

By the Committee on Banking and Insurance; and Senator Posey

597-2463-07

1 A bill to be entitled
2 An act relating to duties, powers, and
3 liabilities of trustees; amending s. 660.417,
4 F.S.; revising criteria for investments in
5 certain investment instruments; creating s.
6 736.04117, F.S.; providing criteria,
7 requirements, and limitations on a trustee's
8 power to invade the principal of a trust;
9 specifying conditions under which discretionary
10 distributions may be made in further trust;
11 amending s. 736.0802, F.S.; specifying
12 additional trust property transactions not
13 voidable by a beneficiary; revising certain
14 disclosure and applicability requirements;
15 broadening authority for investing in certain
16 investment instruments; revising definitions;
17 excusing trustees from certain compliance
18 requirements under certain circumstances;
19 amending s. 736.0816, F.S.; defining the term
20 "mutual fund" for certain purposes; amending s.
21 736.1008, F.S.; revising effective dates
22 relating to limitations on proceedings against
23 trustees; amending s. 736.1011, F.S.; providing
24 construction relating to trustee drafts of
25 exculpatory terms in a trust instrument;
26 providing an effective date.

27
28 Be It Enacted by the Legislature of the State of Florida:
29
30
31

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

4 660.417 Investment of fiduciary funds in investment
5 instruments; permissible activity under certain circumstances;
6 limitations.--

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

13 (a) Are held for sale by the bank or trust company or
14 by an affiliate of the bank or trust company in the ordinary
15 course of its business of providing investment services to its
16 customers and do not include any such interests held by the
17 bank or trust company or by an affiliate of the bank or trust
18 company for its own account.

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

22 1. Are available for sale to accounts of other
23 customers; and

24 2. If sold to other customers, are not sold to the
25 trust accounts ~~fiduciary~~ upon terms that are less ~~not more~~
26 favorable to the buyer than the terms upon which they are
27 normally sold to the other customers ~~accounts for which the~~
28 ~~bank or trust company is acting as a fiduciary.~~

29 Section 2. Section 736.04117, Florida Statutes, is
30 created to read:

31

1 736.04117 Trustee's power to invade principal in
2 trust.--

3 (1)(a) Unless the trust instrument expressly provides
4 otherwise, a trustee who has absolute power under the terms of
5 a trust to invade the principal of the trust, referred to in
6 this section as the "first trust," to make distributions to or
7 for the benefit of one or more persons may instead exercise
8 the power by appointing all or part of the principal of the
9 trust subject to the power in favor of a trustee of another
10 trust, referred to in this section as the "second trust," for
11 the current benefit of one or more of such persons under the
12 same trust instrument or under a different trust instrument;
13 provided:

14 1. The beneficiaries of the second trust may include
15 only beneficiaries of the first trust;

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

19 3. If any contribution to the first trust qualified
20 for a marital or charitable deduction for federal income,
21 gift, or estate tax purposes under the Internal Revenue Code
22 of 1986, as amended, the second trust shall not contain any
23 provision which, if included in the first trust, would have
24 prevented the first trust from qualifying for such a deduction
25 or would have reduced the amount of such deduction.

26 (b) For purposes of this subsection, an absolute power
27 to invade principal shall include a power to invade principal
28 that is not limited to specific or ascertainable purposes,
29 such as health, education, maintenance, and support, whether
30 or not the term "absolute" is used. A power to invade
31 principal for purposes such as best interests, welfare,

1 comfort, or happiness shall constitute an absolute power not
2 limited to specific or ascertainable purposes.

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

7 (3) The exercise of a power to invade principal under
8 subsection (1) shall be considered the exercise of a power of
9 appointment, other than a power to appoint to the trustee, the
10 trustee's creditors, the trustee's estate, or the creditors of
11 the trustee's estate, and shall be subject to the provisions
12 of s. 689.225 covering the time at which the permissible
13 period of the rule against perpetuities begins and the law
14 that determines the permissible period of the rule against
15 perpetuities of the first trust.

16 (4) The trustee shall notify all qualified
17 beneficiaries of the first trust, in writing, at least 60 days
18 prior to the effective date of the trustee's exercise of the
19 trustee's power to invade principal pursuant to subsection
20 (1), of the manner in which the trustee intends to exercise
21 the power. A copy of the proposed instrument exercising the
22 power shall satisfy the trustee's notice obligation under this
23 subsection. If all qualified beneficiaries waive the notice
24 period by signed written instrument delivered to the trustee,
25 the trustee's power to invade principal shall be exercisable
26 immediately. The trustee's notice under this subsection shall
27 not limit the right of any beneficiary to object to the
28 exercise of the trustee's power to invade principal except as
29 provided in other applicable provisions of this code.

30 (5) The exercise of the power to invade principal
31 under subsection (1) is not prohibited by a spendthrift clause

1 or by a provision in the trust instrument that prohibits
2 amendment or revocation of the trust.

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

8 (7) The provisions of this section shall not be
9 construed to abridge the right of any trustee who has a power
10 of invasion to appoint property in further trust that arises
11 under the terms of the first trust or under any other section
12 of this code or under another provision of law or under common
13 law.

14 Section 3. Subsections (2) and (5) of section
15 736.0802, Florida Statutes, are amended to read:

16 736.0802 Duty of loyalty.--

17 (2) Subject to the rights of persons dealing with or
18 assisting the trustee as provided in s. 736.1016, a sale,
19 encumbrance, or other transaction involving the investment or
20 management of trust property entered into by the trustee for
21 the trustee's own personal account or which is otherwise
22 affected by a conflict between the trustee's fiduciary and
23 personal interests is voidable by a beneficiary affected by
24 the transaction unless:

25 (a) The transaction was authorized by the terms of the
26 trust;

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

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

30
31

1 (d) The beneficiary consented to the trustee's
2 conduct, ratified the transaction, or released the trustee in
3 compliance with s. 736.1012;

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

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

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

12 (5)(a) An investment by a trustee authorized by lawful
13 authority to engage in trust business, as defined in s.
14 658.12(20), in investment instruments, as defined in s.
15 660.25(6), that are owned or controlled by the trustee or its
16 affiliate, or from which the trustee or its affiliate receives
17 compensation for providing services in a capacity other than
18 as trustee, is not presumed to be affected by a conflict
19 between personal and fiduciary interests provided the
20 investment otherwise complies with chapters 518 and 660 and
21 the trustee complies with the ~~disclosure~~ requirements of this
22 subsection.

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

27 1. Notice that the trustee has invested trust funds in
28 investment instruments owned or controlled by the trustee or
29 its affiliate.

30 2. The identity of the investment instruments.

31

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

3 (c) A trustee who, pursuant to this subsection,
4 invests trust funds in investment instruments with respect to
5 which the trustee or its affiliate receives compensation for
6 providing services in a capacity other than as trustee shall
7 disclose to all qualified beneficiaries, the nature of the
8 services provided by the trustee or its affiliate, and all
9 compensation, including, but not limited to, fees or
10 commissions paid or to be paid by the account and received or
11 to be received by an affiliate arising from such affiliated
12 investment.

13 (d) Disclosure required by this subsection shall be
14 made at least annually unless there has been no change in the
15 method or increase in the rate at which such compensation is
16 calculated since the most recent disclosure. The disclosure
17 may be given in a trust disclosure document as defined in s.
18 736.1008, in a copy of the prospectus for the investment
19 instrument, in any other written disclosure prepared for the
20 investment instrument under applicable federal or state law,
21 or in a written summary that includes all compensation
22 received or to be received by the trustee and any affiliate of
23 the trustee and an explanation of the manner in which such
24 compensation is calculated, either as a percentage of the
25 assets invested or by some other method.

26 (e) This subsection shall apply as follows:

27 1. This subsection does not apply to qualified
28 investment instruments or to a trust for which a right of
29 revocation exists.

30 2. For investment instruments other than qualified
31 investment instruments, paragraphs (a), (b), (c), and (d)

1 shall apply to irrevocable trusts created on or after July 1,
2 2007, which expressly authorize the trustee, by specific
3 reference to this subsection, to invest in investment
4 instruments owned or controlled by the trustee or its
5 affiliate.

6 3. For investment instruments other than qualified
7 investment instruments, paragraphs (a), (b), (c), and (d)
8 shall apply to irrevocable trusts created on or after July 1,
9 2007, that are not described in subparagraph 2. and to
10 irrevocable trusts created prior to July 1, 2007, only as
11 follows:

12 a. Such paragraphs shall not apply until ~~60 days after~~
13 the statement required in paragraph (f) is provided and a
14 majority of the qualified beneficiaries have provided written
15 consent. All consents must be obtained within 90 days after
16 the date of delivery of the written request. Once given,
17 consent shall be valid as to all investment instruments
18 acquired pursuant to the consent prior to the date of any
19 withdrawal of the consent ~~no objection is made or any~~
20 ~~objection which is made has been terminated.~~

21 ~~(I) An objection is made if, within 60 days after the~~
22 ~~date of the statement required in paragraph (f), a super~~
23 ~~majority of the eligible beneficiaries deliver to the trustee~~
24 ~~written objections to the application of this subsection to~~
25 ~~such trust. An objection shall be deemed to be delivered to~~
26 ~~the trustee on the date the objection is mailed to the mailing~~
27 ~~address listed in the notice provided in paragraph (f).~~

28 ~~(II) An objection is terminated upon the earlier of~~
29 ~~the receipt of consent from a super majority of eligible~~
30 ~~beneficiaries of the class that made the objection or the~~
31 ~~resolution of the objection pursuant to this subparagraph.~~

1 ~~(III) If an objection is delivered to the trustee, the~~
2 ~~trustee may petition the court for an order overruling the~~
3 ~~objection and authorizing the trustee to make investments~~
4 ~~under this subsection. The burden shall be on the trustee to~~
5 ~~show good cause for the relief sought.~~

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

11 ~~(II)(V)~~ The court may award costs and attorney's fees
12 relating to any petition under this subparagraph in the same
13 manner as in chancery actions. When costs and attorney's fees
14 are to be paid out of the trust, the court, in its discretion,
15 may direct from which part of the trust such costs and fees
16 shall be paid.

17 b. The consent objection of a majority of the
18 qualified ~~super majority of eligible~~ beneficiaries under this
19 subparagraph may ~~thereafter~~ be withdrawn prospectively ~~removed~~
20 by ~~the~~ written notice consent of a ~~super~~ majority of any one
21 of the class or classes of the qualified ~~those eligible~~
22 beneficiaries ~~that made the objection.~~

23 (f)1. The trustee of a trust described in s.
24 731.201(35) may request authority to invest in ~~Any time prior~~
25 ~~to initially investing in any~~ investment instruments
26 ~~instrument~~ described in this subsection other than a qualified
27 investment instrument, by providing the trustee of a trust
28 ~~described in subparagraph (c)3. shall provide~~ to all qualified
29 beneficiaries a written request ~~statement~~ containing the
30 following:
31

1 a. The name, telephone number, street address, and
2 mailing address of the trustee and of any individuals who may
3 be contacted for further information.

4 b. A statement that the investment or investments
5 cannot be made without the consent of a majority of each class
6 of the qualified beneficiaries, unless a super majority of the
7 eligible beneficiaries objects to the application of this
8 subsection to the trust within 60 days after the date the
9 statement pursuant to this subsection was delivered, this
10 subsection shall apply to the trust.

11 c. A statement that, if a majority of each class of
12 qualified beneficiaries consent this subsection applies to the
13 ~~trust~~, the trustee will have the right to make investments in
14 investment instruments, as defined in s. 660.25(6), which are
15 owned or controlled by the trustee or its affiliate, or from
16 which the trustee or its affiliate receives compensation for
17 providing services in a capacity other than as trustee, that
18 such investment instruments may include investment instruments
19 sold primarily to trust accounts, and that the trustee or its
20 affiliate may receive fees in addition to the trustee's
21 compensation for administering the trust.

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

25
26 A statement by the trustee is not delivered if the statement
27 is accompanied by another written communication other than a
28 written communication by the trustee that refers only to the
29 statement.

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

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

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

4 ~~(II) If there is no beneficiary described in s.~~
5 ~~736.0103(14)(c), the beneficiaries described in s.~~
6 ~~736.0103(14)(a) and (b).~~

7 ~~a.b.~~ "Super Majority of the qualified eligible
8 beneficiaries" means:

9 (I) If at the time the determination is made there are
10 one or more beneficiaries as described in s. 736.0103(14)(c),
11 at least a majority ~~two thirds~~ in interest of the
12 beneficiaries described in s. 736.0103(14)(a), at least a
13 majority in interest of the beneficiaries described in s.
14 736.0103(14)(b), and at least a majority ~~or two thirds~~ in
15 interest of the beneficiaries described in s. 736.0103(14)(c),
16 if the interests of the beneficiaries are reasonably
17 ascertainable; otherwise, a majority ~~two thirds~~ in number of
18 each ~~either~~ such class; or

19 (II) If there is no beneficiary as described in s.
20 736.0103(14)(c), at least a majority ~~two thirds~~ in interest of
21 the beneficiaries described in s. 736.0103(14)(a) and at least
22 a majority ~~or two thirds~~ in interest of the beneficiaries
23 described in s. 736.0103(14)(b), if the interests of the
24 beneficiaries are reasonably ascertainable; otherwise, a
25 majority ~~two thirds~~ in number of each ~~either~~ such class.

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

29 ~~c.d.~~ An irrevocable trust is created upon execution of
30 the trust instrument. If a trust that was revocable when
31

1 created thereafter becomes irrevocable, the irrevocable trust
2 is created when the right of revocation terminates.

3 (g) Nothing in this chapter is intended to create or
4 imply a duty for the trustee to seek the application of this
5 subsection to invest in investment instruments described in
6 paragraph (a), and no inference of impropriety may be made as
7 a result of a trustee electing not to invest trust assets in
8 investment instruments described in paragraph (a).

9 (h) This subsection is not the exclusive authority
10 under this code for investing in investment instruments
11 described in paragraph (a). A trustee who invests trust funds
12 in investment instruments described in paragraph (a) is not
13 required to comply with paragraph (b), paragraph (c), or
14 paragraph (f) if the trustee is permitted to invest in such
15 investment instruments pursuant to subsection (2).

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

18 736.0816 Specific powers of trustee.--Except as
19 limited or restricted by this code, a trustee may:

20 (3) Acquire an undivided interest in a trust asset,
21 including, but not limited to, a money market mutual fund,
22 mutual fund, or common trust fund, in which asset the trustee
23 holds an undivided interest in any trust capacity, including
24 any money market or other mutual fund from which the trustee
25 or any affiliate or associate of the trustee is entitled to
26 receive reasonable compensation for providing necessary
27 services as an investment adviser, portfolio manager, or
28 servicing agent. A trustee or affiliate or associate of the
29 trustee may receive compensation for such services in addition
30 to fees received for administering the trust provided such
31 compensation is fully disclosed in writing to all qualified

1 beneficiaries. As used in this subsection, the term "mutual
2 fund" includes an open-end or closed-end management investment
3 company or investment trust registered under the Investment
4 Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended.

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

7 736.1008 Limitations on proceedings against
8 trustees.--

9 (6) This section applies to trust accountings for
10 accounting periods beginning on or after ~~July~~ January 1, 2007
11 ~~2008~~, and to written reports, other than trust accountings,
12 received by a beneficiary on or after ~~July~~ January 1, 2007
13 ~~2008~~.

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

16 736.1011 Exculpation of trustee.--

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

20 (a) The trustee proves that the exculpatory term is
21 fair under the circumstances.

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

26 Section 7. This act shall take effect July 1, 2007.
27
28
29
30
31

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
COMMITTEE SUBSTITUTE FOR
Senate Bill 2218

The committee substitute provides the following changes:

1. Limits the power of a trustee to distribute the principal of a trust when the trustee has absolute power under the trust's terms to invade the principal of the trust.
2. States that exculpatory terms caused to be drafted by a trustee are invalid unless the trustee proves that the exculpatory term is fair under the circumstances, and (for a trust created after July 1, 2007) if the term's existence and contents were adequately disclosed to the settlor or the independent attorney of the settlor.