

1 A bill to be entitled
2 An act relating to duties, powers, and liabilities of
3 trustees; amending s. 660.417, F.S.; revising criteria for
4 investments in certain investment instruments; amending s.
5 660.46, F.S.; conforming cross-references to changes made
6 by the act; amending s. 736.0802, F.S.; specifying
7 additional trust property transactions not voidable by a
8 beneficiary; revising certain disclosure and applicability
9 requirements; broadening authority for investing in
10 certain investment instruments; excusing trustees from
11 certain compliance requirements under certain
12 circumstances; amending s. 736.0808, F.S.; revising
13 provisions relating to powers to direct; providing
14 additional criteria and requirements relating to grants of
15 powers to trustees to direct, consent to, or disapprove
16 investment actions; specifying absence of liability of
17 trustees for certain losses; specifying absence of trustee
18 obligations to perform certain activities relating to
19 investment under certain circumstances; subjecting trust
20 advisors to jurisdiction of state courts under certain
21 circumstances; amending s. 736.0816, F.S.; defining the
22 term "mutual fund" for certain purposes; amending s.
23 736.1008, F.S.; revising limitations on proceedings
24 against trustees; providing additional limitations;
25 amending s. 736.1011, F.S.; providing construction
26 relating to trustee drafts of exculpatory terms in a trust
27 instrument; providing an effective date.
28

29 Be It Enacted by the Legislature of the State of Florida:

30
 31 Section 1. Subsection (3) of section 660.417, Florida
 32 Statutes, as amended by section 18 of chapter 2006-217, Laws of
 33 Florida, is amended to read:

34 660.417 Investment of fiduciary funds in investment
 35 instruments; permissible activity under certain circumstances;
 36 limitations.--

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

43 (a) Are held for sale by the bank or trust company or by
 44 an affiliate of the bank or trust company in the ordinary course
 45 of its business of providing investment services to its
 46 customers and do not include any such interests held by the bank
 47 or trust company or by an affiliate of the bank or trust company
 48 for its own account.

49 (b) Are sold primarily to accounts for which the bank or
 50 trust company is ~~not~~ acting as a fiduciary, or are not sold to
 51 accounts for which the bank or trust company is acting as a
 52 fiduciary upon terms that are normally less ~~not more~~ favorable
 53 to the buyer than the terms upon which they are normally sold to
 54 accounts for which the bank or trust company is not acting as a
 55 fiduciary.

HB 743

2007

56 Section 2. Paragraphs (a) and (e) of subsection (1) and
57 subsection (9) of section 660.46, Florida Statutes, as amended
58 by section 19 of chapter 2006-217, Laws of Florida, are amended
59 to read:

60 660.46 Substitution of fiduciaries.--

61 (1) The provisions of this section shall apply to the
62 transfer of fiduciary accounts by substitution, and for those
63 purposes these provisions shall constitute alternative
64 procedures to those provided or required by any other provisions
65 of law relating to the transfer of fiduciary accounts or the
66 substitution of persons acting or who are to act in a fiduciary
67 capacity. In this section, and only for its purposes, the term:

68 (a) "Limitation notice" has the meaning ascribed in s.
69 736.1008 (6) ~~(4)~~.

70 (e) "Trust disclosure document" has the meaning ascribed
71 in s. 736.1008 (6) ~~(4)~~ (a).

72 (9) Unless previously or otherwise barred by adjudication,
73 waiver, consent, limitation, or the provisions of subsection
74 (8), an action for breach of trust or breach of fiduciary duties
75 or responsibilities against an original fiduciary in whose place
76 and stead another trust company or trust department has been
77 substituted pursuant to the provisions of this section is barred
78 for any beneficiary who has received a trust disclosure document
79 adequately disclosing the matter unless a proceeding to assert
80 the claim is commenced within 6 months after receipt of the
81 trust disclosure document or the limitation notice that applies
82 to the trust disclosure document, whichever is received later.
83 In any event, and notwithstanding lack of adequate disclosure,

84 all claims against such original fiduciary which has complied
 85 with the requirements of s. 736.1008 are barred as provided in
 86 chapter 95. Section 736.1008 (6) ~~(4)~~ (a) and (c) applies to this
 87 subsection.

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

90 736.0802 Duty of loyalty.--

91 (2) Subject to the rights of persons dealing with or
 92 assisting the trustee as provided in s. 736.1016, a sale,
 93 encumbrance, or other transaction involving the investment or
 94 management of trust property entered into by the trustee for the
 95 trustee's own personal account or which is otherwise affected by
 96 a conflict between the trustee's fiduciary and personal
 97 interests is voidable by a beneficiary affected by the
 98 transaction unless:

99 (a) The transaction was authorized by the terms of the
 100 trust;

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

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

104 (d) The beneficiary consented to the trustee's conduct,
 105 ratified the transaction, or released the trustee in compliance
 106 with s. 736.1012;

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

110 (f) The transaction was consented to in writing by a
 111 settlor of the trust while the trust was revocable; or.

112 (g) The transaction is one described in s. 736.0816(1),
 113 (3), or (6).

114 (5) (a) An investment by a trustee authorized by lawful
 115 authority to engage in trust business, as defined in s.
 116 658.12(20), in investment instruments, as defined in s.
 117 660.25(6), that are owned or controlled by the trustee or its
 118 affiliate, or from which the trustee or its affiliate receives
 119 compensation for providing services in a capacity other than as
 120 trustee, is not presumed to be affected by a conflict between
 121 personal and fiduciary interests provided the investment
 122 otherwise complies with chapters 518 and 660 and the trustee
 123 complies with the disclosure requirements of this subsection.

124 (b) A trustee who, pursuant to authority granted in this
 125 subsection, invests trust funds in investment instruments that
 126 are owned or controlled by the trustee or its affiliate shall
 127 disclose the following to all qualified beneficiaries:

128 1. Notice that the trustee has invested trust funds in
 129 investment instruments owned or controlled by the trustee or its
 130 affiliate.

131 2. The identity of the investment instruments.

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

134 (c) A trustee who, pursuant to authority granted in this
 135 subsection, invests trust funds in investment instruments with
 136 respect to which the trustee or its affiliate receives
 137 compensation for providing services in a capacity other than as
 138 trustee shall disclose to all qualified beneficiaries, the
 139 nature of the services provided by the trustee or its affiliate,

HB 743

2007

140 and all compensation, including, but not limited to, fees or
141 commissions paid or to be paid by the account and received or to
142 be received by an affiliate arising from such affiliated
143 investment.

144 (d) Disclosure required by this subsection shall be made
145 at least annually unless there has been no change in the method
146 or increase in the rate at which such compensation is calculated
147 since the most recent disclosure. The disclosure may be given in
148 a trust disclosure document as defined in s. 736.1008, in a copy
149 of the prospectus for the investment instrument, in any other
150 written disclosure prepared for the investment instrument under
151 applicable federal or state law, or in a written summary that
152 includes all compensation received or to be received by the
153 trustee and any affiliate of the trustee and an explanation of
154 the manner in which such compensation is calculated, either as a
155 percentage of the assets invested or by some other method.

156 (e) This subsection shall apply as follows:

157 1. This subsection does not apply to qualified investment
158 instruments or to a trust for which a right of revocation
159 exists.

160 2. For investment instruments other than qualified
161 investment instruments, paragraphs (a), (b), (c), and (d) shall
162 apply to irrevocable trusts created on or after July 1, 2007,
163 which expressly authorize the trustee, by specific reference to
164 this subsection, to invest in investment instruments owned or
165 controlled by the trustee or its affiliate.

166 3. For investment instruments other than qualified
167 investment instruments, paragraphs (a), (b), (c), and (d) shall

HB 743

2007

168 apply to irrevocable trusts executed on or after July 1, 2007,
169 that are not described in subparagraph 2. and to irrevocable
170 trusts executed prior to July 1, 2007, only as follows:

171 a. Such paragraphs shall not apply until 60 days after the
172 statement required in paragraph (f) is provided and no objection
173 is made or any objection which is made has been terminated.

174 (I) An objection is made if, within 60 days after the date
175 of the statement required in paragraph (f), a super majority of
176 the eligible beneficiaries deliver to the trustee written
177 objections to the application of this subsection to such trust.
178 An objection shall be deemed to be delivered to the trustee on
179 the date the objection is mailed to the mailing address listed
180 in the notice provided in paragraph (f).

181 (II) An objection is terminated upon the earlier of the
182 receipt of consent from a super majority of eligible
183 beneficiaries of the class that made the objection or the
184 resolution of the objection pursuant to this subparagraph.

185 (III) If an objection is delivered to the trustee, the
186 trustee may petition the court for an order overruling the
187 objection and authorizing the trustee to make investments under
188 this subsection. The burden shall be on the trustee to show good
189 cause for the relief sought.

190 (IV) Any qualified beneficiary may petition the court for
191 an order to prohibit, limit, or restrict a trustee's authority
192 to make investments under this subsection. The burden shall be
193 upon the petitioning beneficiary to show good cause for the
194 relief sought.

HB 743

2007

195 (V) The court may award costs and attorney's fees relating
196 to any petition under this subparagraph in the same manner as in
197 chancery actions. When costs and attorney's fees are to be paid
198 out of the trust, the court, in its discretion, may direct from
199 which part of the trust such costs and fees shall be paid.

200 b. The objection of a super majority of eligible
201 beneficiaries under this subparagraph may thereafter be removed
202 by the written consent of a super majority of the class or
203 classes of those eligible beneficiaries that made the objection.

204 (f)1. Any time prior to initially investing in any
205 investment instrument described in this subsection other than a
206 qualified investment instrument, the trustee of a trust
207 described in subparagraph (e)3. shall provide to all qualified
208 beneficiaries a statement containing the following:

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

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

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

HB 743

2007

223 the trustee or its affiliate may receive fees in addition to the
224 trustee's compensation for administering the trust.

225

226 A statement by the trustee is not delivered if the statement is
227 accompanied by another written communication other than a
228 written communication by the trustee that refers only to the
229 statement.

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

231 a. "Eligible beneficiaries" means:

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

235 (II) If there is no beneficiary described in s.
236 736.0103(14)(c), the beneficiaries described in s.
237 736.0103(14)(a) and (b).

238 b. "Super majority of the eligible beneficiaries" means:

239 (I) If at the time the determination is made there are one
240 or more beneficiaries as described in s. 736.0103(14)(c), at
241 least two-thirds in interest of the beneficiaries described in
242 s. 736.0103(14)(a) or two-thirds in interest of the
243 beneficiaries described in s. 736.0103(14)(c), if the interests
244 of the beneficiaries are reasonably ascertainable; otherwise,
245 two-thirds in number of either such class; or

246 (II) If there is no beneficiary as described in s.
247 736.0103(14)(c), at least two-thirds in interest of the
248 beneficiaries described in s. 736.0103(14)(a) or two-thirds in
249 interest of the beneficiaries described in s. 736.0103(14)(b),
250 if the interests of the beneficiaries are reasonably

251 ascertainable; otherwise, two-thirds in number of either such
 252 class.

253 c. "Qualified investment instrument" means a mutual fund,
 254 common trust fund, or money market fund described in and
 255 governed by s. 736.0816(3).

256 d. An irrevocable trust is created upon execution of the
 257 trust instrument. If a trust that was revocable when created
 258 thereafter becomes irrevocable, the irrevocable trust is created
 259 when the right of revocation terminates.

260 (g) Nothing in this chapter is intended to create or imply
 261 a duty for the trustee to seek the application of this
 262 subsection to invest in investment instruments described in
 263 paragraph (a), and no inference of impropriety may be made as a
 264 result of a trustee electing not to invest trust assets in
 265 investment instruments described in paragraph (a).

266 (h) This subsection is not the exclusive authority for
 267 investing in investment instruments described in paragraph (a).
 268 A trustee who invests trust funds in investment instruments
 269 described in paragraph (a) is not required to comply with
 270 paragraph (b), paragraph (c), or paragraph (f) if the trustee is
 271 permitted to invest in such investment instruments pursuant to
 272 subsection (2) or any other law that would authorize the
 273 investments described in paragraph (a).

274 Section 4. Section 736.0808, Florida Statutes, is amended
 275 to read:

276 736.0808 Powers to direct.--

277 (1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the
 278 trustee may follow a direction of the settlor that is contrary

279 to the terms of the trust while a trust is revocable. For
 280 purposes of this section, the acts of the settlor of a trust
 281 while the trust is revocable shall be treated as acts of a trust
 282 advisor.

283 (2) The terms of a trust instrument may confer on a person
 284 one or more powers and discretions of a trust advisor which may
 285 be exercised or not exercised, in the best interests of the
 286 trust, in the sole and absolute discretion of the trust advisor
 287 whose actions are binding on all other persons. A trust advisor
 288 may be granted the power to direct, consent to, or disapprove
 289 any investment action of the trustee, any distribution of trust
 290 assets, and any modification or termination of the trust. For
 291 purposes of this section, investment actions of the trustee
 292 include, but are not limited to, acquisition, retention,
 293 purchase, sale, exchange, tender, encumbrance, or other
 294 transactions affecting ownership or rights of trust property and
 295 the investment and reinvestment of principal and income of the
 296 trust.

297 (3)-(2) If the terms of a trust confer on a person one or
 298 more powers and discretions of a trust advisor ~~other than the~~
 299 ~~settlor of a revocable trust the power to direct certain actions~~
 300 ~~of the trustee, the trustee shall act in accordance with an~~
 301 ~~exercise of the power unless the attempted exercise is~~
 302 ~~manifestly contrary to the terms of the trust or the trustee~~
 303 ~~knows the attempted exercise would constitute a serious breach~~
 304 ~~of a fiduciary duty that the person holding the power owes to~~
 305 ~~the beneficiaries of the trust. The trustee shall not be liable,~~
 306 individually or as a fiduciary, for any loss that results from

307 compliance with a direction of the trust advisor; for any loss
308 that results from a failure to take any action that requires
309 prior approval of the trust advisor if the trustee timely sought
310 but failed to obtain that authorization; or for any failure to
311 correct, address, or pursue redress against the trust advisor
312 for any breach of trust or other act of the trust advisor in the
313 exercise or failure to exercise the power of the trust advisor.
314 The trustee is also relieved from any obligation to perform
315 investment or suitability reviews, inquiries, or investigations
316 or to make recommendations or evaluations with respect to any
317 investments to the extent the trust advisor had authority to
318 direct investment actions of the trustee. This subsection does
319 not apply to a trust advisor appointed by the trustee unless the
320 trust was revocable at the time of appointment, and the trustee
321 who appointed the trust advisor was also the settlor of the
322 trust.

323 ~~(3) The terms of a trust may confer on a trustee or other~~
324 ~~person a power to direct the modification or termination of the~~
325 ~~trust.~~

326 (4) A person, other than a beneficiary, who holds a power
327 to direct is presumptively a fiduciary who, as such, is required
328 to act in good faith with regard to the purposes of the trust
329 and the interests of the beneficiaries. The holder of a power to
330 direct is liable for any loss that results from breach of a
331 fiduciary duty.

332 (5) By accepting an appointment to serve as a trust
333 advisor of a trust that is subject to the laws of this state,
334 the trust advisor submits to the jurisdiction of the courts of

335 this state even if investment advisory agreements or other
 336 related agreements provide otherwise, and the trust advisor may
 337 be made a party to any action or proceeding if issues relate to
 338 a decision or action of the trust advisor.

339 Section 5. Subsection (3) of section 736.0816, Florida
 340 Statutes, is amended to read:

341 736.0816 Specific powers of trustee.--Except as limited or
 342 restricted by this code, a trustee may:

343 (1) Collect trust property and accept or reject additions
 344 to the trust property from a settlor, including an asset in
 345 which the trustee is personally interested, and hold property in
 346 the name of a nominee or in other form without disclosure of the
 347 trust so that title to the property may pass by delivery but the
 348 trustee is liable for any act of the nominee in connection with
 349 the property so held.

350 (3) Acquire an undivided interest in a trust asset,
 351 including, but not limited to, a money market mutual fund,
 352 mutual fund, or common trust fund, in which asset the trustee
 353 holds an undivided interest in any trust capacity, including any
 354 money market or other mutual fund from which the trustee or any
 355 affiliate or associate of the trustee is entitled to receive
 356 reasonable compensation for providing necessary services as an
 357 investment adviser, portfolio manager, or servicing agent. A
 358 trustee or affiliate or associate of the trustee may receive
 359 compensation for such services in addition to fees received for
 360 administering the trust provided such compensation is fully
 361 disclosed in writing to all qualified beneficiaries. As used in
 362 this subsection, the term "mutual fund" includes an open-end or

363 closed-end management investment company or investment trust
 364 registered under the Investment Company Act of 1940, 15 U.S.C.
 365 ss. 80a-1 et seq., as amended.

366 (6) Borrow money, with or without security, and mortgage
 367 or pledge trust property for a period within or extending beyond
 368 the duration of the trust and advance money for the protection
 369 of the trust.

370 Section 6. Section 736.1008, Florida Statutes, is amended
 371 to read:

372 736.1008 Limitations on proceedings against trustees.--

373 (1) Except as provided in subsection (2), all claims by a
 374 beneficiary against a trustee for breach of trust are barred as
 375 provided in chapter 95 as to:

376 (a) All matters adequately disclosed in a trust disclosure
 377 document issued by the trustee, with the limitations period
 378 beginning on the date of receipt of adequate disclosure.

379 (b) All matters not adequately disclosed in a trust
 380 disclosure document if the trustee has issued a final trust
 381 accounting and has given written notice to the beneficiary of
 382 the availability of the trust records for examination and that
 383 any claims with respect to matters not adequately disclosed may
 384 be barred unless an action is commenced within the applicable
 385 limitations period provided in chapter 95. The limitations
 386 period begins on the date of receipt of the final trust
 387 accounting and notice.

388 (2) Unless sooner barred by adjudication, consent, or
 389 limitations, a beneficiary is barred from bringing an action
 390 against a trustee for breach of trust with respect to a matter

391 that was adequately disclosed in a trust disclosure document
392 unless a proceeding to assert the claim is commenced within 6
393 months after receipt from the trustee of the trust disclosure
394 document or a limitation notice that applies to that disclosure
395 document, whichever is received later.

396 (3) When a trustee has not issued a final trust accounting
397 or has not given written notice to the beneficiary of the
398 availability of the trust records for examination and that
399 claims with respect to matters not adequately disclosed may be
400 barred, a claim against the trustee for breach of trust based on
401 a matter not adequately disclosed in a trust disclosure document
402 accrues when the beneficiary has actual knowledge of the facts
403 upon which the claim is based or actual knowledge of the
404 trustee's resignation, repudiation of the trust, ~~or~~ adverse
405 possession of trust assets, or termination of the trust and is
406 barred as provided in chapter 95.

407 (4) Notwithstanding subsection (1), subsection (2), or
408 subsection (3), all claims by a beneficiary against a trustee
409 shall be barred 10 years after the date of the act or omission
410 of the trustee complained of. The running of the 10-year period
411 is tolled by the minority of the beneficiary entitled to sue
412 during any period of time in which a parent, guardian, or
413 guardian ad litem does not exist, has an interest adverse to
414 that of the minor, or is adjudicated to be incapacitated to sue.

415 (5) The failure of the trustee to take corrective action
416 shall not be construed as a separate act or omission and shall
417 not be construed to extend any period of limitations otherwise

HB 743

2007

418 established by law, including, but not limited to, the
419 limitations established by this section.

420 ~~(6)(4)~~ As used in this section, the term:

421 (a) "Trust disclosure document" means a trust accounting
422 or any other written report of the trustee. A trust disclosure
423 document adequately discloses a matter if the document provides
424 sufficient information so that a beneficiary knows of a claim or
425 reasonably should have inquired into the existence of a claim
426 with respect to that matter.

427 (b) "Trust accounting" means an accounting that adequately
428 discloses the information required by and that substantially
429 complies with the standards set forth in s. 736.08135.

430 (c) "Limitation notice" means a written statement of the
431 trustee that an action by a beneficiary against the trustee for
432 breach of trust based on any matter adequately disclosed in a
433 trust disclosure document may be barred unless the action is
434 commenced within 6 months after receipt of the trust disclosure
435 document or receipt of a limitation notice that applies to that
436 trust disclosure document, whichever is later. A limitation
437 notice may but is not required to be in the following form: "An
438 action for breach of trust based on matters disclosed in a trust
439 accounting or other written report of the trustee may be subject
440 to a 6-month statute of limitations from the receipt of the
441 trust accounting or other written report. If you have questions,
442 please consult your attorney."

443 ~~(7)(5)~~ For purposes of this section, a limitation notice
444 applies to a trust disclosure document when the limitation
445 notice is:

HB 743

2007

446 (a) Contained as a part of the trust disclosure document
447 or as a part of another trust disclosure document received
448 within 1 year prior to the receipt of the latter trust
449 disclosure document;

450 (b) Accompanied concurrently by the trust disclosure
451 document or by another trust disclosure document that was
452 received within 1 year prior to the receipt of the latter trust
453 disclosure document;

454 (c) Delivered separately within 10 days after the delivery
455 of the trust disclosure document or of another trust disclosure
456 document that was received within 1 year prior to the receipt of
457 the latter trust disclosure document. For purposes of this
458 paragraph, a limitation notice is not delivered separately if
459 the notice is accompanied by another written communication,
460 other than a written communication that refers only to the
461 limitation notice; or

462 (d) Received more than 10 days after the delivery of the
463 trust disclosure document, but only if the limitation notice
464 references that trust disclosure document and:

465 1. Offers to provide to the beneficiary on request another
466 copy of that trust disclosure document if the document was
467 received by the beneficiary within 1 year prior to receipt of
468 the limitation notice; or

469 2. Is accompanied by another copy of that trust disclosure
470 document if the trust disclosure document was received by the
471 beneficiary 1 year or more prior to the receipt of the
472 limitation notice.

HB 743

2007

473 ~~(8)(6)~~ This section applies to trust accountings for
 474 accounting periods beginning on or after July ~~January~~ 1, 2007
 475 ~~2008~~, and to written reports, other than trust accountings,
 476 received by a beneficiary on or after July ~~January~~ 1, 2007 ~~2008~~.

477 Section 7. Subsection (2) of section 736.1011, Florida
 478 Statutes, is amended to read:

479 736.1011 Exculpation of trustee.--

480 (2) An exculpatory term drafted or caused to be drafted by
 481 the trustee is invalid as an abuse of a fiduciary or
 482 confidential relationship unless the trustee proves that the
 483 exculpatory term is fair under the circumstances and that the
 484 term's existence and contents were adequately communicated
 485 directly to the settlor. An exculpatory term is not drafted or
 486 caused to be drafted by the trustee within the meaning of this
 487 subsection when the trustee provides exculpatory language to the
 488 person drafting the trust instrument which the trustee requests
 489 or requires to be contained in the trust instrument.

490 Section 8. This act shall take effect July 1, 2007.