

Bill No. SB 2218

Barcode 820792

CHAMBER ACTION

Senate

House

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The Committee on Banking and Insurance (Posey) recommended the following amendment:

**Senate Amendment (with title amendment)**

Delete everything after the enacting clause

and insert:

Section 1. Subsection (3) of section 660.417, Florida Statutes, as amended by section 18 of chapter 2006-217, Laws of Florida, is amended to read:

660.417 Investment of fiduciary funds in investment instruments; permissible activity under certain circumstances; limitations.--

(3) The fact that such bank or trust company or an affiliate of the bank or trust company owns or controls investment instruments shall not preclude the bank or trust company acting as a fiduciary from investing or reinvesting in such investment instruments, provided such investment instruments:

(a) Are held for sale by the bank or trust company or by an affiliate of the bank or trust company in the ordinary

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1 course of its business of providing investment services to its  
2 customers and do not include any such interests held by the  
3 bank or trust company or by an affiliate of the bank or trust  
4 company for its own account.

5 (b) When ~~Are~~ sold ~~primarily~~ to accounts for which the  
6 bank or trust company is ~~not~~ acting as a trustee of a trust as  
7 defined in s. 731.201(35):

8 1. Are available for sale to accounts of other  
9 customers; and

10 2. If sold to other customers, are not sold to the  
11 trust accounts ~~fiduciary~~ upon terms that are less ~~not more~~  
12 favorable to the buyer than the terms upon which they are  
13 normally sold to the other customers ~~accounts for which the~~  
14 ~~bank or trust company is acting as a fiduciary.~~

15 Section 2. Section 736.04117, Florida Statutes, is  
16 created to read:

17 736.04117 Trustee's power to invade principal in  
18 trust.--

19 (1)(a) Unless the trust instrument expressly provides  
20 otherwise, a trustee who has absolute power under the terms of  
21 a trust to invade the principal of the trust, referred to in  
22 this section as the "first trust," to make distributions to or  
23 for the benefit of one or more persons may instead exercise  
24 the power by appointing all or part of the principal of the  
25 trust subject to the power in favor of a trustee of another  
26 trust, referred to in this section as the "second trust," for  
27 the current benefit of one or more of such persons under the  
28 same trust instrument or under a different trust instrument;  
29 provided:

30 1. The beneficiaries of the second trust may include  
31 only beneficiaries of the first trust;

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1           2. The second trust may not reduce any fixed income,  
2 annuity, or unitrust interest in the assets of the first  
3 trust; and

4           3. If any contribution to the first trust qualified  
5 for a marital or charitable deduction for federal income,  
6 gift, or estate tax purposes under the Internal Revenue Code  
7 of 1986, as amended, the second trust shall not contain any  
8 provision which, if included in the first trust, would have  
9 prevented the first trust from qualifying for such a deduction  
10 or would have reduced the amount of such deduction.

11           (b) For purposes of this subsection, an absolute power  
12 to invade principal shall include a power to invade principal  
13 that is not limited to specific or ascertainable purposes,  
14 such as health, education, maintenance, and support, whether  
15 or not the term "absolute" is used. A power to invade  
16 principal for purposes such as best interests, welfare,  
17 comfort, or happiness shall constitute an absolute power not  
18 limited to specific or ascertainable purposes.

19           (2) The exercise of a power to invade principal under  
20 subsection (1) shall be by an instrument in writing, signed  
21 and acknowledged by the trustee, and filed with the records of  
22 the first trust.

23           (3) The exercise of a power to invade principal under  
24 subsection (1) shall be considered the exercise of a power of  
25 appointment, other than a power to appoint to the trustee, the  
26 trustee's creditors, the trustee's estate, or the creditors of  
27 the trustee's estate, and shall be subject to the provisions  
28 of s. 689.225 covering the time at which the permissible  
29 period of the rule against perpetuities begins and the law  
30 that determines the permissible period of the rule against  
31 perpetuities of the first trust.

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1       (4) The trustee shall notify all qualified  
2 beneficiaries of the first trust, in writing, at least 60 days  
3 prior to the effective date of the trustee's exercise of the  
4 trustee's power to invade principal pursuant to subsection  
5 (1), of the manner in which the trustee intends to exercise  
6 the power. A copy of the proposed instrument exercising the  
7 power shall satisfy the trustee's notice obligation under this  
8 subsection. If all qualified beneficiaries waive the notice  
9 period by signed written instrument delivered to the trustee,  
10 the trustee's power to invade principal shall be exercisable  
11 immediately. The trustee's notice under this subsection shall  
12 not limit the right of any beneficiary to object to the  
13 exercise of the trustee's power to invade principal except as  
14 provided in other applicable provisions of this code.

15       (5) The exercise of the power to invade principal  
16 under subsection (1) is not prohibited by a spendthrift clause  
17 or by a provision in the trust instrument that prohibits  
18 amendment or revocation of the trust.

19       (6) Nothing in this section is intended to create or  
20 imply a duty to exercise a power to invade principal and no  
21 inference of impropriety shall be made as a result of a  
22 trustee not exercising the power to invade principal conferred  
23 under subsection (1).

24       (7) The provisions of this section shall not be  
25 construed to abridge the right of any trustee who has a power  
26 of invasion to appoint property in further trust that arises  
27 under the terms of the first trust or under any other section  
28 of this code or under another provision of law or under common  
29 law.

30       Section 3. Subsections (2) and (5) of section  
31 736.0802, Florida Statutes, are amended to read:

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1 736.0802 Duty of loyalty.--

2 (2) Subject to the rights of persons dealing with or  
3 assisting the trustee as provided in s. 736.1016, a sale,  
4 encumbrance, or other transaction involving the investment or  
5 management of trust property entered into by the trustee for  
6 the trustee's own personal account or which is otherwise  
7 affected by a conflict between the trustee's fiduciary and  
8 personal interests is voidable by a beneficiary affected by  
9 the transaction unless:

10 (a) The transaction was authorized by the terms of the  
11 trust;

12 (b) The transaction was approved by the court;

13 (c) The beneficiary did not commence a judicial  
14 proceeding within the time allowed by s. 736.1008;

15 (d) The beneficiary consented to the trustee's  
16 conduct, ratified the transaction, or released the trustee in  
17 compliance with s. 736.1012;

18 (e) The transaction involves a contract entered into  
19 or claim acquired by the trustee when that person had not  
20 become or contemplated becoming trustee; ~~or~~

21 (f) The transaction was consented to in writing by a  
22 settlor of the trust while the trust was revocable; ~~or-~~

23 (g) The transaction is one by a corporate trustee that  
24 involves a money market mutual fund, mutual fund, or a common  
25 trust fund described in s. 736.0816(3).

26 (5)(a) An investment by a trustee authorized by lawful  
27 authority to engage in trust business, as defined in s.  
28 658.12(20), in investment instruments, as defined in s.  
29 660.25(6), that are owned or controlled by the trustee or its  
30 affiliate, or from which the trustee or its affiliate receives  
31 compensation for providing services in a capacity other than

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1 as trustee, is not presumed to be affected by a conflict  
 2 between personal and fiduciary interests provided the  
 3 investment otherwise complies with chapters 518 and 660 and  
 4 the trustee complies with the ~~disclosure~~ requirements of this  
 5 subsection.

6 (b) A trustee who, pursuant to this subsection,  
 7 invests trust funds in investment instruments that are owned  
 8 or controlled by the trustee or its affiliate shall disclose  
 9 the following to all qualified beneficiaries:

10 1. Notice that the trustee has invested trust funds in  
 11 investment instruments owned or controlled by the trustee or  
 12 its affiliate.

13 2. The identity of the investment instruments.

14 3. The identity and relationship to the trustee of any  
 15 affiliate that owns or controls the investment instruments.

16 (c) A trustee who, pursuant to this subsection,  
 17 invests trust funds in investment instruments with respect to  
 18 which the trustee or its affiliate receives compensation for  
 19 providing services in a capacity other than as trustee shall  
 20 disclose to all qualified beneficiaries, the nature of the  
 21 services provided by the trustee or its affiliate, and all  
 22 compensation, including, but not limited to, fees or  
 23 commissions paid or to be paid by the account and received or  
 24 to be received by an affiliate arising from such affiliated  
 25 investment.

26 (d) Disclosure required by this subsection shall be  
 27 made at least annually unless there has been no change in the  
 28 method or increase in the rate at which such compensation is  
 29 calculated since the most recent disclosure. The disclosure  
 30 may be given in a trust disclosure document as defined in s.  
 31 736.1008, in a copy of the prospectus for the investment

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1 instrument, in any other written disclosure prepared for the  
2 investment instrument under applicable federal or state law,  
3 or in a written summary that includes all compensation  
4 received or to be received by the trustee and any affiliate of  
5 the trustee and an explanation of the manner in which such  
6 compensation is calculated, either as a percentage of the  
7 assets invested or by some other method.

8 (e) This subsection shall apply as follows:

9 1. This subsection does not apply to qualified  
10 investment instruments or to a trust for which a right of  
11 revocation exists.

12 2. For investment instruments other than qualified  
13 investment instruments, paragraphs (a), (b), (c), and (d)  
14 shall apply to irrevocable trusts created on or after July 1,  
15 2007, which expressly authorize the trustee, by specific  
16 reference to this subsection, to invest in investment  
17 instruments owned or controlled by the trustee or its  
18 affiliate.

19 3. For investment instruments other than qualified  
20 investment instruments, paragraphs (a), (b), (c), and (d)  
21 shall apply to irrevocable trusts created on or after July 1,  
22 2007, that are not described in subparagraph 2. and to  
23 irrevocable trusts created prior to July 1, 2007, only as  
24 follows:

25 a. Such paragraphs shall not apply until ~~60 days after~~  
26 the statement required in paragraph (f) is provided and a  
27 majority of the qualified beneficiaries have provided written  
28 consent. All consents must be obtained within 90 days after  
29 the date of delivery of the written request. Once given,  
30 consent shall be valid as to all investment instruments  
31 acquired pursuant to the consent prior to the date of any

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1 withdrawal of the consent ~~no objection is made or any~~  
2 ~~objection which is made has been terminated.~~

3 ~~(I) An objection is made if, within 60 days after the~~  
4 ~~date of the statement required in paragraph (f), a super~~  
5 ~~majority of the eligible beneficiaries deliver to the trustee~~  
6 ~~written objections to the application of this subsection to~~  
7 ~~such trust. An objection shall be deemed to be delivered to~~  
8 ~~the trustee on the date the objection is mailed to the mailing~~  
9 ~~address listed in the notice provided in paragraph (f).~~

10 ~~(II) An objection is terminated upon the earlier of~~  
11 ~~the receipt of consent from a super majority of eligible~~  
12 ~~beneficiaries of the class that made the objection or the~~  
13 ~~resolution of the objection pursuant to this subparagraph.~~

14 ~~(III) If an objection is delivered to the trustee, the~~  
15 ~~trustee may petition the court for an order overruling the~~  
16 ~~objection and authorizing the trustee to make investments~~  
17 ~~under this subsection. The burden shall be on the trustee to~~  
18 ~~show good cause for the relief sought.~~

19 ~~(I)(IV)~~ Any qualified beneficiary may petition the  
20 court for an order to prohibit, limit, or restrict a trustee's  
21 authority to make investments under this subsection. The  
22 burden shall be upon the petitioning beneficiary to show good  
23 cause for the relief sought.

24 ~~(II)(V)~~ The court may award costs and attorney's fees  
25 relating to any petition under this subparagraph in the same  
26 manner as in chancery actions. When costs and attorney's fees  
27 are to be paid out of the trust, the court, in its discretion,  
28 may direct from which part of the trust such costs and fees  
29 shall be paid.

30 b. The consent ~~objection~~ of a majority of the  
31 qualified ~~super majority of eligible~~ beneficiaries under this



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1 subparagraph may ~~thereafter~~ be withdrawn prospectively ~~removed~~  
 2 by ~~the~~ written notice ~~consent~~ of a ~~super~~ majority of any one  
 3 of the class or classes of the qualified ~~those eligible~~  
 4 beneficiaries ~~that made the objection.~~

5 (f)1. The trustee of a trust described in s.  
 6 731.201(35) may request authority to invest in ~~Any time prior~~  
 7 ~~to initially investing in any investment~~ instruments  
 8 ~~instrument~~ described in this subsection other than a qualified  
 9 investment instrument, by providing ~~the trustee of a trust~~  
 10 ~~described in subparagraph (e)3.~~ shall provide to all qualified  
 11 beneficiaries a written request ~~statement~~ containing the  
 12 following:

13 a. The name, telephone number, street address, and  
 14 mailing address of the trustee and of any individuals who may  
 15 be contacted for further information.

16 b. A statement that the investment or investments  
 17 cannot be made without the consent of a majority of each class  
 18 of the qualified beneficiaries, ~~unless a super majority of the~~  
 19 ~~eligible beneficiaries objects to the application of this~~  
 20 ~~subsection to the trust within 60 days after the date the~~  
 21 ~~statement pursuant to this subsection was delivered, this~~  
 22 ~~subsection shall apply to the trust.~~

23 c. A statement that, if a majority of each class of  
 24 qualified beneficiaries consent ~~this subsection applies to the~~  
 25 ~~trust,~~ the trustee will have the right to make investments in  
 26 investment instruments, as defined in s. 660.25(6), which are  
 27 owned or controlled by the trustee or its affiliate, or from  
 28 which the trustee or its affiliate receives compensation for  
 29 providing services in a capacity other than as trustee, that  
 30 such investment instruments may include investment instruments  
 31 sold primarily to trust accounts, and that the trustee or its

1 affiliate may receive fees in addition to the trustee's  
2 compensation for administering the trust.

3 d. A statement that the consent may be withdrawn  
4 prospectively at any time by written notice given by a  
5 majority of any class of the qualified beneficiaries.

6  
7 A statement by the trustee is not delivered if the statement  
8 is accompanied by another written communication other than a  
9 written communication by the trustee that refers only to the  
10 statement.

11 2. For purposes of paragraph (e) and this paragraph:

12 ~~a. "Eligible beneficiaries" means:~~

13 ~~(I) If at the time the determination is made there are~~  
14 ~~one or more beneficiaries as described in s. 736.0103(14)(c),~~  
15 ~~the beneficiaries described in s. 736.0103(14)(a) and (c); or~~

16 ~~(II) If there is no beneficiary described in s.~~  
17 ~~736.0103(14)(c), the beneficiaries described in s.~~  
18 ~~736.0103(14)(a) and (b).~~

19 a.b. "Super Majority of the qualified eligible  
20 beneficiaries" means:

21 (I) If at the time the determination is made there are  
22 one or more beneficiaries as described in s. 736.0103(14)(c),  
23 at least a majority ~~two-thirds~~ in interest of the

24 beneficiaries described in s. 736.0103(14)(a), at least a  
25 majority in interest of the beneficiaries described in s.

26 736.0103(14)(b), and at least a majority ~~or two-thirds~~ in  
27 interest of the beneficiaries described in s. 736.0103(14)(c),  
28 if the interests of the beneficiaries are reasonably

29 ascertainable; otherwise, a majority ~~two-thirds~~ in number of  
30 each ~~either~~ such class; or

31 (II) If there is no beneficiary as described in s.

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1 736.0103(14)(c), at least a majority ~~two-thirds~~ in interest of  
 2 the beneficiaries described in s. 736.0103(14)(a) and at least  
 3 a majority ~~or two-thirds~~ in interest of the beneficiaries  
 4 described in s. 736.0103(14)(b), if the interests of the  
 5 beneficiaries are reasonably ascertainable; otherwise, a  
 6 majority ~~two-thirds~~ in number of each ~~either~~ such class.

7 ~~b.c.~~ "Qualified investment instrument" means a mutual  
 8 fund, common trust fund, or money market fund described in and  
 9 governed by s. 736.0816(3).

10 ~~c.d.~~ An irrevocable trust is created upon execution of  
 11 the trust instrument. If a trust that was revocable when  
 12 created thereafter becomes irrevocable, the irrevocable trust  
 13 is created when the right of revocation terminates.

14 (g) Nothing in this chapter is intended to create or  
 15 imply a duty for the trustee to seek the application of this  
 16 subsection to invest in investment instruments described in  
 17 paragraph (a), and no inference of impropriety may be made as  
 18 a result of a trustee electing not to invest trust assets in  
 19 investment instruments described in paragraph (a).

20 (h) This subsection is not the exclusive authority  
 21 under this code for investing in investment instruments  
 22 described in paragraph (a). A trustee who invests trust funds  
 23 in investment instruments described in paragraph (a) is not  
 24 required to comply with paragraph (b), paragraph (c), or  
 25 paragraph (f) if the trustee is permitted to invest in such  
 26 investment instruments pursuant to subsection (2).

27 Section 4. Subsection (3) of section 736.0816, Florida  
 28 Statutes, is amended to read:

29 736.0816 Specific powers of trustee.--Except as  
 30 limited or restricted by this code, a trustee may:

31 (3) Acquire an undivided interest in a trust asset,

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1 including, but not limited to, a money market mutual fund,  
 2 mutual fund, or common trust fund, in which asset the trustee  
 3 holds an undivided interest in any trust capacity, including  
 4 any money market or other mutual fund from which the trustee  
 5 or any affiliate or associate of the trustee is entitled to  
 6 receive reasonable compensation for providing necessary  
 7 services as an investment adviser, portfolio manager, or  
 8 servicing agent. A trustee or affiliate or associate of the  
 9 trustee may receive compensation for such services in addition  
 10 to fees received for administering the trust provided such  
 11 compensation is fully disclosed in writing to all qualified  
 12 beneficiaries. As used in this subsection, the term "mutual  
 13 fund" includes an open-end or closed-end management investment  
 14 company or investment trust registered under the Investment  
 15 Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended.

16 Section 5. Subsection (6) of section 736.1008, Florida  
 17 Statutes, is amended to read:

18 736.1008 Limitations on proceedings against  
 19 trustees.--

20 (6) This section applies to trust accountings for  
 21 accounting periods beginning on or after July ~~January~~ 1, 2007  
 22 ~~2008~~, and to written reports, other than trust accountings,  
 23 received by a beneficiary on or after July ~~January~~ 1, 2007  
 24 ~~2008~~.

25 Section 6. Subsection (2) of section 736.1011, Florida  
 26 Statutes, is amended to read:

27 736.1011 Exculpation of trustee.--

28 (2) An exculpatory term drafted or caused to be  
 29 drafted by the trustee is invalid as an abuse of a fiduciary  
 30 or confidential relationship unless:

31 (a) The trustee proves that the exculpatory term is

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1 fair under the circumstances.

2       **(b)** ~~and that~~ The term's existence and contents were  
3 adequately communicated directly to the settlor or the  
4 independent attorney of the settlor. This paragraph applies  
5 only to trusts created on or after July 1, 2007.

6           Section 7. This act shall take effect July 1, 2007.

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9 ===== T I T L E   A M E N D M E N T =====

10 And the title is amended as follows:

11           Delete everything before the enacting clause

12

13 and insert:

14                               A bill to be entitled  
15           An act relating to duties, powers, and  
16           liabilities of trustees; amending s. 660.417,  
17           F.S.; revising criteria for investments in  
18           certain investment instruments; creating s.  
19           736.04117, F.S.; providing criteria,  
20           requirements, and limitations on a trustee's  
21           power to invade the principal of a trust;  
22           specifying conditions under which discretionary  
23           distributions may be made in further trust;  
24           amending s. 736.0802, F.S.; specifying  
25           additional trust property transactions not  
26           voidable by a beneficiary; revising certain  
27           disclosure and applicability requirements;  
28           broadening authority for investing in certain  
29           investment instruments; revising definitions;  
30           excusing trustees from certain compliance  
31           requirements under certain circumstances;

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1 amending s. 736.0816, F.S.; defining the term  
2 "mutual fund" for certain purposes; amending s.  
3 736.1008, F.S.; revising effective dates  
4 relating to limitations on proceedings against  
5 trustees; amending s. 736.1011, F.S.; providing  
6 construction relating to trustee drafts of  
7 exculpatory terms in a trust instrument;  
8 providing an effective date.

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