

2010 AMENDMENTS TO THE  
DELAWARE STATUTORY TRUST ACT

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The Delaware Statutory Trust Act, 12 *Del. C.* § 3801 *et seq.* (the “Act”), has been amended in 2010, as it is periodically, to keep it current and maintain its preeminence. The 2010 amendments to the Act were contained in Delaware State Senate Bill No. 302, 77 *Del. Laws*, c. 403, and became effective August 1, 2010. Among the provisions of the Act that have been amended are those concerning: clarification of the scope of the defined term “person”; express permission for series of assets; confirmation that statutory trust will not be void for lack of a trustee; the doctrine of independent legal significance and increased flexibility for new statutory trusts to amend or adopt a new governing instrument in connection with a merger or consolidation; effect of merger or consolidation; contractual appraisal rights; statutory trust power; and issuance of rules and regulations by the Delaware Secretary of State allowing for electronic service of process upon the Secretary of State.

**Scope of defined term “person” [§ 3801].** New language has been included in Section 3801(f) of the Act to confirm the broad scope of the defined term “person”. That term is an integral part of many provisions of the Act, including those that deal with who may become a beneficial owner or trustee of a Delaware statutory trust. The language added to Section 3801(f) confirms that the intended broad scope of the word “trust” as used in the definition of “person” includes a common law trust, business trust, statutory trust, voting trust, and any other form of trust.

**Series of assets permitted [§ 3806].** Under the Act a governing instrument of a statutory trust may establish or provide for the establishment of designated series of trustees, beneficial owners or beneficial interests. Section 3806(b)(2) of the Act was amended to specifically permit a governing instrument to establish or provide for the establishment of designated series of assets. This amendment confirms that segregated pools of assets may constitute series under the Act.

**Lack of trustee does not void statutory trust [§ 3808].** Section 3808(b) of the Act was amended to provide that, except to the extent otherwise provided in the governing instrument of a statutory trust, the death, incapacity, dissolution, termination or bankruptcy of a trustee shall not result in the termination or dissolution of a statutory trust. This amendment confirms that a statutory trust will not be void for lack of a trustee.

**Doctrine of independent legal significance [§§ 3815 and 3825].** Predictability is a hallmark of the Act, but in the view of some practitioners the Delaware Court of Chancery’s 2007 decision in the *Twin Bridges Limited Partnership* case nurtured uncertainty about the application of the doctrine of independent legal significance in the statutory trust setting. Senate

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Bill No. 302 in 2010 amended Section 3825 of the Act with the intent of removing any such doubt. New Section 3825(c) makes clear that the doctrine of independent legal significance applies to statutory trusts by providing that “[a]ction validly taken pursuant to one provision of [the Act] shall not be deemed invalid solely because it is identical or similar in substance to an action that could have been taken pursuant to some other provision of [the Act] but fails to satisfy one or more requirements prescribed by such other provision.” Senate Bill No. 302 also amended Section 3815(f) of the Act to carry forward the concept embodied in new Section 3825(c) and to provide that a governing instrument of a Delaware statutory trust need no longer contain a specific reference to Section 3815(f) in order for a properly approved agreement of merger or consolidation to (1) effect any amendment to the governing instrument of the statutory trust or (2) effect the adoption of a new governing instrument of the statutory trust if it is the surviving or resulting statutory trust in the merger or consolidation. As modified, Section 3815(f) clarifies that any such governing instrument amendment or adoption pursuant to such subsection shall be effective notwithstanding any provision of the governing instrument, including a provision relating to amendment or adoption of a new governing instrument. In keeping with the freedom of contract policy underpinning the Act, however, this rule does not control when a provision in the governing instrument by its terms applies to and governs such an amendment or adoption. These 2010 amendments to Section 3815(f) do not apply to a statutory trust created prior to August 1, 2010, the effective date of the 2010 amendments, unless the governing instrument of such statutory trust provides otherwise.

**Effect of merger or consolidation [§ 3815].** Section 3815(g) of the Act was amended to clarify that, unless otherwise agreed, a merger or consolidation of a statutory trust that is not the surviving or resulting entity does not constitute the dissolution of such statutory trust and does not require such statutory trust to wind up its affairs, pay its liabilities or distribute its assets.

**Contractual appraisal rights [§ 3815].** Section 3815(h) was amended to make clear that a governing instrument or an agreement of merger or consolidation may extend contractual appraisal rights to a series of beneficial owners or beneficial interests.

**Statutory trust power [ §§ 3815, 3821 and 3823].** New subsections 3815(i), 3821(i) and 3823(h) of the Act clarify that a governing instrument may provide that a statutory trust does not have the power to merge or consolidate under Section 3815, to convert under Section 3821, or to transfer, domesticate or continue under Section 3823.

**Electronic service of process on Delaware Secretary of State [ §§ 3815, 3821, 3823, 3860 and 3861].** In certain circumstances the Act permits service of process on a Delaware statutory trust or on a foreign statutory trust registered or doing business in the State of Delaware to be effected by service of such process upon the Delaware Secretary of State. Amendments to Sections 3815(b)(8), 3821(e)(7), 3823(b)(7), 3860(b), 3861(a) and 3861(c) allow for service of process upon the Secretary of State by means of electronic transmission but only as prescribed by the Secretary of State. These amendments also authorize the Secretary of State to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate.

