

### **Introduction**

This article highlights some of the issues to be considered, both statutory and practical, in advising on the dissolution and winding up of a Delaware statutory trust. There is no Delaware case law that directly interprets the statutory requirements for the dissolution and winding up of a Delaware statutory trust. This article therefore, focuses on identifying and discussing the statutory standard to be applied in connection with a dissolution, and the practical considerations to keep in mind when advising a client on the appropriate method of dissolving a Delaware statutory trust. In addition, this article discusses and draws from the limited Delaware case law addressing the analogous dissolution provision of the Delaware statute governing limited partnerships.

### **Applicable Statutory Provisions**

Section 3808 of Title 12 of the Delaware Code, the Delaware Statutory Trust Act, sets forth the statutory framework for dissolving and winding up a Delaware statutory trust. In general, Section 3808 provides that the termination, dissolution and the winding up of the affairs of a Delaware statutory trust is to be governed by the terms of the trust agreement. However, the parties to the trust agreement at the time of its drafting may be focused principally upon the creation, operation and management of the trust, not its termination and dissolution. The parties to the trust agreement, and the subject transaction, typically will focus upon the duration of the trust and generally the terms upon which the trust will terminate. There may be instances where the parties did not think to focus their drafting on the procedure for dissolving and winding up

the affairs of the trust, including identifying the party who will be primarily responsible for undertaking the dissolution process. As such, in drafting the trust agreement the parties should anticipate which of the parties, whether it is the trustee, administrator or manager of the trust, will undertake to take the action required by the provisions of Section 3808.

Section 3808(c) provides that “in the event that a statutory trust does not have perpetual existence, a statutory trust is dissolved and its affairs shall be wound up at the time or upon the happening events specified in the governing instrument.” As such, in drafting a trust agreement the parties should be careful to use the terms dissolved or winding up as distinguished from the term termination. If, however, the trust agreement addresses events of termination, or otherwise provides for the circumstances upon which the trust will have no further existence, but does not discuss dissolution or winding up, then it is suggested that the parties who are responsible for the management of the trust should both execute a consent to the dissolution and winding up of the trust. In doing so, management should make sure that if there are beneficial owners, certificate holders or the like remaining, that the consent of such persons or entities is also obtained. Upon obtaining the appropriate consents to dissolve the trust, a plan of distribution should be prepared which reflects that the party adopting the plan (which should be the party that is responsible for managing the trust) has complied with the statutory requirements.

#### **Plan of Distribution**

Section 3808(e) requires a statutory trust to pay or make reasonable provision to pay all claims and obligations which are known to the trust, even if the identity of the claimant is unknown, whether they be contingent, conditional or unmatured. Assuming there are sufficient assets in the trust, the payment and provision for payment of such claims and obligations needs to be made in full and any remaining assets distributed to the beneficial owners of the trust.

Further, any person, including the trustee, who is according to the operative agreement, responsible for winding up the trust affairs and who has complied with Section 3808(e) “shall not be personally liable to the claimants of the dissolved statutory trust by reason of such persons actions in winding up the statutory trust.” Section 3808(e). As such, it is critical that Section 3808(e) be strictly followed to protect the entity or person responsible for winding up the affairs of a trust.

Several issues arise with respect to the meaning and interpretation of this language of Section 3808(e). One question is what standard of conduct will be applied to determine whether the person or entity responsible for winding up the affairs of the trust can claim the protection of this provision. At the very least, it would seem that since the language of 3808(e) refers to “reasonable provision”, if the responsible party acts reasonably (i.e., uses the care exercised by an ordinarily prudent person) that party would be able to claim the protection of 3808(e) even if ultimately sufficient provision for claims was not made. Note that this reasonably prudent person or negligence type standard, however, may be a more stringent standard than otherwise would be applied to the conduct of the trustee or other party in the operation and management of the trust pursuant to the express terms of the trust agreement.

In addition, borrowing from the corporate common law, one might argue that a “business judgment” type of review might be employed by a court, such as the Delaware Court of Chancery, in scrutinizing the responsible party’s conduct in winding up the affairs of a statutory trust. Indeed, the Delaware Court of Chancery has previously looked to Delaware corporate law principles in the context of applying and interpreting the dissolution provision of the Delaware Revised Uniform Limited Partnership Act (“DRULPA”), 6 Del.C. §17-804<sup>1</sup>. In Boesky v. CX

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<sup>1</sup> Note that the statutory language governing the winding up of the affairs of Delaware’s other alternative business entities, limited liability companies and limited partnerships, is very similar to the corporate statute. See Section 18-

Partners, L.P., C.A. Nos. 9739, 9744, 9748, 1988 Del Ch. LEXIS 60 (Del. Ch., April 28, 1988), the Chancery Court found that the liquidating partner had not complied with 17-804(1) of DRULPA by making distribution to the partners without providing for adequate security for the payment of contingent claims. The Court noted among other matters that “the terms of 17-804 are skeletal and starkly so when compared with the elaborate provisions” of the DGCL, and accordingly looked to the corporate statute for guidance. The Court, however, concluded that although adequate security for an unliquidated or contingent claim is a question of judgment, “even when made in good faith and advisedly is not entitled to the powerful effects of the business judgment rule.” Id. at \*50-51. The Court stated that it is the function of the Court supervising the liquidation to make an independent judgment when the security provided has been challenged. More recently, although not referencing the DGCL, the Chancery Court nullified a certificate of cancellation based in part on its finding that the limited partnership had not appropriately made an attempt to make reasonable provision for a request for an accounting from certain of its limited partners. In Re CC&F Fox Hill Associates Limited Partnership, C.A. No. 15430, 1997 Del. Ch. Lexis 89 (Del. Ch. June 12, 1997). The Court cited language in 17-804 of DRULPA, focusing on the requirement that reasonable provision be made for “all contingent, conditional or unmatured claims and obligations, known to the limited partnership,” Id. at \*15-16.

Additional issues that may arise relate to the specificity required in a plan of distribution, including where a determination is made that there are no claims or obligations, perhaps other than the costs of administration of the winding up such as filing fees, trustee fees and legal fees. It would not be unusual to find a situation where a trust is established for a particular investment

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804(b) of the Delaware Limited Liability Company Act and Section 17-804 of the Delaware Revised Uniform Limited Partnership Act.

purpose, and upon conclusion of the investment and payment to investors, there are no further activities to be engaged in by the trust and no identifiable claims. Still, a mere recitation of the language of 3808(e) may not be sufficient, and the greater amount of detail that can be included in the plan or attached as backup for the determination of claims is advisable. A trustee, particularly one which is not responsible for the management of the trust and is not conducting the due diligence for the plan of distribution, may want to request a provision in the plan of distribution which provides that the entity which formed the trust, as depositor or otherwise, undertakes to pay any claims which may arise even if it is determined that no such claims exist or are anticipated. While such an undertaking is not mandated by the statute, it certainly provides further protection for the trustee, administrator or other entity that is responsible for the winding up the affairs of the trust and is distinct from the entity that formed the trust or served as depositor.

### **Certificate of Cancellation**

After the appropriate or necessary consents for dissolving or winding up the affairs of a Delaware statutory trust are obtained, and a plan of distribution is approved by the party or parties as part of the consents and plan of distribution, the trustee is directed to file a certificate of cancellation with the Delaware Secretary of State canceling the trust. This is specifically contemplated and required by Section 3810(d) which provides that a certificate of trust shall be cancelled upon the completion of the winding up of the trust. Such certificate must state the name of the trust, the date of the filing of the certificate of trust and, if cancellation is not to be effective upon filing, the future date of cancellation. Note the important distinction between the timing of winding up and filing of the certificate of cancellation of a Delaware statutory trust and the action required with respect to a Delaware corporation. With a corporation, a certificate of

dissolution is filed prior to the adoption of a plan of distribution, whereas with a statutory trust the certificate of cancellation is filed after adopting the plan.

### **Summary of Advisable Steps**

1. Set forth in trust agreement what party will be primarily responsible for the dissolution process: trustee, administrator or manager of trust.
2. When drafting the trust agreement, give thoughtful consideration to the use of the following terms: “dissolved”, “winding up” and “termination”.
3. Strictly follow the statutory requirements in Section 3808(e) to protect the entity and the responsible party winding up the trust.
4. Use specificity when preparing the Plan of Distribution.
5. Note the timing of when to file the Certificate of Cancellation.

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