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A Road Less Common: Unit Investment Trusts Organized as Delaware Statutory Trusts

By J. Weston Peterson and Andrea Bomalaski

Over the past nearly 25 years, Delaware has surged to become the forum of choice—and the Delaware statutory trust (DST) the entity of choice—for the formation of management companies registered or regulated under the Investment Company Act of 1940 (the 1940 Act).[1] 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 closed funds were formed in Delaware. By the year 2024, the ICI indicates that approximately 43 percent of all mutual funds,[2] 49 percent of all closed end funds, and 59 percent of all business development companies were formed in Delaware. This dramatic shift to Delaware, however, has not been the case for the formation of Unit Investment Trusts (UITs) under the 1940 Act, which instead often are formed as New York common law trusts or common law trusts of other jurisdictions.[3] The authors believe this may change, though, based on both an increase in the formation of UITs and DSTs in our practice as well as an increase of queries from practitioners about the use of DSTs for UITs. This article highlights the provisions of the Delaware Statutory Trust Act[4] (DSTA) likely to be of most interest to UITs and their trustees and advisers and provides some practical considerations for the drafting of governing instruments.

Unit Investment Trusts—Background

A UIT is a registered investment company (RIC) under the 1940 Act.[5] UITs are generally less-commonly utilized forms of RICs compared to their mutual fund, exchange-traded fund, and traditional closed-end fund counterparts.[6] UITs are regulated by the 1940 Act as well as the rules promulgated by the US Securities and Exchange Commission (SEC). UITs are not actively managed by an investment manager. They have a fixed term, fixed units, and relatively fixed portfolios. Prior to the 1940 Act, these were aptly named "fixed trusts."[7]

One of the earliest fixed trusts arose in 1924.[8] A business owner marketed and sold 10 banker's receipts to the public.[9] These receipts represented participation interests in an account maintained at a local bank.[10] This account held one share of his company.[11] There was no active investment management of such account, and the participation interests issued were fixed.[12] From there, the fixed trust was born.

In the early 1930s, fixed trusts saw a surge in popularity, attributable to public distrust in investment management.[13] This distrust was caused by investment managers' misbehavior leading up to the

financial crisis of the Great Depression. In 1961, a new era of UITs began. At that time, UITs as an investment vehicle for municipal bonds were the only tax-exempt avenue to acquire a diverse portfolio of such municipal bonds.[14] This lasted until 1976, when mutual funds were afforded the ability to pass through income from municipal bonds.[15] From there, the fixed trust has evolved into what it is today. As of June 30, 2025, there were a total of 3,672 UITs with a total value of $94.37 billion.[16] Since 2022, total assets of UITs have increased.[17]

By definition, a UIT must be "organized under a trust indenture, contract of custodianship or agency, or similar instrument."[18] This definition, particularly the "similar instrument" catchall, allows multiple avenues of organization. Despite this apparent flexibility (and despite the historical evolution of UITs), utilizing a common law trust for UITs has remained the popular choice. Meanwhile, trusts established via statute (as opposed to their common law counterparts) are afforded significantly more flexibility. While these statutes may vary amongst jurisdictions, Delaware tends to be amongst those states that lead in popularity for establishing statutory trusts.

The Delaware Statutory Trust Act

The DSTA has been described by some practitioners as a revolutionary development in the law governing trusts. For centuries, a trust has been known as a creature of the common law, recognized by courts of equity to allow for the ownership of property to be split in two interests: a trustee would hold the bare legal title to the property but would do so on behalf of a beneficiary who was said to hold "equitable" title. A trust was not a legal entity, but instead a fiduciary relationship. However, as the trust concept came to be used more frequently in sophisticated business transactions, the need for certainty that only a statutory regime could supply became more desirable. Thus, the statutory trust was born.

Adopted in 1988, the DSTA has quickly become the model for similar statutes in other jurisdictions as well as for the Uniform Statutory Trust Entity Act (2009) drafted by the National Conference of Commissioners on Uniform Laws.[19] The DSTA provides a broad framework for the formation and operation of a DST with few mandatory rules, and of important note to drafters of governing instruments, 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.[20] 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.[21] These other Delaware trust laws include a fairly extensive statutory regime governing fiduciary relations and trusts generally[22] addressing such matters as the standard of care of fiduciaries, removal and resignations of trustees, general and specific powers of trustees, voting approval requirements, as well as many other matters.

The DSTA's freedom of contract policy coupled with the lack of default and mandatory rules allows for much more flexibility than is possible with respect to the operation and governance of typical common law trusts. This flexibility creates opportunities for drafters of UIT governing instruments to organize UITs in novel ways.[23]

Series Trusts

UITs, whether established under common law or under statute, often are established in "series." Each such series typically represents a separate and distinct pool of assets. Generally, the SEC and the 1940 Act require a registration statement to be filed for each UIT.[24] UITs are not required to re-register as an investment company under the 1940 Act each time a new series is created. Instead, only an S-6 form related to the registration of the units for sale

will need to be filed.[25] This alleviates burden and is attractive to sponsors and other industry actors.

The DSTA permits the establishment of series of trustees, beneficial owners, assets, or beneficial interests having separate rights with respect to specified property or obligations of the DST or profits and losses associated therewith[26] and also permits a governing instrument to grant any such series a separate business purpose or investment objective.[27] Thus, provided certain formalities are followed, it is possible to "ring fence" the assets and liabilities of a particular series from those of other series and from the DST generally.[28] It is also possible, through appropriate drafting of a governing instrument of a DST, to allow the assets of a series (or the DST generally) to be used to satisfy the debts, liabilities, obligations and expenses of any or all other series.[29] Though the assets and liabilities associated with the series are often referred to as "sub-trusts" or "funds," it is important to note that they are not separate legal entities apart from the trust; however, the trust may contract, hold title to assets, grant liens and security interests, and sue and be sued in the name of a series.[30] Perhaps each series is best thought of as a pool of assets and liabilities of the DST that is segregated from those of other series, and the beneficial interests that are issued with respect to such segregated pools can be analogized to tracking stocks issued by corporations with respect to certain divisions or product lines.

Section 3804 of the DSTA provides the formalities that must be observed in order to insulate a series from the liabilities, debts, obligations, and expenses of other series (and the DST generally), and vice versa. First, separate and distinct records must be maintained for each series.[31] Second, the assets associated with each series must be held in such separate and distinct records (directly or indirectly, including through a nominee or otherwise) and be accounted for in such separate and distinct records separately from the other assets of the DST or any other series.[32] Third, the governing instrument must provide for the inter-series limitation on liability, and the certificate of trust must reference such a limitation of liability. In addition, though not technically required by the DSTA, it is prudent to include notice of the limitation of liability in contracts entered into by a DST and to otherwise disclose to investors and third parties the inter-series limitation on liability.

Fiduciary Duties and Personal Liability

As discussed above, at common law, the fiduciary relationship between the trustee and trust defined the trust (since it was not a separate legal entity). The imposition of fiduciary duties by the courts on common law trustees had the effect of constraining and limiting what actions the trustee could take with trust property. Under the DSTA, the fiduciary relationship is no longer fundamental. Under the DSTA, the governing instruments of DSTs are able to contractually expand, limit, or even eliminate fiduciary duties; provided that the governing instrument may not eliminate the implied contractual covenant of good faith and fair dealing.[33] Under the DSTA, this is true with respect to fiduciary duties of the trustee as well as the fiduciary duties of any "other person," including, for example, the sponsor.[34]

The DSTA has a default provision applicable to RICs and business development companies that provides that trustees have the same fiduciary duties as directors of private corporations for profit organized under the general corporation law of Delaware.[35] The statutory ability to eliminate trustee fiduciary duties can be useful for UITs since they are not managed.[36] In addition, at least one court has recognized the distinction between the statutory trusts and common law trusts in the context of a UIT.[37] In a 2020 order involving a UIT established as a DST, a district court in South Carolina stated, "[a]t common law, it is clear that the relationship of trust between [beneficiary] and [trustee] created fiduciary duties. However, the Trust Agreement is also governed by the statutory law of Delaware, which provides that a trust agreement may restrict, eliminate, or vary a

fiduciary's powers, duties, standard of care, and liability."[38] The court in the same decision also states, "[t]he [DSTA] expressly limits claims for breach of fiduciary duty when a trustee acts in good faith reliance on a governing instrument. In this regard, the standard of care may be expanded, restricted or eliminated by express provisions in a governing instrument."[39]

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, sponsor, or other person, 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.[40] 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.[41] So, putting aside any limitations imposed by the 1940 Act, a drafter could elect to leave traditional fiduciary duties in place but limit or eliminate liability associated therewith, do the opposite by eliminating fiduciary duties to the fullest extent permissible while leaving traditional liability associated with any remaining duties in place, or eliminate both fiduciary duties and liabilities to the fullest extent permitted by Delaware law. In addition, drafters of governing instruments can utilize Section 3817(a) 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."[42]

DSTs are separate legal entities and as a result can insulate a trustee, a sponsor, or other person from personal liability to third parties in a way not possible for a common law trust where the trustee would be considered the legal owner of trust property. The DSTA specifically provides that trustees and other persons acting for a DST do not have personal liability for any act, omission or obligation of the DST.[43]

Unitholder Liability

It is a settled principle of personal trust law that a beneficial owner of a trust is not personally subject to liabilities to third persons incurred in the administration of the trust.[44] However, courts have sought to impose personal liability on beneficial owners of business trusts in certain circumstances. For example, under Massachusetts law, shareholders of such a business trust may, under certain circumstances, be held personally liable as partners for the obligations of the trust as if they were partners.[45] Under the DSTA, however, unless the governing instrument provides otherwise, beneficial owners enjoy the same limitation of personal liability enjoyed by stockholders of a Delaware corporation.[46] The DSTA also affirmatively states that, beneficial owners do not risk losing that limited liability by virtue of controlling or otherwise participating in the management of a DST. The DSTA also makes clear that exercising control or otherwise participating in the management of the DST does not make a beneficial owner a fiduciary vis-à-vis the other beneficial owners, that is, become a trustee.[47]

Derivative Actions

Beneficial owners of a DST, just as investors in other Delaware legal entities, are afforded the right under the DSTA to bring derivative actions in the name of the DST against the trustees or other persons who have management authority over the DST to redress breaches of fiduciary duties and other wrongs of a type generally subject to this form of litigation (claims premised on breach of contract or breach of trust would not generally be considered derivative actions).[48] The DSTA generally is consistent with the statutes of other Delaware legal entities in the types of restrictions placed on the bringing of a derivative action, including generally requiring a demand on the trustees or other persons with authority to bring lawsuits in the name of the trust before initiating a lawsuit. However, uniquely among the statutes of other Delaware legal entities, the DSTA permits restrictions that go beyond those that are

permitted in such other statutes. For example, the section specifically allows for restrictions that require beneficial owners owning a specified beneficial interest in the DST to join in the bringing of the derivative action.[49] This type of provision is analogous to no-action clauses in bond indentures that require a minimum number of bondholders to join in directing the trustee to exercise a remedy available to it. As a result, it is possible to limit an indirect method (a lawsuit) for beneficial owners to have a say in the management of a DST.

Delaware Trustee; Tax Classification; Franchise Tax

There is no Delaware trustee requirement for UITs, even if such UIT is established as a DST.[50] Section 3807(b) of the DSTA 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).[51]

In general, a DST's federal tax classification will determine its classification for Delaware income tax purposes pursuant to Section 3809 of the DSTA. A DST that is an RIC 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.

Unlike Delaware's other legal entities, DSTs are not required to pay any annual franchise tax or renewal fees to the Delaware Secretary of State. As such, choosing a DST instead of a common law trust for the formation of a UIT will not result in these additional expenses.

Conclusion

The authors believe that, much like for RICs and business development companies, utilizing a DST in the organization of a UIT provides potential benefits to investors, sponsors, trustees, and other market participants. DSTs offer sponsors of UITs the ability to tailor the governing instrument to better suit their specific needs. The DSTA is regularly amended and contains provisions specifically aimed at investment companies (including UITs) and business development companies. In addition, it provides statutory provisions addressing personal liability of trustees or other parties to the governing instrument.

Mr. Peterson is a director and **Ms. Bomalaski** is an associate with Richards, Layton & Finger, P.A., in Wilmington, DE. The views expressed in this article are those of the authors and not necessarily of Richards, Layton & Finger or its clients.

NOTES

1 *See* J. Weston Peterson, "Investment Companies Organized as Delaware Statutory Trusts: Practical Considerations for Drafting Governing Instruments," *The Investment Lawyer,* Vol.15, No.1 (Jan. 2008) (the 2008 Article). Some of the discussions of Delaware law contained in this article are an update of, or can also be found in, the 2008 Article.

2 Investment Company Institute. "2025 Investment Company Fact Book," *Icifactbook*, 2025 (hereinafter, Factbook). We note the ICI does not provide entity type information for UITs and as such, statistics on the number of UITs organized as DSTs versus common law trusts are unavailable. *See also*, the 2008 Article.

3 Howes, Kelley A., and Remmelt A. Reigersman, Frequently Asked Questions About Unit Investment Trusts, Morrison & Foerster LLP, 2017 (hereinafter, Howes).

4 12 Del. C. § 3801, *et seq*.

5 15 U.S.C.A. § 80a-4.

6 Factbook, *supra* n.2.

7 Thomas S. Harman, "Emerging Alternatives to Mutual Funds: Unit Investment Trusts and Other

Fixed Portfolio Investment Vehicles," 1987 *Duke L.J.* 1045 (December 1987) (hereinafter, Harman).

8 *Id*. (citing W. Durst, Analysis and Handbook of Investment Trusts, 265 (1932)).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id*.

14 *See* Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 229; Harmon; Factbook.

15 *See* Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 229; Harmon; Factbook.

16 Investment Company Institute, "Release: Unit Investment Trust Deposits, August 2025." *Release: Unit Investment Trust Deposits, August 2025 | Investment Company Institute*, 24 Sept. 2025. Each month, new UITs are issuing new shares, for example, 112 new UITs were issuing shares in the month of August, and 138 in the month of July. *Id;* Investment Company Institute. "Release: Unit Investment Trust Deposits, July 2025." *Release: Unit Investment Trust Deposits, July 2025 | Investment Company Institute*, 13 Aug. 2025.

17 *See* Factbook, *supra* n.2, p.21.

18 15 U.S.C.A. § 80a-4.

19 See *National Conference of Commissioners on Uniform State Laws. Uniform Statutory Trust Entity Act. Chicago, Ill.: National Conference of Commissioners on Uniform State Laws, 2009.* "In drafting the substantive provisions of the Uniform Statutory Trust Entity Act, the drafting committee was influenced primarily by the Delaware Statutory Trust Act."

20 *See* 12 Del. C. § 3828(b).

21 *See* 12 Del. C. § 3809.

22 *See* 12 Del. C. § 3301 et seq.;12 Del. C. § 3501 et seq.

23 For example, many publicly registered investment vehicles that are not RICs, such as commodity pools and cryptocurrency funds, organize as DSTs and shift virtually all traditional trustee duties to a sponsor entity.

24 *See* 15 U.S.C. § 77e; 15 U.S.C. § 80a-8(b); Howes, *supra* n.3.

25 *See* 17 CFR § 230.487; Howes, *supra* n.3.

26 *See* 12 Del. C. § 3806(b)(2).

27 *Id.*

28 *See* 12 Del. C. § 3804(a). The concept of ring fencing series liabilities was added to the DSTA in 1990 and initially was only available for use by RICs. In 1994, the DSTA was amended to permit any DST to ring fence liabilities amongst series.

29 12 Del. C. § 3804(a)(1); 12 Del. C. § 3804(a)(2).

30 *See* 12 Del. C. § 3804(a).

31 *Id.*

32 *Id.*

33 12 De. C. § 3806(c); 12 Del. C. § 3806(e).

34 *Id.*

35 12 De. C. § 3806(l). Though this default standard can be changed or eliminated through appropriate drafting of the DST's governing instrument.

36 43 Bus. Law. 1177 (stating "Because of its nature, there is no management. . . . the structure and regulation of a UIT is generally concerned with the safety of its assets, *the integrity of the trustees* and sponsors, and the adequacy and accuracy of disclosure made to investors" (emphasis added).

37 Accident Ins. Co., Inc. v. U.S. Bank Nat'l Ass'n, No. 3:16-CV-02621-JMC, 2020 WL 1910096, at *22 (D.S.C. Apr. 20, 2020), *aff'd in part*, *vacated in part*, *remanded*, No. 21-1504, 2022 WL 3713512 (4th Cir. Aug. 29, 2022).

38 *Id.*

39 *Id.* at 14.

40 *See* 12 Del. C. § 3806(e).

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

42 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.

43 *See* 12 Del. C. § 3803(b) and (c). These sections do not address the personal liability a trustee may have to the DST or its beneficial owners. That is addressed elsewhere in the DSTA. *See also* J. Weston Peterson

and Anthony W. Rodgers, "Protecting the Protectors: Indemnification of Trustees of Delaware Statutory Trusts," *The Investment Lawyer*, Vol.18, No.7 (July 2011).

44 A. W. Scott, The Law of Trusts §274, at 519–20 (4th ed. 1988).

45 *See* Mazie, Eric A., et al. "19.3, Delaware, Liability of Beneficial Owners." *Delaware Law of Corporations & Business Organizations Statutory Deskbook – Balotti and Finkelstein*, edited by John Mark Zeberkiewicz and Blake Rohrbacher, 4th ed., Wolters Kluwer. 2025-2 Supp.

46 *See* 12 Del. C. § 3803(a).

47 *See* 12 Del. C. § 3806(a).

48 *See* 12 Del. C. § 3816.

49 *See* 12 Del. C. § 3816(e).

50 *See* 12 Del. C. § 3807(b).

51 *Id.*