076072372

HOUSE BILL NO. 2767

Offered January 10, 2007

Prefiled January 10, 2007

A BILL to amend and reenact §§ 26-40.01, 26-45.13, 31-48, and 55-34.7 of the Code of Virginia, relating to the presumption of prudence granted to a fiduciary.

Patron—Hurt

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 26-40.01, 26-45.13, 31-48, and 55-34.7 of the Code of Virginia are amended and reenacted as follows:

§ 26-40.01. In what securities fiduciaries may invest; definitions.

A. As used in this section:

"Fiduciary" shall be defined as in § 8.01-2 and shall also include ~~any~~*an* attorney in fact or agent acting for a principal under a written power of attorney, *a custodian under § 31-48, and a custodial trustee under § 55-34.7.*

"National rating service" shall mean Standard & Poor's Corporation, Moody's Investors Service, Inc., Duff and Phelps, Inc., Fitch Investors Corporation and any successor to the rating business of any of them.

B. Notwithstanding any other provision of law designating as legal investments for fiduciaries the bonds, notes, obligations or other evidences of indebtedness issued by a governmental entity or political subdivision of the Commonwealth, including but not limited to agencies, authorities, commissions, districts, boards, or local governments, and except as specifically provided in § 26-40, fiduciaries, whether individual or corporate, shall, *except as limited in subsection E,* be conclusively presumed to have been prudent in investing the funds held by them in a fiduciary capacity in only the following securities:

1. Obligations of the Commonwealth, its agencies and political subdivisions. - The following obligations:

a. Bonds, notes and other evidences of indebtedness of the Commonwealth, and securities unconditionally guaranteed as to the payment of principal and interest by the Commonwealth;

b. Revenue bonds, revenue notes or other evidences of revenue indebtedness issued by agencies or authorities of the Commonwealth upon which there is no default; and

c. Bonds, notes and other evidences of indebtedness of any county, city, town, district, authority or other public body in the Commonwealth upon which there is no default provided that such bonds, notes and other evidences of indebtedness are (i) direct legal obligations of the public body, for the payment of which the public body has pledged its full faith and credit and unlimited taxing power, or (ii) unconditionally guaranteed as to the payment of principal and interest by the public body.

In every case referred to in subsection B 1, such bonds, notes or other evidences of indebtedness shall be rated in one of the two highest rating categories of at least one national rating service and not rated in a category lower than the two highest rating categories of any national rating service. Determination of an obligation's rating in one of the two highest rating categories shall be made without regard to any refinement or gradation of such rating category by numerical or other modifier. In addition, the remaining maturity of such bonds, notes or other evidences of indebtedness shall not be greater than five years.

2. Obligations of the United States. - Bonds, notes and other obligations of the United States, and securities unconditionally guaranteed as to the payment of principal and interest by the United States with a remaining maturity not greater than five years, except in the case of savings bonds, which may have a longer maturity. The obligations enumerated in this subdivision may be held directly or in the form of repurchase agreements collateralized by such obligations or in the form of securities of any open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940, provided that the portfolio of such investment company or investment trust is limited to such obligations or repurchase agreements collateralized by such obligations, or securities of other such investment companies or investment trusts whose portfolios are so restricted.

3. Savings accounts, time deposits or certificates of deposit. - Savings accounts, time deposits or certificates of deposit in any bank, savings bank, trust company, savings and loan association or credit union authorized to do business as such in this Commonwealth, but only to the extent that such accounts, deposits or certificates are fully insured by the Federal Deposit Insurance Corporation or any

successor federal agency or by the National Credit Union Share Insurance Fund or any successor to it.

C. Notwithstanding the provisions of this section, investments listed in § 26-40 as in effect prior to July 1, 1992, which continue to be held on July 1, 1992, shall be subject to § 26-45.3, and any reference to the Virginia "legal list" or to § 26-40 or any predecessor statute contained in a will, trust, or other instrument that was irrevocable on June 30, 1992, shall be construed to refer to such section as in effect on June 30, 1992, or at such earlier time as may be specified in the controlling document, absent an expression of intent to the contrary contained in such document.

D. The permissible investments specified in subsection B are not exclusive and shall not be construed to limit a fiduciary's investments as permitted pursuant to Article 2 (§ 26-45.3 et seq.).

E. ~~Nothing in this section shall relieve a fiduciary of his obligation, pursuant to § 26-45.3, to comply with the provisions of the prudent investor rule~~*The presumption under subsection B shall apply to (i) a fiduciary only for a calendar year in which the value of the intangible personal property under the fiduciary's control or management does not exceed $100,000 at the beginning of such year, or (ii) a fiduciary who, on motion for good cause shown, has obtained express authorization from the court having jurisdiction over such fiduciary for the presumption under subsection B to apply*.

§ 26-45.13. Definition of terms.

As used in this article, the term "trustee" includes any fiduciary as defined in § 8.01-2 ~~and any~~, *an* attorney in fact or agent acting for a principal under a written power of attorney, *a custodian under § 31-48, and a custodial trustee under § 55-34.7*. The term "trust" includes the assets under the control or management of the trustee as defined herein. "Controlling document" means the will, agreement, power of attorney, court order or other instrument creating the fiduciary powers.

§ 31-48. Care of custodial property; duties of custodian.

A. A custodian shall take control of custodial property, register or record title to custodial property, if appropriate, and collect, hold, manage, invest, and reinvest custodial property.

B. In dealing with custodial property, a custodian shall observe the standard of care ~~that would be observed by a prudent person dealing with such person's own property and is not limited by any other statute restricting investments by fiduciaries. If a custodian has a special skill or expertise or is named custodian on the basis of representations of a special skill or expertise, the custodian shall use that skill or expertise~~ *set forth in the Uniform Prudent Investor Act (§ 26-45.3 et seq.), unless the custodian is investing pursuant to § 26-40.01*. However, a custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor.

C. A custodian may invest in or pay premiums on life insurance or endowment policies on (i) the life of the minor only if the minor or the minor's estate is the sole beneficiary, or (ii) the life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate, or the custodian in the capacity of custodian, is the beneficiary during the period of custodianship.

D. A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor. Custodial property consisting of an undivided interest is so identified if the minor's interest is held as a tenant in common and is fixed. Custodial property subject to recordation is so identified if it is recorded, and custodial property subject to registration is so identified if it is either registered, or held in an account designated, in the name of the custodian, followed in substance by the words: "as a custodian for . . . . . (name of minor) under the Virginia Uniform Transfers to Minors Act."

E. A custodian shall keep records of all transactions with respect to custodial property, including the information necessary for the preparation of the minor's tax returns, and shall make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor if the minor has attained the age of fourteen years.

§ 55-34.7. General duties of custodial trustee.

If appropriate, a custodial trustee shall register or record the instrument vesting title to custodial trust property. If the beneficiary is not incapacitated, a custodial trustee shall follow the directions of the beneficiary in the management, control, investment, or retention of the custodial trust property. In the absence of effective contrary direction by the beneficiary while not incapacitated, the custodial trustee shall observe the standard of care ~~that would be observed by a prudent person dealing with such person's own property and is not limited by any other law restricting investments by fiduciaries~~*set forth in the Uniform Prudent Investor Act (§ 26-45.3 et seq.), unless the custodian is investing pursuant to § 26-40.01*. However, a custodial trustee, in the custodial trustee's discretion, may retain any custodial trust property received from the transferor. ~~If a custodial trustee has a special skill or expertise or is named custodial trustee on the basis of representation of a special skill or expertise, the custodial trustee shall use that skill or expertise.~~ Subject to this paragraph, a custodial trustee shall take control of and collect, hold, manage, invest, and reinvest custodial trust property.

A custodial trustee at all times shall keep custodial trust property of which the custodial trustee has control, separate from all other property in a manner sufficient to identify it clearly as custodial trust property of the beneficiary. Custodial trust property, the title to which is subject to recordation, is so

identified if an appropriate instrument so identifying the property is recorded, and custodial trust property subject to registration is so identified if it is registered, or held in an account in the name of the custodial trustee, designated in substance: "as custodial trustee for . . . . . (name of beneficiary) under the Virginia Uniform Custodial Trust Act."

A custodial trustee shall keep records of all transactions with respect to custodial trust property, including information necessary for the preparation of tax returns, and shall make the records and information available at reasonable times to the beneficiary or legal representative of the beneficiary.

The exercise of a durable power of attorney for an incapacitated beneficiary is not effective to terminate or direct the administration or distribution of a custodial trust.