

Formation of Real Estate Investment Trusts Pursuant to Delaware Law

By The Capital Trust Company of Delaware

In 1960 the concept of Real Estate Investment Trusts (REITs) was a new and bold advance. The idea was to allow groups of small investors to pool their resources to invest in large-scale, income producing commercial property which had historically been the domain of affluent investors and large institutions. The enabling legislation for REITs was modeled after the Registered Investment Company, more commonly known as a mutual fund. A REIT begins as a simple business entity, a business trust, a statutory trust, or corporation. If a number of requirements are satisfied, the business/statutory trust or corporation may elect to be considered a REIT for federal income tax purposes. The REIT must be managed by one or more trustees who have fiduciary duty over the management of the organization.

The historically early enactment of specific REIT legislation, a favorable general corporation law, and minimal costs and taxes have contributed to Maryland's popularity as a domicile for REITs. However, a REIT can be structured using a Delaware Statutory Trust to provide the same types of benefits found in Maryland. The Delaware Statutory Trust Act (the Act) offers an attractive alternative to the Maryland REIT law. The high

degree of flexibility provided by the Act permits formation of REITs in Delaware on terms at least as, if not more, favorable than those found in the Maryland REIT law.

In addition to providing flexibility in organizing and operating a Delaware Statutory Trust, the Act contains specific provisions that insulate a Delaware Statutory Trust from bankruptcy. Because beneficial owners have no interest in specific trust property, their creditors have no right to possess trust property or exercise any legal or equitable remedies with respect to trust property.

In summary, the long-standing reputation of Delaware as the jurisdiction of choice for domicile and the flexibility inherent in the Act should be considered for REIT formations.