

“Delaware Statutory Trust Act, Limited Liability Company Act, and Delaware Revised Article 9”, authored by Norman M. Powell, originally appeared in the December 2004 issue of the *Commercial Law Newsletter*, a joint newsletter of the Uniform Commercial Code and Commercial Financial Services Committees, American Bar Association Section of Business Law.

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# Delaware Statutory Trust Act, Limited Liability Company Act, and Delaware Revised Article 9

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In its most recent legislative session, the Delaware General Assembly enacted changes to the Delaware Statutory Trust Act, 12 DEL. C. § 3801 ET SEQ. (THE "DST Act"), the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the "DLLC Act"), and Uniform Commercial Code Revised Article 9 as in effect in Delaware ("Delaware RA-9"). (It also enacted revised Uniform Commercial Code Articles 1 and 7, the former retaining the "old" choice of law rule.) The DST Act amendments (effective August 1, 2004) focus on maintenance of separate records for series, restrictions on amendments to governing instruments, provision in governing instruments for penalties or consequences (including forfeiture of beneficial interest), merger and consolidation, conversion, domestication, and transfer or continuance. The DLLC Act amendments (effective August 1, 2004) focus on transfer or continuance, maintenance of separate records for series, conversion, restrictions on amendments to limited liability company agreements, and limits on the expansion or restriction of fiduciary and other duties. The Delaware RA-9 amendments (generally effective January 1, 2005) create a safe harbor collateral description (for use in financing statements) for cer-

tain information relevant to some securitization transactions, and attempt to make clearer certain requirements when trusts or trustees are debtors, as well as to lessen or eliminate the consequences of certain types of confusion as between a trust debtor and a trustee debtor.

This article summarizes these amendments to the DST Act (House Bill No. 463, 74 Del Laws 353), the DLLC Act (House Bill No. 411, as amended by House Amendment No. 1, 74 Del Laws 275), and Delaware RA-9 (Senate Bill No. 326, 74 Del Laws 332). To request a copy of any of these bills, send an email to [npowell@morrisjames.com](mailto:npowell@morrisjames.com) and include in the "subject" line a reference to the bill by number.

## DST ACT AMENDMENTS

The DST Act was amended by House Bill No. 463, 74 Del Laws 353, effective August 1, 2004.

### Provisions Relating to Governing Instrument, Series, Etc.

Section 3806(b)(8) now states explicitly that a governing instrument may provide rights to any person, including a person who is not a party to the governing instrument (e.g., a lender). A new Section 3806(b)(9) was added, specifying that a governing instrument may pro-

vide for the manner in which it may be amended, including by requiring the approval of a person not a party to the governing instrument (e.g., a lender) or the satisfaction of certain conditions (e.g., repayment of indebtedness).

A new Section 3806(i) was added, specifying that a governing instrument may provide that a beneficial owner shall be subject to specified penalties or consequences (including forfeiture of beneficial interest) if such beneficial owner fails to perform or comply with terms as required by the governing instrument, or upon the happening of specified events. Section 3810(d) clarifies that a certificate of trust shall be cancelled upon the dissolution and completion of winding up of the trust, or deemed cancelled upon the filing of a certificate of merger or consolidation if the trust is not the surviving or resulting entity, or upon the filing of a certificate of transfer, or upon the filing of a certificate of conversion to a non-Delaware other business entity.

Section 3804(a) was amended to clarify the manner in which records and assets are to be maintained in cases where the governing instrument creates one or more series of trustees or beneficial owners.

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Section 3806(b)(3) was amended to clarify that a governing instrument may contain any provision relating to the management of the trust and certain other matters including conversion, merger, and consolidation.

#### Provisions Relating to Merger, Conversion, Etc.

Section 3811 requires that a certificate of merger or consolidation, conversion, transfer, transfer and continuance, domestication, or termination, and amendments to any of them, if filed by the trust, must be signed by all trustees or as provided in the governing instrument (subsection (a)(4)). New text in Section 3812(b) clarifies that a certificate of trust shall be cancelled upon the filing of a certificate of transfer or a certificate of conversion to a non-Delaware entity.

A new Section 3815(b)(4) was added requiring that, in the case of a merger in which a statutory trust is the surviving entity, the certificate of merger shall state such amendments, if any, to the certificate of trust to change its name as are desired to be effected. Text was added to Section 3815(e) providing that a certificate of merger setting forth any amendment in accordance with new subsection (b)(4) is deemed an amendment to the certificate of trust, obviating the need for separate amendment under Section 3810, and providing that an agreement of merger or consolidation can be

filed in lieu of a certificate of merger or consolidation.

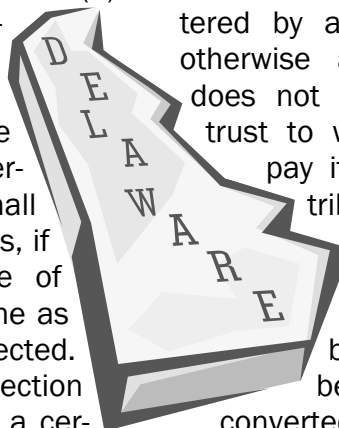
Section 3821, relating to approval of conversion of a statutory trust, has been completely reworked. It sets forth the requirements for a statutory trust to convert to an other business entity, establishing a hierarchy of authorization requirements. If the governing instrument includes a provision specifying a manner of authorizing a conversion, that provision is controlling. If it does not, and the governing instrument does not prohibit conversion, the conversion shall be authorized in the same manner (if any) as is specified for authorizing a merger or consolidation. If that is not specified, and the governing instrument does not prohibit conversion, the conversion shall be authorized by approval of all beneficial owners and all trustees. Thus, this requirement of unanimous approval is the default rule and can be altered by agreement. Unless otherwise agreed, conversion does not require a statutory trust to wind up its affairs, pay its liabilities, or distribute its assets. Rights or securities of, or interests in, the statutory trust being converted may be exchanged for or converted into cash, property, rights or securities of, or interests in, the other business entity into which the statutory trust is being converted, or exchanged for or converted into cash, property, rights or securities of, or interests in, any other business entity, or may be cancelled. If a statutory trust con-

verts to a non-Delaware business entity, a certificate of conversion to a non-Delaware entity must be executed and filed with the Delaware Secretary of State and must contain specified statements, including the jurisdiction in which the other business entity is organized, formed, or created, and agreement of the trust that it may be served through the Delaware Secretary of State in any action, suit or proceeding for enforcement of any of its obligations. When a statutory trust has been converted to an other business entity, the other business entity shall, for all purposes of the laws of the State of Delaware, be deemed to be the same entity as the statutory trust.

#### Provisions Relating to Domestication of Non-United States Entities

A new Section 3822 has been added, dealing with domestication of non-United States entities (generally, entities other than those formed under the laws of a state). It generally permits any non-United States entity to become domesticated as a Delaware statutory trust by complying with certain requirements including the filing of a certificate of statutory trust domestication and a certificate of trust. The certificate of statutory trust domestication must state, among other things, the date on which and jurisdiction where the non-United States entity was first formed, incorporated, created, or otherwise came into being, its name immediately prior to

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filing, the name of the statutory trust, the future effective date or time (if any) of the certificate, and the jurisdiction that constituted the seat, siege social, or principal place of business or central administration of the non-United States entity, or its equivalent. Prior to filing of the certificate of statutory trust domestication, the certificate must be approved in the manner provided for by the document, instrument, agreement or other writing governing the internal affairs of the non-United States entity, and a governing instrument for the domesticated statutory trust approved by the same authorization required to approve the domestication. Unless otherwise agreed or as required under applicable non-Delaware law, the domesticating entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the domestication shall not be deemed to constitute a dissolution. If the entity continues to exist under the laws of the foreign jurisdiction, for purposes of Delaware law the statutory trust and such non-United States entity constitute a single entity existing under the laws of Delaware and the laws of such other jurisdiction. Thus, such an entity is not a registered organization for purposes of Delaware RA-9. In connection with its domestication, rights or securities of, or interests in, the non-United States entity may be exchanged for or converted into

cash, property, rights or securities of, or interests in, such domestic statutory trust, or may be exchanged for or converted into cash, property, rights or securities of, or interests in, an other domestic statutory trust or other entity, or may be cancelled.

#### [Provisions Relating to Transfer or Domestication Out of Delaware](#)

New section 3823 provides for the transfer or domestication of a statutory trust to any jurisdiction other than a state, and permits its election to continue its existence as a statutory trust in Delaware. Unless otherwise provided in the governing instrument, the transfer or domestication or continuance must be approved in writing by all of the beneficial owners and all of the trustees. Following such approval, a certificate of transfer (if the trust's existence as a Delaware statutory trust is to cease) or a certificate of transfer and continuance (if the trust's existence as a Delaware statutory trust is to continue) must be executed and filed with the Delaware Secretary of State and must contain specified statements, including the jurisdiction to which the statutory trust shall be transferred or in which it shall be domesticated, and agreement that it may be served through the Delaware Secretary of State in any action, suit or proceeding for enforcement of any of its obligations. Following the ef-

fectiveness of a certificate of transfer, the statutory trust ceases to exist as a Delaware statutory trust. Following the effectiveness of a certificate of transfer and continuance, the statutory trust continues to exist as a Delaware statutory trust, and for purposes of Delaware law the statutory trust and the other business entity that came into being as a consequence of the transfer or domestication in a foreign jurisdiction shall constitute a single entity formed and existing under the laws of Delaware and such foreign jurisdiction. Thus, such an entity is not a registered organization for purposes of Delaware RA-9.

#### [DLLC ACT AMENDMENTS](#)

The DLLC Act was amended by House Bill No. 411, as amended by House Amendment No. 1, 74 Del Laws 275, effective August 1, 2004.

#### [Provisions Relating to LLC Agreements, Series, Etc.](#)

Text was added to Section 18-101(7), clarifying as a matter of definition that a limited liability company agreement may provide rights to any person, including a person who is not a party to such agreement (e.g., a lender), to the extent set forth therein.

A new Section 18-302(e) was added, stating that if a limited liability company agreement provides for the manner in which it may be amended, including requiring approval of a non-party or satisfaction of certain conditions, it may be

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amended only in such manner or with waiver of such conditions by all persons for whose benefit such conditions were intended.

Section 18-1101(c) has been substantially rewritten, and new Sections 18-1101(d) and (e) added. Section (c) clarifies the extent to which duties, including fiduciary duties, of a member, manager, or other person to a limited liability company, member, manager, or another person party to or bound by a limited liability company agreement may be expanded, restricted, or eliminated by provisions of the limited liability company agreement. It states that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing. Section (d) provides a default rule, alterable by agreement, that a member, manager, or other person shall not be liable to a limited liability company or to another member or manager or another person party to or bound by a limited liability company agreement for breach of fiduciary duty provided the member, manager, or other person relied in good faith on the provisions of the limited liability company agreement. Section (e) permits a limited liability company agreement to provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties, including fiduciary duties, of a member, manager, or other person to a limited liability company or to another member, manager, or other person party to or otherwise bound by a limited liability company agree-

ment, with the proviso that the limited liability agreement may not limit or eliminate liability for bad faith violations of the implied contractual covenant of good faith and fair dealing.

Text was added to Section 18-215(b) relating to series, clarifying that separate and distinct records must be maintained for any series and the assets associated with any such series must be held "in such separate and distinct records" and accounted for "in such separate and distinct records" separately from the other assets of the limited liability company or any other series thereof.

#### [Provisions Relating to Merger, Transfer, Domestication, and Conversion](#)

A new Section 18-209(c) (4) was added, providing that in the case of a merger in which a domestic limited liability company is the survivor, any amendments to the certificate of formation of the surviving entity to change its name shall be set forth in the certificate of merger. Text was added to Section 18-209(e) providing that a name change reflected pursuant to new Section 18-209(c) (4) obviates the need for further action to amend the entity's certificate of formation under Section 18-202 with respect to such name change.

A new Section 18-213(g) was added, addressing the transfer or domestication of a limited liability company out of the State of Delaware. In such instances, the transferred or domesticated business form is considered the same entity as the limited liability company for

all purposes of the laws of the State of Delaware.

Text was added to Section 18-214(i) providing that in connection with a conversion of another business entity to a limited liability company, rights or securities of or interests in the other entity which is converted to a domestic limited liability may be cancelled. Similarly, text was added to Section 18-216(d) providing that in connection with a conversion of a domestic limited liability company to another business form, rights or securities of or interests in the domestic limited liability company which is converted may be cancelled.

New Section 18-216(h) provides that when a limited liability company has been converted to another business form pursuant to this section, the other business form, for purposes of Delaware law, shall be deemed to be the same entity as the limited liability company.

#### [DELAWARE RA-9 AMENDMENTS](#)

Delaware RA-9 was amended by Senate Bill No. 326, 74 Del Laws 332, which generally becomes effective on January 1, 2005.

#### [Trusts and Trustees as Debtors](#)

In the time since Delaware RA-9 took effect, a number of practitioners have observed confusion where trusts and trustees are debtors. It was decided that non-uniform amendments clarifying its requirements and highlighting certain issues would be helpful.

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It was also decided that greater tolerance of certain imprecision was warranted. (For a more complete discussion of filing issues relating to trusts and trustees as debtors, see [Filings Against Trusts and Trustees Under Revised Article 9 - Thirteen Variations](#), 35 UCC L.J. 91 (2002)).

New Section 9-307(k) was added clarifying existing law regarding the location of trusts and trustees. It indicates that a debtor that is a trust and a registered organization is located in such trust's location as specified in Section 9-307(e) or (f). A debtor

*...a safe harbor for collateral descriptions in financing statements covering certain accounts, chattel paper, instruments, or general intangibles.*

that is a trust and not a registered organization is located in such trust's location as specified in Section 9-307(b)(2) or (b)(3), and a debtor that is a trustee acting with respect to property held in trust is located in such trustee's location as specified in Section 9-307(b), (e), (f), or (i). Section 9-503(a)(3) has been revised by the addition of parenthetical text intended to clarify its inapplicability to a debtor which is a trust and a registered organization (e.g., a Delaware statutory trust), and to emphasize its applicability to a trustee which, itself, is a registered organization (e.g., a state-chartered or national bank and trust company).

New Sections 9-203(j) and (k) were added dealing with instances in which the debtor is

a trust (including a registered organization) or a trustee acting with respect to property held in trust. The former provides that a security agreement is properly authenticated if authenticated in the name of either the trust or the trustee by a person authorized to bind the debtor. The latter states that the debtor's security agreement creates or provides for a security interest whether in the name of the trust

or the trustee. New Section 9-509(f) extends the concept introduced in new Sections 9-203(j) and (k),

providing that if the debtor or secured party is a trust (including a registered organization) or a trustee acting with respect to property held in trust, and is otherwise entitled to file a record, authorization to file a record by an authorized person in the name of either the trust or the trustee is effective. New Section 9-516(e) likewise extends the concept, providing that if the debtor is a trust (including a registered organization) or a trustee acting with respect to property held in trust, the information required by Section 9-516(b)(5) to appear on a financing statement with respect to the debtor (mailing address, type and jurisdiction of organization) may be provided with respect to either the trust or the trustee.

### [Financing Statements Describing Certain Information](#)

New Section 9-504A has been added to create a safe harbor for collateral descriptions in financing statements covering certain accounts, chattel paper, instruments, or general intangibles. Such collateral descriptions must meet three requirements. First, they must provide a description of one or more records (such as computer files) in the possession or control of the secured party and which records identify the specific accounts, chattel paper, instruments, or general intangibles constituting the collateral. Second, the financing statement must indicate either (i) that the items are accounts, chattel paper, instruments, or general intangibles, or (ii) the nature of the items by general description or category. Third, the record(s) in the secured party's possession or control must contain either (i) confidential information (such as credit card, loan, or taxpayer identification numbers) identifying the specific account debtors or obligors, or (ii) a description of 100 or more specific accounts, chattel paper, instruments, or general intangibles.

