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Maryland Statutory Trusts: Enhanced Flexibility and Advantages

The Maryland Statutory Trust Act (the “Maryland Act”) was first enacted in 1999 as the Maryland Business Trust Act in Title 12 of the Corporations and Associations Article of the Annotated Code of Maryland and was substantially amended in 2010. In our experience, Maryland statutory trusts are well-suited to investment companies, particularly registered open-end companies (mutual funds and ETFs), and to companies taxed as real estate investment trusts and their subsidiaries, among other applications. Indeed, the Maryland Act specifically provides that it “shall be liberally construed to give maximum effect to the principle of freedom of contract and to the enforceability of the governing instruments.” This flexibility distinguishes statutory trusts from trusts formed under common law and other types of entities and, due to the ability to eliminate corporate formalities, has made statutory trusts the entity of choice for many of our investment company and private real estate investment trust clients.

In 2013, the Maryland Act was further amended to permit conversion of other domestic or foreign business entities into statutory trusts and the conversion of statutory trusts into other domestic or foreign business entities. Another business entity that converts into a statutory trust under the Maryland Act is deemed to be the same entity as the converting entity, which may, in many cases, reduce the burden to obtain advance consent under existing contracts, licenses, permits and registrations granted before conversion. All assets and liabilities of the converting entity remain with the statutory trust after conversion.

A statutory trust is formed by filing a certificate of trust with the State Department of Assessments and Taxation of Maryland (the “SDAT”) and is a separate legal entity. A statutory trust is governed by the Maryland Act and the declaration of trust and any other documents, including bylaws, which together constitute the governing instrument under the Maryland Act. The governing instrument is not filed with the SDAT. The certificate of trust that is filed with the SDAT may contain substantive provisions, but ordinarily this document is limited to the brief statutory requirements.

The Maryland Act contains a list of general powers, which are generally consistent with the powers provided for a Maryland corporation under the Maryland General Corporation Law (the “MGCL”), thus avoiding any requirement that a detailed description of trust powers be included in the governing instrument. These powers may be limited in the certificate of trust or the governing instrument.

The Maryland Act provides that the duties of a trustee are to act (i) in good faith, (ii) in a manner that the trustee reasonably believes to be in the best interests of the statutory trust and (iii) with the care that an ordinarily prudent person in a like position would use under similar

circumstances. These duties are identical to those of a director of a Maryland corporation under the MGCL. However, the Maryland Act allows the governing instrument to “include a provision expanding or limiting the duties of a trustee . . . provided that the governing instrument may not eliminate the duty to act in good faith.” In our experience, we have found that the flexibility regarding trustee duties makes statutory trusts an attractive form of entity for companies seeking to modify the duties of their board members for particular circumstances.

While originally patterned after the Delaware Statutory Trust Act (the “Delaware Act”), the Maryland Act includes provisions more advantageous than the Delaware Act, including the following:

1. The Maryland Act requires a resident agent in Maryland but does not require a trustee in Maryland. For trusts that are not investment companies, the Delaware Act requires at least one trustee who is a resident of Delaware or has its principal place of business in Delaware.
2. The Maryland Act includes an extensive but non-exhaustive list of general trust powers as noted above. The Delaware Act contains no such provision (although there is no statutory limitation on a trust having such powers).
3. As mentioned above, the MGCL standard of conduct for a director of a Maryland corporation is the default standard for the duties of trustees. In Delaware, the default duties of trustees are the duties established at law or in equity, including fiduciary duties. While the Maryland Act provides that all trustee duties, except for the duty to act in good faith, may be eliminated in the governing instrument, the Delaware Act does not permit elimination of the implied contractual covenant of good faith and fair dealing.
4. Under the Maryland Act, the governing instrument may eliminate the liability of the trustees, except for liability resulting from (a) actual receipt of an improper benefit or profit in money, property or services or (b) active and deliberate dishonesty established by a final judgment as being material to the cause of action. Since 1989, these have been the exceptions to the power of a Maryland corporation to exculpate its directors and officers from liability for money damages. In Delaware, the governing instrument may eliminate trustee liability, except for liability for “any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.” We believe that this is a broader exception (and therefore less protective of trustees) than under the Maryland Act.
5. The Maryland Act does not confer on a beneficial owner a right to bring a derivative action. The Delaware Act confers a right to bring a derivative action on a beneficial owner if the persons with authority to do so have refused to bring the action or are not likely to do so, which is a more expansive right to sue derivatively than the Maryland courts have permitted.

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As always, please do not hesitate to call any of us or any of our colleagues if you have any questions or comments about any of the foregoing or any other matter of Maryland law.

Jim Hanks
Michael Leber
Hirsh Ament
Dan Mendelsohn

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