

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

22
23 Be It Enacted by the Legislature of the State of Florida:

24
25 Section 1. Subsection (3) of section 660.417, Florida
26 Statutes, as amended by section 18 of chapter 2006-217, Laws of
27 Florida, is amended to read:

28 660.417 Investment of fiduciary funds in investment
 29 instruments; permissible activity under certain circumstances;
 30 limitations.--

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

37 (a) Are held for sale by the bank or trust company or by
 38 an affiliate of the bank or trust company in the ordinary course
 39 of its business of providing investment services to its
 40 customers and do not include any such interests held by the bank
 41 or trust company or by an affiliate of the bank or trust company
 42 for its own account.

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

46 1. Are available for sale to accounts of other customers;
 47 and

48 2. If sold to other customers, are not sold to the trust
 49 accounts ~~fiduciary~~ upon terms that are less ~~not more~~ favorable
 50 to the buyer than the terms upon which they are normally sold to
 51 the other customers ~~accounts for which the bank or trust company~~
 52 ~~is acting as a fiduciary.~~

53 Section 2. Section 736.04117, Florida Statutes, is created
 54 to read:

55 736.04117 Trustee's power to invade principal in trust.--

56 (1) (a) Unless the trust instrument expressly provides
57 otherwise, a trustee who has absolute power under the terms of a
58 trust to invade the principal of the trust, referred to in this
59 section as the "first trust," to make distributions to or for
60 the benefit of one or more persons may instead exercise the
61 power by appointing all or part of the principal of the trust
62 subject to the power in favor of a trustee of another trust,
63 referred to in this section as the "second trust," for the
64 current benefit of one or more of such persons under the same
65 trust instrument or under a different trust instrument;
66 provided:

67 1. The beneficiaries of the second trust may include only
68 beneficiaries of the first trust;

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

72 3. If any contribution to the first trust qualified for a
73 marital or charitable deduction for federal income, gift, or
74 estate tax purposes under the Internal Revenue Code of 1986, as
75 amended, the second trust shall not contain any provision which,
76 if included in the first trust, would have prevented the first
77 trust from qualifying for such a deduction or would have reduced
78 the amount of such deduction.

79 (b) For purposes of this subsection, an absolute power to
80 invade principal shall include a power to invade principal that
81 is not limited to specific or ascertainable purposes, such as
82 health, education, maintenance, and support, whether or not the
83 term "absolute" is used. A power to invade principal for

84 purposes such as best interests, welfare, comfort, or happiness
85 shall constitute an absolute power not limited to specific or
86 ascertainable purposes.

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

91 (3) The exercise of a power to invade principal under
92 subsection (1) shall be considered the exercise of a power of
93 appointment, other than a power to appoint to the trustee, the
94 trustee's creditors, the trustee's estate, or the creditors of
95 the trustee's estate, and shall be subject to the provisions of
96 s. 689.225 covering the time at which the permissible period of
97 the rule against perpetuities begins and the law that determines
98 the permissible period of the rule against perpetuities of the
99 first trust.

100 (4) The trustee shall notify all qualified beneficiaries
101 of the first trust, in writing, at least 60 days prior to the
102 effective date of the trustee's exercise of the trustee's power
103 to invade principal pursuant to subsection (1), of the manner in
104 which the trustee intends to exercise the power. A copy of the
105 proposed instrument exercising the power shall satisfy the
106 trustee's notice obligation under this subsection. If all
107 qualified beneficiaries waive the notice period by signed
108 written instrument delivered to the trustee, the trustee's power
109 to invade principal shall be exercisable immediately. The
110 trustee's notice under this subsection shall not limit the right
111 of any beneficiary to object to the exercise of the trustee's

112 power to invade principal except as provided in other applicable
 113 provisions of this code.

114 (5) The exercise of the power to invade principal under
 115 subsection (1) is not prohibited by a spendthrift clause or by a
 116 provision in the trust instrument that prohibits amendment or
 117 revocation of the trust.

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

123 (7) The provisions of this section shall not be construed
 124 to abridge the right of any trustee who has a power of invasion
 125 to appoint property in further trust that arises under the terms
 126 of the first trust or under any other section of this code or
 127 under another provision of law or under common law.

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

130 736.0802 Duty of loyalty.--

131 (2) Subject to the rights of persons dealing with or
 132 assisting the trustee as provided in s. 736.1016, a sale,
 133 encumbrance, or other transaction involving the investment or
 134 management of trust property entered into by the trustee for the
 135 trustee's own personal account or which is otherwise affected by
 136 a conflict between the trustee's fiduciary and personal
 137 interests is voidable by a beneficiary affected by the
 138 transaction unless:

- 139 (a) The transaction was authorized by the terms of the
 140 trust;
- 141 (b) The transaction was approved by the court;
- 142 (c) The beneficiary did not commence a judicial proceeding
 143 within the time allowed by s. 736.1008;
- 144 (d) The beneficiary consented to the trustee's conduct,
 145 ratified the transaction, or released the trustee in compliance
 146 with s. 736.1012;
- 147 (e) The transaction involves a contract entered into or
 148 claim acquired by the trustee when that person had not become or
 149 contemplated becoming trustee; ~~or~~
- 150 (f) The transaction was consented to in writing by a
 151 settlor of the trust while the trust was revocable; or-
- 152 (g) The transaction is one by a corporate trustee that
 153 involves a money market mutual fund, mutual fund, or a common
 154 trust fund described in s. 736.0816(3).
- 155 (5) (a) An investment by a trustee authorized by lawful
 156 authority to engage in trust business, as defined in s.
 157 658.12(20), in investment instruments, as defined in s.
 158 660.25(6), that are owned or controlled by the trustee or its
 159 affiliate, or from which the trustee or its affiliate receives
 160 compensation for providing services in a capacity other than as
 161 trustee, is not presumed to be affected by a conflict between
 162 personal and fiduciary interests provided the investment
 163 otherwise complies with chapters 518 and 660 and the trustee
 164 complies with the ~~disclosure~~ requirements of this subsection.
- 165 (b) A trustee who, pursuant to this subsection, invests
 166 trust funds in investment instruments that are owned or

167 controlled by the trustee or its affiliate shall disclose the
168 following to all qualified beneficiaries:

169 1. Notice that the trustee has invested trust funds in
170 investment instruments owned or controlled by the trustee or its
171 affiliate.

172 2. The identity of the investment instruments.

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

175 (c) A trustee who, pursuant to this subsection, invests
176 trust funds in investment instruments with respect to which the
177 trustee or its affiliate receives compensation for providing
178 services in a capacity other than as trustee shall disclose to
179 all qualified beneficiaries, the nature of the services provided
180 by the trustee or its affiliate, and all compensation,
181 including, but not limited to, fees or commissions paid or to be
182 paid by the account and received or to be received by an
183 affiliate arising from such affiliated investment.

184 (d) Disclosure required by this subsection shall be made
185 at least annually unless there has been no change in the method
186 or increase in the rate at which such compensation is calculated
187 since the most recent disclosure. The disclosure may be given in
188 a trust disclosure document as defined in s. 736.1008, in a copy
189 of the prospectus for the investment instrument, in any other
190 written disclosure prepared for the investment instrument under
191 applicable federal or state law, or in a written summary that
192 includes all compensation received or to be received by the
193 trustee and any affiliate of the trustee and an explanation of

194 the manner in which such compensation is calculated, either as a
 195 percentage of the assets invested or by some other method.

196 (e) This subsection shall apply as follows:

197 1. This subsection does not apply to qualified investment
 198 instruments or to a trust for which a right of revocation
 199 exists.

200 2. For investment instruments other than qualified
 201 investment instruments, paragraphs (a), (b), (c), and (d) shall
 202 apply to irrevocable trusts created on or after July 1, 2007,
 203 which expressly authorize the trustee, by specific reference to
 204 this subsection, to invest in investment instruments owned or
 205 controlled by the trustee or its affiliate.

206 3. For investment instruments other than qualified
 207 investment instruments, paragraphs (a), (b), (c), and (d) shall
 208 apply to irrevocable trusts created on or after July 1, 2007,
 209 that are not described in subparagraph 2. and to irrevocable
 210 trusts created prior to July 1, 2007, only as follows:

211 a. Such paragraphs shall not apply until ~~60 days after~~ the
 212 statement required in paragraph (f) is provided and a majority
 213 of the qualified beneficiaries have provided written consent.
 214 All consents must be obtained within 90 days after the date of
 215 delivery of the written request. Once given, consent shall be
 216 valid as to all investment instruments acquired pursuant to the
 217 consent prior to the date of any withdrawal of the consent ~~no~~
 218 ~~objection is made or any objection which is made has been~~
 219 ~~terminated.~~

220 ~~(I) An objection is made if, within 60 days after the date~~
 221 ~~of the statement required in paragraph (f), a super majority of~~

222 ~~the eligible beneficiaries deliver to the trustee written~~
223 ~~objections to the application of this subsection to such trust.~~
224 ~~An objection shall be deemed to be delivered to the trustee on~~
225 ~~the date the objection is mailed to the mailing address listed~~
226 ~~in the notice provided in paragraph (f).~~

227 ~~(II) An objection is terminated upon the earlier of the~~
228 ~~receipt of consent from a super majority of eligible~~
229 ~~beneficiaries of the class that made the objection or the~~
230 ~~resolution of the objection pursuant to this subparagraph.~~

231 ~~(III) If an objection is delivered to the trustee, the~~
232 ~~trustee may petition the court for an order overruling the~~
233 ~~objection and authorizing the trustee to make investments under~~
234 ~~this subsection. The burden shall be on the trustee to show good~~
235 ~~cause for the relief sought.~~

236 ~~(I)-(IV)~~ Any qualified beneficiary may petition the court
237 for an order to prohibit, limit, or restrict a trustee's
238 authority to make investments under this subsection. The burden
239 shall be upon the petitioning beneficiary to show good cause for
240 the relief sought.

241 ~~(II)-(V)~~ The court may award costs and attorney's fees
242 relating to any petition under this subparagraph in the same
243 manner as in chancery actions. When costs and attorney's fees
244 are to be paid out of the trust, the court, in its discretion,
245 may direct from which part of the trust such costs and fees
246 shall be paid.

247 b. The consent objection of a majority of the qualified
248 ~~super majority of eligible~~ beneficiaries under this subparagraph
249 may thereafter be withdrawn prospectively removed by the written

250 ~~notice consent~~ of a ~~super~~ majority of any one of the class or
251 classes of the qualified ~~those eligible~~ beneficiaries ~~that made~~
252 ~~the objection.~~

253 (f)1. The trustee of a trust described in s. 731.201(35)
254 may request authority to invest in ~~Any time prior to initially~~
255 ~~investing in any investment instruments instrument~~ described in
256 this subsection other than a qualified investment instrument, by
257 providing the trustee of a trust described in subparagraph (e)3.
258 ~~shall provide~~ to all qualified beneficiaries a written request
259 ~~statement~~ containing the following:

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

263 b. A statement that the investment or investments cannot
264 be made without the consent of a majority of each class of the
265 qualified beneficiaries, ~~unless a super majority of the eligible~~
266 ~~beneficiaries objects to the application of this subsection to~~
267 ~~the trust within 60 days after the date the statement pursuant~~
268 ~~to this subsection was delivered, this subsection shall apply to~~
269 ~~the trust.~~

270 c. A statement that, if a majority of each class of
271 qualified beneficiaries consent ~~this subsection applies to the~~
272 ~~trust,~~ the trustee will have the right to make investments in
273 investment instruments, as defined in s. 660.25(6), which are
274 owned or controlled by the trustee or its affiliate, or from
275 which the trustee or its affiliate receives compensation for
276 providing services in a capacity other than as trustee, that
277 such investment instruments may include investment instruments

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278 sold primarily to trust accounts, and that the trustee or its
279 affiliate may receive fees in addition to the trustee's
280 compensation for administering the trust.

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

284
285 A statement by the trustee is not delivered if the statement is
286 accompanied by another written communication other than a
287 written communication by the trustee that refers only to the
288 statement.

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

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

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

294 ~~(II) If there is no beneficiary described in s.~~
295 ~~736.0103(14)(c), the beneficiaries described in s.~~
296 ~~736.0103(14)(a) and (b).~~

297 a.b. "Super Majority of the qualified eligible
298 beneficiaries" means:

299 (I) If at the time the determination is made there are one
300 or more beneficiaries as described in s. 736.0103(14)(c), at
301 least a majority ~~two-thirds~~ in interest of the beneficiaries
302 described in s. 736.0103(14)(a), at least a majority in interest
303 of the beneficiaries described in s. 736.0103(14)(b), and at
304 least a majority ~~or two-thirds~~ in interest of the beneficiaries
305 described in s. 736.0103(14)(c), if the interests of the

306 beneficiaries are reasonably ascertainable; otherwise, a
307 majority ~~two-thirds~~ in number of each ~~either~~ such class; or

308 (II) If there is no beneficiary as described in s.
309 736.0103(14)(c), at least a majority ~~two-thirds~~ in interest of
310 the beneficiaries described in s. 736.0103(14)(a) and at least a
311 majority ~~or two-thirds~~ in interest of the beneficiaries
312 described in s. 736.0103(14)(b), if the interests of the
313 beneficiaries are reasonably ascertainable; otherwise, a
314 majority ~~two-thirds~~ in number of each ~~either~~ such class.

315 b.e. "Qualified investment instrument" means a mutual
316 fund, common trust fund, or money market fund described in and
317 governed by s. 736.0816(3).

318 c.d. An irrevocable trust is created upon execution of the
319 trust instrument. If a trust that was revocable when created
320 thereafter becomes irrevocable, the irrevocable trust is created
321 when the right of revocation terminates.

322 (g) Nothing in this chapter is intended to create or imply
323 a duty for the trustee to seek the application of this
324 subsection to invest in investment instruments described in
325 paragraph (a), and no inference of impropriety may be made as a
326 result of a trustee electing not to invest trust assets in
327 investment instruments described in paragraph (a).

328 (h) This subsection is not the exclusive authority under
329 this code for investing in investment instruments described in
330 paragraph (a). A trustee who invests trust funds in investment
331 instruments described in paragraph (a) is not required to comply
332 with paragraph (b), paragraph (c), or paragraph (f) if the

333 trustee is permitted to invest in such investment instruments
 334 pursuant to subsection (2).

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

337 736.0816 Specific powers of trustee.--Except as limited or
 338 restricted by this code, a trustee may:

339 (3) Acquire an undivided interest in a trust asset,
 340 including, but not limited to, a money market mutual fund,
 341 mutual fund, or common trust fund, in which asset the trustee
 342 holds an undivided interest in any trust capacity, including any
 343 money market or other mutual fund from which the trustee or any
 344 affiliate or associate of the trustee is entitled to receive
 345 reasonable compensation for providing necessary services as an
 346 investment adviser, portfolio manager, or servicing agent. A
 347 trustee or affiliate or associate of the trustee may receive
 348 compensation for such services in addition to fees received for
 349 administering the trust provided such compensation is fully
 350 disclosed in writing to all qualified beneficiaries. As used in
 351 this subsection, the term "mutual fund" includes an open-end or
 352 closed-end management investment company or investment trust
 353 registered under the Investment Company Act of 1940, 15 U.S.C.
 354 ss. 80a-1 et seq., as amended.

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

357 736.1008 Limitations on proceedings against trustees.--

358 (6) This section applies to trust accountings for
 359 accounting periods beginning on or after July ~~January~~ 1, 2007

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360 ~~2008~~, and to written reports, other than trust accountings,
 361 received by a beneficiary on or after July ~~January~~ 1, 2007 ~~2008~~.

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

364 736.1011 Exculpation of trustee.--

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

368 (a) The trustee proves that the exculpatory term is fair
 369 under the circumstances.

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

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