

ANALYSIS OF 2000 AMENDMENTS TO THE DELAWARE BUSINESS TRUST ACT

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Introduction

The Delaware Business Trust Act, 12 *Del. C.* § 3801 *et seq.* (the "Business Trust Act"), was amended in 2000, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2000 amendments to the Business Trust Act were contained in Delaware State Senate Bill No. 365, and became effective June 30, 2000. Senate Bill No. 365 amended provisions of the Business Trust Act concerning (among other things): definitions; trust property; action by written consent; voting by proxy; and conversion.

Definitions [§ 3801]. Senate Bill No. 365 effected several amendments to Section 3801 of the Business Trust Act, which sets forth certain defined terms. Section 3801(e) was amended to include "a limited liability company" within the meaning of "other business entity," a term that is used in sections of the statute governing merger, consolidation, and conversion. Section 3801(f), which provides the definition of "governing instrument," was also amended, to clarify that the governing instrument may consist of separate instruments, one which creates the Delaware business trust and one or more others which govern its affairs and the conduct of its business. Finally, a new subsection (h) has been added to Section 3801, defining "Independent Trustee." Under this new provision, for purposes of the Business Trust Act, the Investment Company Act of 1940 governs the determination of whether a trustee of a Delaware business trust that is registered as an investment company is independent and disinterested, and a trustee's receipt of compensation for serving as trustee of multiple investment companies managed by a single investment advisor does not affect the status of a trustee as an "independent trustee."

Trust Property [§ 3805]. The 2000 amendments to the Business Trust act included the addition of new subsections (f) and (g) to Section 3805. Under new subsection (f), subject to the governing instrument, title to business trust property may be held in the name of any trustee of a Delaware business trust, in its capacity as such, with the same effect as if such property were held in the name of the business trust. New subsection (g) provides that "[n]o creditor of the trustee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the business trust with respect to any claim against, or obligation of, such trustee in its individual capacity and not related to the business trust." 12 *Del. C.* § 3805(g). These amendments confirm that, although title to property of a Delaware business trust may be vested in a trustee, such property does not constitute property of the trustee for purposes of satisfying liabilities of such trustee in its individual capacity that are unrelated to the business trust or for purposes of any bankruptcy, insolvency, moratorium, reorganization, receivership, estate administration or similar law or proceeding relating to the trustee in its individual capacity.

Action by Written Consent [§ 3806]. Senate Bill No. 365 added new subsections (e) and (f) to Section 3806 of the Business Trust Act. These new provisions subject to a Delaware business trust's governing instrument, specifically permit trustees and beneficial owners to take action by written consent and to vote by proxy, and establish "quorum requirements" with respect to such action by written consent.

Change of Trustee's Address or Name [§§ 3807 and 3813]. A new subsection (e) has been added to Section 3807 of the Business Trust Act. Under this new subsection, the name or address of a trustee or registered agent of a Delaware business trust, as set forth in the certificates of trust of multiple business trusts, may be changed by the filing of a single certificate. Such a filed certificate constitutes an amendment of the certificate of trust of each business trust affected thereby. (A new subsection (a)(5) has been added to Section 3813, providing that the fee for filing such a certificate is \$50.)

Conversion [§§ 3820 and 3821]. Sections 3820 and 3821 of the Business Trust Act, governing, respectively, the conversion of an "other business entity" to a Delaware business trust, and the conversion of a Delaware business trust to another Delaware business entity, have been amended in their entirety.

Section 3820, as amended, permits the conversion of corporation, organized under the laws of Delaware or another state, to a Delaware business trust. 12 *Del. C.* § 3820(a). It also confirms that, for purposes of Delaware law, no transfer of property occurs as a consequence of a conversion to a Delaware business trust, 12 *Del. C.* § 3820(e), and that a business trust to which an other business entity has converted is the same entity as the converting other business entity, 12 *Del. C.* § 3820(f). Further, amended Section 3820 confirms the flexibility permitted by the Business Trust Act in connection with a conversion, by providing that "[i]n connection with a conversion . . . , rights or securities of, or interests in, the other business entity which is to be converted to a business trust may be exchanged for or converted into cash, property, rights or securities of, or interests in, such business trust or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, another business trust or other business entity." 12 *Del. C.* § 3820(i).

Amended Section 3821: permits the conversion of a business trust into a Delaware corporation; confirms that, unless otherwise agreed, a business trust that converts to another business entity is not required to wind up its affairs or pay its liabilities and distribute its assets under Section 3808 of the Business Trust Act; and confirms the Business Trust Act's flexibility as to the treatment of rights or securities of, or interests in, a Delaware business trust in connection with a conversion of such business trust to an other Delaware business entity.