruptcy, taxation, and other bodies of law, a more "robust" treatment of a series may often be advantageous to the utilization of this structure, especially outside of the traditional investment company and asset securitization applications. In the view of one of the authors (Rutledge), the fact that the investment company and asset securitization industries may be wedded to the concept of the series as currently embodied in the Delaware Statutory Trust Act did not require that the same model be utilized in USTA. Had a different model of the series been included in USTA, a market would have arisen between them. The relatively minimalist concept of the series could continue in Delaware while those desiring a series with more innate substantiality could organize in a jurisdiction that had adopted USTA. By adopting a different model of the series in its individual adoption of USTA, a state can create that market.

If there is a desire to make the statutory trust available outside of its traditional applications, state drafting committees may want to consider other series models,

139. *See supra* note 116.

140. *See* USTA § 401(b) ("A series of a statutory trust is not an entity separate from the statutory trust.").

141. *See*, *e.g.*, DEL. CODE ANN. tit. 6, § 17-218(c) (Supp. 2008) ("Unless otherwise provided in a partnership agreement, a series established in accordance with subsection (b) of this section shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued."); 805 ILL. COMP. STAT. ANN. 180/37-40(b) (West Supp. 2009) ("Each series with limited liability may, in its own name, contract, hold title to assets, grant security interests, sue and be sued and otherwise conduct business and exercise the powers of a limited liability company under this Act."); IOWA CODE ANN. § 489.1201(7) (West 2009) (incorporating section 489.105(1) (power to sue and be sued in own name)); UTAH CODE ANN. § 48-2c-606(5) (2007) ("A series may contract on its own behalf and in its own name, including through a manager."). For an in-depth comparison of the series provisions as they exist across the statutory trust, limited partnership, and limited liability company acts of Delaware, see Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed* (Widener L. Sch. Legal Stud. Res. Paper No. 08-19, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1097645. *See also* Thomas E. Rutledge, *Again, for the Want of a Theory: The Challenge of the "Series" to Business Organization Law*, 46 AM. BUS. L.J. 311 (2009) [hereinafter Rutledge, *Challenge of the Series*].

particularly that set forth in the Texas limited liability company act, in their consideration of USTA.[142] In addition, consideration of provisions that have been adopted with respect to series in other business organization acts may be appropriate.

Article 5—Trustees and Trust Management

The business and affairs of a statutory trust are managed by one or more trustees.[143] In doing so, the trustees have such powers as are conferred by the governing instrument,[144] such other powers as are necessary or convenient with respect to the management of the statutory trust, and all other powers conferred by USTA.[145] These powers may be restricted or limited in the governing instrument. Given that USTA section 501 is not referenced in USTA section 104, the trust instrument could provide for governance of a statutory trust other than by a "trustee."

Absent contrary private ordering in the governing instrument, the trustees act on a per capita basis with the majority controlling[146] either at a meeting or when acting by written consent.[147] In addition to the ability to vote in person, trustees may vote by proxy provided the proxy is set forth in a signed record.[148]

142. *See* Tex. Bus. Orgs. Code Ann. §§ 101.001–101.621 (Vernon 2009). Further, state drafting committees, when considering what series provisions should exist in individual adoptions of USTA, may want to consider whether the state's limited liability company and limited partnership laws should be supplemented to incorporate the series as well. As of this writing, only in Delaware does the state's limited liability, limited partnership, and statutory trust acts contain series provisions, albeit not in the same formula. *See* Conaway, *supra* note 141. Consistent series provisions across all of those acts may be a worthwhile objective. *See* Rutledge, *Challenge of the Series*, *supra* note 141, at 315.

143. USTA § 501. *See also id.* § 102(19) (defining "trustee"). The initial certificate of trust is not required to list the initial trustees, *see id.* § 201; rather, the only requirement is that an individual trustee sign the certificate of trust, *id.* § 203(a). It is also crucial that the governing instrument address the mechanism by which additional or replacement trustees will be appointed, elected, or otherwise designated, *see id.* § 103(e)(6)(C); USTA provides no default rule for doing so. There is no requirement that any trustee be resident in the jurisdiction of formation. *But cf.* Del. Code Ann. tit. 12, § 3807(a) (2007).

144. USTA § 502(1). The term "governing instrument" is defined in section 102(6) as being the certificate of trust and the "trust instrument," with that term being defined in section 102(18). Essentially, the trust instrument must be in a record form, does not itself encompass the certificate of trust, and must otherwise address the governance of the affairs of the statutory trust. The trust instrument may embody the trust agreement, a declaration of trust, or bylaws.

145. *Id.* § 502.

146. *Id.* § 503(1). *Accord* RUPA § 401(f), 6 U.L.A. 133 (2001); ULCAA § 816, 6A U.L.A. 253 (2008).

147. USTA § 503(2). USTA does not require that trustees act by unanimous written consent when acting outside a meeting. *But cf.* Model Bus. Corp. Act Ann. § 8.21 (4th ed. 2008); ULCAA § 812(a), 6A U.L.A. 251 (2008). To the extent that any trustee does not vote in favor of the matter under consideration, that trustee is entitled to notice of the action taken. USTA § 503(2).

148. USTA § 503(3). State drafting committees may want to consider, as a policy matter, the wisdom of permitting the trustees, who stand in a fiduciary relationship with the statutory trust, to vote by proxy. In the analogous situation of corporate directors, voting by proxy is not permitted. *See* 2 William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 427 (2006). Whether the same rule should apply in a statutory trust organized in a particular jurisdiction is a policy determination upon which reasonable minds may differ. *See also* ULCAA § 515 cmt., 6A U.L.A. 222–23 (2008) (reviewing disadvantages of allowing proxy voting by owners).

USTA section 504 details certain protections available to third parties who deal with a statutory trust through one or more of its trustees. Initially, a person who in good faith assists a trustee as to an action to which he or she is unaware that the trustee is exceeding or improperly exercising his or her authority has no liability to the statutory trust for having done so; the person is treated as having transacted with a trustee who is properly exercising his or her power.[149] The same rule applies with respect to a person who in good faith and for value deals with the trustee;[150] he or she is not obligated to inquire as to the extent of the trustee's power or the propriety of the exercise thereof.[151] A person who in good faith delivers property to the trustee is not charged with an obligation to ensure its proper application thereafter.[152] Finally, a person who is without knowledge that a purported trustee no longer serves in that capacity (i.e., is now a former trustee) and in good faith assists him or her, or in good faith and for value deals with him or her, is afforded the same protections from liability as if the former trustee were still a trustee.[153]

A trustee is required to "act in good faith and in a manner the trustee reasonably believes to be in the best interests of the statutory trust."[154] A trustee must discharge the duties imposed "with the care that a person in a similar position would reasonably believe appropriate under similar circumstances."[155] These standards warrant careful parsing.

The obligations of good faith and loyalty[156] are qualified by section 403 of USTA, which provides that in any statutory trust with a series, so long as there is a trustee who is obligated to consider the interest of the trust and all series thereof, other trustees may be charged to act in the best interest of the statutory trust only or of one or more series thereof.[157]

The recitation of "good faith" as a standard of conduct is interesting and constitutes a departure from other recent uniform acts. In each of RUPA, ULPA, and RULLCA, good faith is set forth as a freestanding obligation, distinct from the recitations of the duty of care and the duty of loyalty.[158] In those instances, the

149. USTA § 504(a).

150. *Id.*

151. *Id.* § 504(b). As the comment notes, this provision overrides the common law that a third party is charged with constructive notice of the trust instrument and its contents and thereby any limitations upon the trustee's power. *Id.* 504(b) cmt. *See also* 5 Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 29.2 (5th ed. 2008); *cf.* RUPA § 303(e), 6 U.L.A. 108 (2001) (non-partner deemed to have knowledge of limitations on authority to transfer real property set forth in filed statement of partnership authority).

152. USTA § 504(c). *See also* Restatement (Second) of Trusts § 321 (1959).

153. USTA § 504(d). It bears noting that the former trustee, who notwithstanding that status continues to hold him or herself out as having the capacity to represent the statutory trust, will be exposed to liability for breach of the warranty of authority. *See* Restatement (Third) of Agency § 6.10 (2006).

154. USTA § 505(a).

155. *Id.* § 505(b).

156. The duty of loyalty is the requirement to act "in a manner the trustee reasonably believes to be in the best interests of the statutory trust." *Id.* § 505(a).

157. *Id.* § 403. *See also infra notes* 171–72 and accompanying text.

158. *See* RUPA § 404(d), 6 U.L.A. 143 (2001); ULPA § 408(d), 6A U.L.A. 439–40 (2008); RULLCA § 409(d), 6B U.L.A. 489 (2008).

obligation of good faith, as set forth in "good faith and fair dealing," is a modifier to the manner in which the duties and obligations under the statutes and controlling agreements are exercised or discharged.[159] It is not clear whether, by departing from the other recent uniform business entity acts, the Drafting Committee intended for an independent obligation of good faith to exist under USTA beyond the contractual duty under RUPA and other similar acts. Consequently, states considering the adoption of USTA that desire consistency between the various business entity laws may elect to modify USTA section 505(a) to delete the reference to good faith and to supplement that same provision by adopting language similar to RUPA section 404(d).

The obligation of loyalty, set forth as a requirement that the trustee act in what he or she "reasonably" believes to be in the best interest of the statutory trust, is measured by an objective standard that is in accord with the Model Business Corporation Act.[160] This objective standard of reasonableness differs from the subjective "honestly" standard adopted under Delaware corporate and other law.[161] States that desire to use the subjective "honestly" standard in their business entity laws as opposed to an objective "reasonably" standard need to modify USTA section 505(a) accordingly. Alternatively, certain states may find that substituting an expanded recitation of the duty of loyalty as set forth in, for example, RUPA section 404(b)[162] or section 402(B) of the Prototype Limited Liability Company Act[163] may be appropriate. The obligation of the trustee to act "with the care that a person in a similar position would reasonably believe appropriate under similar circumstances"[164] is akin to the language used in other recent uniform acts.[165]

159. As set forth in the official comment to RUPA section 404(d), "The obligation of good faith and fair dealing is a contract concept, imposed on the partners because of the consensual nature of a partnership. It is not characterized, in RUPA, as a fiduciary duty arising out of the partners' special relationship. Nor is it a separate and independent obligation." 6 U.L.A. 145 (2001) (citation omitted). No such explanation is included in USTA. For expansive reviews of "good faith and fair dealing" under Delaware law, see *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126 (Del. Ch. 2009); Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 Bus. Law. 1469 (2005).

160. *See* Model Bus. Corp. Act Ann. § 8.30 (4th ed. 2008). Model Business Corporation Act section 8.30 is cited in the official comment to USTA section 505 as being the source for this provision.

161. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Ky. Rev. Stat. Ann. § 271B.8-300(1)(c) (LexisNexis 2003) (substituting "honestly" for "reasonably" in adoption of the Model Business Corporation Act § 8.30).

162. RUPA § 404(b), 6 U.L.A. 143 (2001). Further, states making that adoption may determine to modify the language employed in RUPA section 404(b) to make it non-exclusive. *See*, *e.g.*, Ky. Rev. Stat. Ann. § 362.1-404(2) (LexisNexis 2008) (substituting "includes but is not limited to" for "is limited to").

163. *See* Prototype Limited Liability Company Act § 402(B) (1992). The Prototype Act is reproduced in 3 Larry E. Ribstein & Robert R. Keatinge, Ribstein and Keatinge on Limited Liability Companies app. C (2d ed. 2008).

164. USTA § 505(b).

165. *See*, *e.g.*, RULLCA § 409(c), 6B U.L.A. 489 (2008) (imposing obligation to "act with the care that a person in a like position would reasonably exercise under similar circumstances").

It is of critical importance that state drafting committees recognize that the standard of care set forth in USTA section 505 cannot be modified by private ordering. Rather, USTA section 104(5) only permits a governing instrument to define "the standards by which good faith, the best interests of the statutory trust, and care of a person in a similar position" are to be determined, subject to a requirement that such standards are not manifestly unreasonable.[166] To the extent that states modify USTA section 505, USTA section 104(5) may require corresponding modification. To the extent that USTA section 104(5) is retained,[167] whatever standards are established will be binding across the range of statutory trusts organized in that jurisdiction.

Trustees and other representatives of a statutory trust are not liable to either the trust or its beneficial owners for the breach of any duty to the extent such breach results from the good-faith reliance on the governing instrument, a record of the statutory trust, or a professional expert opinion report or statement.[168]

166. USTA § 104(5). A failure of USTA (a failure that continues the tradition of RUPA, ULPA, ULLCA, and RULLCA) is that neither the text nor the official comments define what is either "unreasonable" or "manifestly unreasonable" as those terms are utilized (presumably to different effect) in USTA sections 104(5), (6), (7), (11), and (12). In *South Central Bell Telephone Co. v. Public Service Commission,* 702 S.W.2d 447 (Ky. Ct. App. 1995), the court held that the decision of an administrative agency would be unreasonable "when it is determined that the evidence presented leaves no room for difference of opinion among reasonable minds." *Id.* at 451. That same formulation was employed in *Thurman v. Meridian Mutual Insurance Co.*, 345 S.W.2d 635, 639 (Ky. 1961). The courts do not appear to have rendered a decision yet on what constitutes a provision that is "manifestly unreasonable" as employed in RUPA section 104 and other uniform acts adopting its formula. In the decision rendered in *Morgan Buildings & Spas, Inc. v. Turn-Key Leasing, Ltd.*, 97 S.W.3d 871 (Tex. App. 2003), the court looked to *Black's Law Dictionary* with respect to the definition of "manifest" as utilized in "manifestly unreasonable" in the Uniform Commercial Code, determining that "manifest" constitutes that which is:

> Evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident.

Id. at 880 (quoting BLACK'S LAW DICTIONARY 962 (6th ed. 1990)). The *Morgan* court did not, however, proceed to give a comprehensive definition of "manifestly unreasonable." The court in *Newsome v. Billips*, 671 S.W.2d 252, 255 (Ky. Ct. App. 1984), held that it was "manifestly unreasonable" to repair a structure where the costs of repair far exceeded the value of the structure after the repairs would be completed, though this decision is of little assistance in this context. It is worth noting that "unreasonable," understood here to refer to an agreement where either one or both of the parties acted irrationally, is distinct from an agreement that is "unconscionable," which is one that is one-sided or oppressive. *See, e.g., Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. Ct. App. 2001).

167. It is certainly conceivable that a state could adopt USTA either with or without modifying section 505 but not adopt USTA section 104(5). The standard of care imposed upon trustees will then be based entirely upon private ordering in the governing instrument. *See*, *e.g.*, DEL. CODE ANN. tit. 12, § 3806(e) (2007) (permitting the governing instrument of a Delaware statutory trust to eliminate all liability for breaches of duty, including a fiduciary duty, but not breach of the contractual covenant of good faith and fair dealing); DEL. CODE ANN. tit. 6, § 18-1101(e) (2005) (allowing the limited liability company agreement to modify or eliminate entirely the fiduciary duties otherwise existing in limited liability companies).

168. USTA § 506. *Accord* RULLCA § 409(c), 6B U.L.A. 489 (2008). With respect to the reliance defense generally, see Charles M. Bennett, *When the Fiduciary's Agent Errs—Who Pays the Bill—Fiduciary, Agent, or Beneficiary?*, 28 REAL PROP. PROB. & TR. J. 429 (1993).

USTA section 507 sets forth the rules pursuant to which a trustee or other affiliate of a statutory trust may do business with it. Initially, the section begins by defining a "covered party" as any of a "trustee, officer, employee, or manager of a statutory trust, or a related party of a trustee, officer, employee, [or] manager."[169] The Act does not define the criteria that will be used in determining whether one is a "related party" and thereby a "covered party." While a comprehensive definition of such may not be possible, a comment to this section would have been helpful. For example, we would assume that the single-member limited liability company wholly owned by a trustee would constitute a related party while, conversely, we would assume that a publicly traded corporation in which a trustee is a 3 percent owner but is neither a director nor an officer would not be a related party. Such conclusions, however, are simply conjuncture and will need to be developed by the courts.[170]

A "covered party" may transact business with the statutory trust as well as anyone who does not fall within the scope of a "covered party."[171] However, all transactions with a "covered party" are voidable by the statutory trust unless the covered party satisfies its burden of demonstrating that the transaction is "fair."[172] It bears noting that the approval of an interested transaction with a covered party is not, ab initio, binding (i.e., non-voidable by the statutory trust) simply because it is sanctioned by the disinterested trustees[173] or by the beneficiaries.[174] The burden is on the covered party to prove the fairness of the transaction;[175] a covered party can easily avoid this burden by electing to not do business with the statutory trust. Given USTA section 507 is not referenced in section 104, there are no limitations imposed upon the degree to which the governing instrument may modify the rules with respect to interested transactions. For example, the govern-

169. USTA § 507(a). *See also id*. § 607 (transactions with a beneficial owner who is not a covered party).

170. As USTA section 507 is not referenced in USTA section 104, the governing instrument is free to define who will (and will not) constitute as to that statutory trust a "covered party" and/or a "related party."

171. *Id*. § 507(b).

172. *Id*. § 507(c). *Accord* Model Bus. Corp. Act Ann. § 8.61(b)(3) (4th ed. 2008). The conflict of interest provisions of USTA reflect the liability, not the property, rule. *See* Zohar Goshen, *Voting and the Economics of Self-Dealing: Theory Meets Reality* 5 (Working Paper, 2003), *available at* http://ssrn.com/abstract=229273.

173. *But cf*. Model Bus. Corp. Act Ann. § 8.61(b)(1); Ky. Rev. Stat. Ann. § 271B.8-310(1)(a) (LexisNexis 2003).

174. *But cf*. Model Bus. Corp. Act Ann. § 8.61(b)(2); Ky. Rev. Stat. Ann. § 271B.8-310(1)(b) (LexisNexis 2003).

175. *See* USTA § 507(c). *Accord* Model Bus. Corp. Act Ann. § 8.61 cmt. 2 ("Under section 8.61(b)(3) the interested director has the burden of establishing that the transaction was fair."). *See also*, *e.g.*, Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997); Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994). This allocation of the burden is in conflict with a minority of the states that place the burden upon the party complaining of an interested transaction to demonstrate the unfairness thereof. *See*, *e.g.*, Krukemeier v. Krukemeier Mach. & Tool Co., 551 N.E.2d 885, 887–88 (Ind. Ct. App. 1990).

ing instrument could adopt rules akin to those that appear in the Model Business Corporation Act to the effect that an interested transaction may be sanctioned by the disinterested trustees.[176] As a result of the flexibility provided in USTA section 507, state drafting committees need to consider whether the fiduciary standards, including the duty of loyalty under USTA section 505, are appropriate given that standards for approval and waiver of conflict-of-interest transactions are subject to private ordering. Assuming that the modifiability of USTA section 507 is appropriate, state drafting committees may want to consider a modifiable standard under USTA section 505.

A trustee has a right to receive information from both the statutory trust and the other trustees related to the discharge of the trustee's duties; these rights may be enforced in an appropriate court.[177] The right to information is not subject to restriction by the governing instrument,[178] but the instrument may prescribe standards on how to determine what constitutes "reasonably related," provided such limitations are not manifestly unreasonable.[179] With respect to a trustee with responsibilities limited to less than the entirety of the statutory trust and/or all of the series thereof,[180] absent private ordering to the contrary, inspection rights will be limited to those matters that the trustee oversees.

A statutory trust is empowered to indemnify and hold harmless a trustee or other person for claims arising as a result of that person's relationship with the statutory trust, provided, however, that indemnification may not be provided if the claim arises from that person's "bad faith, willful misconduct, or reckless indifference."[181] These limitations on indemnification[182] differ from the standard of conduct set forth in USTA section 505, implying that indemnification may be provided for conduct that itself breaches the statutory standard of care.[183] It bears noting that USTA does not compel indemnification.[184]

A statutory trust may advance the expenses incurred by trustees and other persons in connection with claims made by reason of their relationship with the statutory trust.[185] This power is conditioned upon the submission of an

176. *See* MODEL BUS. CORP. ACT ANN. § 8.62.
177. USTA § 508.
178. *Id.* § 104(7).
179. *Id.*
180. *See id.* § 403.
181. *Id.* § 509(a). State drafting committees may want to add a prohibition on indemnification for "any transaction from which the trustee received an improper personal benefit." *See* MODEL BUS. CORP. ACT ANN. § 2.02(b)(4); KY. REV. STAT. ANN. § 271B.2-020(2)(d)(4) (LexisNexis 2003).
182. These maximum thresholds with respect to indemnification are not subject to modification in the governing instrument. *See* USTA § 104(8).
183. For example, the ex post determination that it was not objectively reasonable to believe a course of action was in the best interest of the statutory trust may not rise to the level of willful misconduct or reckless indifference, in which instance indemnification would still be permitted.
184. *Id.* § 509(a) ("A statutory trust *may* indemnify . . . ." (emphasis added)). *But cf.* RULLCA § 408(a), 6B U.L.A. 487 (2008) (an LLC "shall . . . indemnify").
185. USTA § 509(b).

undertaking to repay the amounts advanced if it is determined that the person's conduct amounted to bad faith, willful misconduct, or reckless indifference.[186] There is no requirement that the undertaking be in writing or that it be secured.[187] Individual state drafting committees may want to consider these and similar requirements. It should be noted that the threshold conduct that would necessitate the return of fees advanced cannot, at least as implied by USTA, be subject to stricter requirements.[188] State drafting committees may desire to permit a particular statutory trust the flexibility to require reimbursement of funds advanced at a lower level of culpability.

USTA section 509(c) provides that any provision of a governing instrument is "unenforceable to the extent it relieves or exonerates a trustee from liability for conduct involving bad faith, willful misconduct, or reckless indifference."[189] While this appears to set the outer boundary at which private ordering can modify the fiduciary duties of care and loyalty,[190] the standards imposed on trustees by USTA section 505 are not subject to modification in the governing instrument.[191] How USTA section 505 relates to USTA section 509(c) is not clear within the Act or explained in the official comment. State drafting committees need to consider section 505's relationship with USTA section 509(c) in addition to whether to modify USTA section 505.

The governing instrument of a statutory trust may authorize a person to provide binding instructions to a trustee or other person otherwise charged with management of the statutory trust.[192] Such a directed trustee or other representative of the statutory trust is bound to follow those directions unless they are "manifestly contrary" to the terms of the governing instrument or where the directed trustee[193] knows or has reason to know that following those directions would constitute a "serious breach" of fiduciary duty by the trustee.[194] USTA does not address what constitutes a "serious breach" of fiduciary duty, necessarily implying that there is a category of actions that while constituting a breach of fiduciary duty are not in and of themselves "serious." It remains to be seen

186. *Id*. The requirement of such an undertaking appears as well in the Model Business Corporation Act. Model Bus. Corp. Act Ann. § 8.53(a)(2) (2008). *See also* Ky. Rev. Stat. Ann. § 271B.8-530(1)(b) (LexisNexis 2003).

187. *But cf*. Model Bus. Corp. Act Ann. § 8.53(a)(2) (requiring that the undertaking be in writing); Ky. Rev. Stat. Ann. § 271B.8-530(1)(b) (LexisNexis 2003) (same).

188. USTA § 104(8).

189. *Id*. § 509(c).

190. *See*, *e.g.*, Del. Code Ann. tit. 8, § 102(b)(7) (2001); Ky. Rev. Stat. Ann. § 271B.2-020(2)(d) (LexisNexis 2003); Model Bus. Corp. Act Ann. § 2.02(b)(4).

191. *See* USTA § 104(5).

192. *Id*. § 510(a). *See also supra* note 50.

193. While the balance of USTA section 510 refers for the most part to a "trustee or other person," USTA section 510(c) does not address an "other person" with respect to certain carve-outs from the requirement to follow the directions given. To provide consistency, the addition of "other person" to section 510(c) may be considered by state drafting committees.

194. USTA § 510(c). The ability to modify this provision is limited by section 104(9).

whether it will be practicable to follow the suggestion of the comment and seek direction from the court.[195] Further, the comment arguably confuses the actuality of the breach with the determination of what damages might be owing consequent thereto.[196] Whether the rule *de minimis non curat lex* should apply with respect to a fiduciary in order to determine whether a breach has taken place is open to question.

The governing instrument may provide that the person directing a trustee or other representative of the statutory trust is not to be treated as a trustee or one owing duties, including fiduciary duties, to the statutory trust or the beneficial owners thereof.[197] The wording of this provision is important. It does not provide that the person giving direction to, for example, a directed trustee is not to be treated as a trustee and automatically relieved of fiduciary obligations. Rather, it simply provides that the governing instrument may address the situation. The statute does not provide a default one way or the other as to the proper characterization of the person or party providing the instructions to the directed trustee. State drafting committees may want to consider modifying the language of USTA section 510(b) to provide a default rule by adding language to the effect of: "Unless otherwise provided in a governing instrument, then . . . ."[198] The default rule that completes the provision will be based upon the policy determination of the individual state.[199]

195. This comment provides:

> In determining 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," the trustee must comply with the standards of conduct stated in Section 505. The drafting committee contemplated that, in accord with conventional trust practice, a trustee could apply to the appropriate court for a determination of whether an instruction falls within the exclusion of subsection (c).

Id. § 510 cmt. (citing RESTATEMENT (THIRD) OF TRUSTS § 71 (2007)). While certainly consistent with prior law, *see*, *e.g.*, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 543(V), at 442 (rev. 2d ed. 1993); WILLIAM C. DUNN, TRUSTS FOR BUSINESS PURPOSES § 174 (1922), the likelihood of a timely ruling will in most jurisdictions be questionable and whether the assets of the statutory trust should be expended in such an action is an additional question. Further, the fact that the trustee is not comfortable proceeding with the course of action absent judicial sanction may well be probative evidence that the action is not permissible. As the adage provides, "It's not the answer that is indiscreet but the question."

196. *See* USTA § 510 cmt.; *see also id*. § 104 cmt.

197. *Id*. § 510(b).

198. *See*, *e.g.*, CONN. GEN. STAT. ANN. § 34-517(a) (West 2005) ("Except to the extent otherwise provided in the governing instrument of a statutory trust, neither the power to give direction to a trustee or other persons nor the exercise thereof by any person, including a beneficial owner, shall cause such person to be a trustee.").

199. *See*, *e.g.*, Bay Ctr. Apartment Owner, LLC v. Emery Bay PKI, LLC, C.A. No. 3658-VCS, 2009 WL 1124451, at *9–10 (Del. Ch. Apr. 20, 2009); *In re* USACafes, L.P. Litig., 600 A.2d 43, 48–50 (Del. Ch. 1991) (directors of a corporate general partner of a limited partnership personally owed fiduciary duties to the limited partners).

Trustees may delegate duties[200] provided the delegation is effected in accordance with the applicable standard of care.[201] The trustee must determine the scope and terms of the delegation and periodically review the agent's performance and compliance with the terms of the delegation.[202] The agent to whom a trustee has delegated his or her authority owes a duty of reasonable care to the statutory trust to comply with the terms of the delegation, an obligation that presumably encompasses execution upon the authority delegated.[203] Where a trustee satisfies his or her obligations in making a delegation, he or she is not liable to either the statutory trust or to beneficial owners for an agent's failure with respect to a delegated function.[204] By accepting a delegation from a trustee, the agent submits to the jurisdiction of the courts of the state pursuant to which the statutory trust is organized.[205]

Section 512 of USTA addresses who constitutes a disinterested trustee when the trust is registered as an investment company.[206] This provision precludes an argument that, although a particular trustee was disinterested in accordance with the terms of the Investment Company Act, such trustee may still be interested under USTA.

Article 6—Beneficiaries and Beneficial Rights

USTA section 601 sets forth certain of the characteristics of a beneficial interest in a statutory trust, namely that it:

200. The capacity of an individual trustee to delegate duties and powers to a co-trustee is separately referenced in USTA section 511(b). State drafting committees may want to consider whether what is currently subsection (b) should be eliminated, with that capacity noted by modifying section 511(a) to read, "A trustee may delegate duties and powers, including to a co-trustee."

201. USTA § 511. *See also id.* § 505(b) (trustee's duty of care). State drafting committees, in order to achieve greater consistency of the language between the two provisions, may want to insert "that" after "care" in section 511(a).

202. *Id.* § 511(a).

203. *Id.* § 511(c). State drafting committees may want to supplement this provision to address the agent's performance and the resulting liability for any failure therein to the statutory trust. Presumably, any failure could be enforced by the trustees, as well as by the beneficial owners through a derivative action.

204. *Id.* § 511(d). State drafting committees may want to reverse this policy determination and in accordance with generally applicable law on agent delegation hold the delegating trustee liable for the subagent's performance. *See* Restatement (Third) of Agency § 3.15 cmt. d (2006) ("An appointing agent is responsible to the principal for the subagent's conduct."). *See also* Restatement (Second) of Trusts § 225(2) (1959) (discussing liability of trustee for certain actions undertaken by the trustee's agent).

205. USTA § 511(e). While this provision goes as far as it does, state drafting committees should note that there is no express provision to the effect that a trustee, in agreeing to serve in that office on behalf of a statutory trust, submits to the jurisdiction of the state courts in the jurisdiction of organization. *But cf.* Del. Code Ann. tit. 10, § 3114 (Supp. 2008) (directors of a Delaware corporation are subject to the jurisdiction of the Delaware courts).

206. USTA § 512.

- is freely transferrable;[207]
- is personal property regardless of the nature of the property held by the trust;[208]
- is not itself an interest in any property of the statutory trust;[209] and
- affords no preemptive rights with respect to other beneficial interests or other interests issued by the statutory trust.[210]

As a default rule, the beneficial owners of a USTA statutory trust have voting rights only with respect to amending the governing instrument[211] and the merger, conversion, or dissolution of the statutory trust.[212] This explains the "de minimis" treatment given in USTA to beneficial owner voting rights. It will often be the case when a USTA statutory trust is utilized as the vehicle for organization of significant business ventures that the governing instrument will need to provide greater specificity both as to how voting takes place and to expand the matters upon which the beneficial owners may vote.[213] While amendment of the governing instrument requires the unanimous approval of the beneficial owners,[214] and both a conversion and a merger require the unanimous approval of the trustees and the beneficial owners,[215] as to other matters the beneficial owners act by a majority of the beneficial interests.[216] By majority vote or other threshold established by private ordering, the beneficial owners may act without a meeting by written

207. *Id.* § 601(a). *Accord* RUPA § 503(a)(1), 6 U.L.A. 156 (2001); VA. CODE ANN. § 13.1-1226(D) (2006). This is simply a default rule, and the governing instrument may limit a beneficial owner's right to transfer the beneficial interest. *See* USTA § 103(e)(2). In contrast with partnership and limited liability company law, *see* RUPA § 503(a)(3), 6 U.L.A. 156–57 (2001); RULLCA § 502(a)(3), 6B U.L.A. 496 (2008), and certain business trust acts, *see*, *e.g.*, WYO. STAT. ANN. § 17-23-107(d) (2009), the economic and the management rights embodied in a beneficial interest in a statutory trust organized under USTA are unitary; the transferee of a beneficial interest will enjoy all of the economic rights and all of the management rights of the transferor. Such is not the case under either partnership or limited liability company law, pursuant to which, absent private ordering to the contrary, the transferee of a partner/member does not enjoy the right to participate in the business of the partnership or limited liability company. *See* RUPA § 503(a)(3), 6 U.L.A. 157 (2001); ULLCA § 502, 6B U.L.A. 602–03 (2008); RULLCA § 502(a)(3), 6B U.L.A. 496 (2008); *see also* Thomas E. Rutledge, *Assigning Membership Interests: Consequences to the Assignor and Assignee*, J. PASSTHROUGH ENTITIES, July./Aug. 2009, at 35.

208. USTA § 601(b). *Accord* RUPA § 502, 6 U.L.A. 156 (2001); ULCAA § 601(1), 6A U.L.A. 226 (2008); RULLCA § 501, 6B U.L.A. 496 (2008); VA. CODE ANN. § 13.1-1226(C) (2006).

209. USTA § 601(c). *Accord* RUPA § 501, 6 U.L.A. 155 (2001); VA. CODE ANN. § 13.1-1226(B)(1) (2006).

210. *Id.* § 602(d). *Accord* MODEL BUS. CORP. ACT ANN. § 6.30(a) (4th ed. 2008); KY. REV. STAT. ANN. § 271B.6-300(1) (LexisNexis 2003).

211. *See* USTA § 102(6) (defining "governing instrument").

212. *See id.* § 103(d) (amendment of governing instrument); *id.* § 707(a) (approval of merger); *id.* § 703(a) (approval of conversion); *id.* § 801(2)(b) (approval of dissolution).

213. The need to craft such provisions is a transaction cost to be considered in the choice-of-entity calculus.

214. *See supra* note 49 and accompanying text.

215. USTA § 703 (conversion); *id.* § 707(a) (merger).

216. *Id.* § 602(1). *But cf.* RULLCA § 407(b)(3), 6B U.L.A. 483 (2008) (matters in the ordinary course determined by a per capita majority of the members); RUPA § 401(c), (j), 6 U.L.A. 133 (2001) (matters in the ordinary course determined by a per capita majority of the partners).

consent.[217] Beneficial owners may vote in person or by proxy, provided the proxy is in a signed record.[218]

A beneficial owner's contribution to the statutory trust in consideration for the receipt of a beneficial interest may be in the form of cash, property, or services rendered, or an obligation to contribute cash, property, or services in the future.[219] Further, a beneficial interest may be issued by the statutory trust without a beneficial owner making a contribution or undertaking an obligation to make one in the future.[220] The inability to perform an obligation to make a contribution to a statutory trust, including inability occasioned by death or disability, does not excuse the beneficial owner from that obligation.[221] Where the required contribution was to be in the form of property or services, at the option of the statutory trust, the beneficial owner may be obligated to contribute cash equal in value to the contribution obligation undertaken but not satisfied, or the statutory trust may insist upon specific performance.[222] The governing instrument may also specify the consequences to a beneficial owner who fails to make a required contribution or otherwise comply with the terms and conditions of the governing instrument.[223]

217. USTA § 602(2). Drafting committees should note that this provision, as drafted, states that notice need not be provided to those beneficial owners not necessary to reach the required voting threshold. *Id*. As such, even as they may not have the capacity to affect the ultimate outcome, these beneficial owners not given notice lose as well the ability to argue for a contrary course of action. A notice of the action taken by the beneficial owners without a meeting must be given to those who do not provide their consent. *Id. Accord* MODEL BUS. CORP. ACT ANN. § 7.04(f) (4th ed. 2008).

218. USTA § 602(3).

219. *Id*. § 603(a). *Accord* RULLCA § 402, 6B U.L.A. 479 (2008). USTA does not contain a statute of frauds as to an agreement to contribute. *But cf*. VA. CODE ANN. § 13.1-1224(D) (2006) ("No promise of a beneficial owner to contribute to a business trust is enforceable unless set out in a writing signed by the beneficial owner."). State drafting committees considering USTA will want to review whether such a provision should be added. They will also need to reference the state constitution to determine whether section 603(a), if adopted as written, is constitutional. Certain definitions of a "corporation" may include a statutory trust. *See*, *e.g.*, S.D. CONST. art. 17, § 19 ("The term "corporations," as used in this article, shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships."). Through such a provision, constitutional provisions relating to permissible consideration for interests in a corporation may apply. *See, e.g.*, WASH. CONST. art. XII, § 5; S.D. CONST. art. 17, § 8 ("No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void."); ALA. CONST. § 234; IDAHO CONST. art. XI, § 9; OKLA. CONST. art. 9, § 39; WASH. CONST. art. XII, § 6.

220. USTA § 603(a). The capacity to create beneficial owners without the requirement of a contribution to the statutory trust facilitates, for example, the creation of a special beneficial owner whose approval is required for a bankruptcy filing in order to create a "bankruptcy remote" statutory trust. *Cf*. RULLCA § 401(e), 6B U.L.A. 478 (2008); KY. REV. STAT. ANN. § 275.195(2) (LexisNexis Supp. 2009). Note, however, that as a statutory trust may not be utilized in the situation that is predominately donative, USTA § 303(b), section 603(a) should not be interpreted as making the statutory trust equivalent to a donative trust in which no consideration is provided to the trust by the beneficiaries.

221. USTA § 603(b). *Accord* RULLCA § 403(a), 6B U.L.A. 479 (2008).

222. USTA § 603(b). The specific performance option does not exist in, for example, RULLCA. Note that USTA does not afford creditors who have in extending credit relied upon a contribution obligation the capacity to enforce that obligation, *see* RULLCA § 403(b), 6B U.L.A. 479 (2008). State drafting committees may want to consider adding such a provision.

223. USTA § 603(c). *Accord* DEL. CODE ANN. tit. 6, § 18-1101 (2005); VA. CODE ANN. § 13.1-1224(C) (2006).

Once a distribution has been declared, the beneficial owner has the status of a general creditor of the statutory trust and, as such, the remedies afforded to unsecured creditors are available.[224] Note, however, that a beneficial owner, absent a declaration of distribution by the trustees or otherwise in accordance with the governing instrument, has no interest in the underlying assets of the statutory trust.[225] A beneficial owner is not entitled to receive a distribution in a form other than cash,[226] but a statutory trust has the option of making distributions in kind provided that the assets so distributed are fungible and the values of the various assets distributed among the beneficial owners equal their respective interests in the statutory trust.[227] The governing instrument can set a distribution record date.[228] A statutory trust is specifically authorized to acquire, whether by purchase, redemption, or otherwise, the beneficial interests of the trust, and such interests are then cancelled.[229] A governing instrument may provide the means by which beneficial ownership will be determined and evidenced,[230] presumably including mechanisms such as the issuance of certificates and book entry.

USTA section 606 applies only to those statutory trusts that have provided through private ordering, in contrary to USTA section 601(a), that the beneficial interests in the statutory trust are not freely transferable, whereupon a charging order will be the appropriate mechanism by which the creditor of a beneficial interest holder may collect on a judgment.[231] Where the default rule of free transferability of the beneficial interest is not modified by private ordering, section 606 of USTA has no application.

In other unincorporated business entity forms in which the non-assignability of the right to participate in the management of the venture, sometimes referred to as the right to "pick your partner," is embodied in the act, the creditor of a partner/member has the right to receive distributions to secure satisfaction of a judgment without succeeding to the partner or member's right to participate in

224. USTA § 604(a). *Accord* RULLCA § 404(d), 6B U.L.A. 480 (2008); ULPA § 507, 6A U.L.A. 446 (2008).

225. *See* USTA § 601(c). *Accord* ULPA § 504, 6A U.L.A. 445 (2008). State drafting committees may find that a more direct statement of this rule is appropriate. *See*, *e.g.*, RULLCA § 404(b), 6B U.L.A. 480 (2008).

226. USTA § 604(b). *Accord* RULLCA § 404(c), 6B U.L.A. 480 (2008).

227. USTA § 604(c). *Accord* RULLCA § 404(c), 6B U.L.A. 480 (2008). *But cf.* ULPA § 812(b), 6A U.L.A. 486 (2008) (in limited partnership, liquidating distributions are to be paid in cash even though interim distributions, *id.* § 506, 6A U.L.A. 445 (2008), may be made in kind).

228. USTA § 103(e)(14).

229. *Id.* § 605. None of RUPA, ULPA, or RULLCA specifically authorizes the redemption of partnership or membership interests, although individual state statutes may do so. *See*, *e.g.*, FLA. STAT. ANN. § 608.432(5) (West 2007) (redemption of interest in limited liability company). Assuming a statutory trust has not been utilized for the organization of an investment company subject to the Investment Company Act and its requirements as to redemptions, *see*, *e.g.*, 15 U.S.C. § 80a-22 (2006), a different rule as to redemptions may be put in place by private ordering.

230. USTA § 103(e)(1).

231. *Id.* § 606.

management.[232] Assuming the beneficial interests in the statutory trust are non-transferable,[233] the judgment creditor of a beneficial owner is restricted to a charging order.[234] The charging order constitutes a lien upon the beneficial interest holder's right to distributions from the statutory trust.[235] A receiver may be appointed to receive the distributions and enforce the beneficial owner's right to a distribution,[236] and the court issuing the charging order may "make other orders necessary to give effect to the charging order."[237] It bears noting that the capacity of the court to issue orders in connection with the enforcement of its charging order is limited to ensuring that the judgment creditor receives the distributions as declared by the statutory trust;[238] the court may not interfere with the internal management of the statutory trust,[239] such as by compelling a distribution[240] or redemption. The charging order is redeemable by either the statutory trust or another beneficial owner, whereupon the redeemer will step into the position of the judgment creditor, including the benefit of the previously issued charging order.[241] A beneficial owner or transferee of a beneficial interest is not deprived of

232. With respect to the charging order in general, see Thomas E. Rutledge, *Charging Orders: Some of What You Ought to Know (Part I)*, J. Passthrough Entities, Mar./Apr. 2006, at 15; Thomas E. Rutledge, *Charging Orders: Some of What You Ought to Know* (*Part II)*, J. Passthrough Entities, July/Aug. 2006, at 21; Thomas E. Rutledge, Carter G. Bishop & Thomas Earl Geu, *Foreclosure and Dissolution Rights of a Member's Creditors: No Cause for Alarm*, Prob. & Prop., May/June 2007, at 35.

233. Whether the restrictions imposed by the governing instrument on the transfer of the beneficial interests are of the type and magnitude appropriate for application of the charging order provision is determined by reference to section 606(a). This "toggle" as to the transferability or not of the beneficial interest is unique in uniform unincorporated business entity law. While interests in a partnership, limited partnership, or limited liability company are, by statutory default, non-transferrable under each of RUPA, ULPA, and RULLCA (and as well their respective predecessor acts), the application of the charging order provisions of those various acts, RUPA § 504, 6 U.L.A. 160 (2001); ULPA § 703, 6A U.L.A. 463 (2008); RULLCA § 503, 6B U.L.A. 498–49 (2008), are no less applicable when, by private ordering, the interests therein are freely transferable.

234. USTA § 606(a).

235. *Id.* § 606(c). *Accord* RUPA § 504(b), 6 U.L.A. 160 (2001); ULPA § 703(b), 6A U.L.A. 463 (2008); RULLCA § 503(a), 6B U.L.A. 498 (2008); Ky. Rev. Stat. Ann. § 275.260(3) (LexisNexis Supp. 2009); Ky. Rev. Stat. Ann. § 362.1-504(3) (LexisNexis 2008); *id.* § 362.2-703(3).

236. USTA § 606(b)(1). *Accord* RUPA § 504(a), 6 U.L.A. 160 (2001); ULPA § 703(a), 6A U.L.A. 463 (2008); RULLCA § 503(b)(1), 6B U.L.A. 498 (2008); Ky. Rev. Stat. Ann. § 275.260(2) (LexisNexis Supp. 2009); Ky. Rev. Stat. Ann. § 362.1-504(2) (LexisNexis 2008); *id.* § 362.2-703(2). *See also* USTA § 604(a).

237. USTA § 606(b)(2). *Accord* RULLCA § 503(b)(2), 6B U.L.A. 498 (2008); ULPA § 703(a), 6A U.L.A. 463 (2008); RUPA § 504(a), 6 U.L.A. 160 (2001); ULCAA § 605(b)(2), 6A U.L.A. 233 (2008); Ky. Rev. Stat. Ann. § 275.260(2) (LexisNexis Supp. 2009); Ky. Rev. Stat. Ann. § 362.1-504(2) (LexisNexis 2008); *id.* § 362.2-703(2).

238. *See* USTA § 604.

239. For example, the terms of a Colorado charging order reproduced in Alan S. Gassman & Sabrina M. Moravecky, *Charging Orders: The Remedy for Creditors of Debtor Partners*, Est. Plan., Dec. 2009, at 21, restricting the ability of the organization to make loans, capital acquisitions, sales, and other transactions involving an interest in the organization and requiring disclosure of historical confidential financial and tax records, would be invalid under USTA.

240. *See* USTA § 604(b).

241. *Id.* § 606(d). *Accord* RUPA § 504(c), 6 U.L.A. 160 (2001); ULPA § 703(c), 6A U.L.A. 463 (2008); RULLCA § 503(d), 6B U.L.A. 498–99 (2008); Ky. Rev. Stat. Ann. § 275.260(4) (LexisNexis Supp. 2009); *id.* § 362.1-504(5) (LexisNexis 2008); *id.* § 362.2-703(5).

the benefit of any exemption laws applicable to a beneficial interest.[242] The right of a creditor to such a charging order, and presumably the effect of that order once entered, are not subject to contrary private ordering,[243] but the governing instrument presumably could provide additional provisions such as, for example, waiving any right of the statutory trust or its beneficial owners to redemption.

State drafting committees should carefully consider the operative provisions of section 606. Notwithstanding the necessary "toggle" provision of USTA section 606(a), there is no policy basis for a charging order formula that differs from that embodied in state adoptions of RUPA, ULPA, RULLCA, and otherwise. Rather, the charging order provisions of all of the unincorporated business entity acts in a particular state should consistently provide the same remedies to creditors. Further, USTA's lack of the exclusivity provision that appears in the other uniform acts[244] is troubling and highlights an additional point of cross-entity consistency that should be achieved.

A beneficial owner or a person related thereto may transact business with a statutory trust on the same terms as any person who is not a beneficial owner.[245]

A beneficial owner has the right to receive information from the statutory trust or a trustee thereof as it relates to such affairs of the statutory trust as are reasonably related to the beneficial owner's interest therein.[246] While the rules with respect to the availability of information are not subject to restriction in the governing instrument, the instrument may include standards on how "reasonably related to the beneficial owner's interest" will be determined, provided such standards are not "manifestly unreasonable."[247]

A beneficial owner may bring suit on behalf of the beneficial owner itself or on behalf of the statutory trust.[248] In the former case, the beneficial owner may bring an action against the statutory trust to address injury sustained by or enforce an obligation owed to the beneficial owner.[249] The availability of such a direct action is contingent upon the beneficial owner being able to prevail without showing an

242. USTA § 606(e). *Accord* ULCAA § 605(f), 6A U.L.A. 234 (2008); RUPA § 504(d), 6 U.L.A. 160 (2001); ULPA § 703(d), 6A U.L.A. 463 (2008); RULLCA § 503(f), 6B U.L.A. 499 (2008); KY. REV. STAT. ANN. § 275.260(5) (LexisNexis Supp. 2009); KY. REV. STAT. ANN. § 362.1-504(6) (LexisNexis 2008); *id*. § 362.2-703(6).

243. USTA § 104(10).

244. *See*, *e.g*., RUPA § 504(e), 6 U.L.A. 160 (2001); RULLCA § 503(g), 6B U.L.A. 499 (2008); ULCAA § 605(g), 6A U.L.A. 234 (2008); ULPA § 703(e), 6A U.L.A. 463 (2008). If added to a state adoption of USTA, an exclusivity provision would need to be conditioned upon the application of section 606.

245. USTA § 607. See section 507 for the rules applicable to transactions between a statutory trust and a trustee thereof.

246. *Id*. § 608. *Accord* RUPA § 403(c), 6 U.L.A. 140 (2001).

247. USTA § 104(11). The Model Business Corporation Act likewise precludes restriction of the right to inspect records. *See* MODEL BUS. CORP. ACT ANN. § 16.02(d) (4th ed. 2008).

248. USTA § 609.

249. *Id*. § 609(a). *See also id*. § 302 (the statutory trust is an entity distinct from its trustees and beneficial owners); *id*. § 308 (a statutory trust may sue and be sued in its own name).

injury or breach of trust owed to the statutory trust itself.[250] Alternatively, a beneficial owner may bring a derivative action on behalf of the statutory trust, and any proceeds or other benefits of that action will belong to the trust and not the beneficial owner bringing the action on its behalf.[251] Further, provided the action is successful, the beneficial owner's reasonable expenses and attorney's fees may be recovered from the trust.[252]

In order to initiate a derivative action, the beneficial owner must have been a beneficial owner both when the conduct giving rise to the cause of action occurred and at the time the action is commenced.[253] Further, the beneficial owner must have made a demand upon the trustees for investigation and redress, or demand must have been futile.[254] The date and content of the demand or the reason for which the demand should be excused as futile must be detailed in the complaint.[255] The governing instrument may impose additional standards and restrictions in order to bring a derivative action, provided such standards and restrictions are not manifestly unreasonable.[256]

Article 7—Conversion and Merger

Article 7 of USTA addresses mergers and conversions involving a statutory trust, the conversion of another form of business organization into a statutory trust, mergers between statutory trusts, and mergers between statutory trusts and another form of business organization.

An organization other than a statutory trust may convert into a statutory trust provided the conversion is not prohibited by the law governing the other form of business organization and that organic law is complied with in effecting the conversion.[257] The other business entity must adopt a plan of conversion satisfying both its organic law and the requirements of USTA.[258] Given that "organization"

250. *Id.* § 609(a). State drafting committees, in their consideration of section 609(a), may want to consider RULLCA section 901, 6B U.L.A. 522 (2008), for an alternative and more detailed recitation of this principle. The comments to USTA section 609(a) identify as its source ULPA section 1001(a). RULLCA section 901 is itself a further development of ULPA section 1001; in effect, USTA section 609(a) is based upon the penultimate development of the uniform language.

251. USTA § 609(b), (e). *Accord* RULLCA § 906(a), 6B U.L.A. 526 (2008); ULCAA § 1305(a), 6A U.L.A. 298 (2008); ULPA § 1005(a), 6A U.L.A. 502 (2008).

252. USTA § 609(f). *Accord* RULLCA § 906(b), 6B U.L.A. 526 (2008); ULCAA § 1305(b), 6A U.L.A. 298 (2008); ULPA § 1005(b), 6A U.L.A. 502 (2008).

253. USTA § 609(c). *Accord* RULLCA § 903, 6B U.L.A. 523 (2008); ULCAA § 1302(a)(1), 6A U.L.A. 296 (2008); ULPA § 1003, 6A U.L.A. 501 (2008).

254. USTA § 609(b). *Accord* RULLCA § 902, 6B U.L.A. 523 (2008); ULCAA § 1301, 6A U.L.A. 295 (2008); ULPA § 1002, 6A U.L.A. 500–01 (2008).

255. USTA § 609(d). *Accord* RULLCA § 904, 6B U.L.A. 524 (2008); ULCAA § 1303, 6A U.L.A. 297 (2008); ULPA § 1004, 6A U.L.A. 501–02 (2008). There is no requirement in USTA that the complaint filed in the derivative action be verified, and there is no statutory provision for a special litigation committee. *But cf*. RULLCA § 905, 6B U.L.A. 524 (2008).

256. USTA § 104(12).

257. *Id.* § 702(a)(1).

258. *Id.* § 702(a)(2).

is defined to include a common law trust that lacks a predominantly donative purpose,[259] certain common law trusts will be able to convert into a statutory trust.

A statutory trust may convert into another form of organization pursuant to USTA section 703, which requires unanimous approval by the trustees and the beneficial owners, absent private ordering to the contrary in the governing instrument.[260]

If the conversion is of a business entity into a statutory trust, a certificate of trust and articles of conversion must be delivered to the secretary of state.[261] Alternatively, where the conversion is from a statutory trust into another form of business organization, a statement of conversion must be filed with the secretary of state.[262] In most situations, the organic law governing the form of organization into which the statutory trust is converted will impose additional requirements. For example, the conversion of a statutory trust into a limited partnership requires the filing of a certificate of limited partnership.[263] Upon a conversion, the surviving entity is treated for all purposes as the same organization that existed before the conversion, and it seamlessly takes on all assets and liabilities of the predecessor organization.[264]

A statutory trust may engage in a merger with another statutory trust or another form of business organization, provided the merger is not prohibited by the law governing the other form of business organization and each business organization complies with its organic law in connection with the merger.[265] The constituents to the merger must adopt a plan of merger in record form satisfying the requirements of USTA and any other applicable law.[266] Absent private ordering to the contrary, a plan of merger must be approved by all trustees and all beneficial holders of the statutory trust.[267] After approval of the merger, articles of merger must be filed with the secretary of state.[268] Upon the effective time and date of the merger,[269] the business organizations other than the business organization surviving the merger cease to exist, and the business organization surviving the merger is vested with all of the assets and properties of the other business organization, and is also responsible for all debts, obligations, and liabilities of the other organizations.[270]

259. *Id.* § 701(7). *See also id.* § 303(b).
260. *Id.* § 703(a).
261. *See id.* § 704(a)(2).
262. *See id.* § 704(a)(1); *see also id.* § 201.
263. *See* ULPA § 1104(a)(2), 6A U.L.A. 508 (2008). *See also* RULLCA § 1008(a)(2), 6B U.L.A. 533–34 (2008).
264. USTA § 705.
265. *Id.* § 706(a).
266. *Id.* § 706(a)(2), 706(b).
267. *Id.* § 707(a).
268. *Id.* § 708.
269. *See id.* § 708(d).
270. *Id.* § 709(a). This statement is correct as to the organizational law, but is qualified by other law. *See*, *e.g.*, Cincom Sys., Inc. v. Novelis Corp., 581 F.3d 431, 440 (6th Cir. 2009) (notwithstanding that under state law a statutory merger does not constitute a transfer, successor by merger did not succeed to copyright license held by a participant in the merger).

USTA article 7 is not exclusive, and conversions and mergers may be accomplished by any other means provided by law.[271]

Article 8—Dissolution and Winding Up

A statutory trust may be dissolved by administrative dissolution or voluntarily either upon the events or circumstances set forth in the governing instrument or with the approval of all beneficial owners.[272] The governing instrument need not define an event or circumstance causing dissolution.[273] The governing instrument may provide for the approval of dissolution by less than all of the beneficial owners.[274] Other than upon an administrative dissolution, to dissolve, the statutory trust must file articles of dissolution with the secretary of state, whereupon the trust is dissolved.[275]

USTA does not provide a mechanism for judicial dissolution of a statutory trust;[276] individual state drafting committees may want to consider the addition of a provision for judicial dissolution in their adoptions of USTA.[277]

After dissolution, the statutory trust must proceed to wind up its activities, and the trust continues to exist for only that limited purpose.[278] During winding up, the statutory trust is to discharge its debts and obligations, marshal its property, and distribute property not required for the satisfaction of debts and obligations among the beneficial interest holders.[279] The winding up of a statutory trust may extend for a "reasonable time," a period that will be of such duration as is necessary and appropriate for the statutory trust in question.[280] The immediate fire sale of the trust's assets is neither necessary nor appropriate.[281] Any person, or a group

271. USTA § 710.
272. *Id.* § 801.
273. *Cf. id.* § 306 (providing that a statutory trust has perpetual duration).
274. *Id.* § 103(e)(6)(E).
275. *Id.* § 802.
276. *But cf.* RULLCA § 701(a)(4), (5), 6B U.L.A. 506 (2008); ULPA § 802, 6A U.L.A. 468 (2008); RUPA § 801(5), 6 U.L.A. 189 (2001); ULCAA § 1203, 6A U.L.A. 281 (2008); Model Bus. Corp. Act Ann. § 14.30 (4th ed. 2008). The inclusion of a judicial dissolution mechanism was considered by the Drafting Committee and ultimately rejected on the ground that the appropriate tests for dissolution would be set forth in the governing instrument and that there should not be additional grounds for dissolution.
277. Including a statutory mechanism for judicial dissolution would do minimal, if any, damage to the freedom of contract principles embodied in USTA if its terms were waivable in the governing instrument. *See* R&R Capital, LLC v. Buck & Doe Run Valley Farms, C.A. No. 3803-CC, 2008 WL 3846318, at *3 (Del. Ch. Aug. 19, 2008) (holding enforceable a contractual waiver of the right to seek judicial dissolution).
278. USTA § 803(a). The terminology employed in USTA differs from that utilized in numerous other acts and is less express than might be desired. A state drafting committee may want to consider revising USTA section 803(a) to provide: "A dissolved statutory trust and any series thereof shall continue its existence as a statutory trust or a series thereof but shall not carry on any business except that appropriate to wind up and liquidate its business and affairs."
279. USTA § 803(b).
280. *Id.* § 803(c)(1).
281. *See id.*

that could include a trustee, beneficial owner, or a creditor of the statutory trust, may on good cause shown petition the appropriate court to appoint a receiver for the dissolved statutory trust to oversee its winding up.[282]

As part of the winding up, the statutory trust may give notice to known and unknown claimants against its assets.[283] A known claim against a dissolved statutory trust is barred if the claimant receives a record notice of the necessity of and requirements for submitting a claim.[284] The deadline for submitting a claim may not be less than 120 days after transmission of that notice to the claimant.[285] To the extent a claimant whose claim is rejected by the statutory trust does not file suit to enforce its claim within ninety days after the rejection, the claim is barred.[286] There should be no bar against claims that, as of the effective date of the statutory trust's dissolution, were unmatured, or contingent with respect to an event occurring after dissolution.[287] With respect to unknown claimants, notice of the dissolution may be published in a newspaper of general circulation with instructions for the submission of claims.[288] Subsequent to publication of notice, claims will be barred against the statutory trust, its remaining undistributed assets, and those assets that, in liquidation, have been distributed to the beneficial interest owners, after a three-year period has elapsed.[289]

A statutory trust is subject to administrative dissolution if it is without an agent for service of process for thirty days, its annual report is not filed within sixty days after the due date, or if any fee, tax, or penalty due to be paid to the secretary of state is not paid within sixty days of its due date.[290] Upon determining that a basis for administrative dissolution exists, the secretary of state is charged to notify the statutory trust of that basis, through its agent for service of process or at its designated office, affording the statutory trust a sixty-day opportunity to cure the problem triggering the notice.[291] Absent cure, the secretary of state will proceed

282. *Id.* § 803(f).

283. *Id.* §§ 804, 805.

284. *Id.* § 804(a).

285. *Id.* § 804(a)(3). *Accord* RULLCA § 703(a), (b), 6B U.L.A. 508–09 (2008); ULCAA § 1208(a), (b), 6A U.L.A. 286 (2008); ULPA § 806(a), (b), 6A U.L.A. 473 (2008).

286. USTA § 804(b). *Accord* RULLCA § 703(c), 6B U.L.A. 509 (2008); ULCAA § 1208(c), 6A U.L.A. 287 (2008); ULPA § 806(c), 6A U.L.A. 473 (2008).

287. USTA § 804(c). *Accord* RULLCA § 703(d), 6B U.L.A. 509 (2008); ULCAA § 1208(c), 6A U.L.A. 287 (2008); ULPA § 806(d), 6A U.L.A. 473 (2008).

288. USTA § 805(a), (b). *Accord* RULLCA § 704, 6B U.L.A. 509–10 (2008); ULCAA § 1209, 6A U.L.A. 287–88 (2008); ULPA § 807, 6A U.L.A. 476 (2008).

289. USTA § 805(c), (d), (e). USTA provides, in brackets, for a period of repose of three years after the publication of the notice of dissolution, *id.* § 805(b)(4), but this period is subject to modification in an individual state adoption. Presumably, this period of repose should be the same across all business entities as there is no policy basis for drawing distinctions as to the rights of creditors based upon the form of organization of the debtor. In addition, state drafting committees may want to focus upon section 805(c)(3), which refers to "contingent" but not to "unmatured"; both "contingent" and "unmatured" appear in USTA section 804(c)(2), and there does not appear to be a policy basis for the inclusion of "unmatured" in one provision and not in the other.

290. *Id.* § 806(a).

291. *Id.* § 806(b).

to dissolve the statutory trust and will provide notice of that action through the agent for service of process or the designated office.[292] The lawful purpose of the statutory trust is then limited to activities appropriate to its winding up.[293] In all likelihood, state drafting committees will want to conform the provisions relating to administrative dissolution with those already in effect in the state's other business entity statutes.

Having undergone administrative dissolution, a statutory trust may apply for reinstatement.[294] If the secretary of state determines that reinstatement is appropriate, a declaration of reinstatement shall be filed, and the reinstatement, upon its effectiveness, shall relate back to and take effect as of the effective date of the initial administrative dissolution.[295] A statutory trust denied reinstatement may appeal that determination.[296]

Article 9—Foreign Statutory Trusts

A statutory trust doing business in a foreign jurisdiction will continue to have the law of its jurisdiction of formation apply to its "internal affairs," the determination of the liability of a beneficial owner or trustee for any debt, obligation, or liability of the trust or of a series thereof, and the enforceability of a debt, obligation, or liability of the statutory trust or series thereof against the property of either the trust or a series.[297] What exactly is contemplated by "internal affairs" is not specified either in USTA or in its official comments; presumably the reference is to "internal affairs" as contemplated by the *Restatement (Second) of Conflict of Laws*.[298] USTA section 901(a)(2) provides that the personal liability of the beneficial owners and trustees for the debts and obligations of the statutory trust or a series thereof will be determined pursuant to the law of the jurisdiction of formation,[299] adopting, inter alia, the rule of sections 307 and 309 of the *Restatement (Second)*

292. *Id.* § 806(c).
293. *Id.* § 803(a).
294. *Id.* § 807(a).
295. *Id.* § 807(b), (c). *See also* Thomas E. Rutledge, *The 2007 Amendments to the Kentucky Business Entity Statutes*, 97 Ky. L.J. 229, 239–43 (2008–2009) (discussing issues incident to the preservation (or not) of limited liability for those in operational control of an administratively dissolved business entity).
296. USTA § 808.
297. *Id.* § 901(a). As it is referenced in section 104(15), USTA section 901 is not subject to modification by private ordering.
298. *See* Restatement (Second) of Conflict of Laws § 302 cmt. a (1971).
299. USTA § 901(a)(2). *Accord* RULLCA § 801(a)(2), 6B U.L.A. 515 (2008) (the law of the jurisdiction of formation will determine "the liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of the company"); Ky. Rev. Stat. Ann. § 386.4420(1)(a) (LexisNexis Supp. 2009) (the law of the jurisdiction under which a foreign business trust is organized shall govern "the liability of its trustees and beneficial owners for the debts and obligations of the business trust"); Va. Code Ann. § 13.1-1241(B)(1) (Supp. 2009) ("The laws of the state or other jurisdiction under which a foreign business trust is formed shall govern its formation and internal affairs and the liability of its beneficial owners and trustees."). Section 901(a)(2) rejects the rule recited in *Means v. Limpia Royalties*, 115 S.W.2d 468 (Tex. Civ. App. 1938), wherein the limited liability enjoyed by the beneficial owners in an Oklahoma business trust was not respected in Texas. The court held:

of Conflict of Laws.[300] Since USTA has expressly adopted this rule, it will not be necessary to assess whether a particular foreign statutory trust that transacts business in a particular jurisdiction would fall within the ambit of a "corporation" for purposes of sections 307 and 309 of the *Restatement*.[301] USTA section 901(a)(3) provides an express rule that, with respect to a foreign business trust, the law of the jurisdiction of formation will determine which assets, including assets that have been associated with a series, will be available to satisfy the debts and obligations of either the statutory trust as a whole or of a series thereof.[302] This is a crucial provision and is distinct from section 901(a)(2) of the Act. The question of which assets of a statutory trust will be available to satisfy particular obligations is different from the question of whether the participants in the statutory trust are liable for its debts and obligations.[303]

USTA section 901 goes on to provide that a foreign statutory trust may not be denied a certificate of authority on the basis that the law under which it is organized differs from the law of the jurisdiction in which the certificate of registration is sought.[304] While the placement of this provision is equivalent to that set forth

> The fact that, under the laws of the state of Oklahoma and under the provisions of the declaration of trust, a shareholder in the Limpia Royalties could not be held liable for the debts or obligations of the association would not operate to extend the same immunity from liability growing out of transactions by the association in the state of Texas . . . .

Id. at 475.

300. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (1971) ("The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts."); *id*. § 309 ("The local law of the state of incorporation will be applied to determine the existence and extent of a director's or officer's liability to the corporation, its creditors and shareholders, except where, with respect to the particular issue, some other state has a more significant relationship under the principle stated in § 6 to the parties and the transaction, in which event the local law of the other state will be applied."). *See also id*. § 297 cmt. c ("Insofar as this protection is accorded them in the state of incorporation, a state will usually recognize the immunity of the shareholders of a foreign corporation from being sued as individuals on matters arising out of the acts or omissions of the corporation and from having their individual property made responsible for obligations of the corporation.").

301. *See id*. § 298 ("An organization formed in one state will be considered a corporation within the meaning of a statute or rule of another state if the attributes the organization possesses under the local law of the state of its formation are sufficient to make it a corporation for the purposes of the statute or rule."). *See also* Thomas E. Rutledge, *To Boldly Go Where You Have Not Been Told You May Go: LLCs, LLPs, and LLLPs in Interstate Transactions*, 58 BAYLOR L. REV. 205 (2006).

302. USTA § 901(a)(3).

303. The official comment to RULLCA section 801, addressing the equivalent of USTA section 901(a)(2), states that:

> This provision does not pertain to the "internal shields" of a foreign "series" LLC, because those shields do not concern the liability of members or managers for the obligations of the LLC. Instead, those shields seek to protect specified assets of the LLC (associated with one series) from being available to satisfy specified obligations of the LLC (associated with another series).

RULLCA § 801 cmt., 6B U.L.A. 515 (2008). *See also* Rutledge, *Challenge of the Series*, *supra* note 141, at 329–30.

304. USTA § 901(b). *Accord* RULLCA § 801(b), 6B U.L.A. 515 (2008); KY. REV. STAT. ANN. § 275.380(1)(b) (LexisNexis Supp. 2009); *id*. § 386.4420(1)(b); VA. CODE ANN. § 13.1-1241(B)(2) (Supp. 2009).

in a number of other uniform acts,[305] state drafting committees may want to consider whether this placement is appropriate.[306] The applicable governing law is not contingent upon whether the state has granted a certificate of registration to a particular trust. USTA section 901(b) may be more appropriately placed as a new subsection (c) of USTA section 902 that sets forth the substantive requirements to apply for a certificate of registration.

USTA section 901(c) provides that a foreign statutory trust holding a certificate of registration is not authorized to "engage in any business or exercise any power that a statutory trust may not engage in or exercise in this state."[307] While the statement is good as far as it goes, USTA section 901(c) is arguably deficient both as to its placement in the Act and the incompleteness as to the effect, or not, of a statement of registration. Furthermore, the terminology employed is somewhat ambiguous. A state drafting committee may want to consider a more comprehensive freestanding provision as to the effect of a certificate of registration:

- reciting that a foreign statutory trust holding a certificate of registration is authorized, during the term thereof, to transact business in that jurisdiction;[308] and
- expanding USTA section 901(c) to clarify that a foreign statutory trust with a certificate of authority has the same, but not greater, rights and privileges and is subject to the same duties, restrictions, penalties, and liabilities that are imposed upon a domestic statutory trust.[309]

USTA section 902 is primarily focused upon reciting the substantive requirements for an application for a certificate of registration sought by a foreign statutory trust. The application must set forth:

- the name of the statutory trust;[310]
- the name of the jurisdiction under which it is formed;[311]
- the street and mailing address of the principal office of the statutory trust and, if the laws under which the statutory trust was formed require that it

305. *See*, *e.g.*, RULLCA § 801(b), 6B U.L.A. § 515 (2008).

306. "A foolish consistency is the hobgoblin of little minds." RALPH WALDO EMERSON, ESSAYS, FIRST SERIES: SELF-RELIANCE (1841).

307. USTA § 901(c). *Accord* KY. REV. STAT. ANN. § 386.4420(2) (LexisNexis Supp. 2009); VA. CODE ANN. § 13.1-1241(B)(2) (Supp. 2009).

308. *See*, *e.g.*, MODEL BUS. CORP. ACT ANN. § 15.05(a) (4th ed. 2008); KY. REV. STAT. ANN. § 275.405(1) (LexisNexis Supp. 2009); *id.* § 386.4430(a).

309. *See, e.g.*, MODEL BUS. CORP. ACT ANN. § 15.05(b); KY. REV. STAT. ANN. § 275.405(2) (LexisNexis Supp. 2009); *id.* § 386.4430(2).

310. USTA § 902(a)(1). A foreign statutory trust whose name does not satisfy the requirements for a domestic statutory trust as set forth in USTA section 207 may adopt an alternative name for use in that jurisdiction and may thereunder transact business. *Id.* This is another area in which individual state drafting committees will want to conform the practice applied to foreign statutory trusts to be consistent with the rules applicable to foreign limited partnerships, corporations, and limited liability companies.

311. *Id.* § 902(a)(2).

maintain an office in its jurisdiction of organization, the street and mailing address of that required office;[312] and

- the registered office and registered agent of the statutory trust and the jurisdiction for which the certificate of registration is sought.[313]

In addition, the statutory trust must deliver a certificate of good standing or similar record from the secretary of state of the jurisdiction in which it was formed.[314] Individual states may want to consider a requirement that the application for a certificate of registration recite the names and the business address of each of the trustees.[315] In addition, states may want to consider that, with respect to statutory trusts formed in many jurisdictions, there is no requirement to file with the secretary of state and, as a consequence thereof, the issuance of a "certificate of good standing or a record of similar import signed by the Secretary of State" from the jurisdiction of formation is not possible.[316] Documentation as to the existence of a foreign statutory trust is of somewhat questionable need; the authors are unaware of any groundswell of efforts, held back only by such requirements, to qualify nonexistent foreign entities in the various jurisdictions. Further, were a nonexistent foreign statutory trust to qualify to transact business, the law of that purported foreign jurisdiction, and not the law of the jurisdiction in which the registration is sought,[317] would govern the liability of the purported beneficial owners and trustees and, as a consequence, they would have no claim for limited liability.

312. *Id.* § 902(a)(3). The reference to an office required to be maintained in the jurisdiction of organization is somewhat ambiguous. In almost every instance, a statutory trust will be required to maintain a registered office and agent in its jurisdiction of organization. *See*, *e.g.*, IND. CODE ANN. § 23-5-1-4(a)(4) (West 2005); KY. REV. STAT. ANN. § 386.384 (LexisNexis Supp. 2009); VA. CODE ANN. § 13.1-1220 (2006). It is not clear whether this "office" is sufficient to constitute the office that must, pursuant to USTA section 902(a)(3), be identified. Conversely, the reference could be to a principal place of business or similar office required in the jurisdiction of organization. Some confusion may be avoided if state drafting committees consider including a requirement that any registered office and agent information required by the jurisdiction of organization be included, thereby avoiding the ambiguity as to what constitutes a required office.

313. USTA § 902(a). *Accord* KY. REV. STAT. ANN. § 386.4426(1)(e) (LexisNexis Supp. 2009); VA. CODE ANN. § 13.1-1242(A)(3) (Supp. 2009).

314. USTA § 902(b).

315. *Accord* KY. REV. STAT. ANN. § 386.4426(1)(f) (LexisNexis Supp. 2009). USTA section 201 does not require that the certificate of trust recite the names and addresses of the trustees.

316. USTA § 902(b). For example, Massachusetts does not require filing with the Secretary of State to form a business trust. Certainly a jurisdiction adopting the Act would not intend to preclude the issuance of a certificate of registration to a foreign statutory trust organized in a jurisdiction in which no certificate may be had from the secretary of state. This issue could be addressed with the addition of an "if any" in USTA section 902(b), or requiring that the person who has executed and delivered the application for a certificate of registration provide an affirmative statement or representation that the foreign statutory trust validly exists under the laws of its jurisdiction of organization. *See*, *e.g.*, KY. REV. STAT. ANN. § 275.395(1)(g) (LexisNexis Supp. 2009); *id.* § 386.4426(1)(g); VA. CODE ANN. § 13.1-1242(A)(6) (Supp. 2009).

317. *See* USTA § 901(a).

USTA does not contain a provision mandating that the application for a certificate registration be amended or updated when the information set forth therein becomes out of date;[318] state drafting committees considering the adoption of USTA may want to add such a provision.

Another matter that state drafting committees may want to consider is the crucial distinction between a mandatory "shall" and permissive "may." USTA section 902(a) provides that in order to register to do business, a foreign statutory trust "may" apply for a certificate of registration.[319] The use of the permissive "may" indicates that there is an alternative mechanism for registering to transact business or that qualification is optional; in fact, neither suggestion is correct. Further, USTA does not mandate that a foreign statutory trust transacting business apply for a certificate of registration; rather, it only sets forth certain consequences that follow the failure to do so.[320] State drafting committees may want to make the requirement to apply for a certificate of registration mandatory and also impose a temporal requirement, so that USTA section 902(a) reads:

> Before transacting business in this state, a foreign statutory trust shall apply for a certificate of registration by delivering an application to the [Secretary of State].[321]

USTA incorporates a non-exclusive list of activities that of themselves do not constitute doing business by a statutory trust.[322] It expressly provides that a person is not doing business in a state solely by reason of being a trustee or a beneficial owner of a foreign statutory trust that is transacting business.[323]

Once all requirements for filing the certificate of registration have been satisfied, it is to be filed by the secretary of state with a copy returned to the foreign statutory trust.[324] Thereafter, assuming it has not been revoked and no notice of cancellation has been filed with respect to the foreign statutory trust, a certified copy of the certificate of registration may be delivered to anyone requesting it, and that certificate may be relied upon as "conclusive evidence" that the foreign statutory trust is authorized to transact business in that jurisdiction.[325]

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318. *But cf*. MODEL BUS. CORP. ACT ANN. § 15.04(a) (4th ed. 2008); DEL. CODE ANN. tit. 12, § 3855 (2007); KY. REV. STAT. ANN. § 275.400 (LexisNexis Supp. 2009); *id*. § 386.4428; VA. CODE ANN. § 13.1-1245 (Supp. 2009). This lacuna is especially curious in that USTA section 906(b) makes reference to an amended certificate of registration.

319. USTA § 902(a).

320. *See id*. § 909. *See infra* notes 333–36 and accompanying text (discussing USTA section 909).

321. USTA § 902(a). *Accord* KY. REV. STAT. ANN. § 275.385(1) (LexisNexis 2003). *See also* KY. REV. STAT. ANN. § 386.4422(1) (LexisNexis Supp. 2009) ("A foreign business trust shall not transact business in this Commonwealth until it obtains a certificate of authority from the Secretary of State.").

322. USTA § 903. While section 903 of ULPA is cited as the primary source for this provision, it is similar in content as well to RULLCA section 803 and Model Business Corporation Act section 15.01(b). Individual state drafting committees will likely want to modify this list so it is consistent with the state's other business entity acts.

323. USTA § 903(c). *But cf*. FLA. STAT. ANN. § 620.1910(2)(f) (West 2007) (requiring that general partners of a foreign limited partnership qualified to transact business in Florida be themselves qualified to transact business).

324. USTA § 904.

325. *Id*. § 905. *Accord* MODEL BUS. CORP. ACT ANN. § 1.27 (4th ed. 2008).

Once effective, a certificate of registration is subject to either revocation by the secretary of state or voluntary cancellation by the foreign statutory trust.[326] A certificate of registration may be revoked by the secretary of state if the statutory trust does not maintain an agent for service of process, does not file a timely update of change in its registered office or registered agent, does not file its annual report, or does not pay any fees, taxes, or penalties due to the secretary of state.[327] The secretary of state will give notice to the foreign statutory trust of its intent to revoke and afford it the opportunity to cure the basis for the revocation.[328] In the absence of cure, the authority of the foreign statutory trust to transact business in that jurisdiction will terminate as of the date set forth in the secretary of state's notice of intent to revoke.[329] If, in the alternative, the basis for revocation is cured within the appropriate period, it shall be reinstated.[330] To cancel voluntarily a certificate of registration, a foreign statutory trust must file a notice of cancellation with the secretary of state.[331] The certificate of registration is cancelled upon the effectiveness of the notice of cancellation, which is determined in accordance with USTA section 204.[332]

A foreign statutory trust transacting business in a particular jurisdiction without applying for and receiving a certificate of registration is precluded from maintaining an action or proceeding in that state until it has received that certificate of

326. USTA §§ 907–908.

327. *Id.* § 907(a). State drafting committees will likely want to revise their individual adoptions of USTA section 907(a). With respect to subsection (2) thereof, as the identification of the registered office and agent for service of process of a statutory trust are a matter of positive law, they being the person and office identified to the secretary of state, it is difficult to see how there can be a change in either, absent a filing with the secretary of state. Therefore, it is questionable how there can be a "statement of change" filed up to sixty days after a change has occurred. *See id.* § 907(a)(2). Rather, it would seem that no change has occurred until the statement of change is delivered for filing. In subsection (3), the reference to "file an [annual] [biennial] report," *id.* § 907(a)(3), is inaccurate in that the statutory trust does not file the report—that action is accomplished by the secretary of state. Rather, the statutory trust delivers its annual report for filing. *See also id.* § 213(a) (providing that a statutory trust shall deliver its annual report to the Secretary of State for filing).

328. *Id.* § 907(b), (c).

329. *Id.* § 907(c).

330. *Id.* § 907(d). This is another area that state drafting committees will want to scrutinize carefully and likely redraft the uniform language. Under USTA section 907(b), when notice of the intent to revoke the certificate of registration is given, the effective date of the revocation must be at least sixty days after the notice is sent. *Id.* § 907(b)(1). During that sixty-day period, the statutory trust may cure the reason for the revocation. *See id.* § 907(c). If a cure is accomplished in that sixty-day period, the notice of intent to revoke becomes a nullity, and a revocation will never have occurred. As such, it is inappropriate where USTA section 907(d) indicates that upon cure the statutory trust is "reinstated," and that the reinstatement relates back to the date of transmission of the notice of revocation. *See id.* § 907(d). Further, USTA does not contain a provision addressing the ability of the foreign statutory trust to appeal the revocation of its certificate of registration. *But cf.* MODEL BUS. CORP. ACT ANN. § 15.32 (4th ed. 2008); KY. REV. STAT. ANN. § 386.4448 (LexisNexis Supp. 2009).

331. USTA § 908(a). The notice of cancellation must set forth the name of the foreign statutory trust, the date of filing of its initial certificate of registration, that the certificate of registration is being cancelled, and any other information the trustee may determine to set forth therein. *Id.*

332. USTA § 908(b). *See also supra* notes 63–64 and accompanying text.

registration.[333] Still, the failure to qualify does not impair the validity of contracts or acts of the statutory trust or preclude it from defending an action or proceeding initiated against it in that jurisdiction,[334] nor does the failure subject either a trustee or a beneficial owner to liability for the debts, obligations, or liabilities of the trust solely because the trust transacted business without a certificate of registration.[335] A foreign statutory trust transacting business without obtaining a certificate of registration, or a foreign statutory trust that has cancelled its certificate of registration, is subject to service in accordance with USTA section 212.[336] The state attorney general is empowered to initiate an action against a foreign statutory trust that is transacting business without having registered to do so.[337] None of the provisions of Article 9 of USTA are subject to modification by private ordering.[338]

USTA does not contain a provision imposing liability upon the trustees or others who authorize or permit a statutory trust to transact business in the jurisdiction without registering to do so.[339]

Article 10—Miscellaneous Provisions

Because USTA is a uniform act, it directs that consideration be given to the object of uniformity across the various states in its application and construction.[340] This directive as to uniform construction is not subject to override by private ordering.[341] Section 1002 explains the relationship of the Act to the Electronic Signatures in Global and National Commerce Act.[342] With respect to transition, the adoption of USTA does not impact upon either actions that are pending or

333. USTA § 909(a). *Accord* Model Bus. Corp. Act Ann. § 15.02(a); RULLCA § 808(a), 6A U.L.A. 520 (2008); ULPA § 907(b), 6A U.L.A. 497 (2008); Ky. Rev. Stat. Ann. § 386.4424(1) (LexisNexis Supp. 2009); Va. Code Ann. § 13.1-1247(A) (Supp. 2009).

334. USTA § 909(b). *Accord* Model Bus. Corp. Act § 15.02(e); RULLCA § 808(b), U.L.A. 520 (2008); ULPA § 907(c), 6A U.L.A. 497 (2008); ULCAA § 1407(c), 6A U.L.A. 304 (2008); Ky. Rev. Stat. Ann. § 386.4424(5) (LexisNexis Supp. 2009); Va. Code Ann. § 13.1-1247(B) (Supp. 2009).

335. USTA § 909(c). *Accord* RULLCA § 808(c), U.L.A. 520 (2008); ULPA § 907(d), 6A U.L.A. 497 (2008); ULCAA § 1407(d), 6A U.L.A. 304 (2008).

336. USTA § 909(d). This provision would indicate, although such is not set forth in the statute, that a USTA section 908 cancellation of a certificate of registration terminates the authority of the previously appointed registered office and agent. If that is a desired consequence, state drafting committees may desire to make such express in section 908. Thereafter, for purposes of consistency, USTA section 907 should likewise be supplemented.

337. *Id.* § 910. *Accord* RULLCA § 809, 6B U.L.A. 521 (2008); ULPA § 908, 6A U.L.A. 499 (2008); Va. Code Ann. § 13.1-1248 (2006).

338. *See* USTA § 104(15).

339. *But cf*. Va. Code Ann. § 13.1-1247(D) (Supp. 2009) (imposing upon each trustee, officer, and employee a personal fine between $500 and $5,000 when he or she has knowledge that the foreign statutory trust is transacting business without qualifying to do so).

340. USTA § 1001. *Accord* RUPA § 1201, 6 U.L.A. 265 (2001); ULPA § 1201, 6A U.L.A. 525 (2008); RULLCA § 1101, 6B U.L.A. 541 (2008); ULCAA § 1701, 6A U.L.A. 321 (2008).

341. USTA § 104(16).

342. USTA § 1002. *Accord* ULPA § 1203, 6A U.L.A. 525 (2008); RULLCA § 1102, 6B U.L.A. 541 (2008); ULCAA § 1702, 6A U.L.A. 321 (2008).

rights that have accrued.[343] A *Dartmouth College* provision is also included in the Act by which the state legislature has the power to amend or repeal all or any part of the Act at any time.[344]

USTA section 1005 contains the transition provision providing that: (a) from the effective date of the state adoption of USTA, it will thereafter govern the formation of all newly created statutory trusts; (b) over a transition period, a statutory trust with an existence that predates the effective date of the state adoption of USTA may elect to be governed by the new Act;[345] and (c) at the end of the transition period, all statutory trusts formed prior to the initial effective date of USTA will be governed by the new law.[346] In considering the transition to USTA, states will need to consider carefully their existing laws and determine whether a mandatory drag-in of business trusts formed either at common law or under statutes that do not themselves contain a *Dartmouth College* provision is permissible without impacting the rights of the participants therein as protected by the Contract Clause of the U.S. Constitution.[347] Further, even if subjecting preexisting business trusts to USTA is permissible, there is the question as to whether it is appropriate—just because you can do something does not mean you should do it. As business trusts were often drafted before the current focus upon freedom of contract and embodied the law of common law (largely donative) trusts, in certain circumstances the application of USTA to those trusts may alter the agreement of the participants in that venture in what will no doubt be surprising ways.[348] If that is a concern, state drafting committees may want to forego a mandatory drag-in date.[349]

343. USTA § 1003. *Accord* RUPA § 1207, 6 U.L.A. 272 (2001); ULPA § 1207, 6A U.L.A. 532 (2008); RULLCA § 1103, 6B U.L.A. 541 (2008); ULCAA § 1703, 6A U.L.A. 321 (2008).

344. USTA § 1004. USTA section 1004 is based upon the *Dartmouth College* provision of the Model Business Corporation Act. *See* MODEL BUS. CORP. ACT ANN. § 1.02 (4th ed. 2008). The *Dartmouth College* reservation is not subject to contrary private ordering. *See* USTA § 104(16).

345. USTA provides for a two-year transition period. USTA § 1005(d). Looking at the various state adoptions of RUPA, those transition periods have ranged from three years, ALA. CODE § 10-8A-1106 (1999), or four-and-a-half years, CONN. GEN. STAT. ANN. § 34-398 (West 2005), to no transition whatsoever. *See*, *e.g.*, COLO. REV. STAT. ANN. § 7-64-1204 (West 2006); HAW. REV. STAT. ANN. § 425-143 (LexisNexis 2008); WYO. STAT. ANN. § 17-21-1003 (2009). A uniform act may be adopted so as to be effective as of a particular date but binding upon organizations predating that date only if they so elect. *See*, *e.g.*, KY. REV. STAT. ANN. §§ 362.1–1204, 362.2–1205 (LexisNexis 2008).

346. USTA § 1005. *Accord* RUPA § 1206, 6 U.L.A. 266–67 (2001); ULPA § 1206, 6A U.L.A. 526–27 (2008); RULLCA § 1104, 6B U.L.A. 541–42 (2008); ULLCA § 1205, 6B U.L.A. 651 (2008).

347. U.S. CONST. art. 1, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."). This issue assumes that the trust agreements of the business trusts organized prior to a state adoption of USTA are contracts. *But cf.* Frankel, *supra* note 15, at 331–32.

348. *See*, *e.g.*, Thomas E. Rutledge & Phuc H. Lu, *No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization About to Be Governed by a New Law*, 45 BRANDEIS L.J. 755 (2007); Allan W. Vestal, *Should the Revised Uniform Partnership Act of 1994 Really Be Retroactive?*, 50 BUS. LAW. 267 (1994).

349. Such a model of leaving preexisting business organization laws in place while adopting uniform acts effective from a particular date and into which preexisting organizations may, on an individual basis, elect to be subject has been followed in, for example, the adoptions of RUPA and ULPA in Kentucky and Nevada. *See* Allan W. Vestal & Thomas E. Rutledge, *Modern Partnership Law Comes to Kentucky: Comparing the Kentucky Revised Uniform Partnership Act and the Uniform Act from Which It Was Derived*, 95 KY. L.J. 715, 717–18 (2006–2007); Allan W. Vestal & Thomas E. Rutledge, *The Uniform*

Conclusion

USTA is a useful addition to the menagerie of modern uniform unincorporated business organization acts.[350] Assuming widespread adoption, it will bring a degree of order to the current mix of state statutes and principles of common law that currently govern statutory trusts. The Act also provides a mechanism by which a statutory trust may be used outside of its traditional applications of the investment company and structured finance. Still, the uniform language of USTA needs to be carefully examined by state drafting committees, policy decisions embodied in the uniform act should be reconsidered, and, as appropriate, alternative determinations should be made by appropriate changes in the language. Further, the provisions relating to interface with the secretary of state should be reconsidered and modified to achieve individual state consistency. With these considerations in mind, a state adoption of USTA will be a worthwhile addition to the state's range of business organization statutes.

Limited Partnership Act (2001) Comes to Kentucky: An Owner's Manual, 34 N. Ky. L. Rev. 411, 414–16 (2007); Allan W. Vestal, *"Wide Open": Nevada's Innovative Market in Partnership Law*, 35 Hofstra L. Rev. 275, 285–88 (2006).

350. *See supra* note 1.