

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 743

Duties, Powers, and Liabilities of Trustees

SPONSOR(S): Hukill

TIED BILLS:

IDEN./SIM. BILLS: SB 2218

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Constitution & Civil Law</u>	<u>6 Y, 0 N</u>	<u>Thomas</u>	<u>Birtman</u>
2) <u>Safety & Security Council</u>	<u>15 Y, 0 N, As CS</u>	<u>Thomas</u>	<u>Havlicak</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. Current law pertaining to the administration of trusts is found in ch. 737, F.S. However, ch. 737, F.S., will stand repealed on July 1, 2007 as a result of the 2006 Legislature adopting a new Trust Code that will become effective July 1, 2007. The bill modifies several sections of the new Trust Code to:

- expand the ability of a bank or trust company, or an affiliate of a bank or trust company, that owns or controls investment instruments, when acting as a fiduciary, to invest or reinvest fiduciary funds in such investment instruments;
- create a new statute to govern a trustee's power to invade principal in trust;
- provide that specified transactions are not voidable by the beneficiary in the case of conflict between the trustee's fiduciary and personal interests;
- revise provisions relating to affiliated services offered by a bank or trust company acting as a trustee;
- revise provisions relating to the specific powers of a trustee;
- revise effective dates relating to limitations on actions against a trustee; and
- provide that an exculpatory term drafted or caused to be drafted by a trustee is not considered invalid if the exculpatory term was adequately communicated to the independent attorney of the testator.

The bill does not appear to have a fiscal impact on state or local governments.

The bill becomes effective on July 1, 2007.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families -- This bill may affect families who use trust instruments in dealing with personal property.

Safeguard individual liberty -- This bill affects the options of an individual, organization or association regarding the conduct of his/her own affairs using trust instruments.

B. EFFECT OF PROPOSED CHANGES:

Background

The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. Florida's body of statutory law specific to trusts is presently found in ch. 737, F.S., and encompasses: trust registration; the jurisdiction of the courts; the duties and liabilities of trustees; the powers of the trustee; charitable trusts; and rules of construction for trusts. This chapter sets forth the default rules for trust administration which can be limited or altered by the grantor (creator of the trust) in the trust instrument. Trust provisions in statute are also supplemented by case law in areas such as requirements for trust creation, treatment of revocable trusts, and rights of creditors.

However, ch. 737, F.S., is set for repeal on July 1, 2007¹. This repeal is a result of the 2006 Legislature adopting a new Trust Code that will become effective July 1, 2007.² The new Trust Code is based on the updated Uniform Trust Code and is codified as ch. 736, F.S.³

The comprehensive new Trust Code is modeled on the Uniform Trust Code of 2000, with a number of changes that center primarily on updating current Florida law. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Trust Code (UTC) in 2000 and it has been enacted in some form in 18 states and the District of Columbia. In Florida, the Ad Hoc Trust Code Revision Committee (the committee) of the Florida Bar reviewed and revised the UTC to account for distinctions found in Florida statutory and case law. The product of the committee's work was the basis for the new Florida Trust Code.

A trust is generally defined as:

a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.⁴

¹ Section 48, ch. 2006-217, L.O.F.

² Chapter 2006-217, L.O.F.

³ Sections 1-13, ch. 2006-217, L.O.F.

⁴ 55A Fla. Jur. 2d Trusts s. 1.

A “grantor” is “one who creates or adds to a trust and includes ‘settlor’ or ‘trustor’ and a testator who creates or adds to a trust.”⁵ The term “trustee” as used in a technical or legal sense means the person who takes and holds the legal title to trust property for the benefit of another.⁶ “Trustee” includes “an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court.”⁷

Investment of Fiduciary Funds

Section 640.417, F.S., governs the ability of a bank or trust company, or an affiliate of a bank or trust company, when acting as a fiduciary to make certain investments of fiduciary funds. Subsection (3) of this section takes effect July 1, 2007, and provides that:

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

(b) Are sold primarily to accounts for which the bank or trust company is not acting as a fiduciary upon terms that are not more favorable to the buyer than the terms upon which they are sold to accounts for which the bank or trust company is acting as a fiduciary.

The bill amends paragraph (3)(b) to provide that investment is authorized when such investment meets paragraph (3)(a) and:

(b) Are sold to accounts for which the bank or trust company is acting as a trustee of a trust, and the investment instruments are available for sale to accounts of other customers and, if sold to other customers, are not sold to the trust accounts upon terms that are less favorable to the buyer than the terms upon which they are normally sold to the other customers. [emphasis added]

Trustee’s Power to Invade Principle in Trust

The Florida Supreme Court case, Phipps v. Palm Beach Trust,⁸ constitutes longstanding law in Florida that permits a trustee that has absolute discretion to distribute the principal of a trust among a class of beneficiaries, to be able distribute the principal of the trust into a new trust for a member of the class of beneficiaries, rather than making the distribution directly to the beneficiary. The Phipps case held the trustee’s absolute discretion over distributions of principal to be in the nature of a power of appointment, and expressly held that the trustee’s power of appointment could be exercised in further trust. The power to distribute in further trust can facilitate the administration of trusts in a variety of ways. It can permit trusts with multiple beneficiaries to be divided into separate trusts. This can ease administration and avoid a conflict among the beneficiaries. The power can also be used to permit trusts to qualify for additional tax benefits by adding administrative language necessary to qualify for those benefits. The power can also be used to alter administrative provisions that are no longer appropriate to the administration of the trust due to changes in assets, trustees or the interests of the beneficiaries.

⁵ Section 731.201(17), F.S.

⁶ 90 C.J.S. Trusts s.2.

⁷ Section 731.201(35), F.S.

⁸ 142 Fla. 782, 196 So. 299 (Fla. 1940).

When the Florida Legislature adopted the new Florida Trust Code in 2006, the law established in the Phipps case was not codified. The bill creates a new section of Florida Statutes to specifically govern a trustee's power to invade principal held in trust. The bill provides that:

(1) unless the trust instrument expressly provides otherwise, a trustee who has absolute power under the terms of a trust to invade the principal of the trust (the "first trust") to make distributions to, or for the benefit of, one or more persons, may instead exercise the power by appointing all or part of the principal subject to the power in favor of a trustee of a another trust (the "second trust") for the current benefit of one or more of the beneficiaries of the first trust. A power to invade principal for purposes such as best interests, welfare, comfort or happiness constitutes an "absolute power" for purposes of this subsection. It is not necessary for the trust to contain the word "absolute." The trustee would not have the power to invade principal in further trust if the trustee's principal invasion power is limited to specific or ascertainable purposes.

(2) the exercise of the power set forth in subsection (1) must be by written instrument, signed and acknowledged by the trustee and filed with the records of the trust.

(3) the exercise of the power set forth in subsection (1) is to be considered the power of appointment and does not permit the trustee to appoint the trust to the trustee, the trustee's creditors, the trustee's estate or the creditors of the trustee's estate. This avoids conflicts of interest and provides tax protection for the trustee who holds the power and is consistent with other provisions of the trust code.

(4) the trustee must notify all qualified beneficiaries of the first trust, in writing, at least 60 days prior to the effective date of the trustee's exercise of the power set forth in subsection (1) of the manner in which the trustee intends to exercise the power. If all qualified beneficiaries waive the notice requirement by signed written instrument, the power is exercisable immediately. The trustee's notice under this subsection does not limit the right of any beneficiary to object to the exercise of the trustee's power to invade principal in trust except as provided in other applicable provisions of the trust code.

(5) the power to invade principal set forth in subsection (1) is not prohibited by a spendthrift clause⁹ or by a provision in the trust instrument that prohibits amendments or revocation of the trust.

(6) nothing in this section creates or implies that a trustee has a duty to exercise a power to invade trust principal and no inference of impropriety shall be made as a result of a trustee not exercising the power set forth in subsection (1).

(7) the provisions of this section do not abridge the right of any trustee who has a power of invasion to appoint property in further trust which arises under the terms of the trust instrument, under any other section of the trust code, under another provision of law, or under common law.

Duty of Loyalty

A trustee has a duty to administer the trust solely in the interests of the beneficiaries.¹⁰ In the absence of a contrary provision in the trust instrument, a court order,¹¹ or a specific statutory exception:

⁹ "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest. Section 736.0103(17), F.S.

¹⁰ See generally, s. 736.0802(1), F.S.

¹¹ A trustee who is faced with a transaction that might involve a breach of the duty of loyalty may petition the court for appointment of a special fiduciary to act with respect to the transaction. Section 736.0802(9), F.S.

- A trustee may not engage in any sale, encumbrance or transaction for its own personal account or that involves a conflict between the trustee's personal and fiduciary interests;¹²
- A trustee may not usurp an opportunity properly belonging to the trust;¹³ and
- In voting shares of stock or in exercising powers of control over interests in other enterprises, the trustee must act in the best interest of the beneficiaries.¹⁴

With some exceptions, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests, is voidable by an affected beneficiary.¹⁵

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business¹⁶ or personal ties¹⁷ to the trustee. Such transactions are only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.¹⁸ Accordingly, the transactions are not voidable per se; they are voidable only if the presumption is not rebutted.

The new Trust Code includes several exceptions to the basic duty of loyalty in the interest of fair, effective, and efficient trust administration. Notwithstanding the potential presence of a conflict between the personal and fiduciary interests of a trustee, the trustee's duty of loyalty does not preclude any of the following:

- Payment of reasonable compensation to the trustee or an agreement between a trustee and beneficiary relating to the appointment or compensation of the trustee;¹⁹
- Transactions between the trust and another trust, a decedent's estate, or a guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest;²⁰
- A deposit of trust money in a regulated financial-service institution operated by the trustee;²¹
- An advance by the trustee of money for the protection of the trust;²² or
- The employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee or are associated with the trustee, to advise or assist the trustee in the performance of its administrative duties or the employment of agents to perform any act of administration, whether or not discretionary.²³

The bill amends s. 736.0802(2), F.S., to create a new exception to the provisions making a sale, encumbrance, or other transaction voidable by a beneficiary. The new exception includes any transaction made by a corporate trustee that involves a money market mutual fund, a mutual fund, or a common trust fund as described in subsection (3),²⁴ of s. 736.0816, F.S., relating to the specific powers

¹² Section 736.0802(2), F.S. This provision does not apply to contracts entered into or claims acquired by the trustee prior to the time the person became or contemplated becoming trustee. Section 736.0802(2)(e), F.S.

¹³ Section 736.0802(4), F.S.

¹⁴ Section 736.0802(6), F.S.

¹⁵ Section 736.0802(2), F.S.

¹⁶ Section 736.0802(3)(c) and (d), F.S. This includes an officer, director, employee, agent, or attorney of the trustee or a corporation or other person or enterprise in which the trustee (or a person owning a significant interest in the trust) has an interest that might affect the trustee's best judgment.

¹⁷ Section 736.0802(3)(a) and (b), F.S. This includes the trustee's spouse and the trustee's descendants, siblings, parents, or the spouse of any of them.

¹⁸ Section 736.0802(3), F.S.

¹⁹ Section 736.0802(7)(a) and (b), F.S.

²⁰ Section 736.0802(7)(c), F.S.

²¹ Section 736.0802(7)(d), F.S.

²² Section 736.0802(7)(e), F.S.

²³ Section 736.0802(8), F.S.

²⁴ Section 736.0816(3), F.S., reads: "Acquire an undivided interest in a trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common trust fund, in which asset the trustee holds an undivided interest in any trust capacity, including

of a trustee. Actions taken by the trustee under the provisions being added to the exception are voidable by a beneficiary under current law, provided such actions involve a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests. Such actions would no longer be voidable pursuant to the provisions in the bill.

The bill amends s. 736.0802(5), F.S., to provide that the subsection, and its limits on a trustee making investments in investment instruments that are owned or controlled by the trustee, are only applicable within that subsection and are not the exclusive authority under the Trust Code for investing in investment instruments that are owned or controlled by the trustee. The bill further provides that a "trustee who invests trust funds in investment instruments" that are owned or controlled by the trustee is not required to comply with disclosure and notice requirements of the subsection if the trustee is authorized to make such investments pursuant to subsection (2) as discussed above.

Affiliated Services

After July 1, 2007, an exception is provided under the "Duty of Loyalty" provisions discussed above that authorizes a trustee to engage in affiliated services, whereby a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company, provided certain notification requirements are met.²⁵ Such a transaction is not presumed to be affected by a conflict between personal and fiduciary interests so long as the investment complies with chapters 518²⁶ and 660,²⁷ and the trustee complies with the disclosure requirements.²⁸ The requirements of disclosure are that all qualified beneficiaries are: noticed regarding the investment; provided the identity of the investments; and informed of the nature of the relationship of the trustee to the affiliate.²⁹ However, if a trustee chooses not to initiate the affiliated investment opt out procedure and elects not to invest funds in affiliated investments, the law protects the trustee from liability for making that decision.³⁰

The notification requirements provided under this exception are different for irrevocable trusts created on or after July 1, 2007, and for those created prior to July 1, 2007. For those irrevocable trusts created on or after July 1, 2007, the exception applies only to those irrevocable trust instruments that "expressly authorize the trustee, by specific reference to this subsection, to invest in investment instruments owned or controlled by the trustee or its affiliate."³¹ For those irrevocable trusts created prior to July 1, 2007, the exception "shall not apply until 60 days after the statement required in paragraph (f)³² is provided and no objection is made or any objection which is made has been terminated."³³

any money market or other mutual fund from which the trustee or any affiliate or associate of the trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A trustee or affiliate or associate of the trustee may receive compensation for such services in addition to fees received for administering the trust provided such compensation is fully disclosed in writing to all qualified beneficiaries."

²⁵ Section 736.0802(5), F.S.

²⁶ See in particular s. 518.11, F.S., Florida's Prudent Investor rule, which provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes of the trust. In seeking to satisfy this standard, the trustee must exercise reasonable care and caution.

²⁷ Chapter 660, F.S. governs trust business and in part precludes self-dealing (s. 660.40, F.S.).

²⁸ Section 736.0802(5)(a), F.S.

²⁹ The requirements of s. 736.0802(5), F.S. do not apply to qualified investment instruments or to a trust for which a right of revocation exists, s. 736.0802(5)(e)(1), F.S., and to those beneficiaries which the grantor has not make a specific decision in the trust document about whether investments in proprietary products is permissible, s. 736.0802(5)(e)(2), F.S.

³⁰ Section 736.0802(5)(g), F.S.

³¹ Section 736.0802(5)(e)2., F.S.

³² Paragraph (f) of subsection 736.0802(5), F.S., reads: (f)1. Any time prior to initially investing in any investment instrument described in this subsection other than a qualified investment instrument, the trustee of a trust described in subparagraph (e)3. shall provide to all qualified beneficiaries a statement containing the following:

The bill amends s. 736.0802(5)(e)3., F.S., to provide that for “investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts created on or after July 1, 2007, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts created prior to July 1, 2007...” This change will allow the exception to the prohibition on a trustee making investments in investment instruments that are owned or controlled by the trustee to apply to those irrevocable trusts created on or after July 1, 2007, that do not “expressly authorize the trustee, by specific reference to this subsection, to invest in investment instruments owned or controlled by the trustee or its affiliate,”³⁴ provided the notification requirements are met and no objection is made.

The bill further amends s. 736.0802(5)(e)3., F.S., to provide that these paragraphs do not apply until the statement required in paragraph (f) is provided and a majority of the qualified beneficiaries provide written consent. Consents by the qualified beneficiaries must be obtained within 90 days of the date of delivery of the written request. Consent, once given, is valid as to all investment instruments acquired pursuant to the consent prior to the date of any withdrawal of the consent. Any qualified beneficiary may petition the court for an order to prohibit, limit, or restrict a trustee's authority to make such investments. The burden is on the petitioning beneficiary to show good cause for the relief sought. The court may award costs and attorney's fees relating to any such petition. The court may direct from which part of the trust such costs and fees shall be paid. The consent of a majority of the qualified beneficiaries may be withdrawn prospectively by written notice of a majority of any one of the class or classes of the qualified beneficiaries.

Specific Powers of a Trustee

Section 736.0816, F.S., provides a detailed listing of powers that a trustee automatically has in the absence of a contrary provision in the trust instrument. Among these powers, the trustee may collect trust property, acquire or sell property, acquire an undivided interest in a trust asset, exchange, partition, or otherwise change the character of trust property, deposit trust money, borrow money, continue a business enterprise, exercise stock rights, maintain real property, enter into a lease for any purpose as lessor or lessee, grant an option involving disposition of trust property, insure the property of the trust, abandon or decline to administer property of no value or of insufficient value, pay or contest any claim, pay taxes, allocate items of income or expense, exercise elections with respect to taxes, select a mode of payment under any employee benefit or retirement plan, make loans, employ persons, pay an amount distributable to a beneficiary, make distributions, prosecute or defend an action, sign and deliver contracts and other instruments, and exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to the property.

This section specifically provides that a trustee may:

Acquire an undivided interest in a trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common trust fund, in which asset the trustee holds an undivided interest in any trust capacity, including any money market or other mutual fund from which the trustee or any affiliate or associate of the trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A trustee or affiliate or associate of the

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

b. A statement that, unless a super majority of the eligible beneficiaries objects to the application of this subsection to the trust within 60 days after the date the statement pursuant to this subsection was delivered, this subsection shall apply to the trust.

c. A statement that, if this subsection applies to the trust, the trustee will have the right to make investments in investment instruments, as defined in s. 660.25(6), which are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, and that the trustee or its affiliate may receive fees in addition to the trustee's compensation for administering the trust.

³³ Section 736.0802(5)(e)3.a., F.S.

³⁴ Section 736.0802(5)(e)2., F.S.

trustee may receive compensation for such services in addition to fees received for administering the trust provided such compensation is fully disclosed in writing to all qualified beneficiaries.³⁵

The bill amends this subsection to provide that the term “mutual fund” includes “an open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940,³⁶ 15 U.S.C. ss. 80a-1 et seq., as amended.”

Forbes defines a closed-end fund as an “investment company that sells shares like any other corporation and usually does not redeem its shares. A publicly traded fund sold on stock exchanges or over the counter that may trade above or below its net asset value.”³⁷

Forbes defines open-end fund as a “[m]utual fund that continually creates new shares on demand. Mutual fund shareholders buy the funds at net asset value and may redeem them at any time at the prevailing market prices.”³⁸

Limitations on Actions Against Trustees

Section 736.1008, F.S., specifies limitation periods for claims by a beneficiary against a trustee for breach of trust. With respect to matters adequately disclosed on a trust accounting, the applicable limitations period depends on whether the trustee has sent the beneficiary a limitation notice that relates to that accounting. The shortest limitations period provided is six months. This period applies to actions on matters the trustee has adequately disclosed on a trust accounting or other trust disclosure document when the trustee has provided the beneficiary with a related limitation notice.³⁹ A limitation notice is a written statement informing the beneficiary that an action against the trustee for actions based on any matter adequately disclosed in the accounting may be barred unless the action is commenced within six months of receipt of the accounting or limitation notice, whichever is later.⁴⁰

A significantly longer limitations period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. Section 736.1008(1)(a), F.S., provides that the claims are barred as provided in chapter 95, F.S. Normally, this will result in a four-year limitations with the period beginning on the date of receipt of the adequate disclosure.⁴¹ An exception applies to matters involving actual or constructive fraud by the trustee. In those cases, the discovery rule of s. 95.031(2)(a), F.S., applies. Subject to an overall requirement that the action be commenced within 12 years, the discovery rule provides that the limitations period does not begin until the later of the time the facts giving rise to the action are discovered or the time the facts should have been discovered by an exercise of due diligence.

The provisions of this section apply to trust accountings for accounting periods beginning on or after January 1, 2008, and to written reports, other than trust accountings, received by a beneficiary on or after January 1, 2008. This section was scheduled to become effective on January 1, 2008, in order to coincide with the calendar year used for such accountings. However, the existing provisions⁴² that provide similar limitations are scheduled to repeal July 1, 2007.⁴³

³⁵ Section 736.0816(3), F.S.

³⁶ “Created in 1940 through an act of Congress, this piece of legislation clearly defines the responsibilities and limitations placed upon fund companies that offer investment products to the public. Enforced and regulated by the Securities and Exchange Commission, this act clearly sets out the limits regarding filings, service charges, financial disclosure and fiduciary duties. It is the document that keeps investment companies in check.” <http://www.investopedia.com/> (last visited on March 1, 2007).

³⁷ <http://www.forbes.com/>

³⁸ <http://www.forbes.com/>

³⁹ Section 736.1008(2), F.S.

⁴⁰ Section 736.1008(4)(c), F.S.

⁴¹ See s. 95.11(3), F.S. See also s. 736.1008(1)(a), F.S.

⁴² Section 737.307, F.S.

⁴³ Section 48, ch. 2006-217, L.O.F.

The bill provides that this section applies to trust accountings for accounting periods beginning on or after July 1, 2007, and to written reports, other than trust accountings, received by a beneficiary on or after July 1, 2007. This will avoid the existence of any gap between the repeal of the old statute of limitations and the creation of the new statute.

Exculpation of Trustee

The powers and duties of a trustee are governed pursuant to part VIII of ch. 736, F.S., and are discussed in detail above. Section 736.0802, F.S., provides a duty of loyalty to certain parties upon the trustee. A trustee may be liable for damage or loss resulting from the breach of trust owed by the trustee.⁴⁴ The Florida Trust Code contains a provision that restricts the enforceability of a term in a trust that attempts to relieve a trustee of liability for a breach of trust.⁴⁵ The restrictions are mandatory and may not be relaxed in the trust instrument.⁴⁶ Under this statute, an exculpatory term may not relieve a trustee of liability for breaches committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.⁴⁷ In addition, an exculpatory term is unenforceable if it was inserted as a result of an abuse of a fiduciary or confidential relationship between the trustee and grantor.⁴⁸ This latter restriction applies to terms that were drafted or caused to be drafted by the trustee unless the trustee proves that the term is fair and its existence and contents were adequately communicated directly to the grantor.⁴⁹ This provision is part of the new Trust Code and will take effect July 1, 2007.

The bill adds a qualification to the existing prohibition to provide that an exculpatory term within a trust agreement is not considered invalid as an abuse of a fiduciary or confidential relationship between the trustee and settlor, if the trustee proves that the exculpatory clause is fair under the circumstances and the term's existence and contents were adequately communicated to the settlor or the independent attorney of the settlor.

Effective Date

The bill takes effect July 1, 2007.

C. SECTION DIRECTORY:

Section 1 amends s. 660.417, F.S., relating to investment of fiduciary funds in investment instruments.

Section 2 creates s. 736.04117, F.S., relating to a trustee's power to invade principal in trust.

Section 3 amends s. 736.0802, F.S., relating to the duty of loyalty of trustees.

Section 4 amends s. 736.0816, F.S., relating to specific powers of a trustee.

Section 5 amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

Section 6 amends s. 736.1011, F.S., relating to exculpation of a trustee.

Section 7 provides an effective date.

⁴⁴ Part X of ch. 736, F.S.

⁴⁵ Section 736.1011, F.S.

⁴⁶ Section 736.0105(2)(u), F.S.

⁴⁷ Section 736.1011(1)(a), F.S.

⁴⁸ Section 736.1011(1)(b), F.S.

⁴⁹ Section 736.1011(2), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement was submitted by the original bill sponsor.

The chair of the Safety & Security Council chose not to submit any further comments regarding the council substitute.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 7, 2007, the Committee on Constitution & Civil Law adopted one amendment and reported the bill favorably as amended. The amendment removed the entire body of the bill and inserted new language that:

- Revises provisions in the bill relating to Investment of Fiduciary Funds, Duty of Loyalty, Affiliated Services, and Exculpation of Trustee.
- Creates a new statute to codify case law relating to a Trustee's Power to Invade Principal in Trust.
- Removes all the provisions in the bill relating to the power to direct a trustee.
- Reinserts identical language from the bill regarding Specific Powers of a Trustee.
- Removes all the provisions in the bill relating to limitations on actions against a trustee, except the amendment does retain the change in the effective date of this provision.

This same amendment was adopted by the Safety & Security Council on March 21, 2007, and the bill was reported favorably.

This analysis is addressed to the bill as amended by the Council.