



SPONSOR: Rep. Stone & Rep. Valihura & Sen. Vaughn;
Rep. M Marshall; Sen. Amick

HOUSE OF REPRESENTATIVES

143rd GENERAL ASSEMBLY

HOUSE BILL NO. 445

AN ACT TO AMEND CHAPTER 38, TITLE 12 OF THE DELAWARE CODE RELATING TO STATUTORY TRUSTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (three-fifths of all members elected to each house thereof concurring therein):

1 Section 1. Amend § 3801(a), Chapter 38, Title 12 of the Delaware Code by inserting the following sentence: “A statutory
2 trust may be organized to carry on any lawful business or activity, whether or not conducted for profit, and/or for any of the
3 purposes referred to in clause (i) of this subsection (including, without limitation, for the purpose of holding or otherwise taking title
4 to property, whether in an active or custodial capacity).” immediately after the second sentence thereof.

5 Section 2. Amend § 3801(d), Chapter 38, Title 12 of the Delaware Code by deleting “, limited partnership” and
6 substituting in lieu thereof “(whether general or limited)”, by inserting “(including any group, organization, co-tenancy, plan, board,
7 council or committee)” immediately after the word “association”, by inserting “government (including a country, state, county or
8 any other governmental subdivision, agency or instrumentality),” immediately prior to the word “custodian”, and by inserting “(or
9 series thereof)” immediately after the word “entity”.

10 Section 3. Amend § 3801(f), Chapter 38, Title 12 of the Delaware Code by (1) inserting the sentence “A beneficial owner
11 or a trustee is bound by the governing instrument whether or not such beneficial owner or trustee executes the governing
12 instrument.” immediately after the last sentence thereof, and (2) deleting the words “and shall become bound by the governing
13 instrument” contained in Section 3801(f)(1).

14 Section 4. Amend Section 3804, Chapter 38, Title 12 of the Delaware Code by deleting subsection (h) thereof in its
15 entirety.

16 Section 5. Amend § 3806(c), Chapter 38, Title 12 of the Delaware Code by deleting said subsection in its entirety and
17 substituting in lieu thereof the following:

18 “(c) To the extent that, at law or in equity, a trustee or beneficial owner or other person has duties (including
19 fiduciary duties) to a statutory trust or to another trustee or beneficial owner or to another person that is a
20 party to or is otherwise bound by a governing instrument, the trustee’s or beneficial owner’s or other

21 person's duties may be expanded or restricted or eliminated by provisions in the governing instrument;
22 provided, that the governing instrument may not eliminate the implied contractual covenant of good faith
23 and fair dealing.”.

24 Section 6. Amend § 3806(d), Chapter 38, Title 12 of the Delaware Code by deleting said subsection in its entirety and
25 substituting in lieu thereof the following:

26 “(d) Unless otherwise provided in a governing instrument, a trustee or beneficial owner or other person shall
27 not be liable to a statutory trust or to another trustee or beneficial owner or to another person that is a
28 party to or is otherwise bound by a governing instrument for breach of fiduciary duty for the trustee's or
29 beneficial owner's or other person's good faith reliance on the provisions of the governing instrument.”.

30 Section 7. Amend § 3806, Chapter 38, Title 12 of the Delaware Code by re-designating subsections “(e)” through “(i)”
31 thereof, as subsections “(f)” through “(i)” respectively, and by inserting a new subsection (e) thereto immediately prior to the newly
32 designated subsection (f) thereof to read as follows:

33 “(e) A governing instrument may provide for the limitation or elimination of any and all liabilities for breach
34 of contract and breach of duties (including fiduciary duties) of a trustee, beneficial owner or other person
35 to a statutory trust or to another trustee or beneficial owner or to another person that is a party to or is
36 otherwise bound by a governing instrument; provided, that a governing instrument may not limit or
37 eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual
38 covenant of good faith and fair dealing.”.

39 Section 8. Amend newly designated Section 3806(f), Chapter 38, Title 12 of the Delaware Code by inserting the following
40 sentence at the beginning thereof: “Unless otherwise provided in the governing instrument of a statutory trust, meetings of
41 beneficial owners may be held by means of conference telephone or other communications equipment by means of which all
42 persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute
43 presence in person at the meeting.”.

44 Section 9. Amend newly designated § 3806(g), Chapter 38, Title 12 of the Delaware Code by inserting the following
45 sentence at the beginning thereof: “Unless otherwise provided in the governing instrument of a statutory trust, meetings of trustees
46 may be held by means of conference telephone or other communications equipment by means of which all persons participating in
47 the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the
48 meeting.”.

49 Section 10. Amend § 3806, Chapter 38, Title 12 of the Delaware Code by inserting a new subsection (k) thereto
50 immediately after the newly designated subsection (j) thereof to read as follows:

51 “(k) A trustee, beneficial owner or an officer, employee, manager or other person designated in accordance
52 with subsection (b)(7) of this Section shall be fully protected in relying in good faith upon the records of
53 the statutory trust and upon information, opinions, reports or statements presented by another trustee,
54 beneficial owner or officer, employee, manager or other person designated in accordance with subsection
55 (b)(7) of this Section, or by any other person as to matters the trustee, beneficial owner or officer,
56 employee, manager or other person designated in accordance with subsection (b)(7) of this Section
57 reasonably believes are within such other person’s professional or expert competence, including
58 information, opinions, reports or statements as to the value and amount of the assets, liabilities, profits or
59 losses of the statutory trust, or the value and amount of assets or reserves or contracts, agreements or
60 other undertakings that would be sufficient to pay claims and obligations of the statutory trust or to make
61 reasonable provision to pay such claims and obligations, or any other facts pertinent to the existence and
62 amount of assets from which distributions to beneficial owners or creditors might properly be paid.”.

63 Section 11. Amend § 3807(b)(2), Chapter 38, Title 12 of the Delaware Code by deleting the two references to
64 “corporation” in such subsection and inserting in lieu thereof “corporation, limited partnership, limited liability company or
65 statutory trust”.

66 Section 12. Amend § 3808(c), Chapter 38, Title 12 of the Delaware Code by inserting after the first sentence
67 thereof the following:

68 “Notwithstanding the happening of events specified in the governing instrument, the statutory trust shall
69 not be dissolved and its affairs shall not be wound up if, prior to the filing of a certificate of cancellation
70 as provided in § 3810 of this Chapter, the statutory trust is continued, effective as of the happening of
71 such event, pursuant to the affirmative vote or written consent of all remaining beneficial owners of the
72 statutory trust (and any other person whose approval is required under the governing instrument to
73 revoke a dissolution pursuant to this Section), provided, however, if the dissolution was caused by a vote
74 or written consent, the dissolution shall not be revoked unless each beneficial owner and other person (or
75 their respective personal representatives) who voted in favor of, or consented to, the dissolution has
76 voted or consented in writing to continue the statutory trust.”.

77 Section 13. Amend § 3808(e), Chapter 38, Title 12 of the Delaware Code by inserting the words “and claims and
78 obligations that have not been made known to the statutory trust or that have not arisen but that, based on the facts known to the
79 statutory trust, are likely to arise or to become known to the statutory trust within 10 years after the date of dissolution” immediately
80 following the words “claimant is unknown” in the first sentence thereof.

81 Section 14.. Amend § 3810(a)(2), Chapter 38, Title 12 of the Delaware Code by inserting after the first sentence
82 thereof the following sentence “A statutory trust formed under this Chapter shall be a separate legal entity, the existence of which as
83 a separate legal entity shall continue until cancellation of the statutory trust’s certificate of trust.”.

84 Section 15. Amend § 3820(a), Chapter 38, Title 12 of the Delaware Code by deleting “(f)” after the word
85 “subsection” and before the word “of” in the first sentence thereof and replacing such deletion with “(g)”.

86 Section 16. Amend § 3820(f), Chapter 38, Title 12 of the Delaware Code by deleting the words “or as required
87 under applicable non-Delaware law” and inserting in lieu thereof the words “for all purposes of the laws of the State of Delaware”
88 in the first sentence thereof.

89 Section 17. Amend § 3822(i), Chapter 38, Title 12 of the Delaware Code by deleting the words “or as required
90 under applicable non-Delaware law” and inserting in lieu thereof the words “for all purposes of the laws of the State of Delaware”
91 in the second sentence thereof.

92 Section 18. Amend Section 3823(b), Chapter 38, Title 12 of the Delaware Code by deleting the first two
93 sentences thereof in their entirety and inserting the following sentences in lieu thereof: “If the governing instrument specifies the
94 manner of authorizing a transfer or domestication or continuance described in (a) of this Section, the transfer or domestication or
95 continuance shall be authorized as specified in the governing instrument. If the governing instrument does not specify the manner
96 of authorizing a transfer or domestication or continuance described in (a) of this Section and does not prohibit such a transfer or
97 domestication or continuance, the transfer or domestication or continuance shall be authorized in the same manner as is specified in
98 the governing instrument for authorizing a merger or consolidation that involves the statutory trust as a constituent party to the
99 merger or consolidation. If the governing instrument does not specify the manner of authorizing a transfer or domestication or
100 continuance described in (a) of this Section or a merger or consolidation that involves the statutory trust as a constituent party and
101 does not prohibit such a transfer or domestication or continuance, the transfer or domestication or continuance shall be authorized
102 by the approval by all of the beneficial owners and all of the trustees. If a transfer or domestication or continuance described in (a)
103 of this Section shall be approved as provided in this subsection (b), a certificate of transfer if the statutory trust’s existence as a
104 statutory trust of the State of Delaware is to cease, or a certificate of transfer and continuance if the statutory trust’s existence as a

105 statutory trust in the State of Delaware is to continue, executed in accordance with § 3811 of this Chapter, shall be filed in the
106 Office of the Secretary of State in accordance with § 3812 of this Chapter.”.

107 Section 19. Amend § 3852, Chapter 38, Title 12 of the Delaware Code by deleting subsection (b) in its entirety.

108 Section 20. Amend Chapter 38, Title 12 of the Delaware Code by adding a new Section 3863. New § 3863 shall
109 read as follows:

110 “§ 3863. Activities Not Constituting Doing Business.

111 (a) Activities of a foreign statutory trust in the State of Delaware that do not constitute doing business for
112 the purpose of this Chapter include:

- 113 (1) maintaining, defending or settling an action or proceeding;
- 114 (2) holding meetings of its beneficial owners or trustees or carrying on any other activity
115 concerning its internal affairs;
- 116 (3) maintaining bank accounts;
- 117 (4) maintaining offices or agencies for the transfer, exchange or registration of the statutory trust’s
118 own securities or maintaining trustees or depositories with respect to those securities;
- 119 (5) selling through independent contractors;
- 120 (6) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if
121 the orders require acceptance outside the State of Delaware before they become contracts;
- 122 (7) selling, by contract consummated outside the State of Delaware, and agreeing, by the contract,
123 to deliver into the State of Delaware, machinery, plants or equipment, the construction, erection
124 or installation of which within the State of Delaware requires the supervision of technical
125 engineers or skilled employees performing services not generally available, and as part of the
126 contract of sale agreeing to furnish such services, and such services only, to the vendee at the
127 time of construction, erection or installation;
- 128 (8) creating, as borrower or lender, or acquiring indebtedness with or without a mortgage or other
129 security interest in property;
- 130 (9) collecting debts or foreclosing mortgages or other security interests in property securing the
131 debts, and holding, protecting and maintaining property so acquired;
- 132 (10) conducting an isolated transaction that is not one in the course of similar transactions;
- 133 (11) doing business in interstate commerce; and

- 134 (12) doing business in the State of Delaware as an insurance company.
- 135 (b) A person shall not be deemed to be doing business in the State of Delaware solely by reason of being a
- 136 beneficial owner or trustee of a domestic statutory trust or a foreign statutory trust.
- 137 (c) This Section does not apply in determining whether a foreign statutory trust is subject to service or
- 138 process, taxation or regulation under any other law of the State of Delaware.”.
- 139 Section 21. This Act shall become effective on August 1, 2006.

SYNOPSIS

This Bill continues the practice of amending periodically the Delaware Statutory Trust Act (the “Act”) to keep it current and to maintain its national preeminence. The following is a Section-by-Section review of the amendments of the Act.

Section 1. This Bill restores language that was inadvertently deleted by a prior amendment.

Section 2. This Bill confirms the broad scope of the defined term “person”.

Section 3. This Bill confirms that beneficial owners and trustees are bound by governing instruments whether or not executed by them.

Section 4. This Bill deletes a subsection that is duplicative of the new § 3863 of the Act added hereby.

Section 5. This Bill clarifies that duties (including fiduciary duties) may be expanded, restricted and eliminated in a governing instrument. This Bill confirms that a governing instrument may not eliminate the implied contractual covenant of good faith and fair dealing.

Section 6. This Bill clarifies the default exculpation provision in the Act by providing that it only applies with respect to breaches of fiduciary duties.

Section 7. This Bill confirms the flexibility permitted in the Act regarding exculpation.

Section 8. This Bill clarifies that meetings of beneficial owners of a Delaware statutory trust may be held by conference telephone or similar communications equipment unless otherwise provided in a governing instrument.

Section 9. This Bill clarifies that meetings of trustees of a Delaware statutory trust may be held by conference telephone or similar communications equipment unless otherwise provided in a governing instrument.

Section 10. This Bill to add a new subsection (k) to § 3806 clarifies the circumstances under which trustees, beneficial owners or officers, employees, managers or other persons designated in accordance with § 3806(b)(7) may rely on the records of, or information relating to, the statutory trust.

Section 11. This Bill makes a technical change with respect to registered agents.

Sections 12 through 14. This Bill allows the beneficial owners to vote to continue the existence of the statutory trust notwithstanding the governing instrument provides for dissolution, makes some technical changes with respect to the winding up of the affairs of a statutory trust and confirms that a statutory trust’s existence continues until the cancellation of its certificate of trust.

Sections 15, 16 and 17. This Bill makes some technical and conforming changes to the sections of the Act relating to conversion of an entity into a statutory trust and domestication of non-U.S. entities.

Section 18. This Bill confirms the flexibility permitted in the Act with respect to transfer or continuance of domestic statutory trusts.

Section 19. This Bill deletes a subsection that is duplicative of the new § 3863 of the Act added hereby.

Section 20. This Bill adds a new § 3863 of the Act relating to activities not constituting doing business in Delaware.

Section 21. This Bill provides that the proposed amendments of the Act shall become effective on August 1, 2006.