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L. 1968, ch. 257, effective May 14, 1968, inserted brackets in paragraphs (a)(2)–(a)(7) to conform numbering of section to format of the Act; inserted brackets in of paragraphs (b)(1) and (b)(2) to conform numbering of section to format of the Act; amended paragraph (b)(2) by deleting the words, “an executor, administrator” following the phrase “a personal representative.”

Bill or revision notes: L. 1968, ch. 257, effective May 14, 1968.—This act is designed to correct certain small technical defects in the Estates, Powers and Trusts Law.

—L. 1968, ch. 515, effective June 15, 1968.—Subparagraph (L) of subparagraph (1) of paragraph (a) of section 11–2.2 of the estates, powers and trusts law proposed to be repealed by this bill, pertains to the power of a fiduciary to invest in shares of federal and state savings and loan associations, in certain cases.

§ 11–2.3. Prudent investor act

(a) Prudent investor rule.

A trustee has a duty to invest and manage property held in a fiduciary capacity in accordance with the prudent investor standard defined by this section, except as otherwise provided by the express terms and provisions of a governing instrument within the limitations set forth by section 11–1.7 of this chapter. This section shall apply to any investment made or held on or after January first, nineteen hundred ninety-five by a trustee.

(b) Prudent investor standard.

(1) The prudent investor rule requires a standard of conduct, not outcome or performance. Compliance with the prudent investor rule is determined in light of facts and circumstances prevailing at the time of the decision or action of a trustee. A trustee is not liable to a beneficiary to the extent that the trustee acted in substantial compliance with the prudent investor standard or in reasonable reliance on the express terms and provisions of the governing instrument.

(2) A trustee shall exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument.

(3) The prudent investor standard requires a trustee:

(A) To pursue an overall investment strategy to enable the trustee to make appropriate present and future distributions to or for the benefit of the beneficiaries under the governing instrument, in accordance with risk and return objectives reasonably suited to the entire portfolio;

(B) To consider, to the extent relevant to the decision or action, the size of the portfolio, the nature and estimated duration of the fiduciary relationship, the liquidity and distribution requirements of the governing instrument, general economic conditions, the possible effect of inflation or deflation, the expected tax consequences of investment decisions or strategies and of distributions of income and principal, the role that each investment or course of action plays within the overall portfolio, the expected total return of the portfolio (including both income and appreciation of capital), and the needs of beneficiaries (to the extent reasonably known to the trustee) for present and future distributions authorized or required by the governing instrument;
(C) To diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes and terms and provisions of the governing instrument; and

(D) Within a reasonable time after the creation of the fiduciary relationship, to determine whether to retain or dispose of initial assets.

(4) The prudent investor standard authorizes a trustee:

(A) To invest in any type of investment consistent with the requirements of this paragraph, since no particular investment is inherently prudent or imprudent for purposes of the prudent investor standard;

(B) To consider related trusts, the income and resources of beneficiaries to the extent reasonably known to the trustee, and also an asset’s special relationship or value to some or all of the beneficiaries if consistent with the trustee’s duty of impartiality;

(C) To delegate investment and management functions if consistent with the duty to exercise skill, including special investment skills; and

(D) To incur costs only to the extent they are appropriate and reasonable in relation to the purposes of the governing instrument, the assets held by the trustee and the skills of the trustee.

(5) Trustee’s power to adjust.

(A) Where the rules in article 11-A apply to a trust and the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust’s income, the prudent investor standard also authorizes the trustee to adjust between principal and income to the extent the trustee considers advisable to enable the trustee to make appropriate present and future distributions in accordance with clause (b)(3)(A) if the trustee determines, after applying the rules in article 11-A, that such an adjustment would be fair and reasonable to all of the beneficiaries, so that current beneficiaries may be given such use of the trust property as is consistent with preservation of its value.

(B) In deciding whether and to what extent to exercise the power conferred by clause (b)(5)(A), a trustee may consider, in addition to the factors stated in clauses (b)(3)(B) and (b)(4)(B), the following factors to the extent relevant:

(i) the intent of the settlor, as expressed in the governing instrument; the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(ii) the net amount allocated to income under article 11-A and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available; and

(iii) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income.

(C) A trustee may not make an adjustment:

(i) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction is claimed;
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(ii) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(iii) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust’s assets;

(iv) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless the income therefrom is also permanently devoted to charitable purposes;

(v) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(vi) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(vii) if the trustee is a current beneficiary or a presumptive remainderman of the trust;

(viii) if the trustee is not a current beneficiary or a presumptive remainderman, but the adjustment would benefit the trustee directly or indirectly; or

(ix) if the trust is an irrevocable lifetime trust which provides income to be paid for life to the grantor, and possessing or exercising the power to make an adjustment would cause any public benefit program to consider the adjusted principal or income to be an available resource or available income and the principal or income or both would in each case not be considered as an available resource or income if the trustee did not possess the power to make an adjustment.

(D) If item (b)(5)(C)(v), (vi), (vii), or (viii) applies to a trustee and there is more than one trustee, a co-trustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(E) A trustee may release the entire power conferred by clause (b)(5)(A) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in items (b)(5)(C)(i) through (vi) or (b)(5)(C)(viii) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in clause (b)(5)(C). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(F) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income are not contrary to this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by clause (b)(5)(A).

(6) Special investment skills.

For a bank, trust company or paid professional investment advisor (whether or not registered under any federal securities or investment law) which serves as a trustee, and any other trustee representing that such trustee has special investment skills, the exercise of skill contemplated by the prudent investor standard shall require the trustee to exercise such diligence in investing and managing assets as would customarily be exercised by prudent investors of discretion and intelligence having special investment skills.
(c) Delegation of investment or management functions.

(1) Delegation of an investment or management function requires a trustee to exercise care, skill and caution in:

(A) Selecting a delegee suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the delegee;

(B) Establishing the scope and terms of the delegation consistent with the purposes of the governing instrument;

(C) Periodically reviewing the delegee's exercise of the delegated function and compliance with the scope and terms of the delegation; and

(D) Controlling the overall cost by reason of the delegation.

(2) The delegee has a duty to the trustee and to the trust to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution. An attempted exnovation of the delegee from liability for failure to meet such duty is contrary to public policy and void.

(3) By accepting the delegation of a trustee's function from the trustee of a trust that is subject to the law of New York, the delegee submits to the jurisdiction of the courts of New York even if a delegation agreement provides otherwise, and the delegee may be made a party to any proceeding in such courts that places in issue the decisions or actions of the delegee.

(d) Investment in securities of related investment companies.

A trustee holding funds for investment may invest the same in securities of any management type investment company or trust registered pursuant to the federal investment company act of nineteen hundred forty, as amended, notwithstanding that the trustee or an affiliate of the trustee acts as investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager or provides other services to the investment company or trust. Unless the will, lifetime trust or order appointing the trustee provides otherwise, the trustee shall elect annually either (i) to receive or have its affiliate receive compensation for providing such services to such investment company or trust for the portion of the trust invested in such investment company or trust or (ii) to take annual corporate trustees' commissions with respect to such portion.

(e) As used in this section:

(1) The term "trustee" includes a personal representative, trustee, guardian, donee of a power during minority, guardian under article eighty-one of the mental hygiene law, committee of the property of an incompetent person, and conservator of the property of a conservatee;

(2) The term "trust" includes any fiduciary entity with property owned by a trustee as defined in this section;

(3) The term "governing instrument" includes a court order; and

(4) The term "portfolio" includes all property of every kind and character held by a trustee as defined in this section.