

SENATE BILL 784: BILL EXPLANATION

Senate Bill 784, proposed by the Committee on Corporate Laws of the Business Law Section of the Maryland State Bar Association (the "MSBA") and supported and approved by the Business Law Section of the MSBA, would amend the Maryland Business Trust Act (the "Trust Act") to clarify and modernize the statute in many respects.

Short Title and Entity Name

The Trust Act is amended to change the name of the entity formed under the statute from "business trust" to "statutory trust" and to change all references throughout the statute. This change is consistent with corresponding statutes of other states, such as Delaware, and is made in part to avoid an inference that the trust is a business trust under Federal bankruptcy law. A new Section 12-101.1 is added to provide that the use of the term "business trust" prior to the effective date of the amendments may not create a presumption that the trust is a business trust under Federal bankruptcy law. Additionally, Section 12-104 of the Trust Act is amended to change the short title of the statute to the Maryland Statutory Trust Act.

Definitions

Section 12-101 of the Trust Act is amended to add definitions of statutory trust and foreign statutory trust and to clarify the definition of other forms of doing business. The definition of statutory trust clarifies that a statutory trust is formed by filing a certificate of trust under Section 12-204 of the Trust Act. Section 12-101 is also amended to clarify that a beneficial owner means any owner of record of a beneficial interest (the ownership interest) in a statutory trust.

Interpretation of the Trust Act

The relationship and duties of the trustees of a statutory trust and the owners of the beneficial interests of a statutory trust, and other matters relating to the internal affairs of the trust, are established by the certificate of trust, the declaration of trust or trust agreement, the bylaws, and other similar documents. These documents, excluding the certificate of trust, are collectively referred to in the Trust Act as the governing instrument. The statute currently provides for substantial flexibility in defining the rights and duties of the trustees and beneficial owners in the certificate of trust and the governing instrument and imposes few mandatory requirements. Consistent with the flexible nature of the statute, the amendments add new Section 12-105 which clarifies that the Trust Act shall be construed liberally to give maximum effect to the principle of freedom of contract and to the enforceability of governing instruments. Section 12-105 also clarifies that, to the extent that the Trust Act overrides common law principles relating to trusts, it should not be construed strictly.

Powers of the Trust

Section 12-201 of the Trust Act is amended to add a list of general powers, which may be limited in the certificate of trust or governing instrument. These general powers are consistent with the general powers provided for a Maryland corporation under the Maryland General Corporation Law (the "MGCL"). The purpose of the amendments is to clarify that a statutory trust has these general powers, unless limited in the certificate of trust or the governing instrument, and that they need not be specifically stated in the certificate of trust or the governing instrument. There is no change to the prohibition under the current law on statutory trusts carrying on the business of granting policies of insurance or assuming insurance risks or banking.

Certificate of Trust

The certificate of trust is the document initially filed with the State Department of Assessments and Taxation of Maryland (the "SDAT") to form the statutory trust. Section 12-204 is amended to clarify what is required to be included in the certificate of trust and to provide for the restatement of the certificate of trust after it has been amended.

Execution of Documents

Section 12-205 is amended to provide that articles of merger or consolidation, a restated certificate of trust and other documents that a trust may file with the SDAT shall be executed in the manner required by Section 1-301 of the MGCL (the general provisions governing the execution of charter documents) or by a person duly authorized by one or more of the trustees or, if there are no trustees, as provided in the governing instrument.

Governing Instrument

Section 12-207 currently states provisions that may be included in the governing instrument. The current Section 12-207 is very broad and permissive yet non-specific. The purpose of the amendments to Section 12-207 is to provide additional clarity that various provisions may be included and that they are valid under the statute. These clarified provisions include statements that a governing instrument may provide: (a) for an unlimited number of shares or other units of beneficial interests or the combination of shares or other units of beneficial interests in the statutory trust; (b) rights to any person, including a person not a party to the governing instrument, to the extent set forth in the governing instrument; (c) for the manner in which the governing instrument may be amended; and (d) for action by or on behalf of the statutory trust in the event there are no trustees.

Section 12-207 is also amended to clarify that a statutory trust is not required to execute its governing instrument and that a statutory trust, its trustees and its beneficial owners are bound by the governing instrument whether or not any of them

execute the governing instrument. These clarifying amendments are consistent with ordinary practices regarding execution of the documents that constitute the governing instrument. Often, the initial trustees execute the declaration of trust or trust agreement and no other persons, including successor trustees, execute such documents. Additionally, documents such as bylaws that may form part of the governing instrument are typically not executed by any person.

Trustees

The amendments expressly state in Section 12-402 that the duties of the trustees are the same as those of directors of a Maryland corporation under the MGCL. These duties may be expanded or limited in the governing instrument, but the governing instrument may not eliminate a trustee's duty to act in good faith. The statute currently makes reference to the MGCL regarding the duties of the trustees, but it does not clearly define the duties of trustees and it is not entirely clear how the duties may be varied in the governing instrument. The amendments provide greater clarity regarding the duties of trustees and the way in which they may be expanded or limited in the governing instrument. The amendments also provide that a trustee has no duties other than as set forth in the Trust Act, as modified in the governing instrument.

Section 12-403 is amended to clarify that, except as provided in the governing instrument, a statutory trust may indemnify and advance expenses to its trustees, officers, employees or agents to the same extent provided in the MGCL for directors, officers, employees or agents of a Maryland corporation.

Additionally, the amendments add a new Section 12-405 that provides (consistent with the MGCL for directors of Maryland corporations that are investment companies) that a trustee of an investment company formed as a statutory trust who with respect to the statutory trust is not an "interested person," as defined by the Investment Company Act of 1940, shall be deemed to be independent and disinterested when making determinations or taking actions as a trustee.

Consistent with the statutory trust's status as a separate legal entity, the amendments clarify in Section 12-402 that no creditor of a trustee has any legal claim to any property of the statutory trust with respect to any claim by the creditor against the trustee in the trustee's individual capacity.

Meetings of Trustees

The amendments add a new Section 12-404 governing meetings of trustees, the taking of action by trustees by consent without a meeting and for voting by trustees by proxy. The current statute does not expressly address any of these matters. The provisions set forth in Section 12-404 may be changed in the governing instrument.

Beneficial Owners

The amendments clarify in Section 12-301 what may constitute valid consideration to be paid or provided to the statutory trust for a beneficial interest in a statutory trust. The amendments clarify that, except as provided in the governing instrument or by agreement, a beneficial owner has no preemptive right to acquire any beneficial interest or other interest in the statutory trust. The statute currently has no provisions expressly addressing preemptive rights.

Section 12-304 is amended to clarify that a statutory trust has the power, except as provided in the governing instrument, to pay or reimburse in advance of final disposition a legal proceeding any expenses incurred by a beneficial owner in connection with the proceeding.

The inspection rights of beneficial owners regarding the records of the statutory trust under Section 12-305 are amended to more closely conform to the inspection rights of a stockholder of a Maryland corporation under the MGCL. These rights are subject to change in the governing instrument.

Meetings of Beneficial Owners

The amendments add a new Section 12-306 governing meetings of beneficial owners, the taking of action by beneficial owners by consent without a meeting and for voting by beneficial owners by proxy. The current statute does not expressly address any of these matters. The provisions set forth in Section 12-306 may be changed in the governing instrument.

Merger or Consolidation; Dissolution

The amendments clarify certain provisions of Subtitle 6, which governs a merger or consolidation of a statutory trust with another entity. Additionally, the amendments change the information required in articles of merger or consolidation filed with the SDAT to be more consistent with a statutory trust's filing obligations under the statute generally.

The amendments transfer the provisions regarding dissolution of a statutory trust from Section 12-202 to a new Section 12-611. The amendments also expressly provide for the dissolution of a series or class of beneficial interests of a statutory trust without dissolution of the entire entity. The dissolution of a series or class is typically provided for in the governing instrument, where applicable. The amendments clarify the statutory basis for such provisions.

Other Amendments

Section 12-501 is amended to transfer the power of a statutory trust to sue and be sued to Section 12-201. Section 12-501 is also amended to provide that service of

process on a statutory trust may be effected in the same manner as service of process on a Maryland corporation. The amendments also add provisions to Section 12-501 clarifying that a trustee, beneficial owner, or other person may consent in the governing instrument or other writing to be subject to the exclusive jurisdiction of the courts of the State of Maryland and the exclusivity of arbitration in a specified jurisdiction or the State of Maryland and the nonexclusive jurisdiction, or arbitration in, a specified jurisdiction. The amendments also provide that such persons may consent to be served with legal process in the manner prescribed in the governing instrument or other writing. The foregoing matters may be set forth in the governing instrument under the current statute, but the amendments clarify the statutory basis for such provisions.

The amendments include numerous conforming changes to other titles of the Corporations and Association Article and to other provisions of the Maryland Code to add references to statutory trusts.

Foreign Statutory Trusts

Finally, the amendments add a new Subtitle 9 to provide for the qualification to do business in Maryland of statutory trusts formed under the laws of other jurisdictions and to provide for what constitutes doing business in the State. Currently, unlike other titles in the Corporations and Associations Article dealing with other forms of doing business, there is no mechanism for a foreign statutory trust doing business in Maryland to qualify in Maryland. The provisions of Subtitle 9 are very similar to the qualification provisions for other foreign entities in other titles of the Corporations and Associations Article.