

2006 AMENDMENTS TO THE DELAWARE STATUTORY TRUST ACT

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Introduction

The Delaware Statutory Trust Act, 12 *Del. C.* § 3801 *et seq.* (the “Act”), was amended in 2006, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2006 amendments to the Act were contained in Delaware State House Bill No. 445, and became effective on August 1, 2006. *See* 75 *Del. Laws*, c. 418. House Bill No. 445 amended provisions of the Act concerning (among other things): permitted purposes of a statutory trust; the binding effect of the governing instrument; the scope of the defined term “person”; management of a statutory trust; revocation of dissolution; existence of a statutory trust; domestication, transfer and continuance, and conversion, of a statutory trust; and activities of a foreign statutory trust that do not constitute doing business in Delaware.

Permitted purposes [§ 3801]. Section 3801 of the Act has been amended in 2006 to restore, in subsection (a)(1) thereof, language that was inadvertently deleted by a prior amendment. The restored language makes clear that a statutory trust may be organized to carry on any lawful business purpose, whether or not conducted for profit.

Binding effect of the governing instrument [§ 3801]. Section 3801(f) has been amended to make explicit a principle that previously was implicit: beneficial owners and trustees are bound by the governing instrument of a statutory trust whether or not that document has been executed by them.

Scope of defined term “person” [§ 3801]. New language has been added in Section 3801(d) of the Act to confirm the broad scope of the defined term “person”. That term is fundamental to many provisions of the Act, including those dealing with who may become a beneficial owner or a trustee of a Delaware statutory trust. The language added to Section 3801(d) confirms that an association (including any group, organization, co-tenancy, plan, board, council or committee), a government (including a country, state, county or any other governmental subdivision, agency or instrumentality), or a series of a series entity (such as under Section 3804 of the Act), is a “person” for purposes of the Act.

Management of a statutory trust [§ 3806]. Section 3806 of the Act has been amended in a number of respects. Certain changes enacted in 2006 conform Section 3806 to provisions previously adopted in Delaware’s limited liability company and partnership statutes. The 2006 amendments to subsection (c) of that Section clarify that duties, including fiduciary duties, of a trustee or beneficial owner or other person to a statutory trust or to another trustee or beneficial owner or to another person that is a party to or otherwise bound by a governing instrument, may be eliminated, as well as expanded or restricted, by provisions in the governing instrument.

Subsection (c) as amended, however, also confirms that the governing instrument may not eliminate the implied contractual covenant of good faith and fair dealing. As amended, subsection (d) of Section 3806 clarifies that the default exculpation provision in the Act applies only with respect to breach of fiduciary duty. It states that, unless otherwise provided in the governing instrument, a trustee or beneficial owner or other person shall not be liable to the statutory trust or to another trustee or beneficial owner or to another person that is a party to or is otherwise bound by the governing instrument for breach of fiduciary duty for the trustee's or beneficial owner's or other person's good faith reliance on the provisions of the governing instrument. A new subsection (e) has been added to Section 3806. This new provision confirms the flexibility permitted in the Act regarding exculpation, stating that the governing instrument may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a trustee, beneficial owner or other person to the statutory trust or to another trustee or beneficial owner or to another person party to or otherwise bound by the governing instrument; subsection (e) additionally provides, however, that the governing instrument may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

Newly designated Sections 3806(f) and (g) of the Act parallel 2006 amendments to Delaware's other "alternative entity" statutes. These subsections address the manner in which beneficial owners and trustees of statutory trusts may take action. They have been amended to clarify that meetings of beneficial owners and meetings of trustees may be held by conference telephone or similar communications equipment unless otherwise provided in the governing instrument of the statutory trust.

Finally, the 2006 amendments to Section 3806 of the Act add a new subsection (k). This provision clarifies the circumstances under which trustees, beneficial owners or officers, employees, managers or other persons designated in accordance with Section 3806(b)(7) are protected from liability in relying on the records of or information relating to the statutory trust.

Revocation of dissolution; existence of a statutory trust [§ 3808]. Newly added language in Section 3808 of the Act allows for the revocation of the dissolution of a statutory trust, in certain circumstances, upon a vote specified in that Section. Amendments to this Section also make technical changes with respect to winding up of the affairs of a statutory trust and confirm that a statutory trust's separate legal existence continues until the cancellation of its certificate of trust.

Conversion, and domestication, transfer and continuance, of a statutory trust [§§ 3820, 3822, and 3823]. The Act has been amended to make technical and conforming changes to Sections 3820 (conversion of an entity to a Delaware statutory trust) and 3822 (domestication of a non-U.S. entity as a Delaware statutory trust), as well as to confirm the flexibility permitted in Section 3823 of the Act with respect to transfer, domestication, or continuance of a Delaware statutory trust to or in a foreign jurisdiction.

Activities not constituting doing business [§§ 3804, 3852, and 3863]. New Section 3863 of the Act identifies certain activities of a foreign statutory trust that do not constitute “doing business” in the State of Delaware for certain purposes under the Act. Such activities include: maintaining, defending or settling an action or proceeding; activities concerning the trust’s internal affairs; maintaining bank accounts; maintaining offices or agencies for transfers or exchanges of the trust’s own securities, or maintaining trustees or depositories with respect to those securities; selling through independent contractors; soliciting or obtaining orders that require acceptance outside Delaware before they become contracts; certain sales of machinery, plants or equipment; creating, as borrower or lender, or acquiring indebtedness; collecting debts, foreclosing mortgages or security interests, and taking specified actions regarding property so acquired; conducting an isolated transaction; doing business in interstate commerce; and doing business as an insurance company. This listing is helpful in determining when a foreign statutory trust must register under the Act. Conforming changes were made to Sections 3804 and 3852 of the Act.