



SPONSOR: Sen. Townsend & Rep. B. Short & Rep. Lynn & Rep. M. Smith
Sens. Blevins, Bonini, Hall-Long, McDowell & Sokola;
Reps. Hensley, J. Johnson, Keeley, Paradee & Ramone

DELAWARE STATE SENATE
148th GENERAL ASSEMBLY

SENATE BILL NO. 243

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(g), Chapter 38, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3801 Definitions.

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

(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, unless otherwise provided in its certificate of trust and in its governing instrument, 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 2. Amend § 3804(a), Chapter 38, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3804 Legal Proceedings.

(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. 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 or otherwise existing with respect to the statutory trust generally or any other series thereof shall be enforceable against the assets of such series. Neither the preceding sentence nor any provision pursuant thereto in a governing instrument or certificate of trust shall (i) restrict a statutory trust on behalf of a series from agreeing in the governing instrument or otherwise that any or all of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the statutory trust generally or any other series thereof shall be enforceable against the assets of such series or (ii) restrict a statutory trust from agreeing in the governing instrument or otherwise that any or all of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a series shall be enforceable against the assets of the statutory trust generally. As used in this chapter, a reference to assets of a series includes assets associated with a series and a reference to assets associated with a series includes assets of a series. Except to the extent otherwise provided in the governing instrument of a statutory trust, a statutory trust that has established series in accordance with this subsection (a) may contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued, in each case, in the name of a series.

Section 3. Amend § 3806(i), Chapter 38, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3806 Management of statutory trust.

54 “(i) Except to the extent otherwise provided in the governing instrument of a statutory trust, a trustee of a statutory
55 trust has the power and authority to delegate to one or more other persons the trustee's rights and powers to manage and
56 control the business and affairs of the statutory trust, including to delegate to agents, officers and employees of the trustee
57 or the statutory trust, and to delegate by management agreement or other agreement with, or otherwise to, other persons.
58 Unless otherwise provided in the governing instrument of a statutory trust, such delegation by a trustee of a statutory trust
59 shall be irrevocable if it states that it is irrevocable. Except to the extent otherwise provided in the governing instrument of
60 a statutory trust, such delegation by a trustee of a statutory trust shall not cause the trustee to cease to be a trustee of the
61 statutory trust or cause the person to whom any such rights and powers have been delegated to be a trustee of the statutory
62 trust.

63 Section 4. Amend § 3806, Chapter 38, Title 12 of the Delaware Code by making deletions as shown by strike
64 through and insertions as shown by underline as follows:

65 § 3806 Management of statutory trust.

66 (l) Except to the extent otherwise provided in the governing instrument of a statutory trust, trustees of a
67 statutory trust that is registered as an investment company under the 1940 Act shall have the same fiduciary duties
68 as directors of private corporations for profit organized under the general corporation law of the State.”

69 Section 5. Amend § 3808(c), Chapter 38, Title 12 of the Delaware Code by making additional insertions as shown
70 by underlining and additional deletions as shown by strikethrough as follows:

71 § 3808 Existence of statutory trust.

72 (b) In the event that a statutory trust does not have perpetual existence, a statutory trust is dissolved and its affairs
73 shall be wound up at the time or upon the happening of events specified in the governing instrument.
74 Notwithstanding If a governing instrument provides the manner in which a dissolution may be revoked, it may
75 be revoked in that manner and, unless a governing instrument prohibits revocation of dissolution, then
76 notwithstanding the happening of events specified in the governing instrument, the statutory trust shall not be
77 dissolved and its affairs shall not be wound up if, prior to the filing of a certificate of cancellation as provided
78 in § 3810 of this Chapter, the statutory trust is continued, effective as of the happening of such event, pursuant
79 to (i) in the case of dissolution effected by the affirmative vote or written consent of all remaining beneficial
80 owners of the statutory trust (and any other person whose approval is required under the governing instrument
81 to revoke a dissolution pursuant to this Section), provided, however, if the dissolution was caused by a vote or
82 written consent, the dissolution shall not be revoked unless each beneficial owner and other person (or their
83 respective personal representatives) who voted in favor of, or consented to, the dissolution has voted or
84 consented in writing to continue the statutory trust the beneficial owners or other persons, pursuant to such
85 affirmative vote or written consent (and the approval of any beneficial owners or other persons whose

approval is required under the governing instrument to revoke a dissolution contemplated by this clause), and (ii) in the case of dissolution at the time or upon the happening of events specified in a governing instrument (other than a dissolution effected by the affirmative vote or written consent of the beneficial owners or other persons), pursuant to such affirmative vote or written consent that, pursuant to the terms of the governing instrument, is required to amend the provision of the governing instrument effecting such dissolution (and the approval of any beneficial owners or other persons whose approval is required under the governing instrument to revoke a dissolution contemplated by this clause). The provisions of this section shall not be construed to limit the accomplishment of a revocation of dissolution by other means permitted by law.

Section 6. Amend § 3810(a), Chapter 38, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3810 Certificate of trust; amendment; restatement; cancellation.

(2) A statutory trust is formed at the time of the filing of the initial certificate of trust in the Office of the Secretary of State or at any later date or time specified in the certificate of trust if, in either case, there has been substantial compliance with the requirements of this section. A statutory trust formed under this Chapter, unless otherwise provided in its certificate of trust and in its governing instrument, shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the statutory trust's certificate of trust. A statutory trust as to which a certificate of trust has been filed and a governing instrument has been adopted, regardless of the sequence of such acts, shall be duly formed, and the existence of the statutory trust shall continue until cancellation of the statutory trust's certificate of trust.

Section 7. Amend § 3811(d), Chapter 38, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3811 Execution.

(d) For all purposes of the laws of the State of Delaware, unless otherwise provided in a governing instrument of a statutory trust, a power of attorney or proxy 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 to any person 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 of attorney or proxy. Such irrevocable power of attorney or proxy, unless otherwise provided therein or in a governing instrument of a statutory trust, 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 or proxy 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 of attorney or proxy. The provisions of this subsection shall not be construed to limit the enforceability of a power of attorney or proxy that is part of a governing instrument of a statutory trust.

Section 8. Amend § 3813, Chapter 38, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows: by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3913 Fees.

(c) Notwithstanding Delaware's Freedom of Information Act (Chapter 100 of Title 29) or other provision of law granting access to public records, the Secretary of State upon request shall issue only photocopies or electronic image copies of public records in exchange for the fees described in this section, and in no case shall the Secretary of State be required to provide copies (or access to copies) of such public records (including without limitation bulk data, digital copies of instruments, documents and other papers, databases or other information) in an electronic medium or in any form other than photocopies or electronic image copies of such public records in exchange, as applicable, for the fees described in this section or § 2318 of Title 29 for each such record associated with a file number.

(d) Except as provided by this section, all other fees for the Secretary of State shall be as provided for in § 2315 of Title 29.

Section 9. Amend § 3819, Chapter 38, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3819 Access to and confidentiality of information; records.

(a) Except to the extent otherwise provided in the governing instrument of a statutory trust, each beneficial owner of a statutory trust, in person or by attorney or other agent, 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:

(b) Except to the extent otherwise provided in the governing instrument of a statutory trust, each trustee, in person or by attorney or other agent, shall have the right to examine all the information described in subsection (a) of this section for any purpose reasonably related to his position as a trustee.

(c) Any demand by a beneficial owner or trustee under this section shall be in writing and shall state the purpose of such demand. In every instance where an attorney or other agent shall be the person who seeks the right to obtain the information described in subsection (a) of this section, the demand shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the beneficial owner or trustee.

SYNOPSIS

This bill makes the following changes to 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 proposed amendments of the Act.

Section 1. This section amends § 3801(g) of the Act to provide that a statutory trust may opt out of separate legal entity status if provided in the certificate of trust and the governing instrument of such statutory trust.

Section 2. This section amends § 3804(a) of the Act to confirm and clarify two propositions. First, neither the fourth sentence of § 3804(a) nor any language in a governing instrument or certificate of trust that is included pursuant to that fourth sentence shall be construed as restricting a statutory trust on behalf of a series from agreeing to be liable for any or all of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the statutory trust generally or any other series thereof, or restricting a statutory trust from agreeing to be liable for any or all of the debts, liabilities, obligations or expenses incurred, contracted for or otherwise existing with respect to a series. Second, any reference to assets of a series includes assets associated with a series and any reference to assets associated with a series includes assets of a series. The final sentence amends § 3804(a) of the Act to confirm and clarify that a statutory trust which has established series may take specified actions in the name of such series unless otherwise provided in the governing instrument.

Section 3. This section amends § 3806(i) of the Act to confirm and clarify that if so stated in the governing instrument of a statutory trust, the delegation by a trustee to one or more other persons of such trustee’s rights and powers to manage and control the business and affairs of the statutory trust can be made irrevocable.

Section 4. This section amends § 3806 of the Act to add a new subsection which provides that trustees of statutory trusts registered as investment companies under the 1940 Act will have the same fiduciary duties as directors of private corporations for profit organized under the general corporation law of the State unless otherwise provided in the governing instrument. This amendment codifies, with respect to such trustees, the historical Delaware rule that generally affords the protection of the business judgment rule to the conduct and decisions of the board (or other manager) of a Delaware business entity. The amendment does not imply that such protection is inapplicable to trustees or other persons of statutory trusts that are not registered as investment companies under the 1940 Act.

Section 5. This section amends § 3808(c) of the Act to modify and provide additional means by which a dissolution of a statutory trust may be revoked.

Section 6. This section amends § 3810(a) of the Act to provide that a statutory trust may opt out of separate legal entity status if provided in the certificate of trust and the governing instrument of such statutory trust; and to confirm and clarify that the formation of a statutory trust is not invalid as a result of the sequence in which the certificate of trust is filed and the governing instrument is adopted by the statutory trust.

Section 7. This section amends § 3811(d) of the Act to provide for the manner in which a proxy relating to a statutory trust may be made irrevocable under the governing instrument.

Section 8. This section amends § 3813 of the Act to limit the form of copies of public records to be supplied by the Secretary of State upon request and payment of fees under this section to photocopies or electronic images.

Section 9. This section amends § 3819 of the Act to confirm that a beneficial owner and a trustee of a statutory trust may make a books and records request in person or by attorney or other agent.

Section 10. This section provides that the proposed amendments of the Act shall become effective August 1, 2016.

Author: Senator Townsend