

ANALYSIS OF 2004 AMENDMENTS TO THE DELAWARE STATUTORY TRUST ACT

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Introduction

The Delaware Statutory Trust Act, 12 Del. C. § 3801 *et seq.* (the “DST Act”), was amended in 2004, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2004 amendments to the DST Act were contained in Delaware State House Bill No. 463, and became effective on August 1, 2004. *See* 74 Del. Laws, c. 353. House Bill No. 463 amended provisions of the DST Act concerning (among other things): governing instruments; merger and consolidation; conversion; transfer and domestication; and series.

Governing Instruments [§ 3806]. House Bill No. 463 amended certain provisions of the DST Act dealing with the contents of the governing instrument of a Delaware statutory trust. Section 3806(b)(3) of the DST Act was amended to indicate specifically that the governing instrument may provide for the accomplishment of a conversion. Section 3806(b)(8) was amended to state that the governing instrument may provide rights to any person, including a person who is not a party to the governing instrument, to the extent set forth therein. Also, a new paragraph (9) was added to Section 3806(b), to establish that the governing instrument may provide for the manner in which it may be amended, including by requiring the approval of a person who is not a party to the governing instrument or the satisfaction of conditions. Such new paragraph further states that, to the extent the governing instrument provides for the manner in which it may be amended, it may be amended only in that manner or as otherwise permitted by law; new paragraph (9) further states, however, that the approval of any person may be waived by such person, and any such conditions may be waived by all persons for whose benefit such conditions were intended. Further, House Bill No. 463 added a new subsection (i) to Section 3806. This new subsection indicates that the governing instrument may provide for specified penalties or specified consequences to which a beneficial owner shall be subject upon the beneficial owner’s failure to perform in accordance with or to comply with the terms and conditions of the governing instrument, or at the time or upon the happening of events specified in the governing instrument. New subsection (i) also provides that such specified penalties or specified consequences may include and take the form of any penalty or consequence set forth in Section 3802(c) of the DST Act. These include reduction, elimination, subordination, forced sale, or forfeiture of a beneficial owner’s beneficial interest in the statutory trust, redemption or sale of such beneficial interest at a value fixed by appraisal or by formula, lending by other beneficial owners of the amount necessary to meet a beneficial owner’s commitment, or any other penalty or consequence.

Merger and Consolidation [§§ 3810 and 3815]. Several 2004 amendments to the DST Act provide flexibility, characteristic of the DST Act, regarding mergers and consolidations. Section 3815(a) was amended to provide that, in connection with a merger or consolidation

thereunder, rights or securities of or interests in a Delaware statutory trust or other business entity that is a constituent party to the merger or consolidation not only may be exchanged for or converted into cash, property, or rights or securities of or interests in the surviving or resulting statutory trust, the surviving or resulting other business entity, or another Delaware statutory trust or other business entity, but also may be cancelled. Also, a new paragraph was added to Section 3815(b) to provide that, in the case of a merger in which a Delaware statutory trust is the surviving entity, the certificate of merger filed under Section 3815 may set forth such amendments to the certificate of trust of the surviving statutory trust to change its name as are desired to be effected by the merger. Under newly amended Section 3815(e), a certificate of merger that sets forth any such amendment in accordance with Section 3815(b) shall be deemed to be an amendment to the certificate of trust of the statutory trust, and the statutory trust shall not be required to take any further action to amend its certificate of trust under Section 3810 of the DST Act with respect to such amendments set forth in the certificate of merger. Further, pursuant to the 2004 amendment to Section 3815(e), Section 3815's requirement of filing a certificate of merger or consolidation shall be deemed satisfied by the filing of an agreement of merger or consolidation containing the information that, under Section 3815, must be set forth in such a certificate. Finally, House Bill No. 463 amended Section 3810(d) to provide that the certificate of trust of a statutory trust shall be deemed to be cancelled upon the filing of a certificate of merger or consolidation if the statutory trust is not the surviving or resulting entity in the merger or consolidation.

Conversion [§§ 3806, 3810, 3812, 3820 and 3821]. Section 3806(b)(3) of the DST Act was amended by House Bill No. 463 to provide specifically that the governing instrument of a Delaware statutory trust may provide for the accomplishment of a conversion. Further, Section 3821 of the DST Act, which deals with the conversion of a Delaware statutory trust, was amended in its entirety in 2004. Under Section 3821(a) as amended in 2004, a Delaware statutory trust may convert to an other business entity, whether such other business entity is organized, formed or created under the laws of the State of Delaware or under the laws of another jurisdiction. In connection with a Delaware statutory trust's conversion to an other business entity organized, formed or created under the laws of a jurisdiction other than the State of Delaware, new subsection (e) of Section 3821 provides for the filing of a certificate of conversion to a non-Delaware entity and sets forth the required contents of such a certificate, and new subsection (f) establishes the effect of the filing of such a certificate, namely, the cessation of the existence of such statutory trust as a statutory trust of the State of Delaware. (Other 2004 amendments, to Sections 3810(d) and 3812(b), provide that the certificate of trust of a statutory trust shall be deemed to be cancelled upon the filing of a certificate of conversion of such statutory trust to a non-Delaware entity.) New subsection (g) of Section 3821 provides that the conversion of a statutory trust out of Delaware in accordance with that Section and the resulting cessation of its existence as a Delaware statutory trust shall not be deemed to affect any obligations or liabilities of the statutory trust, or the personal liability of any person, incurred prior to such conversion, or to affect the choice of law applicable to the statutory trust with respect to matters arising prior to such conversion. House Bill No. 463 also added a new subsection (h) to Section 3821. This subsection confirms the treatment under Delaware law of a statutory trust that has converted to an other business entity. Subsection (h) provides among other things that, for all purposes of the laws of the State of Delaware, when a statutory trust has

been converted to an other business entity pursuant to Section 3821, the other business entity shall be deemed to be the same entity as the statutory trust, the rights, privileges, powers, and property of the statutory trust that has converted shall remain vested in the other business entity to which such statutory trust has converted, the debts, liabilities, and duties of such statutory trust shall remain attached to such other business entity, and the rights, privileges, powers and interests in property of such statutory trust, as well as its debts, liabilities and duties, shall not be deemed, as a consequence of the conversion, to have been transferred to such other business entity. With respect to the conversion of an other business entity to a Delaware statutory trust, under Section 3820 of the DST Act, Section 3820(i) was amended in 2004 to provide that, in connection with such a conversion, rights or securities of or interests in such other business entity not only may be exchanged for or converted into cash, property, or rights or securities of or interests in such statutory trust, another Delaware statutory trust, or another business entity, but also may be cancelled.

Transfer and Domestication [§§ 3810, 3812, 3822 and 3823]. House Bill No. 463 amended the DST Act by renumbering existing Sections 3822, 3823, and 3824 and inserting new Sections 3822 and 3823.

New Section 3822 provides for the domestication of a “non-United States entity” as a Delaware statutory trust. Among other things, this new Section: in subsection (a) thereof, defines “non-United States entity” as used in such Section; in subsections (b), (c) and (g) thereof, establishes the manner in which such a non-United States entity may become domesticated as a Delaware statutory trust, provides for the filing of a certificate of statutory trust domestication, and sets forth the required contents of such a certificate; in subsection (d) thereof, indicates that the existence of the statutory trust shall be deemed to have commenced on the date the non-United States entity commenced its existence in the jurisdiction in which it was first formed, incorporated, created or otherwise came into being; in subsections (e) and (f) thereof, provides that such a domestication shall not be deemed to affect any obligations or liabilities of the non-United States entity incurred prior to the domestication, the personal liability of any person therefor, or (except as stated in subsection (f) the choice of law applicable to the non-United States entity; in subsection (h) thereof, provides that, for all purposes of the laws of the State of Delaware, when a domestication under Section 3822 has become effective, the rights, privileges, powers, and property of the non-United States entity that has been domesticated shall remain vested in the Delaware statutory trust to which such non-United States entity has been domesticated, the debts, liabilities, and duties of such non-United States entity shall remain attached to such Delaware statutory trust, and the rights, privileges, powers and interests in property of such non-United States entity, as well as its debts, liabilities and duties, shall not be deemed, as a consequence of the domestication, to have been transferred to such Delaware statutory trust; in subsection (i) thereof, provides that such statutory trust (for all purposes of the laws of the State of Delaware) shall be deemed to be the same entity as the domesticating non-United States entity, indicates that unless otherwise agreed, or as required under applicable non-Delaware law, the domesticating non-United States entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and that the domestication shall not be deemed to constitute a dissolution of such non-United States entity and shall constitute a continuation of the existence of the domesticating non-United States entity in the form of a

Delaware statutory trust, and further states that if, following domestication, the non-United States entity that has become domesticated as a statutory trust continues its existence in the foreign jurisdiction in which it was existing immediately prior to domestication, the statutory trust and the non-United States entity shall, for all purposes of the laws of the State of Delaware, constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of the State of Delaware and the laws of such foreign country or other foreign jurisdiction; and in subsection (j) thereof, provides for the treatment of rights or securities of or interests in a non-United States entity in connection with a domestication under Section 3822.

New Section 3823 provides for the transfer or domestication of a statutory trust out of the State of Delaware. Section 3823, among other things: in subsections (a) and (b) thereof, establishes the manner in which a Delaware statutory trust may transfer or domesticate out of Delaware, provides for the filing of a certificate of transfer or of a certificate of transfer and continuance, and sets forth the required contents of such certificates; in subsection (c) thereof, states that the statutory trust shall cease to exist as a statutory trust of the State of Delaware as a consequence of a certificate of transfer becoming effective; in subsection (d) thereof, provides that a transfer or domestication of a statutory trust out of Delaware and the resulting cessation of its existence as a Delaware statutory trust shall not be deemed to affect any obligations or liabilities of the statutory trust, or the personal liability of any person, incurred prior thereto, or to affect the choice of law applicable to the statutory trust with respect to matters arising prior thereto, and that, unless otherwise agreed, such transfer or domestication shall not require such statutory trust to wind up its affairs or pay its liabilities and distribute its assets under Section 3808 of the DST Act; in subsection (e) thereof, provides that after a certificate of transfer and continuance becomes effective, the statutory trust shall continue to exist as a statutory trust of the State of Delaware, and that so long as the statutory trust continues to exist as such following such filing, the continuing statutory trust and the other business entity formed, incorporated, created or that otherwise came into being as a consequence of the transfer or domestication of the statutory trust to or in a foreign jurisdiction shall, for all purposes of the laws of the State of Delaware, constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of the State of Delaware and the laws of such foreign jurisdiction; in subsection (f) thereof, provides for the treatment of rights or securities of or interests in the statutory trust in connection with a transfer or domestication under Section 3823; and in subsection (g) thereof, provides among other things that, for purposes of the laws of the State of Delaware, when a statutory trust has transferred or domesticated out of the State of Delaware pursuant to Section 3823, the transferred or domesticated other business entity shall be deemed to be the same entity as the statutory trust, the rights, privileges, powers, and property of the statutory trust that has transferred or domesticated shall remain vested in the transferred or domesticated other business entity, the debts, liabilities, and duties of such statutory trust shall remain attached to such transferred or domesticated other business entity, and the rights, privileges, powers, and interests in property of such statutory trust, as well as its debts, liabilities and duties, shall not be deemed, as a consequence of such transfer or domestication, to have been transferred to such transferred or domesticated other business entity. (Conforming amendments also were made in 2004 to

Sections 3810(d) and 3812(b) of the DST Act, to provide that the certificate of trust of a statutory trust shall be deemed to be cancelled upon the filing of a certificate of transfer.)

Series [§ 3804]. House Bill No. 463 amended Section 3804(a) of the DST Act to confirm the manner in which assets associated with a series may be held and accounted for pursuant to such Section, namely, in separate and distinct records maintained for such series.