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Investment Companies Organized as Delaware Statutory Trusts: Practical Considerations for Drafting Governing Instruments

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Delaware is increasingly becoming the forum of choice—and the Delaware statutory trust (DST) increasingly the entity of choice—for the formation of investment companies registered under the Investment Company Act of 1940 (the 1940 Act). According to the Investment Company Institute (ICI), in the year 2000 approximately 15.2 percent of all open-end funds and 8.7 percent of all closed-end funds were formed in Delaware.[1] By the year 2007 ICI indicates that these percentages increased to approximately 30.2 percent and 29.3 percent, respectively, and that of these Delaware funds approximately 94 percent of the open-end funds and approximately 61 percent of the closed-end funds were DSTs. This increase in the use of DSTs for the formation of investment companies has raised interest amongst 1940 Act practitioners as to the treatment of these trusts and their trustees under the Delaware Statutory Trust Act (the DSTA). This article highlights the provisions of the DSTA likely to be of most interest to investment companies and their advisers (particularly those provisions designed specifically

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to address the needs of investment companies) as well as provides some practical considerations for the drafting of governing instruments, including with respect to those areas that can prove to be traps for the unwary.

Background

Adopted in 1988, the DSTA has quickly become the model for similar statutes in other jurisdictions as well as influential in the drafting of the work-in-progress Uniform Statutory Trust Entity Act. The DSTA provides a broad framework for the formation and operation of a DST with few mandatory rules and few default or gap-filler rules in the statute itself thus largely deferring to the drafter of the governing instrument to set forth those matters that will govern the internal affairs of a DST and much of the conduct of its business. In fact, this deference is made clear in the DSTA, which expressly states that its policy is to give maximum effect to the principle of freedom of contract.[2] Though the DSTA itself has few default or gap-filler rules, it expressly provides that Delaware's other trust laws are applicable to DSTs to the extent a matter is not addressed in the governing instrument or the DSTA, thus providing some gap-filler rules indirectly (though, as discussed in this article, these indirect gap-filler rules do not address some of the areas of interest to investment companies—shareholder meetings and shareholder voting rights are examples).[3] These other Delaware trust laws include a fairly extensive statutory regime governing fiduciary relations and trusts generally,[4] addressing such matters as the standard of care of fiduciaries, removal and resignation of trustees, general and specific powers of trustees, voting approval requirements, as well as many other matters. Many of these other trust laws are aimed primarily (and in some cases exclusively) at trusts established in connection with gifts or pursuant to wills, but nonetheless, absent appropriate drafting of the governing instrument, some of these laws could be held applicable to a DST and its trustees and some of them, as this article notes, could be viewed as undesirable from the point of view of an investment company trustee (standard of care being the most likely area).

The DSTA's freedom of contract policy coupled with the lack of default and mandatory rules is in stark contrast to the Delaware General Corporation Law (the DGCL)—Delaware's much more well known business entity statute. For example, unlike the DGCL, the DSTA has few default and mandatory rules with respect to matters such as shareholder meeting and voting rights, the setting of record dates, the adjournment and postponement of meetings or quorum determinations. In addition, unlike the DGCL, the DSTA expressly provides that the duties (including fiduciary duties) of trustees of a DSTA can be restricted or eliminated in the governing instrument from those that otherwise exist under Delaware law. Drafters of governing instruments for investment companies then have an ability to tailor terms to the needs and wishes of their clients to an extent not available in many other jurisdictions or indeed not available to organizers of Delaware corporations. However, drafters also have somewhat of a burden to think carefully about the choices available to them, including the overriding of any potential undesirable default trust rules, and not simply use a form of agreement from another jurisdiction or, as discussed herein, assume the rules applicable to Delaware corporations apply to DSTs.

Voting Rights

The ability of stockholders of a Delaware corporation to vote for directors, or put colloquially, the ability to "throw the bums out," is of central importance under Delaware corporate law. As one court recently put it "[a] stockholder's vote is one of the most fundamental rights of owning stock. Although such a vote may be seen as a 'vestige or ritual of little practical importance', it is clear that it is the 'ideological underpinning upon which the legitimacy of directorial power rests'."[5] The same cannot necessarily be said of DSTs. For unlike the DGCL, the DSTA does not provide shareholders[6] the fundamental right to vote, by meeting or otherwise, on the election of trustees or on any other matter[7]—shareholders may certainly be granted voting rights but they are not mandatory as a matter of state law.[8] Thus, for DSTs the matters shareholders may vote on are largely determined by the drafters of governing instruments. The result is that for investment companies organized as DSTs, shareholder voting rights are often limited to those voting rights required by the 1940 Act (the election of trustees for example) and certain extraordinary transactions.[9] With respect to extraordinary transactions, drafters of governing instruments should be aware that the DSTA provides default rules for the approval by shareholders and trustees of mergers, consolidations, conversions and transfers of domestication:[10] in each case the default requirement is approval by 100 percent of the trustees and shareholders.

This statutory default can be freely reduced or eliminated by the governing instrument but obviously can be a draconian trap for the unwary. Not surprisingly then most DST governing instruments have provisions significantly reducing or eliminating the vote requirements for these types of extraordinary transactions given the virtual impossibility of obtaining 100 percent shareholder approval.

Meetings and Shareholder Rights

In the area of shareholder and trustee meetings, drafters of investment company governing instruments should be aware of the matters for which the DSTA does and does not provide default rules and should also have some understanding of what rules govern if neither the DSTA nor the governing instrument addresses a shareholder meeting or other matter. Some of the more important default rules provide that:

1. Meetings of shareholders and trustees may be held by conference telephone or other communications equipment and that participation in that manner constitutes presence in person at the meeting;
2. Actions by trustees and shareholders may be taken by written consent in lieu of a meeting (signed by the minimum number of votes needed to authorize the action);[11] and
3. Votes of trustees and shareholders may be by proxy[12] (which may be granted in writing, electronic transmission or otherwise).[13]

Beyond these modest default rules the DSTA generally leaves it up to the governing instrument to set forth the provisions with respect to the notice of time, place or purpose of any meeting, waiver of such notice, establishment of record dates, quorum requirements and adjournments and postponements of meetings.[14] Of these matters questions as to the rules governing adjournments and postponements of shareholder meetings are some of the most frequently posed by clients, and often inadequately addressed by governing instruments (perhaps on the mistaken assumption that the DSTA contains default provisions similar to the DGCL).

If the DSTA provides few default rules in the area of shareholder meetings, an obvious question is whether in this area a court will look to Delaware corporate law to decide issues before it. Somewhat surprisingly, there is no definitive answer. This is primarily because of two factors:

1. The previously noted default to other trust law provision in the DSTA; and
2. No Delaware court has interpreted this default provision or otherwise determined whether corporate law principles are ever relevant to a DST.[15]

As a result, it should not be considered a foregone conclusion that corporate law rules are applicable to DSTs (particularly as discussed elsewhere in this article with respect to fiduciary duty matters). Nonetheless, in the areas of shareholder meetings and voting rights many Delaware practitioners will advise that Delaware corporate law principles, though perhaps not directly applicable, should provide some guidance as to what is acceptable (or not contrary to) Delaware public policy. One reason for this approach is that shareholder meeting matters are not the stuff of traditional trust law, that is, there may not be any trust law rules to apply, and there is precedent for Delaware courts looking to corporate law when there was no controlling authority for other Delaware entities, including limited liability companies and limited partnerships.[16] But no matter how reasonable this approach, drafters of governing instruments can, and should, opt for the relative certainty of governing instrument provisions by trying to address as many of the shareholder meeting matters outlined above as possible and also perhaps to give consideration to expressly providing in the governing instrument that Delaware corporate law is the default body of law to fill any gaps with respect to these types of matters.

Special Considerations for Closed-End Funds

Careful drafting in the shareholder meeting area is perhaps even more important for closed-end funds because the possibility of proxy contests and contested elections is real, and as a result there may be a desire to build in anti-takeover provisions into the governing instrument of a fund.[17] One area that can raise interpretative difficulty because of, among other things, the interplay of state and federal law is the area of shareholder proposals. The DSTA is silent on the matter of shareholder proposals and, given its deference to the terms of the governing instrument coupled with the fact that there are no fundamental voting rights, there should be nothing in the DSTA preventing a governing instrument from restricting or prohibiting shareholder proposals, including those labeled as recommendations. Of course, for investment companies state law is only a part of

the landscape, much of which is filled by federal law. But a fund's 1940 Act counsel should consider if such a provision would assist, or even carry the day, in arguments that a shareholder proposal could be omitted from being considered at a meeting under Rule 14(a)(8)(i)(1) of the Securities and Exchange Act of 1934, which permits omission on the grounds that a proposal is not a proper subject for action by shareholders under the laws of the state of the fund's organization.

Drafters of governing instruments of closed-end funds also should give consideration to provisions relating to a shareholder's right to view the books and records of a fund. To a board of trustees faced by a proxy contest, what records shareholders may view and how quickly those items must be made available can be of paramount importance in fashioning a defense strategy. Similar to the DGCL, the DSTA has a provision relating to the access of books and records by a shareholder but unlike the DGCL the DSTA does not have unalterable rules with respect to such access - in particular as to how quickly such records need to be provided. For example, Section 220(c) of the DGCL provides that a stockholder may apply to the Delaware Court of Chancery for an order to compel if a corporation refuses to provide requested records (or fails to respond) within five business days of a demand. The DSTA is silent as to the applicable time period, instead providing that a shareholder's right is subject to reasonable standards as may be established by the trustees or as is provided in the governing instrument. Thus for defensive purposes a fund's governing instrument could provide for a time period longer than that permitted by the DGCL for providing access to books and records (though one should keep in mind that there are likely practical limits on the amount of time a Delaware court would be willing to uphold).[18]

Fiduciary Duties and Elimination of Trustee Liability

Fiduciary Duties under State Law

A full discussion of the fiduciary duties of trustees of a DST is beyond the scope of this article but there are a number of points that drafters of DST governing instruments should be aware. Similar to the DGCL, the DSTA does not define the fiduciary duties of trustees leaving the matter primarily to common law to the extent not addressed in the governing instrument. But unlike under the DGCL, there is currently no body of case law establishing or interpreting the fiduciary duties of a trustee of a DST (or any other manager thereof). The same question discussed previously in connection with shareholder meetings arises then in this context: would a Delaware court look to corporate law in establishing and interpreting the fiduciary duties of a trustee of a DST? Or put another way, do trustees of a DST have the same fiduciary duties as directors of a Delaware corporation and have the benefit, for example, of the business judgment rule? The authors of at least one 1940 Act treatise on the legal duties of fund directors seem to believe the answer to be yes and this is probably a common assumption. But as previously discussed, the answer is not clear-cut, and predicting the answer in this area is perhaps more complicated than in the shareholder meeting area because, unlike there, Delaware trust law has an existing body of case and statutory law with respect to the fiduciary duties of common law trustees. In fact one could argue that the nature of a trustee's fiduciary duties is perhaps the central principle of traditional trust law since, at its core, a common law trust is a fiduciary relationship between trustee and beneficiary.

Given the presence of a body of case law coupled with the default to trust law provision of the DSTA previously noted, a court (absent provisions addressing the matter in the governing instrument) could decide to confine itself to considering Delaware's non-DSTA trust law rather than Delaware corporate law with respect to fiduciary duty matters. At first blush, this point appears to be a distinction without a difference given that Delaware courts have often stated that the fiduciary duties of directors of corporations have their source in traditional trust law and that directors' acts are "subject to the familiar rules that govern the relations of trustee to the [trust's beneficiary]."[19] In addition, interpretative questions arising in the context of investment companies will not likely have easy analogues in trust law—a body of law not traditionally associated with business enterprises (thus, it could be argued, leading a court inevitably to the corporate law for guidance). However, in at least one area—interested transactions—Delaware's Supreme Court has stated that the fiduciary duties of corporate directors and trustees of common law trusts are different, with trust law applying stricter standards.[20] In addition, a court seemingly could conclude (if the governing instrument was silent on the matter) that the corporate law concept of the business judgment rule—a concept said to be predicated on gross negligence[21]—is not always compatible with Delaware's default fiduciary standard,[22]

and thus find inapplicable perhaps one of the most important shields to a director's liability existing under Delaware law.

However, the uncertainty described above can be addressed through appropriate drafting of the governing instrument. As noted previously, the DSTA (unlike the DGCL) provides that the fiduciary duties of trustees (and certain other persons) that otherwise exist at law or equity may be restricted or eliminated, provided that the governing instrument may not eliminate the implied contractual covenant of good faith and fair dealing.[23] A governing instrument for an investment company then could eliminate all of the traditional fiduciary duties of Delaware trustees and substitute other duties in their place or none at all. The governing instrument also could provide that the fiduciary duties of Delaware corporate directors were applicable, some combination of these two approaches or even impose greater duties than either trustees or corporate directors currently have under Delaware law. As in other areas, the DSTA provides drafters and their clients the flexibility to fashion the duties that meet their particular needs.[24]

Elimination of Trustee Liabilities

From a trustee's perspective, perhaps of more interest than the question of what fiduciary duties he or she may have is: Under what circumstances will the trustee be personally liable for the breach of any such duties. Similar to the area of fiduciary duties, the DSTA permits a governing instrument to limit or eliminate any liabilities for breach of contract and breach of duties (including fiduciary duties) of a trustee, provided that the governing instrument may not limit or eliminate liability for a bad faith violation of the implied contractual covenant of good faith and fair dealing.[25] Thus the DSTA draws a distinction between the concepts of fiduciary duties and liability for breaches thereof and permits the two concepts to be independently addressed.[26] So, putting aside for the moment any limitations imposed by the 1940 Act as discussed below, a drafter could elect to:

1. Leave traditional fiduciary duties in place but limit or eliminate trustee liability associated therewith;
2. Do the opposite by eliminating fiduciary duties to the fullest extent permissible while leaving traditional liability associated with any remaining duties in place; or
3. Eliminate both fiduciary duties and liabilities to the fullest extent permitted by Delaware law.

In addition, drafters of governing instruments can utilize Section 3817 of the DSTA which provides that a DST "shall have the power to indemnify and hold harmless any trustee or beneficial owner or other person from and against any and all claims and demands whatsoever."[27]

1940 Act Limitations

Though the DSTA allows for the virtual elimination of trustee fiduciary duties and personal liability, for investment companies organized as DSTs, federal and state securities laws and market practice establish a floor for trustee liability. For example, the 1940 Act limits the types of provisions that can be in a governing instrument of an investment company with respect to the elimination of trustee liabilities and, perhaps, duties.[28] Thus to the extent a drafter of a governing instrument desires to eliminate or restrict state law fiduciary duties and trustee personal liability it must be done with an eye to the interplay of federal and state law and the permissibility of any proposed provisions. For example, Section 17(h) of the 1940 Act provides that a governing instrument may not contain "any provision which protects or purports to protect any director or officer of such company against any liability to the company or to its security holders to which he would otherwise be subject by reason of willful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his office." Some funds have attempted to address Section 17(h) of the 1940 Act by using the DSTA's flexibility to limit or eliminate state law trustee liabilities while including a savings clause to the effect that nothing in the governing instrument is to be interpreted as relieving trustees of liability to the extent not permitted by the 1940 Act—essentially establishing the provisions of the 1940 Act as the floor with respect to liability matters. Whether this approach is viable from the perspective of the 1940 Act is a federal law question that the author as a state law practitioner is not in a position to evaluate.

Investment Company Specific Provisions of the DSTA

There are a number of provisions of the DSTA that are either applicable only to investment companies or were included in the DSTA primarily with investment companies in mind. These include provisions relating to series trusts, the definition of what constitutes an independent trustee, the

allocation of fees and expenses among classes of shareholders and an exemption from having a Delaware trustee. In addition, the Delaware corporate income tax code has an exemption applicable to investment companies.

Series Trusts

The DSTA includes a number of provisions with respect to series trusts that, though not limited to being used by investment companies, were included in the DSTA largely with the business of investment companies in mind. The DSTA provides that a governing instrument may provide for the establishment of series of beneficial interests having separate rights with respect to specified property or obligations of the DST or profits and losses associated therewith and also permits a governing instrument to grant any such series a separate business purpose or investment objective.[29] Each series of a DST is commonly referred to as a separate "fund" of an investment company. These provisions provide a statutory basis for a common organizational form for investment companies often done only on the strength of contractual provisions in other jurisdictions. They also provide a statutory stamp of approval to the "ring-fencing" of liabilities, such that assets of one fund are off limits to a creditor of a different series.[30]

In addition to observing the necessary formalities in the certificate of trust filed with the Delaware secretary of state and within the governing instrument, the drafter of a series trust governing instrument should give some thought to two main areas:

1. Whether to provide for the possibility of the appointment of series trustees; and
2. Series voting matters.

With respect to the appointment of series trustees, the DSTA permits the appointment of trustees with rights and responsibilities with respect to one or a limited number of the series of the trust such that a single trust could have multiple boards of trustees. Some funds have utilized these provisions to satisfy independent trustee requirements of the 1940 Act by appointing trustees for certain series only if those funds were to use sub-advisors in which certain existing trustees had ownership interests. With respect to voting matters the drafter needs to make sure that the voting provisions of the governing instrument contemplate voting solely by series when appropriate and whether to give the trustees the ability to provide for different voting rights for different series when voting on trust-wide matters, that is, one share one vote, or by economic interest. Either basis is permitted under the DSTA but would need to be set forth in the governing instrument.

Independent Trustee

Section 3801(h) of the DSTA defines an independent trustee as any trustee that is not an interested person within the meaning of the 1940 Act, and makes clear that serving as an independent trustee for one or more investment companies managed by a single investment adviser does not affect the status of such trustee as an independent trustee. This section was included to ensure that Delaware law was not interpreted as Maryland law was in the case of *Strugo v. Scudder, Stevens & Clark*,[31] where the court held that directors serving on the boards of multiple investment companies managed by a single investment adviser were not independent of the adviser for purposes of Maryland law.[32]

No Delaware Trustee Required

Section 3807(b) exempts DSTs registered under the 1940 Act from the otherwise mandatory requirement that all DSTs have at least one trustee resident in the state of Delaware, if an individual, or with its principal place of business in Delaware, if an entity. In lieu of this requirement, DSTs that are registered under the 1940 Act must maintain a registered agent and a registered office (which need not be a place of business).

Allocation of Fees/Expenses Among Classes

Section 3805(h) of the DSTA is applicable only to DSTs subject to the 1940 Act, and is designed to make clear that any class, group or series of beneficial interests of a DST are not deemed "senior securities" within the meaning of Section 18 of the 1940 Act (unless the governing instrument provides otherwise). Section 18 of the 1940 Act governs the capital structure of investment companies and places restrictions on investment companies' ability to issue such securities.

Not Subject to Delaware Corporate Income Tax

In general, a DST's federal tax classification also will determine its classification for Delaware income tax purposes pursuant to Section 3809 of the DSTA. A DST which is a registered investment

company under the 1940 Act will be exempt from Delaware corporate income tax pursuant to Section 1902(b)(8) of Title 30 of the Delaware Code.

Conclusion

If current trends continue, the number of registered investment companies organized as DSTs will continue to grow and with that the numbers of drafters of governing instruments of DSTs will continue to grow. As this article has discussed, the DSTA has many provisions that either are tailored to the needs of investment companies or can be tailored to their needs. A drafter that is sensitive to the possibilities and potential pitfalls the DSTA provides can produce a governing instrument that truly serves his or her client well.

NOTES

1. The ICI's numbers do not distinguish between a legal entity and a series of a legal entity so these numbers are not reflective of separate legal entities but are nonetheless instructive.

2. *See* Section 3825(b) of the DSTA.

3. *See* Section 3809 of the DSTA.

4. *See* 12 Del. C. Section 3301 *et seq*. and 12 Del. C. Section 3501 *et seq*.

5. Perlegos v. Atmel Corporation, (Del. Ch. 2007) 2007 Del. Ch. LEXIS 25, *quoting in part* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988).

6. Note that equity owners in DSTs are technically considered "beneficial owners" and their ownership rights are not directly analogous to those of a stockholder in a Delaware corporation.

7. The DSTA provides some default provisions that require shareholder voting rights for certain matters but those default rights are subject to being overridden in the governing instrument and thus cannot be considered fundamental in the sense of being inalienable.

8. Part of the explanation for the DSTA's default rule of no shareholder voting rights on most matters is that DSTs evolved from traditional common law trusts where, particularly in gift scenarios, trustees generally control all aspects of trust property to the exclusion of beneficiaries. In addition, the DSTA anticipated that DSTs often would be used as single purpose vehicles in structured finance transactions where the concept of annual meetings for the election of the managers of the enterprise has little or no relevance.

9. Some governing instruments grant shareholders voting rights on many other matters, including, somewhat confusingly, matters "authorized" by law. With respect to this latter point, since there are few matters that cannot be argued to be authorized (in the sense of permitted) under Delaware law, the intent of the provision becomes difficult to interpret and can lend itself to argument in proxy or other contests.

10. Note that there are no express provisions in the DSTA requiring a shareholder vote for the sale of all or substantially all of the assets of a DST, as is the case under Section 271(a) of the DGCL.

11. Compare to the requirement in Section 141(f) of the DGCL that directors may only act by written consent if the action is approved unanimously. Also note that 12 Del. C. Section 3323(a) (a non-DSTA statutory provision) provides that absent a governing instrument provision to the contrary, any power granted to three or more fiduciaries may be exercised by a majority of such fiduciaries.

12. Again compare to Delaware corporate law where directors cannot take action by proxy.

13. Internet voting is increasingly becoming an area of interest for investment companies. Generally speaking the DSTA should permit Internet voting even without specific authorization in the governing instrument but clarity as to the permissibility is of course preferable.

14. Most of these matters have mandatory and/or default rules in the DGCL.

15. One Delaware court applied the corporate concept of waste in the common law business trust context and presumably this concept would be applicable to DSTs by virtue of Section 3809 of the DSTA absent a governing instrument provision to the contrary. *See* Saminsky v. Abbott, 185 A.2d 765 (Del. Ch. 1961).

16. *See, e.g.*, U.S. West, Inc. v. Time Warner Inc., (Del. Ch. 1996) 1996 Del. Ch. LEXIS 55 (applying "corporate opportunity" doctrine in the limited partnership context); Poore v. Fox Hollow Enters., C.A. No. 93A-09-005 (Del. Sup. Mar. 29, 1994) (holding that the interest of a member in a Delaware limited liability company is analogous to stockholders of a corporation); Litman v. Prudential-Bache Props., Inc., 611 A.2d 12 (Del. Ch. 1992) (drawing analogies to corporate law in the limited partnership context with respect to the determination of whether a fiduciary duty lawsuit is derivative or direct in nature); Boesky v. CX Partners, L.P., (Del. Ch. 1988) 1988 Del. Ch. LEXIS 60 (applying Sections 280 and 282 of the DGCL by analogy in interpreting Section 17-804 of the Delaware Limited Partnership Act (the LP Act)). It should be noted, though, that the Delaware Limited Liability Company Act (the LLC Act) and the LP Act have different default law provisions than the DSTA, *i.e.,* neither expressly looks to trust law to fill gaps but instead each provide that "the rules of law and equity, including the law merchant, shall govern." *See* Section 18-1104 of the LLC Act and Section 17-1105 of the LP Act.

17. The DSTA's provisions will permit the fashioning of a wide variety of anti-takeover provisions, including but certainly not limited to staggered boards, poison pills, board vacancies filled only by trustees, supermajority vote requirements, limitations on shareholder proposals and greenmail prohibitions.

18. The DSTA also provides some ability for the governing instrument to impose standards and restrictions on a shareholder's ability to bring a derivative action beyond those provided in the statute.

19. Loft, Inc. v. Guth, 2 A.2d 225, 238 (1938).

20. Corporate directors have the benefit of Section 144 of the DGCL (permitting an interested transaction to be approved by a majority of disinterested directors). *See* Oberly v. Kirby, 592 A.2d 445 (1991) and Stegemeier v. Magness, 728 A.2d 557 (1999).

21. Smith v. Van Gorkum, 488 A.2d 858, 873 (1985) "While the Delaware cases use a variety of terms to describe the applicable standard of care, our analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence."

22. This standard requires a fiduciary to "act with care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account." 12 Del. C. Section 3302(a). This is essentially a negligence standard. *See* Lockwood v. OFB Corporation, 305 A.2d 636 (1973), where the court discussed that a trustee could be liable for its negligence under this statutory provision.

23. The implied contractual covenant of good faith and fair dealing is a principle of the common law that, as of yet, has not been precisely or uniformly defined by Delaware courts but has nonetheless been held to be part of every contract. The DSTA leaves this common law principle undisturbed.

24. For example, because closed-end fund's shares often trade at a discount to net asset value, a drafter of a governing instrument for a closed-end fund could consider whether to make clear that the board had no fiduciary duty to take action to narrow the discount.

25. *See* Section 3806(e) of the DSTA.

26. Though more permissive, the DSTA's treatment is similar to that of Section 102(b)(7) of the DGCL, which permits the elimination of director liability in certain instances.

27. In Nakahara v. The NS 1991 American Trust, 739 A.2d 770 (1998), the court held that the DSTA implicitly allows DSTs to authorize advancement of litigation expenses.

28. Federal law also imposes fiduciary duties, a discussion of which is beyond the scope of this article.

29. The DSTA also makes clear that separate series of trustees and beneficial owners also can be established.

30. Note that currently the DSTA, unlike the LLC Act and the LP Act, does not provide that series of a DST have certain indicia of separate legal entities, *i.e.*, they cannot hold property, contract or sue or be sued in their own name.

31. Strugo v. Scudder, Stevens & Clark, 964 F. Supp. 783 (S.D.N.Y. 1997).

32. Maryland has since amended its corporate code to in effect reverse this holding.

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