

1 AN ACT in relation to financial regulation.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 5. The Trusts and Trustees Act is amended by
5 changing Section 5.3 and adding Section 5.5 as follows:

6 (760 ILCS 5/5.3)

7 Sec. 5.3. Total return trusts.

8 (a) Conversion by trustee. A trustee may convert a trust to
9 a total return trust as described in this Section if all of the
10 following apply:

11 (1) The trust describes the amount that may or must be
12 distributed to a beneficiary by referring to the trust's
13 income, and the trustee determines that conversion to a
14 total return trust will enable the trustee to better carry
15 out the purposes of the trust and the conversion is in the
16 best interests of the beneficiaries;

17 (2) conversion to a total return trust means the
18 trustee will invest and manage trust assets seeking a total
19 return without regard to whether that return is from income
20 or appreciation of principal, and will make distributions
21 in accordance with this Section (such a trust is called a
22 "total return trust" in this Section);

23 (3) the trustee sends a written notice of the trustee's
24 decision to convert the trust to a total return trust,
25 specifying a prospective effective date for the conversion
26 and including a copy of this Section, to the following
27 beneficiaries, determined as of the date the notice is sent
28 and assuming nonexercise of all powers of appointment:

29 (A) all of the legally competent beneficiaries who
30 are currently receiving or eligible to receive income
31 from the trust; and

32 (B) all of the legally competent beneficiaries who

1 would receive or be eligible to receive a distribution
2 of principal or income if the current interests of
3 beneficiaries currently receiving or eligible to
4 receive income ended;

5 (4) there are one or more legally competent income
6 beneficiaries under subdivision (3)(A) of this subsection
7 (a) and one or more legally competent remainder
8 beneficiaries under subdivision (3)(B) of this subsection
9 (a), determined as of the date of sending the notice;

10 (5) no beneficiary objects to the conversion to a total
11 return trust in a writing delivered to the trustee within
12 60 days after the notice is sent; and

13 (6) the trustee has signed acknowledgments of receipt
14 confirming that notice was received by each beneficiary
15 required to be sent notice under subdivision (3) of this
16 subsection (a).

17 (b) Conversion by agreement. Conversion to a total return
18 trust may be made by agreement between a trustee and all the
19 primary beneficiaries of the trust under the virtual
20 representation provisions of Section 16.1 of this Act if those
21 provisions otherwise apply. The agreement may include any
22 actions a court could properly order under subsection (g) of
23 this Section; however, any distribution percentage determined
24 by the agreement may not be less than 3% nor greater than 5%.

25 (c) Conversion or reconversion by court.

26 (1) The trustee may for any reason elect to petition
27 the court to order conversion to a total return trust,
28 including without limitation the reason that conversion
29 under subsection (a) is unavailable because:

30 (A) a beneficiary timely objects to the conversion
31 to a total return trust;

32 (B) there are no legally competent beneficiaries
33 described in subdivision (3)(A) of subsection (a); or

34 (C) there are no legally competent beneficiaries
35 described in subdivision (3)(B) of subsection (a).

36 (2) A beneficiary may request the trustee to convert to

1 a total return trust or adjust the distribution percentage.
2 If the trustee declines or fails to act within 6 months
3 after receiving a written request to do so, the beneficiary
4 may petition the court to order the conversion or
5 adjustment.

6 (3) The trustee may petition the court prospectively to
7 reconvert from a total return trust or adjust the
8 distribution percentage if the trustee determines that the
9 reconversion or adjustment will enable the trustee to
10 better carry out the purposes of the trust. A beneficiary
11 may request the trustee to petition the court prospectively
12 to reconvert from a total return trust or adjust the
13 distribution percentage. If the trustee declines or fails
14 to act within 6 months after receiving a written request to
15 do so, the beneficiary may petition the court to order the
16 reconversion or adjustment.

17 (4) In a judicial proceeding under this subsection (c),
18 the trustee may, but need not, present the trustee's
19 opinions and reasons (A) for supporting or opposing
20 conversion to (or reconversion from or adjustment of the
21 distribution percentage of) a total return trust,
22 including whether the trustee believes conversion (or
23 reconversion or adjustment of the distribution percentage)
24 would enable the trustee to better carry out the purposes
25 of the trust, and (B) about any other matters relevant to
26 the proposed conversion (or reconversion or adjustment of
27 the distribution percentage). A trustee's actions in
28 accordance with this subsection (c) shall not be deemed
29 improper or inconsistent with the trustee's duty of
30 impartiality unless the court finds from all the evidence
31 that the trustee acted in bad faith.

32 (5) The court shall order conversion to (or
33 reconversion prospectively from or adjustment of the
34 distribution percentage of) a total return trust if the
35 court determines that the conversion (or reconversion or
36 adjustment of the distribution percentage) will enable the

1 trustee to better carry out the purposes of the trust and
2 the conversion (or reconversion or adjustment of the
3 distribution percentage) is in the best interests of the
4 beneficiaries.

5 (6) Notwithstanding any other provision of this
6 Section, a trustee has no duty to inform beneficiaries
7 about the availability of this Section and has no duty to
8 review the trust to determine whether any action should be
9 taken under this Section unless requested to do so in
10 writing by a beneficiary described in subdivision (3) of
11 subsection (a).

12 (d) Post conversion. While a trust is a total return trust,
13 all of the following shall apply to the trust:

14 (1) the trustee shall make income distributions in
15 accordance with the governing instrument subject to the
16 provisions of this Section;

17 (2) the term "income" in the governing instrument means
18 an annual amount (the "distribution amount") equal to a
19 percentage (the "distribution percentage") of the net fair
20 market value of the trust's assets, whether the assets are
21 considered income or principal under the Principal and
22 Income Act, averaged over the lesser of:

23 (i) the 3 preceding years; or

24 (ii) the period during which the trust has been in
25 existence;

26 (3) the distribution percentage for any trust
27 converted to a total return trust by a trustee in
28 accordance with subsection (a) shall be 4%; ~~and~~

29 (4) the trustee shall pay to a beneficiary (in the case
30 of an underpayment) and shall recover from a beneficiary
31 (in the case of an overpayment) an amount equal to the
32 difference between the amount properly payable and the
33 amount actually paid, plus interest compounded annually at
34 a rate per annum equal to the distribution percentage in
35 the year or years while the underpayment or overpayment
36 exists; and.

1 (5) a change in the method of determining a reasonable
2 current return by converting to a total return trust in
3 accordance with this Section and substituting the
4 distribution amount for net trust accounting income is a
5 proper change in the definition of trust income
6 notwithstanding any contrary provision of the Principal
7 and Income Act, and the distribution amount shall be deemed
8 a reasonable current return that fairly apportions the
9 total return of a total return trust.

10 (e) Administration. The trustee, in the trustee's
11 discretion, may determine any of the following matters in
12 administering a total return trust as the trustee from time to
13 time determines necessary or helpful for the proper functioning
14 of the trust:

15 (1) the effective date of a conversion to a total
16 return trust;

17 (2) the manner of prorating the distribution amount for
18 a short year in which a beneficiary's interest commences or
19 ceases;

20 (3) whether distributions are made in cash or in kind;

21 (4) the manner of adjusting valuations and
22 calculations of the distribution amount to account for
23 other payments from or contributions to the trust;

24 (5) whether to value the trust's assets annually or
25 more frequently;

26 (6) what valuation dates and how many valuation dates
27 to use;

28 (7) valuation decisions about any asset for which there
29 is no readily available market value, including:

30 (A) how frequently to value such an asset;

31 (B) whether and how often to engage a professional
32 appraiser to value such an asset; and

33 (C) whether to exclude the value of such an asset
34 from the net fair market value of the trust's assets
35 under subdivision (d) (2) for purposes of determining
36 the distribution amount. Any such asset so excluded is

1 referred to as an "excluded asset" in this subsection
2 (e), and the trustee shall distribute any net income
3 received from the excluded asset as provided for in the
4 governing instrument, subject to the following
5 principles:

6 (i) unless the trustee determines there are
7 compelling reasons to the contrary considering all
8 relevant factors including the best interests of
9 the beneficiaries, the trustee shall treat each
10 asset for which there is no readily available
11 market value as an excluded asset;

12 (ii) if tangible personal property or real
13 property is possessed or occupied by a
14 beneficiary, the trustee shall not limit or
15 restrict any right of the beneficiary to use the
16 property in accordance with the governing
17 instrument whether or not the trustee treats the
18 property as an excluded asset;

19 (iii) examples of assets for which there is a
20 readily available market value include: cash and
21 cash equivalents; stocks, bonds, and other
22 securities and instruments for which there is an
23 established market on a stock exchange, in an
24 over-the-counter market, or otherwise; and any
25 other property that can reasonably be expected to
26 be sold within one week of the decision to sell
27 without extraordinary efforts by the seller;

28 (iv) examples of assets for which there is no
29 readily available market value include: stocks,
30 bonds, and other securities and instruments for
31 which there is no established market on a stock
32 exchange, in an over-the-counter market, or
33 otherwise; real property; tangible personal
34 property; and artwork and other collectibles; and

35 (8) any other administrative matters as the trustee
36 determines necessary or helpful for the proper functioning

1 of the total return trust.

2 (f) Allocations.

3 (1) Expenses, taxes, and other charges that would be
4 deducted from income if the trust were not a total return
5 trust shall not be deducted from the distribution amount.

6 (2) Unless otherwise provided by the governing
7 instrument, the trustee shall fund the distribution amount
8 each year from the following sources for that year in the
9 order listed: first from net income (as the term would be
10 determined if the trust were not a total return trust),
11 then from other ordinary income as determined for federal
12 income tax purposes, then from net realized short-term
13 capital gains as determined for federal income tax
14 purposes, then from net realized long-term capital gains as
15 determined for federal income tax purposes, then from trust
16 principal comprised of assets for which there is a readily
17 available market value, and then from other trust
18 principal.

19 (g) Court orders. The court may order any of the following
20 actions in a proceeding brought by a trustee or a beneficiary
21 in accordance with subdivision (c) (1), (c) (2), or (c) (3):

22 (1) select a distribution percentage other than 4%;

23 (2) average the valuation of the trust's net assets
24 over a period other than 3 years;

25 (3) reconvert prospectively from or adjust the
26 distribution percentage of a total return trust;

27 (4) direct the distribution of net income (determined
28 as if the trust were not a total return trust) in excess of
29 the distribution amount as to any or all trust assets if
30 the distribution is necessary to preserve a tax benefit; or

31 (5) change or direct any administrative procedure as
32 the court determines necessary or helpful for the proper
33 functioning of the total return trust.

34 Nothing in this subsection (g) limits the equitable powers
35 of the court to grant other relief.

36 (h) Restrictions. ~~The distribution amount may not be less~~

1 ~~than the net income of the trust, determined without regard to~~
2 ~~the provisions of this Section, for either a trust for which an~~
3 ~~estate tax or a gift tax marital deduction was or may be~~
4 ~~claimed in whole or in part (but only during the lifetime of~~
5 ~~the spouse for whom the trust was created), or a trust that was~~
6 ~~exempt in whole or in part from generation skipping transfer~~
7 ~~tax on the effective date of this amendatory Act of the 92nd~~
8 ~~General Assembly by reason of any effective date or transition~~
9 ~~rule.~~ Conversion to a total return trust does not affect any
10 provision in the governing instrument:

11 (1) directing or authorizing the trustee to distribute
12 principal;

13 (2) directing or authorizing the trustee to distribute
14 a fixed annuity or a fixed fraction of the value of trust
15 assets;

16 (3) authorizing a beneficiary to withdraw a portion or
17 all of the principal; or

18 (4) in any manner that would diminish an amount
19 permanently set aside for charitable purposes under the
20 governing instrument unless both income and principal are
21 so set aside.

22 (i) Tax limitations. If a particular trustee is a
23 beneficiary of the trust and conversion or failure to convert
24 would enhance or diminish the beneficial interest of the
25 trustee, or if possession or exercise of the conversion power
26 by a particular trustee would alone cause any individual to be
27 treated as owner of a part of the trust for income tax purposes
28 or cause a part of the trust to be included in the gross estate
29 of any individual for estate tax purposes, then that particular
30 trustee may not participate as a trustee in the exercise of the
31 conversion power; however:

32 (1) the trustee may petition the court under
33 subdivision (c)(1) to order conversion in accordance with
34 this Section; and

35 (2) if the trustee has one or more co-trustees to whom
36 this subsection (i) does not apply, the co-trustee or

1 co-trustees may convert the trust to a total return trust
2 in accordance with this Section.

3 (j) Releases. A trustee may irrevocably release the power
4 granted by this Section if the trustee reasonably believes the
5 release is in the best interests of the trust and its
6 beneficiaries. The release may be personal to the releasing
7 trustee or may apply generally to some or all subsequent
8 trustees, and the release may be for any specified period,
9 including a period measured by the life of an individual.

10 (k) Remedies. A trustee who reasonably and in good faith
11 takes or omits to take any action under this Section is not
12 liable to any person interested in the trust. If a trustee
13 reasonably and in good faith takes or omits to take any action
14 under this Section and a person interested in the trust opposes
15 the act or omission, the person's exclusive remedy is to obtain
16 an order of the court directing the trustee to convert the
17 trust to a total return trust, to reconvert from a total return
18 trust, to change the distribution percentage, or to order any
19 administrative procedures the court determines necessary or
20 helpful for the proper functioning of the trust. An act or
21 omission by a trustee under this Section is presumed taken or
22 omitted reasonably and in good faith unless it is determined by
23 the court to have been an abuse of discretion. Any claim by any
24 person interested in the trust that an act or omission by a
25 trustee under this Section was an abuse of discretion is barred
26 if not asserted in a proceeding commenced by or on behalf of
27 the person within 2 years after the trustee has sent to the
28 person or the person's personal representative a notice or
29 report in writing sufficiently disclosing facts fundamental to
30 the claim such that the person knew or reasonably should have
31 known of the claim. The preceding sentence shall not apply to a
32 person who was under a legal disability at the time the notice
33 or report was sent and who then had no personal representative.
34 For purposes of this subsection (k), a personal representative
35 refers to a court appointed guardian or conservator of the
36 estate of a person.

1 (1) Application. This Section is available to trusts in
2 existence on the effective date of this amendatory Act of the
3 92nd General Assembly or created after that date. This Section
4 shall be construed as pertaining to the administration of a
5 trust and shall be available to any trust that is administered
6 in Illinois under Illinois law or that is governed by Illinois
7 law with respect to the meaning and effect of its terms unless:

8 (1) the trust is a trust described in Internal Revenue
9 Code Section 642(c)(5), ~~170(f)(2)(B)~~, 664(d), ~~1361(d)~~,
10 2702(a)(3), or 2702(b); or

11 (2) the governing instrument expressly prohibits use
12 of this Section by specific reference to this Section. A
13 provision in the governing instrument in the form: "Neither
14 the provisions of Section 5.3 of the Trusts and Trustees
15 Act nor any corresponding provision of future law may be
16 used in the administration of this trust" or a similar
17 provision demonstrating that intent is sufficient to
18 preclude the use of this Section.

19 (m) Application to express trusts.

20 (1) This subsection (m) does not apply to a charitable
21 remainder unitrust as defined by Section 664(d), Internal
22 Revenue Code of 1986 (26 U.S.C. Section 664), as amended.

23 (2) In this subsection (m):

24 (A) "Unitrust" means a trust the terms of which
25 require distribution of a unitrust amount, without
26 regard to whether the trust has been converted to a
27 total return trust in accordance with this Section or
28 whether the trust is established by express terms of
29 the governing instrument.

30 (B) "Unitrust amount" means an amount equal to a
31 percentage of a trust's assets that may or must be
32 distributed to one or more beneficiaries annually in
33 accordance with the terms of the trust. The unitrust
34 amount may be determined by reference to the net fair
35 market value of the trust's assets as of a particular
36 date or as an average determined on a multiple year

1 basis.

2 (3) A unitrust changes the definition of income by
3 substituting the unitrust amount for net trust accounting
4 income as the method of determining current return and
5 shall be given effect notwithstanding any contrary
6 provision of the Principal and Income Act. By way of
7 example and not limitation, a unitrust amount determined by
8 a percentage of not less than 3% nor greater than 5% is
9 conclusively presumed a reasonable current return that
10 fairly apportions the total return of a unitrust.

11 (4) The allocations provision of subdivision (2) of
12 subsection (f) of Section 5.3 applies to a unitrust except
13 to the extent its governing instrument expressly provides
14 otherwise.

15 (Source: P.A. 92-838, eff. 8-22-02.)

16 (760 ILCS 5/5.5 new)

17 Sec. 5.5. Gift to a deceased beneficiary under an inter
18 vivos trust. Unless the settlor expressly provides otherwise in
19 his or her trust:

20 (1) if a gift of a present or future interest is to a
21 descendant of the settlor who dies before or after the
22 settlor, the descendants of the deceased beneficiary
23 living when the gift is to take effect in possession or
24 enjoyment take per stirpes the gift so bequeathed;

25 (2) if a gift of a present or future interest is to a
26 class and any member of the class dies before or after the
27 settlor, the members of the class living when the gift is
28 to take effect in possession or enjoyment take the share or
29 shares that the deceased member would have taken if he or
30 she were then living, except that, if the deceased member
31 of the class is a descendant of the settlor, the
32 descendants of the deceased member then living shall take
33 per stirpes the share or shares that the deceased member
34 would have taken if he or she were then living; and

35 (3) except as above provided in items (1) and (2), if

1 the gift is not to a descendant of the settlor or is not to
2 a class as provided in items (1) and (2) and if the
3 beneficiary dies either before or after the settlor and
4 before the gift is to take effect in possession or
5 enjoyment, then the gift shall lapse. If the gift lapses by
6 reason of the death of the beneficiary before the gift is
7 to take possession or enjoyment, then the gift so given
8 shall be included in and pass as part of the residue of the
9 trust under the trust. If the gift is or becomes part of
10 the residue, the gift so bequeathed shall pass to and be
11 taken by the beneficiaries remaining, if any, of the
12 residue in proportions and upon trusts corresponding to
13 their respective interests in the residue of the trust.

14 The provisions of items (1) and (2) do not apply to a
15 future interest that is or becomes indefeasibly vested at the
16 settlor's death or at any time thereafter before it takes
17 effect in possession or enjoyment.

18 The provisions of this Section apply on and after January
19 1, 2005 for any gifts to a deceased beneficiary under an inter
20 vivos trust where the deceased beneficiary dies after January
21 1, 2005 and before the gift is to take effect in possession or
22 enjoyment.

23 Section 10. The Uniform TOD Security Registration Act is
24 amended by changing Section 1 as follows:

25 (815 ILCS 10/1)

26 Sec. 1. Definitions. In this Act, unless the context
27 otherwise requires:

28 (1) "Beneficiary form" means a registration of a security
29 which indicates the present owner of the security and the
30 intention of the owner regarding the person who will become the
31 owner of the security upon the death of the owner.

32 (2) "Devisee" means any person designated in a will to
33 receive a disposition of real or personal property.

34 (3) "Heirs" means those persons, including the surviving

1 spouse, who are entitled under the statutes of intestate
2 succession to the property of a decedent.

3 (4) "Person" means an individual, a corporation, an
4 organization, or other legal entity.

5 (5) "Personal representative" includes executor,
6 administrator, successor personal representative, special
7 administrator, and persons who perform substantially the same
8 function under the law governing their status.

9 (6) "Property" includes both real and personal property or
10 any interest therein and means anything that may be the subject
11 of ownership.

12 (7) "Register", including its derivatives, means to issue a
13 certificate showing the ownership of a certificated security
14 or, in the case of an uncertificated security, to initiate or
15 transfer an account showing ownership of securities.

16 (8) "Registering entity" means a person who originates or
17 transfers a security title by registration, and includes a
18 broker maintaining security accounts for customers and a
19 transfer agent or other person acting for or as an issuer of
20 securities.

21 (9) "Security" means a share, participation, or other
22 interest in property, in a business, or in an obligation of an
23 enterprise or other issuer, and includes a certificated
24 security, an uncertificated security, and a security account.

25 (10) "Security account" means (i) a reinvestment account
26 associated with a security, a securities account with a broker,
27 a cash balance in a brokerage account, cash, interest,
28 earnings, or dividends earned or declared on a security in an
29 account, a reinvestment account, or a brokerage account,
30 whether or not credited to the account before the owner's
31 death, or (ii) an investment management or custody account with
32 a trust company or trust division of a bank with trust powers,
33 including the securities in the account, a cash balance in the
34 account, and cash, equivalents, interest, earnings, or
35 dividends earned or declared on a security in the account,
36 whether or not credited to the account before the owner's

1 death, or (iii) a cash balance or other property held for or
2 due to the owner of a security as a replacement for or product
3 of an account security, whether or not credited to the account
4 before the owner's death.

5 (11) "State" includes any state of the United States, the
6 District of Columbia, the Commonwealth of Puerto Rico, and any
7 territory or possession subject to the legislative authority of
8 the United States.

9 (Source: P.A. 88-577, eff. 1-1-95.)

10 Section 99. Effective date. This Act takes effect upon
11 becoming law.