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The Uniform Statutory Trust Entity Act: A Review

By: Thomas E. Rutledge and Ellisa O. Habbart

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By Thomas E. Rutledge* and Ellisa O. Habbart**

The Uniform Statutory Trust Entity Act, the most recent product of the National Conference of Commissioners on Uniform State Laws in the area of business entity legislation, is intended to render uniform the statutory (i.e., “business”) trust across the various states. Currently, business trust legislation is widely disparate across the various states, and many of the existing statutes are at best skeletal. This Act has the objective of rendering the business trust more effective as a form of organization by addressing many issues that are typically seen in other business entity laws, while at the same time seeking to minimize both unexpected and, in certain places, undesirable results otherwise dictated by applicable trust law. This Article both reviews the workings of this new uniform act and identifies issues and deficiencies therein.

As part of the continued efforts of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) to provide up-to-date uniform acts for business organizations, it approved the Uniform Statutory Trust Entity Act (“USTA” or “the Act”) at its 2009 Annual Meeting.¹

The Act is an important development for statutory trusts which, to date, have not been governed in the various states by uniform or even similar statutes, and in states such as Massachusetts, have been based solely on the common law. Given that we believe the statutory trust should be part of any choice-of-entity analysis, our objectives in this Article are twofold. Our first aim is to help readers garner an understanding of the Act by examining the language employed and placing both procedural and policy determinations embodied in USTA in the context of

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1. In recent years, NCCUSL has promulgated the Uniform Partnership Act (1997), 6 U.L.A. 1 (2001) (“RUPA”), succeeding the Uniform Partnership Act (1914), 6 U.L.A. 275 (2001) (“UPA”); the Uniform Limited Partnership Act (2001), 6A U.L.A. 325 (2008) (“ULPA”), succeeding the Revised Uniform Limited Partnership Act (amended 1985), 6B U.L.A. 1 (2008) (“RULPA”), which superseded the Uniform Limited Partnership Act (1916), 6B U.L.A. 405 (2008); the Revised Uniform Limited Liability Company Act (2006), 6B U.L.A. 407 (2008) (“RULLCA”), succeeding the Uniform Limited Liability Company Act (1996), 6B U.L.A. 545 (2008) (“ULLCA”); and, of more recent vintage and without a predecessor act, the Uniform Limited Cooperative Association Act, 6A U.L.A. 141 (2008) (“ULCAA”).

comparable provisions in other business organization acts.² Our second objective, and that which we hope will be most useful to state drafting committees that in future years will be considering the adoption of USTA, is to address certain policy decisions made in the drafting of USTA that have led to determinations that, in our assessment, deserve further consideration.³

THE DRAFTING PROCESS

In 2003, NCCUSL approved the appointment of the Drafting Committee to prepare a uniform business trust act for consideration by the Commissioners. The Drafting Committee met approximately five times for weekend-long drafting sessions before its first reading⁴ to the Commissioners at NCCUSL's 2006 Annual Meeting. An additional seven drafting meetings took place before the Act's second and final reading in July 2009.

A variety of sources were considered during the drafting process including state business trust acts, model and uniform acts, and statistical data on the use of statutory trusts in various states.⁵ The Drafting Committee concluded that the Delaware Statutory Trust Act,⁶ adopted in 1988, and similar state acts adopted after 1988 would guide the drafting process. During the review, the Drafting Committee determined that, consistent with the 2002 change of the name of Delaware's act from Business Trust Act to Statutory Trust Act, a similar change to the name of the Act was required. The Drafting Committee made the request and NCCUSL approved the name change in January 2005, conditioned upon the addition of the word "Entity" to its title.

The Drafting Committee would have been prepared for a second reading at NCCUSL's 2008 Annual Meeting but for its decision to address the concept of the series in the Act.⁷ Given the array of issues raised by the series concept, the Drafting Committee understood the challenges posed by its decision. In addition,

2. Expressly not addressed herein is the tax classification and treatment of the statutory trust. As to that topic, see JAMES S. EUSTICE, BITTKER & EUSTICE'S FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 2.03 (2009); Carter G. Bishop, *Trusts, Taxes and Business*, BUS. L. TODAY, Nov./Dec. 2003, at 23. For a further explanation of the difficulty in application of the existing classification scheme and recommendations for its modification, see Carter G. Bishop, *Forgotten Trust: A Check-the-Box Achilles Heel*, 43 SUFFOLK U. L. REV. 529 (2010).

3. Both of the authors were active in the drafting of USTA. Habbart served as the advisor from the American Bar Association ("ABA") to the Drafting Committee, while Rutledge served as an advisor from the ABA Section of Business Law. All views expressed herein are entirely those of the authors and do not necessarily reflect those of other participants in the drafting of USTA.

4. A reading is the line-by-line presentation of a proposed act to the Commissioners for their review and consideration. See Ellisa O. Habbart & Thomas E. Rutledge, *Sneak Previews: Will the Uniform Statutory Trust Act Be Next Summer's Blockbuster Hit?*, DEL. BANKER, Summer 2008, at 10, 11.

5. See DRAFTING COMM. OF THE UNIF. STATUTORY TRUST ACT, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIFORM STATUTORY TRUST ACT—PRELIMINARY REPORT 1 (July 2005), available at <http://www.law.upenn.edu/bll/archives/ulc/UBTA/2005AMTrustReport.pdf> [hereinafter 2005 USTA PRELIMINARY REPORT].

6. Delaware Statutory Trust Act, DEL. CODE ANN. tit. 12, §§ 3801–3863 (2007).

7. See *infra* notes 109–42 and accompanying text.

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