

CHAPTER 280
FORMERLY
SENATE BILL NO. 218

AN ACT TO AMEND CHAPTER 38, TITLE 12 OF THE DELAWARE CODE RELATING TO THE CREATION, REGULATION, OPERATION AND DISSOLUTION OF DOMESTIC STATUTORY TRUSTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 3801(c), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining as follows:

“(c) “Governing Instrument” means any written instrument (whether referred to as a trust agreement, declaration of trust or otherwise) which creates a statutory trust or provides for the governance of the affairs of the statutory trust and the conduct of its business. A governing instrument:

(1) may provide that a person shall become a beneficial owner or a trustee if such person (or, in the case of a beneficial owner, a representative authorized by such person orally, in writing or by other action such as payment for a beneficial interest) complies with the conditions for becoming a beneficial owner or a trustee set forth in the governing instrument or any other writing and, in the case of a beneficial owner, acquires a beneficial interest;

(2) may consist of one or more agreements, instruments or other writings and may include or incorporate by-laws containing provisions relating to the business of the statutory trust, the conduct of its affairs and its rights or powers or the rights or powers of its trustees, beneficial owners, agents or employees; and

(3) may contain any provision that is not inconsistent with law or with the information contained in the certificate of trust.

A statutory trust is not required to execute its governing instrument. A statutory trust is bound by its governing instrument whether or not the statutory trust executes the governing instrument.

A beneficial owner or a trustee is bound by the governing instrument whether or not such beneficial owner or trustee executes the governing instrument. A governing instrument is not subject to any statute of frauds (including Section 2714 of Title 6).”

Section 2. Amend § 3801(g), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining as follows:

“(g) "Statutory trust" means an unincorporated association which:

(1) is created by a governing instrument under which property is or will be held, managed, administered, controlled, invested, reinvested and/or operated, or business or professional activities for profit are carried on or will be carried on, by a trustee or trustees or as otherwise provided in the governing instrument for the benefit of such person or persons as are or may become beneficial owners or as otherwise provided in the governing instrument, including but not limited to a trust of the type known at common law as a "business trust," or "Massachusetts trust," or a trust qualifying as a real estate investment trust under § 856 et seq., of the United States Internal Revenue Code of 1986 [26 U.S.C. § 856 et seq.], as amended, or under any successor provision, or a trust qualifying as a real estate mortgage investment conduit under § 860D of the United States Internal Revenue Code of 1986 [26 U.S.C. § 860D], as amended, or under any successor provision; and

(2) files a certificate of trust pursuant to § 3810 of this title.

Any such association heretofore or hereafter organized shall be a statutory trust and a separate legal entity. The term "statutory trust" shall be deemed to include each trust formed under this chapter prior to September 1, 2002 as a "business trust" (as such term was then defined in this subsection). A statutory trust may be organized to carry on any lawful business or activity, whether or not conducted for profit, and/or for any of the purposes referred to in paragraph (g)(1) of this section (including, without limitation, for the purpose of holding or otherwise taking title to property, whether in an active or custodial capacity). Unless otherwise provided in a governing instrument, a statutory trust has the power and authority to grant, hold or exercise a power of attorney, including an irrevocable power of attorney. Neither use of the designation "business trust" nor a statement in a certificate of trust or governing instrument executed prior to September 1, 2002, to the effect that the trust formed thereby is or will qualify as a Delaware business trust within the meaning of or pursuant to this chapter, shall create a presumption or an inference that the trust so formed is a "business trust" for purposes of Title 11 of the United States Code.”

Section 3. Amend § 3804, Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining and additional deletions as shown by strikethrough as follows:

“(a) A statutory trust may sue and be sued, and service of process upon 1 of the trustees shall be sufficient. In furtherance of the foregoing, a statutory trust may be sued for debts and other obligations or liabilities contracted or incurred by the trustees or other authorized persons, or by the duly authorized agents of such trustees or other authorized persons, in the performance of their respective duties under the governing instrument of the statutory trust, ~~and for any damages to persons or property resulting from the negligence of such trustees or agents acting in the performance of such respective duties.~~ The property of a statutory trust shall be subject to attachment and execution as if it were a corporation, subject to § 3502 of Title 10. Notwithstanding the foregoing provisions of this § 3804, in the event that the governing instrument of a statutory trust, including a statutory trust which is a registered investment company under the Investment Company Act of 1940, as amended (15 U.S.C. §§ 80a-1 et seq.), creates one or more series as provided in § 3806(b)(2), and if separate and distinct records are maintained for any such series and the assets associated with any such series are held in such separate and distinct records (directly or indirectly, including through a nominee or otherwise) and accounted for in such separate and distinct records separately from the other assets of the statutory trust, or any other series thereof, and if the governing instrument so provides, and notice of the limitation on liabilities of a series as referenced in this sentence is set forth in the

certificate of trust of the statutory trust, then the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the statutory trust generally or any other series thereof, and, unless otherwise provided in the governing instrument, none of the debts, liabilities, obligations and expenses incurred, contracted for otherwise existing with respect to the statutory trust generally or any other series thereof shall be enforceable against the assets of such series.”

Section 4. Amend § 3806(b)(9), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining as follows:

“(9) 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, and to the extent the governing instrument provides for the manner in which it may be amended such governing instrument may be amended only in that manner or as otherwise permitted by law, including as permitted by § 3815(f) of this title (provided that the approval of any person may be waived by such person and that any such conditions may be waived by all persons for whose benefit such conditions were intended). Unless otherwise provided in a governing instrument, a supermajority amendment provision shall only apply to provisions of the governing instrument that are expressly included in the governing instrument. As used in this section, "supermajority amendment provision" means any amendment provision set forth in a governing instrument requiring that an amendment to a provision of the governing instrument be adopted by no less than the vote or consent required to take action under such latter provision. If a governing instrument does not provide for the manner in which it may be amended, the governing instrument may be amended with the approval of all of the beneficial owners and trustees or as otherwise permitted by law, including as permitted by § 3815(f) of this chapter.”

Section 5. Amend § 3806(f)(1), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining and additional deletions as shown by strikethrough as follows:

“Unless otherwise provided in the governing instrument of a statutory trust, meetings of beneficial owners may be held by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting. Unless otherwise provided in the governing instrument of a statutory trust, on any matter that is to be voted on by the beneficial owners,

(1) the beneficial owners may take such action without a meeting, without a prior notice and without a vote if ~~a consent or consents consented to, in writing, setting forth the action so taken~~ or by electronic transmission, shall be signed by the by beneficial owners having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all interests in the statutory trust entitled to vote thereon were present and voted and”

Section 6. Amend § 3806(g)(1), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining and additional deletions as shown by strikethrough as follows:

“Unless otherwise provided in the governing instrument of a statutory trust, meetings of trustee may be held by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting. Unless otherwise provided in the governing instrument of a statutory trust, on any matter that is to be voted on by the trustees,

(1) the trustees may take such action without a meeting, without a prior notice and without a vote if ~~a consent or consents consented to, in writing, setting forth the action so taken~~ or by electronic transmission, shall be signed by the by trustees having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all trustees entitled to vote thereon were present and voted; and”

Section 7. Amend § 3808(f), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining as follows:

“(f) Except to the extent otherwise provided in the governing instrument of the statutory trust, a series established in accordance with § 3804(a) may be dissolved and its affairs wound up without causing the dissolution of the statutory trust or any other series thereof. Unless otherwise provided in the governing instrument of the statutory trust, the dissolution, winding up, liquidation or termination of the statutory trust or any series thereof shall not affect the limitation of liability with respect to a series established in accordance with § 3804(a). A series established in accordance with § 3804(a) is dissolved and its affairs shall be wound up at the time or upon the happening of events specified in the governing instrument of the statutory trust. Except to the extent otherwise provided in the governing instrument of a statutory trust, the death, incapacity, dissolution, termination or bankruptcy of a beneficial owner or a trustee of such series shall not result in the termination or dissolution of such series and such series may not be terminated or revoked by a beneficial owner of such series or other person except in accordance with the terms of the governing instrument of the statutory trust.” Section 8. Amend § 3810(d), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining as follows:

“(d) A certificate of trust shall be cancelled upon the dissolution and the completion of winding up of a statutory trust, or upon the filing of a certificate of merger or consolidation if the statutory trust is not the surviving or resulting entity in a merger or consolidation, or upon the future effective date or time of a certificate of merger or consolidation if the trust is not the surviving or resulting entity in a merger or consolidation, or upon the filing of a certificate of transfer, or upon the future effective date or time of a certificate of transfer, or upon the filing of a certificate of conversion to non-Delaware other business entity or upon the future effective date or time of a certificate of conversion to non-Delaware entity. A certificate of cancellation shall be filed in the office of the Secretary of State and set forth:

(1) The name of the statutory trust;

- (2) The date of filing of its certificate of trust;
- (3) The future effective date or time (which shall be a date or time certain) of cancellation if it is not to be effective upon the filing of the certificate; and
- (4) Any other information the trustee determines to include therein.

A certificate of cancellation that is filed in the office of the Secretary of State prior to the dissolution or the completion of winding up of a statutory trust may be corrected as an erroneously executed certificate of cancellation by filing with the office of the Secretary of State a certificate of correction of such certificate of cancellation in accordance with § 3810(e). The Secretary of State shall not issue a certificate of good standing with respect to a statutory trust if its certificate of trust is cancelled.

Section 9. Amend § 3810, Chapter 38, Title 12 of the Delaware Code by making additional insertions following § 3810(f) as shown by underlining as follows:

“(g) When the certificate of trust of any statutory trust formed under this Chapter shall be cancelled by the filing of a certificate of cancellation pursuant to this Section 3810, the Court of Chancery, on application of any creditor, beneficial owner or trustee of the statutory trust, or any other person who shows good cause therefor, at any time, may either appoint 1 or more persons to be trustees, or appoint 1 or more persons to be receivers, of and for the statutory trust, to take charge of the statutory trust’s property, and to collect the debts and property due and belonging to the statutory trust, with the power to prosecute and defend, in the name of the statutory trust, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the statutory trust, if in being, that may be necessary for the final settlement of the unfinished business of the statutory trust. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid.”

Section 10. Amend the title of § 3811, Chapter 38, Title 12 of the Delaware Code by making additional deletions as shown by strikethrough as follows:

“§ 3811. Execution of certificate.”

Section 11. Amend § 3811, Chapter 38, Title 12 of the Delaware Code by making additional insertions following § 3811(c) as shown by underlining as follows:

“(d) For all purposes of the laws of the State of Delaware, a power of attorney with respect to matters relating to the organization, internal affairs or termination of a statutory trust or granted by a person as a beneficial owner or by a person seeking to become a beneficial owner shall be irrevocable if it states that it is irrevocable and it is coupled with an interest sufficient in law to support an irrevocable power. Such irrevocable power of attorney, unless otherwise provided therein, shall not be affected by subsequent death, disability, incapacity, dissolution, termination of existence or bankruptcy of, or any other event concerning, the principal. A power of attorney with respect to matters relating to the organization, internal affairs or termination of a statutory trust or granted by a person as a beneficial owner or by a person seeking to become a beneficial owner and, in either case, granted to the statutory trust, a trustee or beneficial owner thereof, or any of their respective officers, directors, managers, members, partners, trustees, employees or agents shall be deemed coupled with an interest sufficient in law to support an irrevocable power.”

Section 12. Amend § 3815(a), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining and additional deletions as shown by strikethrough as follows:

“(a) Pursuant to an agreement of merger or consolidation, a statutory trust may merge or consolidate with or into 1 or more statutory trusts or other business entities formed or organized or existing under the laws of the State of Delaware or any other state or the United States or any foreign country or other foreign jurisdiction, with such statutory trust or other business entity as the agreement shall provide being the surviving or resulting statutory trust or other business entity. Unless otherwise provided in the governing instrument of a statutory trust, ~~a~~ an agreement of merger or consolidation shall be approved by each statutory trust which is to merge or consolidate by all of the trustees and the beneficial owners of such statutory trust. In connection with a merger or consolidation hereunder, rights or securities of, or interests in, a statutory trust or other business entity which is a constituent party to the merger or consolidation may be exchanged for or converted into cash, property, rights or securities of, or interests in, the surviving or resulting statutory trust or other business entity or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, a statutory trust or other business entity which is not the surviving or resulting statutory trust or other business entity in the merger or consolidation or may be cancelled. Notwithstanding prior approval, an agreement of merger or consolidation may be terminated or amended pursuant to a provision for such termination or amendment contained in the agreement of merger or consolidation.”

Section 13. Amend § 3815(b)(1), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining and additional deletions as shown by strikethrough as follows:

“(1) The name, ~~and~~ jurisdiction of formation or organization and type of entity of each of the statutory trusts or other business entities which is to merge or consolidate;”

Section 14. Amend § 3815(f), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining and additional deletions as shown by strikethrough as follows:

“(f) ~~Notwithstanding anything to the contrary contained in the governing instrument of a statutory trust, an~~ An agreement of merger or consolidation approved in accordance with subsection (a) of this section may (1) effect any amendment to the governing instrument of the statutory trust or (2) effect the adoption of a new governing instrument of the statutory trust if it is the surviving or resulting statutory trust in the merger or consolidation. Any amendment to the governing instrument of a statutory trust or adoption of a new governing instrument of the statutory trust made pursuant to the foregoing sentence shall be effective at the effective time or date of the merger or consolidation and shall be effective notwithstanding any provision of the governing instrument relating to

amendment or adoption of a new governing instrument, other than a provision that by its terms applies to an amendment to the governing instrument or the adoption of a new governing instrument, in either case, in connection with a merger or consolidation. The provisions of this subsection shall not be construed to limit the accomplishment of a merger or consolidation or of any of the matters referred to herein by any other means provided for in the governing instrument of a statutory trust or other agreement or as otherwise permitted by law, including that the governing instrument of any constituent statutory trust to the merger or consolidation (including a statutory trust formed for the purpose of consummating a merger or consolidation) shall be the governing instrument of the surviving or resulting statutory trust. Unless otherwise provided in a governing instrument, a statutory trust whose original certificate of trust was filed with the Secretary of State and effective on or prior to July 31, 2010, shall continue to be governed by this subsection as in effect on July 31, 2010.”

Section 15. Amend § 3816(a), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining and additional deletions as shown by strikethrough as follows:

“(a) A beneficial owner may bring an action in the Court of Chancery in the right of a statutory trust to recover a judgment in its favor if ~~trustees~~ persons with authority to do so have refused to bring the action or if an effort to cause those ~~trustees~~ persons to bring the action is not likely to succeed.”

Section 16. Amend § 3816(c), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining and additional deletions as shown by strikethrough as follows:

“(c) In a derivative action, the complaint shall set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by the ~~trustees~~ persons with authority to do so, or the reasons for not making the effort.”

Section 17. Amend § 3819(a), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining as follows:

“(a) Except to the extent otherwise provided in the governing instrument of a statutory trust, each beneficial owner of a statutory trust has the right, subject to such reasonable standards (including standards governing what information and documents are to be furnished at what time and location and at whose expense) as may be established by the ~~trustees~~ or other persons who have authority to manage the business and affairs of the statutory trust, to obtain from the statutory trust from time to time upon reasonable demand for any purpose reasonably related to the beneficial owner's interest as a beneficial owner of the statutory trust:

- (1) A copy of the governing instrument and certificate of trust and all amendments thereto, together with copies of any written powers of attorney pursuant to which the governing instrument and any certificate and any amendments thereto have been executed;
- (2) A current list of the name and last known business, residence or mailing address of each beneficial owner and trustee;
- (3) Information regarding the business and financial condition of the statutory trust; and
- (4) Other information regarding the affairs of the statutory trust as is just and reasonable.”

Section 18. Amend § 3819(c), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining and additional deletions as shown by strikethrough as follows:

“(c) Except to the extent otherwise provided in the governing instrument of a statutory trust, the ~~trustees of~~ a or other persons who have authority to manage the business and affairs of the statutory trust shall have the right to keep confidential from the beneficial owners, for such period of time as ~~the trustees~~ such persons deem reasonable, any information that ~~the trustees~~ such persons reasonably believe to be in the nature of trade secrets or other information the disclosure of which ~~the trustees~~ such persons in good faith believe is not in the best interest of the statutory trust or could damage the statutory trust or its business or which the statutory trust is required by law or by agreement with a third party to keep confidential.”

Section 19. Amend § 3820(b)(2), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining as follows:

“(2) The name and type of entity of the other business entity immediately prior to the filing of the certificate of conversion to statutory trust;”

Section 20. Amend § 3823(b)(7), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown by underlining as follows:

“(7) The address (which may not be that of the statutory trust's registered agent, as applicable, without the written consent of the statutory trust's registered agent, such consent to be filed with the certificate of transfer) to which a copy of the process referred to in paragraph (b)(6) of this section shall be mailed to it by the Secretary of State. Process may be served upon the Secretary of State under paragraph (b)(6) of this section by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of service under this section upon the Secretary of State, the procedures set forth in § 3861(c) of this title shall be applicable, except that the plaintiff in any such action, suit or proceeding shall furnish the Secretary of State with the address specified in this subsection and any other address that the plaintiff may elect to furnish, together with copies of such process as required by the Secretary of State, and the Secretary of State shall notify the statutory trust that has transferred or domesticated out of the State of Delaware at all such addresses furnished by the plaintiff in accordance with the procedures set forth in § 3861(c) of this title; and”

Section 21. Amend § 3825, Chapter 38, Title 12 of the Delaware Code by making additional insertions following § 3825(c) as shown by underlining as follows:

“(d) A governing instrument that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms.”

Section 22. This Act shall become effective August 1, 2012.

Approved June 28, 2012