Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Subtitle IV. Fiduciaries and Guardians
Part B. Powers of Attorney
Chapter 16. Uniform Power of Attorney Act
Article 1. General Provisions

§ 64.2-1612. Agent's duties

A. Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

1. Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

2. Act in good faith; and

3. Act only within the scope of authority granted in the power of attorney.

B. Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

1. Act loyally for the principal's benefit;

2. Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

3. Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

4. Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

5. Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and otherwise act in the principal's best interest; and

6. Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

a. The value and nature of the principal's property;

b. The principal's foreseeable obligations and need for maintenance;

c. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

d. Eligibility for a benefit, a program, or assistance under a statute or regulation.

C. An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

D. An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting

§ 64.2-1805. Powers of guardian

A. Whether appointed by a parent, the circuit court, or the circuit court clerk, a guardian of a ward's estate shall have the powers set forth in § 64.2-105 as of the date the guardian acts. A guardian of a ward's estate shall also have the following powers:

1. To ratify or reject a contract entered into by the ward;

2. To pay any sum distributable for the benefit of the ward by paying the sum directly to the ward, to the provider of goods and services that have been furnished to the ward, to any individual or facility that is responsible for or has assumed responsibility for care and custody of the ward, or to a ward's custodian under a Uniform Transfers to Minors Act, Uniform Gifts to Minors Act, or comparable law of any applicable jurisdiction;

3. To maintain life, health, casualty, and liability insurance for the benefit of the ward;

4. To manage the estate following the termination of the guardianship until its delivery to the ward or successors in interest;

5. To execute and deliver all instruments and to take all other actions that will serve the best interests of the ward;

6. To initiate a proceeding to seek a divorce or to make an augmented estate election under § 64.2-302 or 64.2-308.13, as applicable; and

7. To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the guardian deems advisable, including the power to borrow from the guardian, if the guardian is a bank, for any purpose; to mortgage or pledge such portion of the ward's personal estate, and real estate subject to subsection B, as may be required to secure such loan or loans; and, as maker or endorser, to renew existing loans.

B. A guardian may exercise the powers set forth in subsection A without prior authorization, except that the court or the commissioner of accounts, if a guardian is appointed other than by the court, may impose requirements to be satisfied by the guardian prior to the conveyance of any interest in real estate, including (i) increasing the amount of the guardian's bond, (ii) securing an appraisal of the real estate or interest, (iii) giving notice to interested parties as the court or commissioner deems proper, and (iv) consulting with the commissioner of accounts.

1. If the court or commissioner of accounts imposes any requirements under this subsection, the guardian shall make a report of his compliance with each requirement, which shall be filed with the commissioner of accounts. Upon receipt of the guardian's report, the commissioner of accounts shall file promptly a report with the court stating whether the requirements imposed have been met and whether the conveyance is otherwise consistent with the guardian's duties. The conveyance shall not be closed until a report by the commissioner of accounts is filed with the court and confirmed as provided in §§ 64.2-1212, 64.2-1213, and 64.2-1214.

2. If the commissioner of accounts does not impose any requirements under this subsection, he shall, upon request of the guardian of the minor, issue a notarized statement providing that "The Commissioner of Accounts has declined to impose any requirements upon the power of (name of guardian), Guardian of (name of minor), to convey the following real estate of the minor: (property identification)." The conveyance shall not be closed until the guardian has furnished such a statement to the proposed grantee.

C. Any guardian may at any time irrevocably disclaim the right to exercise any of the powers conferred by this section by filing a written disclaimer with the clerk of the circuit court wherein his accounts may be settled. Such disclaimer shall relate back to the time when the guardian assumed the guardianship and shall be binding upon any successor guardian.

1999, c. 16, § 31-14.1; 2012, c. 614;2016, cc. 187, 269.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Article 8. Duties and Powers of Trustee

§ 64.2-763. Duty to administer trust and invest

Upon acceptance of a trusteeship, the trustee shall administer the trust and invest trust assets in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter. In administering, managing and investing trust assets, the trustee shall comply with the provisions of the Uniform Prudent Investor Act (§ 64.2-780 et seq.) and the Uniform Principal and Income Act (§ 64.2-1000 et seq.).

2005, c. 935, § 55-548.01; 2012, c. 614.

§ 64.2-764. Duty of loyalty

A. A trustee shall administer the trust solely in the interests of the beneficiaries.

B. Subject to the rights of persons dealing with or assisting the trustee as provided in § 64.2-803, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

1. The transaction was authorized by the terms of the trust;

2. The transaction was approved by the court;

3. The beneficiary did not commence a judicial proceeding within the time allowed by § 64.2-796;

4. The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with § 64.2-800;or

5. The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

C. A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

1. The trustee's spouse;

2. The trustee's descendants, siblings, parents, or their spouses;

3. An agent or attorney of the trustee; or

4. A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

D. A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage beyond the normal commercial advantage from such transaction is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

E. A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

F. An investment by a trustee in securities of an investment company, investment trust, mutual fund, or other investment or financial product to which the trustee, or an affiliate of the trustee, sponsors, sells, or provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the Uniform Prudent Investor Act (§ 64.2-780 et seq.) and § 64.2-1506. The trustee may be compensated by the investment company, investment trust, mutual fund, or other investment or financial product, or by the affiliated entity sponsoring, selling, or providing such service, and such compensation may be in addition to the compensation the trustee is receiving as a trustee if the trustee notifies the persons entitled to receive a copy of the trustee's annual report under § 64.2-775 of the rate and method by which that compensation was determined and of any subsequent changes to such rate or method of compensation.

G. In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

H. This section does not preclude the following transactions, if fair to the beneficiaries:

1. An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

2. Payment of reasonable compensation to the trustee;

3. A transaction between a trust and another trust, decedent's estate, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

4. A deposit of trust money in a regulated financial service institution operated by the trustee; or

5. An advance by the trustee of money for the protection of the trust.

I. The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

2005, c. 935, § 55-548.02; 2012, c. 614.

§ 64.2-765. Impartiality

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

2005, c. 935, § 55-548.03; 2012, c. 614.

§ 64.2-766. Prudent administration

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

2005, c. 935, § 55-548.04; 2012, c. 614.

§ 64.2-767. Costs of administration

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

2005, c. 935, § 55-548.05; 2012, c. 614.

§ 64.2-768. Trustee's skills

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

2005, c. 935, § 55-548.06; 2012, c. 614.

§ 64.2-769. Delegation by trustee

A. A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

1. Selecting an agent;

2. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

3. Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

B. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

C. A trustee who complies with subsection A is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

D. By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of the Commonwealth, an agent submits to the jurisdiction of the courts of the Commonwealth.

2005, c. 935, § 55-548.07; 2012, c. 614.

§ 64.2-770. Repealed

Repealed by Acts 2020, c. 768, cl. 2.

§ 64.2-771. Control and protection of trust property

A trustee shall take reasonable steps to take control of and protect the trust property.

2005, c. 935, § 55-548.09; 2012, c. 614.

§ 64.2-772. Recordkeeping and identification of trust property

A. A trustee shall keep adequate records of the administration of the trust.

B. A trustee shall keep trust property separate from the trustee's own property.

C. Except as otherwise provided in subsection D, a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

D. If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

E. A deed or other instrument purporting to convey or transfer real or personal property to a trust instead of to the trustee or trustees of the trust shall be deemed to convey or transfer such property to the trustee or trustees as fully as if made directly to the trustee or trustees.

2005, c. 935, § 55-548.10; 2007, c. 197;2012, c. 614.

§ 64.2-773. Enforcement and defense of claims

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

2005, c. 935, § 55-548.11; 2012, c. 614.

§ 64.2-774. Collecting trust property

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust or duty known to the trustee to have been committed by a former trustee or other fiduciary.

2005, c. 935, § 55-548.12; 2012, c. 614.

§ 64.2-775. Duty to inform and report

A. A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust. A trustee who fails to furnish information to a beneficiary or respond to a request for information regarding the administration of the trust in a good faith belief that to do so would be unreasonable under the circumstances or contrary to the purposes of the settlor shall not be subject to removal or other sanctions therefor.

B. A trustee:

1. Upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

2. Within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

3. Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection C; and

4. Shall notify the qualified beneficiaries in advance of any change in the method or rate of the

trustee's compensation.

C. A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report shall be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

D. A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

E. Subdivisions B 2 and B 3 and subsection C apply only to an irrevocable trust created on or after the effective date of this chapter, and to a revocable trust that becomes irrevocable on or after the effective date of this chapter.

2005, c. 935, § 55-548.13; 2007, c. 254;2012, c. 614.

§ 64.2-776. Discretionary powers; tax savings

A. Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

B. Subject to subsection D, and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

1. A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard; and

2. A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

For purposes of this subsection, "trustee" includes a person who is deemed to have any power of a trustee, whether because such person has the right to remove or replace any trustee or because a reciprocal trust or power doctrine applies.

C. A power whose exercise is limited or prohibited by subsection B may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

D. Subsection B does not apply to:

1. A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in § 2056(b)(5) or 2523(e) of the Internal Revenue Code of 1986, as in effect on the effective date of this chapter, or as later amended, was previously allowed;

2. Any trust during any period that the trust may be revoked or amended by its settlor; or

3. A trust if contributions to the trust qualify for the annual exclusion under § 2503(c) of the Internal Revenue Code of 1986, as in effect on the effective date of this chapter, or as later amended.

2005, c. 935, § 55-548.14; 2012, c. 614;2013, c. 324.

§ 64.2-777. General powers of trustee

A. A trustee, without authorization by the court, may exercise:

1. Powers conferred by the terms of the trust; and

2. Except as limited by the terms of the trust:

a. All powers over the trust property that an unmarried competent owner has over individually owned property;

b. Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and

c. Any other powers conferred by this chapter.

B. The exercise of a power is subject to the fiduciary duties prescribed by this article.

C. Any reference in a trust instrument incorporating the powers authorized under § 64.2-105 shall not be construed to limit powers a trustee may exercise pursuant to this section, unless the settlor expressly states in the trust instrument that such reference should be so construed.

2005, c. 935, § 55-548.15; 2012, c. 614.

§ 64.2-778. Specific powers of trustee

A. Without limiting the authority conferred by § 64.2-777, a trustee may:

1. Collect trust property and accept or reject additions to the trust property from a settlor or any other person;

2. Acquire or sell property, for cash or on credit, at public or private sale;

3. Exchange, partition, or otherwise change the character of trust property;

4. Deposit trust money in an account in a regulated financial service institution;

5. Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

6. With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

7. With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:

a. Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

b. Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

c. Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and

d. Deposit the securities with a depository or other regulated financial service institution;

8. With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

9. Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

10. Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

11. Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;

12. Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

13. With respect to possible liability for violation of environmental law:

a. Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

b. Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

c. Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

d. Compromise claims against the trust that may be asserted for an alleged violation of environmental law; and

e. Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

14. Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

15. Pay taxes, assessments, compensation of the trustee and of employees and agents of the

trust, and other expenses incurred in the administration of the trust;

16. Exercise elections with respect to federal, state, and local taxes;

17. Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

18. Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

19. Pledge trust property to guarantee loans made by others to the beneficiary;

20. Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

21. Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

a. Paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;

b. Paying it to the beneficiary's custodian under the Uniform Transfers to Minors Act (§ 64.2-1900 et seq.) or custodial trustee under the Uniform Custodial Trust Act (§ 64.2-900 et seq.), and, for that purpose, creating a custodianship or custodial trust;

c. If the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

d. Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

22. On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

23. Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

24. Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

25. Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and

26. On termination of the trust, exercise the powers appropriate to wind up the administration of

the trust and distribute the trust property to the persons entitled to it.

B. Any reference in a trust instrument incorporating the powers authorized under § 64.2-105 shall not be construed to limit powers a trustee may exercise pursuant to this section, unless the settlor expressly states in the trust instrument that such reference should be so construed.

2005, c. 935, § 55-548.16; 2012, c. 614.

§ 64.2-778.1. Repealed
Repealed by Acts 2017, c. 592, cl. 2.

§ 64.2-779. Distribution upon termination
A. Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

B. Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

C. A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

1. It was induced by improper conduct of the trustee; or

2. The beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

2005, c. 935, § 55-548.17; 2012, c. 614.

Code of Virginia

Title 64.2. Wills, Trusts, and Fiduciaries

Chapter 10. Uniform Principal and Income Act.

Article 1. Definitions and Fiduciary Duties.

§ 64.2-1000. Definitions.

In this chapter:

"Accounting period" means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.

"Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

"Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

"Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Article 4 (§ 64.2-1009 et seq.).

"Income beneficiary" means a person to whom net income of a trust is or may be payable.

"Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

"Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

"Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, or joint venture; government or governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

"Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

"Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

"Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

"Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

1999, c. 975, § 55-277.2; 2012, c. 614.

§ 64.2-1001. Fiduciary duties; general principles.

A. In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 (§ 64.2-1004 et seq.) and 3 (§ 64.2-1006 et seq.), a fiduciary:

1. Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

2. May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

3. Shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

4. Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

B. In exercising the power to adjust under subsection A of § 64.2-1002 or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

C. The power of a fiduciary to allocate receipts and expenses between income and principal, whether incorporated by reference, expressly conferred by the terms of a will or trust, or granted by a court pursuant to § 64.2-106, does not alone constitute a discretionary power of administration for purposes of this section.

1999, c. 975, § 55-277.3; 2012, c. 614.

§ 64.2-1002. Fiduciary's power to adjust.

A. A fiduciary may adjust between principal and income to the extent the fiduciary considers necessary if the fiduciary invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or shall be distributed to a beneficiary by referring to the trust's income, and the fiduciary determines, after applying the rules in subsection A of § 64.2-1001, that the fiduciary is unable to comply with subsection B of § 64.2-1001.

B. In deciding whether and to what extent to exercise the power conferred by subsection A, a fiduciary shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

1. The nature, purpose, and expected duration of the trust;

2. The intent of the settlor;

3. The identity and circumstances of the beneficiaries;

4. The needs for liquidity, regularity of income, and preservation and appreciation of capital;

5. 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 fiduciary or received from the settlor;

6. The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the fiduciary may estimate as to assets for which market values are not readily available;

7. Whether and to what extent the terms of the trust give the fiduciary the power to invade principal or accumulate income or prohibit the fiduciary from invading principal or accumulating income, and the extent to which the fiduciary has exercised a power from time to time to invade principal or accumulate income;

8. The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

9. The anticipated tax consequences of an adjustment.

C. A fiduciary may not make an adjustment:

1. 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 would be allowed, in whole or in part, if the fiduciary did not have the power to make the adjustment;

2. 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;

3. That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

4. From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

5. 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 fiduciary did not possess the power to make an adjustment;

6. 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 fiduciary or appoint a fiduciary, or both, and the assets would not be included in the estate of the individual if the fiduciary did not possess the power to make an adjustment;

7. If the fiduciary is a beneficiary of the trust; or

8. If the fiduciary is not a beneficiary, but the adjustment would benefit the fiduciary directly or indirectly.

D. If subdivision C 5, 6, 7, or 8 applies to a fiduciary and there is more than one fiduciary, a cofiduciary to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining fiduciary or fiduciaries is not permitted by the terms of the trust. Any beneficiary or fiduciary may petition the circuit court for appointment of a cofiduciary who would be permitted to make an adjustment not permitted by the other fiduciary or fiduciaries.

E. A fiduciary may release the entire power conferred by subsection A or may release only the power to adjust from income to principal or the power to adjust from principal to income if the fiduciary is uncertain about whether possessing or exercising the power will cause a result described in subdivisions C 1 through 6 or subdivision C 8 or if the fiduciary 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 subsection 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 fiduciary to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the fiduciary the power of adjustment conferred by subsection A.

G. As used in this section and the application of this section elsewhere in this chapter, the term "trust" includes the assets under the control or management of a personal representative.

1999, c. 975, § 55-277.4; 2005, c. 935;2012, c. 614.

§ 64.2-1003. Total return unitrust.
A. As used in this section:

"Disinterested person" means a person who is not a "related or subordinate party," as that term is defined in § 672(c) of the Internal Revenue Code (hereinafter referred to in this section as the "I.R.C.," and all such references shall include the specific section referred to and any successor provisions thereof) with respect to the person then acting as trustee of the trust, and excludes the grantor of the trust and any interested trustee.

"Grantor" means an individual who created an inter vivos or a testamentary trust.

"Grantor-created unitrust" means a trust created either by an inter vivos or a testamentary instrument that provides that the trust shall be administered in the manner of a total return unitrust as provided in this section.

"Income trust" means a trust, created by either an inter vivos or a testamentary instrument, that directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee, and regardless of whether the trust directs or permits the trustee to distribute the principal of the trust to one or more such persons.

"Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a "related or subordinate party" as defined in I.R.C. § 672(c), with respect to such distributee.

"Interested trustee" means (i) an individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed; (ii) any trustee who may be removed and replaced by an interested distributee; or (iii) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

"Total return unitrust" means (i) an income trust that has been converted under and meets the provisions of this section; or (ii) a grantor-created unitrust.

"Trustee" means all persons acting as trustee of the trust, except where expressly noted otherwise, whether acting in their discretion or at the direction of one or more persons acting in a fiduciary capacity.

"Unitrust amount" means an amount computed as a percentage of the fair market value of the trust.

B. A trustee, other than an interested trustee, or where two persons are acting as trustees the trustee that is not an interested trustee, or where more than two persons are acting as trustee a majority of the trustees who are not an interested trustee, may, in his sole discretion and without judicial approval, (i) convert an income trust to a total return unitrust; (ii) convert a total return unitrust to an income trust; or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

1. The trustee adopts a written policy for the trust providing: (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income; (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts; or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

2. The trustee sends notice in a manner authorized under § 64.2-707 of his intention to take such action, along with copies of such written policy and this section, to (i) the grantor of the trust, if living; (ii) without regard to the exercise of any power of appointment, the qualified beneficiaries of the trust then determined under §§ 64.2-701 and 64.2-708, other than the Attorney General; and (iii) all persons acting as advisor or protector of the trust. The representation provisions of §§ 64.2-714, 64.2-716, 64.2-717, and 64.2-718 shall apply to notice under this subdivision;

3. At least one member of each class of qualified beneficiaries receiving notice under clause (ii) of subdivision 2 is (i) legally competent, (ii) in the case of a charitable organization, then existing, or (iii) represented in the manner set forth in subdivision 2; and

4. No person receiving such notice objects, by written instrument delivered to the trustee, to the proposed action of the trustee within 30 days of receipt of such notice.

C. If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of such interested trustees may, in his sole discretion and without judicial approval, (i) convert an income trust to a total return unitrust; (ii) convert a total return unitrust to an income trust; or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

1. The trustee adopts a written policy for the trust providing: (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income; (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts; or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the

fair market value of the trust will be changed as stated in the policy;

2. The trustee appoints a disinterested person who, in his sole discretion but acting in a fiduciary capacity: (i) in the case of conversion to a total return unitrust, determines for the trustee (a) the percentage to be used to calculate the unitrust amount, (b) the method to be used in determining the fair market value of the trust, and (c) which assets, if any, are to be excluded in determining the unitrust amount; and (ii) determines for the trustee that conversion is in the best interests of the trust;

3. The trustee sends notice in a manner authorized under § 64.2-707 of his intention to take such action, along with copies of such written policy and this section, to (i) the grantor of the trust, if living; (ii) without regard to the exercise of any power of appointment, the qualified beneficiaries of the trust then determined under §§ 64.2-701 and 64.2-708, other than the Attorney General; and (iii) all persons acting as advisor or protector of the trust. The representation provisions of §§ 64.2-714, 64.2-716, 64.2-717, and 64.2-718 shall apply to notice under this subdivision;

4. At least one member of each class of qualified beneficiaries receiving notice under clause (ii) of subdivision 3 is (i) legally competent, (ii) in the case of a charitable organization, then existing, or (iii) represented in the manner set forth in subdivision 3; and

5. No person receiving such notice objects, by written instrument delivered to the trustee, to the proposed action of the trustee or the determinations of the disinterested person within 30 days of receipt of such notice.

D. If any trustee desires to convert an income trust to a total return unitrust, convert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust but does not have the ability to or elects not to do it under the provisions of subsection B or C, the trustee may petition the circuit court in which the trustee qualified, or if there is no such qualification, the circuit court for the jurisdiction in which the trustee or beneficiary resides, or if the trustee is a corporate trustee and there is no resident beneficiary, the circuit court where the trust account is administered, for such order as the trustee deems appropriate. In the event, however, there is only one trustee of such trust and such trustee is an interested trustee or in the event there are two or more trustees of such trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of such trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present such information to the court as shall be necessary to enable the court to make its determinations hereunder. Any qualified beneficiary of the trust then determined under §§ 64.2-701 and 64.2-708, other than the Attorney General, may also petition such circuit court to convert an income trust to a total return unitrust, convert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust assets.

E. The fair market value of the trust shall be determined at least annually, using such valuation date or dates or averages of valuation dates as are deemed appropriate. Any asset for which a fair market value cannot be readily ascertained shall be valued using such valuation methods as are deemed reasonable and appropriate. Any such asset may be excluded from valuation, provided all income received with respect to such asset is distributed to the extent distributable in accordance with the terms of the governing instrument.

F. The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event no less than three percent nor more than five percent, either as provided by the grantor in the governing instrument in the case of a grantor-created unitrust, or otherwise taking into account the intentions of the grantor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

G. Following the conversion of an income trust to a total return unitrust, or upon the creation of a grantor-created unitrust, the trustee:

1. Shall treat the unitrust amount as if it were net income of the trust for purposes of determining the amount available, from time to time, for distribution from the trust, and the distribution of the unitrust amount shall be considered in full satisfaction of the distribution of all of the net income of the trust;

2. May allocate to trust income for each taxable year of the trust, or portion thereof:

a. Net short-term capital gain described in I.R.C. § 1222(5), for such year or portion thereof, but only to the extent that the amount so allocated together with all other amounts allocated to trust income for such year or portion thereof does not exceed the unitrust amount for such year or portion thereof; and

b. Net long-term capital gain described in I.R.C. § 1222(7), for such year or portion thereof, but only to the extent that the amount so allocated together with all other amounts, including amounts described in subdivision 2 a, allocated to trust income for such year, or portion thereof, does not exceed the unitrust amount for such year, or portion thereof; and

3. Shall treat the unitrust amount as if it were income of the trust for purposes of determining the amount of trustee compensation where the governing instrument directs that such compensation be based wholly or partially on income.

H. In administering a total return unitrust, the trustee may, in his sole discretion but subject to the provisions of the governing instrument, determine (i) if the trust is converted to a total return unitrust, the effective date of the conversion; (ii) the timing of distributions, including provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases; (iii) whether distributions are to be made in cash or in kind or partly in cash and partly in kind; (iv) if the trust is converted to an income trust, the effective date of such conversion; and (v) such other administrative matters as may be necessary or appropriate to carry out the purposes of this section.

I. Conversion to a total return unitrust under the provisions of this section shall not affect any other provision of the governing instrument, if any, regarding distributions of principal.

J. Subject to the provisions of the governing instrument, this section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered under Virginia law, regardless of the date the trust was created, unless:

1. The governing instrument reflects an intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust;

2. The trust is a pooled income fund described in I.R.C. § 642(c)(5), or a charitable-remainder

trust described in I.R.C. § 664(d); or

3. The governing instrument expressly prohibits use of this section by specific reference to this section or expressly reflects the grantor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that "The provisions of § 64.2-1003, Code of Virginia, as amended, or any corresponding provision of future law, shall not be used in the administration of this trust," or "My trustee shall not determine the distributions to the income beneficiary as a unitrust amount," or similar words reflecting such intent shall be sufficient to preclude the use of this section.

K. Any trustee or disinterested person who in good faith takes or fails to take any action under this section shall not be liable to any person affected by such action or inaction, regardless of whether such person received written notice as provided in this section and regardless of whether such person was under a legal disability at the time of the delivery of such notice. Such person's exclusive remedy shall be to obtain an order of the court directing the trustee to convert an income trust to a total return unitrust, to convert from a total return unitrust to an income trust, or to change the percentage used to calculate the unitrust amount.

2004, c. 639, § 55-277.4:1; 2009, c. 477;2012, c. 614.

Article 2. Decedent's Estate or Terminating Income Interest.

§ 64.2-1004. Determination and distribution of net income.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

1. A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Articles 3 (§ 64.2-1006 et seq.) through 5 (§ 64.2-1024 et seq.) that apply to trustees and the rules in subdivision 5. The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

2. A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Articles 3 through 5 that apply to trustees and by:

a. Including in net income all income from property used to discharge liabilities;

b. Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

c. Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

3. A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from

net income determined under subdivision 2 or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

4. A fiduciary shall distribute the net income remaining after distributions required by subdivision 3 in the manner described in § 64.2-1005 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

5. A fiduciary may not reduce principal or income receipts from property described in subdivision 1 because of a payment described in § 64.2-1024 or 64.2-1025 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

1999, c. 975, § 55-277.5; 2012, c. 614.

§ 64.2-1005. Distribution to residuary and remainder beneficiaries.

A. Each beneficiary described in subdivision 4 of § 64.2-1004 is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

B. In determining a beneficiary's share of net income, the following rules apply:

1. The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

2. The beneficiary's fractional interest in the undistributed principal assets shall be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

3. The beneficiary's fractional interest in the undistributed principal assets shall be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

4. The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are

actually distributed.

C. If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

D. A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

1999, c. 975, § 55-277.6; 2012, c. 614.

Article 3. Apportionment at Beginning and End of Income Interest.

§ 64.2-1006. When right to income begins and ends.

A. An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

B. An asset becomes subject to a trust:

1. On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

2. On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

3. On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

C. An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection D, even if there is an intervening period of administration to wind up the preceding income interest.

D. An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

1999, c. 975, § 55-277.7; 2012, c. 614.

§ 64.2-1007. Apportionment of receipts and disbursements when decedent dies or income interest begins.

A. A trustee shall allocate an income receipt or disbursement other than one to which subdivision 1 of § 64.2-1004 applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

B. A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement shall be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins shall be allocated to principal and the balance shall be allocated to income.

C. An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this chapter. Distributions to shareholders or other owners from an entity to which § 64.2-1009 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that shall be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

1999, c. 975, § 55-277.8; 2012, c. 614.

§ 64.2-1008. Apportionment when income interest ends.

A. In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

B. When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked shall be added to principal.

C. When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

1999, c. 975, § 55-277.9; 2012, c. 614.

Article 4. Allocation of Receipts During Administration of Trust.

§ 64.2-1009. Character of receipts.

A. In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which § 64.2-1010 applies, a business or activity to which § 64.2-1011 applies, or an asset-backed security to which § 64.2-1023 applies.

B. Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

C. A trustee shall allocate the following receipts from an entity to principal:

1. Property other than money;

2. Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

3. Money received in total or partial liquidation of the entity; and

4. Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

D. Money is received in partial liquidation:

1. To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

2. If the total amount of money and property received in a distribution or series of related distributions is greater than 20 percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

E. Money is not received in partial liquidation, nor may it be taken into account under subdivision D 2, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary shall pay on taxable income of the entity that distributes the money.

F. A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

1999, c. 975, § 55-277.10; 2012, c. 614.

§ 64.2-1010. Distribution from trust or estate.
A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, § 64.2-1009 or 64.2-1023 applies to a receipt from the trust.

1999, c. 975, § 55-277.11; 2012, c. 614.

§ 64.2-1011. Business and other activities conducted by trustee.
A. If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

B. A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts shall be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

C. Activities for which a trustee may maintain separate accounting records include:

1. Retail, manufacturing, service, and other traditional business activities;

2. Farming;

3. Raising and selling livestock and other animals;

4. Management of rental properties;

5. Extraction of minerals and other natural resources;

6. Timber operations; and

7. Activities to which § 64.2-1022 applies.

1999, c. 975, § 55-277.12; 2012, c. 614.

§ 64.2-1012. Principal receipts.
A trustee shall allocate to principal:

1. To the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

2. Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this article;

3. Amounts recovered from third parties to reimburse the trust because of disbursements described in subdivision A 7 of § 64.2-1025 or for other reasons to the extent not based on the loss of income;

4. Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

5. Net income received in an accounting period during which there is no beneficiary to whom a trustee may or shall distribute income; and

6. Other receipts as provided in §§ 64.2-1016 through 64.2-1023.

1999, c. 975, § 55-277.13; 2012, c. 614.

§ 64.2-1013. Rental property.
To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, shall be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

1999, c. 975, § 55-277.14; 2012, c. 614.

§ 64.2-1014. Obligation to pay money.
A. An amount received as interest, whether determined at a fixed, variable, or floating rate, on an

obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, shall be allocated to income without any provision for amortization of premium.

B. A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust shall be allocated to income.

C. This section does not apply to an obligation to which § 64.2-1017, 64.2-1018, 64.2-1019, 64.2-1020, 64.2-1022, or 64.2-1023 applies.

1999, c. 975, § 55-277.15; 2012, c. 614.

§ 64.2-1015. Insurance policies and similar.

A. Except as otherwise provided in subsection B, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

B. A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to § 64.2-1011, loss of profits from a business.

C. This section does not apply to a contract to which § 64.2-1017 applies.

1999, c. 975, § 55-277.16; 2012, c. 614.

§ 64.2-1016. Insubstantial allocations not required.

If a trustee determines that an allocation between principal and income required by § 64.2-1017, 64.2-1018, 64.2-1019, 64.2-1020, or 64.2-1023 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in subsection C of § 64.2-1002 applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in subsection D of § 64.2-1002 and may be released for the reasons and in the manner described in subsection E of § 64.2-1002. An allocation is presumed to be insubstantial if:

1. The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent; or

2. The value of the asset producing the receipt for which the allocation would be made is less than 10 percent of the total value of the trust's assets at the beginning of the accounting period.

1999, c. 975, § 55-277.17; 2012, c. 614.

§ 64.2-1017. Deferred compensation, annuities, and similar payments.

A. In this section, "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan. For purposes of subsections D, E, F, and G, the term also includes any payment from a separate fund, regardless of the reason for the payment.

B. To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

C. If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income 10 percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

D. Except as otherwise provided in subsection E, subsections F and G apply, and subsections B and C do not apply, in determining the allocation of a payment made from a separate fund to:

1. A trust to which an election to qualify for a marital deduction under § 2056(b)(7) of the Internal Revenue Code of 1986, as amended, has been made; or

2. A trust that qualifies for the marital deduction under § 2056(b)(5) of the Internal Revenue Code of 1986, as amended.

E. Subsections D, F, and G do not apply if and to the extent that the series of payments would, without the application of subsection D, qualify for the marital deduction under § 2056(b)(7)(C) of the Internal Revenue Code of 1986, as amended.

F. A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this chapter. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

G. If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal at least four percent of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under § 7520 of the Internal Revenue Code of 1986, as amended, for the month preceding the accounting period for which the computation is made.

H. Subsections D, E, F, and G apply to a trust described in subsection D on and after the following dates: (i) if the trust is not funded as of July 1, 2009, the date of the decedent's death, (ii) if the trust is initially funded in the calendar year beginning January 1, 2009, the date of the decedent's death, or (iii) if the trust is not described in (i) or (ii), January 1, 2009.

I. This section does not apply to a payment to which § 64.2-1018 applies.

1999, c. 975, § 55-277.18; 2009, c. 477;2012, c. 614.

§ 64.2-1018. Liquidating asset.

A. In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, or royalty right, and a right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to § 64.2-1017, resources subject to § 64.2-1019, timber subject to § 64.2-1020, an activity subject to § 64.2-1022 , an asset subject to § 64.2-1023, or any asset for which the trustee establishes a reserve for depreciation under § 64.2-1026.

B. A trustee shall allocate to income 10 percent of the receipts from a liquidating asset and the balance to principal.

1999, c. 975, § 55-277.19; 2012, c. 614.

§ 64.2-1019. Minerals, water, and other natural resources.

A. To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

1. If received as nominal delay rental or nominal annual rent on a lease, a receipt shall be allocated to income.

2. If received from a production payment, a receipt shall be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance shall be allocated to principal.

3. If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, 90 percent shall be allocated to principal and the balance to income.

4. If an amount is received from a working interest or any other interest not provided for in subdivision 1, 2, or 3, 90 percent of the net amount received shall be allocated to principal and the balance to income.

B. An amount received on account of an interest in water that is renewable shall be allocated to income. If the water is not renewable, 90 percent of the amount shall be allocated to principal and the balance to income.

C. This chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

D. If a trust owns an interest in minerals, water, or other natural resources on January 1, 2000, the trustee may allocate receipts from the interest as provided in this chapter or in the manner used by the trustee before January 1, 2000. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2000, the trustee shall allocate receipts from the interest as provided in this chapter.

1999, c. 975, § 55-277.20; 2012, c. 614.

§ 64.2-1020. Timber.

A. To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

1. To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

2. To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

3. To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in subdivision 1 or 2; or

4. To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to subdivision 1, 2, or 3.

B. In determining net receipts to be allocated pursuant to subsection A, a trustee shall deduct and transfer to principal a reasonable amount for depletion.

C. This chapter applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

D. If a trust owns an interest in timberland on January 1, 2000, the trustee may allocate net receipts from the sale of timber and related products as provided in this chapter or in the manner used by the trustee before January 1, 2000. If the trust acquires an interest in timberland after January 1, 2000, the trustee shall allocate net receipts from the sale of timber and related products as provided in this chapter.

1999, c. 975, § 55-277.21; 2012, c. 614.

§ 64.2-1021. Property not productive of income.

A. If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under § 64.2-1002 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by subsection A of § 64.2-1002. The trustee may decide which action or combination of actions to take.

B. In cases not governed by subsection A, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

1999, c. 975, § 55-277.22; 2012, c. 614.

§ 64.2-1022. Derivatives and options.

A. In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments that gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

B. To the extent that a trustee does not account under § 64.2-1011 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

C. If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option shall be allocated to principal. An amount paid to acquire the option shall be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, shall be allocated to principal.

1999, c. 975, § 55-277.23; 2012, c. 614.

§ 64.2-1023. Asset-backed securities.

A. In this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which § 64.2-1009 or 64.2-1017 applies.

B. If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment that the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

C. If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate 10 percent of the payment to income and the balance to principal.

1999, c. 975, § 55-277.24; 2012, c. 614.

Article 5. Allocation of Disbursements During Administration of Trust.

§ 64.2-1024. Disbursements from income.

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which subdivision 2 b or 2 c of § 64.2-1004 applies:

1. One-half of the regular compensation of the trustee and of any person providing investment

advisory or custodial services to the trustee;

2. One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

3. All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

4. Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

1999, c. 975, § 55-277.25; 2012, c. 614.

§ 64.2-1025. Disbursements from principal.
A. A trustee shall make the following disbursements from principal:

1. The remaining one-half of the disbursements described in subdivisions 1 and 2 of § 64.2-1024;

2. All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

3. Payments on the principal of a trust debt;

4. Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

5. Premiums paid on a policy of insurance not described in subdivision 4 of § 64.2-1024 of which the trust is the owner and beneficiary;

6. Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

7. Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

B. If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

C. Notwithstanding any other provision of law and unless the governing instrument provides to the contrary, a trustee may pay from the principal of the trust from time to time (i) the federal or state income taxes, or both, imposed upon the settlor on income of the trust that is not distributed to the settlor, or (ii) such amounts that are required to reimburse the settlor for any federal or state income taxes, or both, imposed on the settlor on income of the trust that is not distributed to the settlor. The trustee shall not have the power to make payments pursuant to this subsection with respect to any trust where a charitable income, estate, or gift tax deduction has been allowed, in whole or in part, for the contributions to such trust if the exercise of such power would limit or reduce the amount of such deduction.

1999, c. 975, § 55-277.26; 2012, cc. 614, 718.

§ 64.2-1026. Transfers from income to principal for depreciation.
A. In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

B. A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

1. Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

2. During the administration of a decedent's estate; or

3. Under this section if the trustee is accounting under § 64.2-1011 for the business or activity in which the asset is used.

C. An amount transferred to principal need not be held as a separate fund.

1999, c. 975, § 55-277.27; 2012, c. 614.

§ 64.2-1027. Transfers from income to reimburse principal.
A. If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

B. Principal disbursements to which subsection A applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

1. An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

2. A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

3. Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

4. Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

5. Disbursements described in subdivision A 7 of § 64.2-1025.

C. If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection A.

1999, c. 975, § 55-277.28; 2012, c. 614.

§ 64.2-1028. Income taxes.
A. A tax required to be paid by a trustee based on receipts allocated to income shall be paid from

income.

B. A tax required to be paid by a trustee based on receipts allocated to principal shall be paid from principal, even if the tax is called an income tax by the taxing authority.

C. A tax required to be paid by a trustee on the trust's share of an entity's taxable income shall be paid:

1. From income to the extent that receipts from the entity are allocated only to income;

2. From principal to the extent that receipts from the entity are allocated only to principal;

3. Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

4. From principal to the extent that the tax exceeds the total receipts from the entity.

D. After applying subsections A through C, the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

1999, c. 975, § 55-277.29; 2009, c. 477;2012, c. 614.

§ 64.2-1029. Adjustments between principal and income because of taxes.
A. A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries that arise from:

1. Elections and decisions, other than those described in subsection B, that the fiduciary makes from time to time regarding tax matters;

2. An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

3. The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

B. If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement shall equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced shall be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

1999, c. 975, § 55-277.30; 2012, c. 614.

Article 6. Miscellaneous Provisions.

§ 64.2-1030. Expenses and receipts; nontrust estates.

A. The provisions of this chapter concerning the allocation and apportionment of receipts and expenses to principal and income shall govern the allocation and apportionment of receipts and expenses between a tenant and a remainderman where no trust has been created, except as otherwise provided in subsection B or C, and except for any provision that requires the exercise of a discretionary power by a trustee.

B. The cost of, or special taxes or assessments for, an improvement representing an addition of value to property forming part of the principal shall be paid by the tenant, when such improvement cannot reasonably be expected to outlast the estate of the tenant. In all other cases a portion thereof only shall be paid by the tenant, while the remainder shall be paid by the remainderman. Such portion shall be ascertained by taking that percentage of the total that is found by dividing the present value of the tenant's estate by the present value of an estate corresponding to the reasonably expected duration of the improvement. The computation of present values of the estate shall be made on the expectancy basis set forth in § 55.1-500 and no other evidence of duration or expectancy shall be considered. When either tenant or remainderman has incurred an expense for the benefit of his own estate and without the consent or agreement of the other, he shall pay such expense in full.

C. The rules of this section are subject to any agreement of the parties.

1999, c. 975, § 55-277.31; 2012, c. 614.

§ 64.2-1031. Uniformity of application and construction.
In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

1999, c. 975, § 55-277.32; 2012, c. 614.

§ 64.2-1032. Application of chapter to existing trusts, decedent's estates, and nontrust estates.
This chapter applies to every trust, decedent's estate, or nontrust estate existing on January 1, 2000, except as otherwise expressly provided in the will or the terms of the trust, any other governing document, or in this chapter.

1999, c. 975, § 55-277.33; 2012, c. 614.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 11. Uniform Prudent Management of Institutional Funds Act

§ 64.2-1100. Definitions.

In this chapter:

"Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental or municipal purpose, or any other purpose the achievement of which is beneficial to the community.

"Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

"Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

"Institution" means:

1. A person, other than an individual, organized and operated exclusively for charitable purposes;

2. A government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; or

3. A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

"Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

1. Program-related assets;

2. A fund held for an institution by a trustee that is not an institution, unless the fund is held by the trustee as a component trust of a community trust or foundation; or

3. A fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

1973, c. 167, § 55-268.1; 1995, c. 199;1997, c. 219;2008, c. 184, § 55-268.12; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 64.2-1101. Standard of conduct in managing and investing institutional fund.

A. Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

B. In addition to complying with the duty of loyalty imposed by law other than this chapter, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

C. In managing and investing an institutional fund, an institution:

1. May incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

2. Shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

D. An institution may pool two or more institutional funds for purposes of management and investment.

E. Except as otherwise provided by a gift instrument, the following rules apply:

1. In managing and investing an institutional fund, the following factors, if relevant, shall be considered:

a. General economic conditions;

b. The possible effect of inflation or deflation;

c. The expected tax consequences, if any, of investment decisions or strategies;

d. The role that each investment or course of action plays within the overall investment portfolio of the fund;

e. The expected total return from income and the appreciation of investments;

f. Other resources of the institution;

g. The needs of the institution and the fund to make distributions and to preserve capital; and

h. An asset's special relationship or special value, if any, to the charitable purposes of the institution.

2. Management and investment decisions about an individual asset shall be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

3. Except as otherwise provided by law other than this chapter, an institution may invest in any kind of property or type of investment consistent with this section.

4. An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better

served without diversification.

5. Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this chapter.

6. A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

1973, c. 167, §§ 55-268.4, 55-268.6; 2008, c. 184, § 55-268.13; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 64.2-1102. Appropriation for expenditure or accumulation of endowment fund; rules of construction.

A. Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

1. The duration and preservation of the endowment fund;

2. The purposes of the institution and the endowment fund;

3. General economic conditions;

4. The possible effect of inflation or deflation;

5. The expected total return from income and the appreciation of investments;

6. Other resources of the institution; and

7. The investment policy of the institution.

B. To limit the authority to appropriate for expenditure or accumulate under subsection A, a gift instrument shall specifically state the limitation.

C. Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income," "interest," "dividends," or "rents, issues, or profits," or "to preserve the principal intact," or words of similar import:

1. Create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purposes of the fund; and

2. Do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection A.

1973, c. 167, §§ 55-268.2, 55-268.3; 2008, c. 184, § 55-268.14; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 64.2-1103. Delegation of management and investment functions.
A. Subject to any specific limitation set forth in a gift instrument or in law other than this chapter, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

1. Selecting an agent;

2. Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

3. Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

B. In performing a designated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

C. An institution that complies with subsection A is not liable for the decisions or actions of an agent to which the function was delegated.

D. By accepting delegation of a management or investment function from an institution that is subject to the laws of the Commonwealth, an agent submits to the jurisdiction of the courts of the Commonwealth in all proceedings arising from or related to the delegation or the performance of the delegated function.

E. An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of the Commonwealth other than this chapter.

1973, c. 167, § 55-268.5; 2008, c. 184, § 55-268.15; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 64.2-1104. Release or modification of restrictions on management, investment, or purpose.
A. If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

B. The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the Attorney General of the application, and the Attorney General shall be given an opportunity to be heard. To the extent practicable, any modification shall be made in accordance with the donor's probable intention.

C. If a particular charitable purpose or restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the Attorney General of the application, and the Attorney General shall be given an opportunity to be heard.

D. If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, without application to the court but with the consent of the Attorney General, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument if the fund subject to the restriction has a total value of less than $250,000.

E. If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after notification to the Attorney General, may release or modify the restriction, in whole or part, if:

1. The institutional fund subject to the restriction has a total value of less than $50,000;

2. More than 20 years have elapsed since the fund was established; and

3. The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

1973, c. 167, § 55-268.7; 2008, c. 184, § 55-268.16; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 64.2-1105. Reviewing compliance.
Compliance with this chapter is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

2008, c. 184, § 55-268.17; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 64.2-1106. Application to existing institutional funds.
This chapter applies to institutional funds existing on or established after July 1, 2008. As it applies to institutional funds existing on July 1, 2008, this article governs only decisions made or

actions taken on or after that date.

2008, c. 184, § 55-268.18; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 64.2-1107. Relation to Electronic Signatures in Global and National Commerce Act.
This chapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., but does not modify, limit, or supersede § 101 of that act, 15 U.S.C. § 7001(a), or authorize electronic delivery of any of the notices described in § 103 of that act, 15 U.S.C. § 7001(b).

2008, c. 184, § 55-268.19; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 64.2-1108. Uniformity of application and construction.
In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

1973, c. 167, § 55-268.9; 2008, c. 184, § 55-268.20; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Subtitle IV. Fiduciaries and Guardians
Part A. Fiduciaries

Chapter 14. Fiduciaries Generally

Article 1. Appointment, Qualification, Resignation, and Removal of Fiduciaries

§ 64.2-1400. Authority to qualify trustee; necessity for security; notice of qualification; qualification by less than all of trustees named

A. Subject to the provisions of § 64.2-1406, the clerk of any circuit court or any duly qualified deputy of such clerk may qualify any trustee named in a will, deed, or other writing, and require and take from them the necessary bonds in the same manner and with like effect as the court.

B. Pursuant to the provisions of § 64.2-1426, the clerk or deputy may appoint and qualify an individual or a corporation authorized under § 6.2-803 as trustee. Such appointment may be made in the same manner and subject to the provisions of § 64.2-500.

C. The clerk shall not require security from a trustee if the will, deed, or other writing directs that a trustee shall not give security, unless, based on the application of any interested person or on the clerk's own knowledge, the clerk determines that security ought to be required. This section shall not be construed to require security where security is not required pursuant to § 6.2-1003 or 64.2-1401 or to affect the jurisdiction of the court to qualify trustees and to require security or not, as the court sees fit.

D. Qualification of a trustee under this section may be ex parte, and no prior notice to the beneficiaries of the qualification shall be required. If less than all the trustees named in the deed, will, or other writing desire to qualify, then the trustee shall only be qualified after reasonable notice is given to any other named trustees.

E. If less than all the trustees named in the will, deed, or other writing qualify, then the trust powers conferred by the trust instrument shall be exercisable only by the trustees who have qualified under this section or in any other manner permitted by law.

1964, c. 464, § 26-46.1; 1977, c. 256; 1981, c. 239; 1997, c. 220;2012, c. 614.

§ 64.2-1401. Jurisdiction for qualification of testamentary trustee; qualification and bond; when surety not required

A. In the case of a testamentary trust, the jurisdiction where the will has been admitted to probate in the Commonwealth shall be the exclusive jurisdiction for the qualification of the trustee under such will. In the case of a will of a nonresident that has not been admitted to probate in the Commonwealth, the trustee under such will shall be permitted to qualify in any jurisdiction in which such will could be probated or, if there is no such jurisdiction, then the trustee shall be permitted to qualify pursuant to § 64.2-1402.

B. Before proceeding to act as trustee, the trustee named in a will probated after July 1, 1968, shall qualify and give bond before the proper circuit court or clerk with surety as may be required by the court or clerk unless (i) the will waives surety on the bond, (ii) surety is not required under § 6.2-1003, or (iii) the will was executed prior to July 1, 1968, and the trustee offering to qualify as such was also named in the will as executor and qualifies as such, and the will waives surety upon the bond of such executor.

C. The provisions hereof shall not apply to a testamentary devise or bequest to a church or its trustees.

D. If real estate located in the Commonwealth constitutes any of the trust assets, the qualification of the trustee under this section shall not be in lieu of any other recordation required by law.

1964, c. 464, §§ 26-46.2, 26-46.3; 1966, c. 327; 1968, c. 514; 1981, c. 239, 2012, c. 614.

§ 64.2-1402. Jurisdiction for qualification of certain testamentary trustees and trustees generally

A. In the case of a testamentary trust for which there is no jurisdiction for probate as provided in § 64.2-1401 and in the case of any trust under any deed or other writing, other than a will, the trustee may qualify in any jurisdiction where the trustee resides, or if one trustee is a corporate trustee, then in the jurisdiction where the corporate trustee has its registered office.

B. If real estate located in the Commonwealth constitutes any of the trust assets, the qualification of the trustee under this section shall not be in lieu of any other recordation required by law.

1964, c. 464, § 26-46.3; 2012, c. 614.

§ 64.2-1403. Qualification of trustees

A. For the purposes of this section, the phrase "deed or other writing" does not include a will.

B. Any trustee appointed by a deed or other writing where the deed or other writing requires that the trustee qualify shall not act as trustee until he has qualified before the circuit court or clerk by giving bond and taking oath that he will perform the duties of his office. The oath may be taken on behalf of a corporate trustee by its president or other officer.

C. Any trustee appointed by a deed or other writing where the deed or other writing does not require that the trustee qualify may voluntarily qualify. However, regardless of whether the deed or other writing does not require qualification, upon the request of any interested party, the administration of the trust shall be in the same manner as if qualification had been required by the terms of the deed or other writing creating it.

1968, c. 382, § 26-1.1; 2012, c. 614.

§ 64.2-1404. New fiduciary appointed when authority of former revoked

If an order revoking and annulling the powers of any fiduciary is entered, the circuit court in which he qualified shall, at or after the date of the order, appoint an administrator de bonis non, a new guardian, or other fiduciary as if the fiduciary whose powers have been revoked and annulled had died at that date.

Code 1919, § 5148; Code 1950, § 26-47; 2012, c. 614.

§ 64.2-1405. Court may appoint trustee in place of one named in will, deed, or other writing; management by corporate trustee outside of the Commonwealth

A. If a trustee named in a will, deed, or other writing (i) dies, (ii) becomes incapable of executing the trust on account of physical or mental disability or confinement in prison, (iii) if residency is statutorily required, is no longer a resident of the Commonwealth, (iv) declines to accept the trust, (v) resigns the trust after having accepted the trust, (vi) in the case of a corporate trustee, is adjudicated bankrupt or for any reason loses its charter, (vii) for any other reason ceases to be eligible to continue serving as trustee, or (viii) for any other good cause shown, the circuit court in which such will was admitted to probate or such deed or other writing is or might have been recorded, or if the trustee is a corporation, in which its principal office in the Commonwealth is located, or in which the trustee resides, may on motion of any interested party, and upon satisfactory evidence of any of the conditions in clauses (i) through (viii), appoint a trustee in place of the trustee named in the instrument.

B. The circuit court may appoint a substitute corporate trustee whenever a corporate trustee removes the management function over an existing trust which was previously managed in the Commonwealth to a jurisdiction outside of the Commonwealth if the court finds that the management of the trust after such removal results in good cause for the substitution of the trustee. A corporate trustee that maintains a place of business in the Commonwealth where one or more trust officers are available on a regular basis for personal contact with trust customers or beneficiaries shall not be deemed to have removed such management function.

Code 1919, § 6298; 1930, p. 350; 1934, p. 162; 1950, p. 457, § 26-48; 1998, cc. 392, 410;2012, c. 614.

§ 64.2-1406. Notice required; certain substitutions validated

A. Reasonable notice of a motion made pursuant to § 64.2-1405 for the appointment of a substitute trustee shall be provided to all persons interested in the execution of the trust other than the moving party. If any interested person is under 18 years of age, the circuit court or clerk shall appoint a discreet and competent attorney-at-law as guardian ad litem for such person on whom notice may be served. If any interested person is incapacitated or incarcerated, the notice shall be served on his committee, guardian, or conservator, if any, or if none exists, the court or clerk shall appoint a discreet and competent attorney-at-law as a guardian ad litem for such person on whom notice may be served. Notice does not need to be given to a trustee or, if one has previously been appointed, a substitute trustee who no longer resides the Commonwealth, declined to accept the trust, or resigned, or to the personal representative of a deceased trustee, or to a corporate trustee that has been adjudicated bankrupt or that has lost its charter.

B. In the case of the substitution of the trustee in a deed of trust securing the payment of indebtedness, notice of the motion made pursuant to § 64.2-1405 need only be given to the trustee or, if one has previously been appointed, to the substitute trustee unless notice to him is not required pursuant to subsection A; any beneficiaries appearing of record or known to the moving party; any debtors mentioned in the deed of trust; any persons who may be shown by the deed records to have assumed payment of the indebtedness in whole or in part; and the person in whom the equitable title to the property conveyed by the deed of trust is vested at the time of the motion as shown by the deed records. In such case when the written notice of motion has been filed in the clerk's office of the court having jurisdiction as defined in § 64.2-1405, service of the notice as to all parties mentioned in § 8.01-316 may be made in conformity with the provisions of §§ 8.01-316, 8.01-317, 8.01-318, 8.01-320, 8.01-322, and 8.01-323.

C. Any decree or order of substitution heretofore made by a court of competent jurisdiction is hereby validated.

D. Nothing in this section shall be construed as preventing a court from substituting a trustee in a suit instituted for that purpose.

Code 1919, § 6299; 1930, p. 350; 1932, p. 135; 1934, p. 156; 1944, p. 337; Code 1950, § 26-50; 1972, c. 825; 1997, c. 921;2012, c. 614.

§ 64.2-1407. Who to execute the trust until new trustee appointed

A. The personal representative of a deceased trustee, or the remaining trustee or trustees if there were more than one trustee and one or more but less than all of them have died, resigned, become incapable of executing the trust on account of physical or mental disability or confinement in prison, become ineligible to continue to serve as trustee because of no longer being a resident of the Commonwealth where residency is statutorily required, or otherwise become ineligible to continue serving as trustee, shall execute the trust, or so much of the trust as remained unexecuted at the time such lack of capacity to execute the trust or such ineligibility came into being until an appointment is made pursuant to this part, unless the instrument creating the trust directs otherwise or some other trustee is appointed for the purpose by a circuit court having jurisdiction of the case. In the case of removal of the trust management function by a corporate trustee, the corporate trustee shall continue to execute the trust until such time as an appointment is made pursuant to this part.

B. The provisions of this section shall not apply to any trust governed by the Uniform Trust Code (§ 64.2-700 et seq.).

Code 1919, § 6300; 1930, p. 350; 1940, p. 302; 1942, p. 168; Code 1950, § 26-51; 1998, cc. 392, 410 ;2001, c. 38;2005, c. 935;2012, c. 614.

§ 64.2-1408. Circuit court may exercise same powers in suit to enforce or administer trust

A circuit court may exercise all the powers conferred by §§ 64.2-1405, 64.2-1406, 64.2-1407, and 64.2-1412 in a suit pending to enforce or administer the trust.

Code 1919, § 6302; Code 1950, § 26-52; 2012, c. 614.

§ 64.2-1409. Information to be provided to clerk by fiduciary

A. On and after July 1, 1998, every person seeking to qualify in any fiduciary capacity before the circuit court or clerk shall provide to the court or clerk the information required to make the qualification on forms provided to the proposed fiduciary by the clerk. The forms, with appropriate instructions concerning their use, shall be provided to each clerk by the Office of the Executive Secretary of the Supreme Court. In lieu of any form, a computer-generated facsimile of the form may be used by any person seeking to qualify.

B. Every qualified fiduciary who moves from the Commonwealth and becomes resident in another state shall inform the clerk and the commissioner of accounts of the court in which he was qualified of his new address within 30 days of the date of the change in residency. Any fiduciary who fails to so inform the clerk and commissioner of accounts shall be subject to a civil penalty of $50. For purposes of this section, a person becomes resident in another state when he can no longer satisfy the residency requirements specified in § 38.2-1800.1. This section shall not apply to any fiduciary whose cofiduciary is a resident of the Commonwealth.

1997, c. 842, § 26-1.2; 2005, c. 644;2012, c. 614.

§ 64.2-1410. When court may require new bond or revoke authority; giving new bond upon motion of fiduciary, surety, or other party in interest

A. Regardless of whether a fiduciary has given bond with or without sureties, at any time the circuit court under whose order or under the order of whose clerk any such fiduciary derives his authority shall, on the application of any surety or his personal representative, or may, (i) upon motion of the fiduciary or (ii) when it appears proper on report of the clerk or a commissioner of accounts or on evidence adduced before it by any interested party, order the fiduciary to give before the court or clerk a new bond or additional bond in a reasonable time as prescribed by the court and in such penalty and with or without sureties as the court deems proper. The new bond or additional bond shall have the effect provided by § 49-14. In all cases where the fiduciary qualified pursuant to an order issued by a clerk, the clerk shall have the same power as the court regarding bond and surety under this section. If the order of the court or clerk is not complied with, or whenever from any cause it appears proper, the court may revoke and annul the powers of any such fiduciary. However, no such order shall be made unless reasonable notice appears to have been given to the fiduciary by (a) the commissioner of accounts who made the report, (b) the surety or his representative making the application, or (c) the service of a rule or otherwise. No order or revocation shall invalidate any previous act of such fiduciary.

B. When the court or clerk orders a new bond, additional bond, or a reduction in bond, the court or clerk shall, in lieu of requiring a personal appearance by the fiduciary for the execution thereof, allow the fiduciary's execution to be made by the fiduciary's agent under a power of attorney expressly authorizing the same.

Code 1919, § 5417; Code 1950, § 26-3; 1966, c. 328; 1997, c. 842;2001, c. 79;2012, c. 614.

§ 64.2-1411. When fiduciary may qualify without security; requirements for issuance of certificates of qualification; payments

A. Any circuit court or circuit court clerk, having jurisdiction to appoint personal representatives, guardians, conservators, and committees, may, in his discretion, when there are no assets or the asset or amount coming into the possession of the personal representative, guardian of a minor, conservator, or committee does not exceed $25,000, allow the personal representative, guardian, conservator, or committee to qualify by giving bond without surety.

B. Any personal representative or trustee serving jointly with a bank or trust company that is exempted from giving surety on its bond under § 6.2-1003 shall, unless the court directs otherwise, also be exempt from giving surety.

C. If a fiduciary qualifies pursuant to subsection A, the court or clerk shall issue one or more certificates of qualification pursuant to this section for administration of an estate, guardianship, conservatorship, or committeeship that does not exceed a cumulative total of $25,000. Each such certificate shall specify that the maximum amount of estate, guardianship, conservatorship, or committeeship assets that may be collected pursuant to that certificate shall not exceed $25,000. Each such certificate shall:

1. Be titled "Qualification Certificate for Small Asset Estate";

2. State in a prominent position on the front of such certificate that any person may pay or deliver to the fiduciary named in the certificate any asset belonging, owed, or distributable to the specified deceased person, incapacitated ward, or minor having a value, on the date of payment or delivery, of no more than $25,000. Assets held in a safe deposit box shall not be counted toward such $25,000 limit, and the lessor of a safe deposit box shall not be deemed to know of, and shall have no obligation to determine, the presence or value of any asset in a safe deposit box;

3. State that the certificate (i) may only be used once, (ii) is not effective if it does not have an impression seal of the court clerk and therefore photocopies of the certificate are not effective, and (iii) must be retained by the payor; and

4. Bear the impression seal of the court clerk.

D. Upon being presented with a certificate of qualification issued pursuant to subsection C, any person may pay or deliver to the fiduciary named in such certificate any asset belonging, owed, or distributable to the specified deceased person, incapacitated ward, or minor having a value, on the date of payment, of no more than $25,000. The payor shall retain possession of such certificate. Assets held in a safe deposit box shall not be counted toward such $25,000 limit, and the lessor of a safe deposit box shall not be deemed to know of, and shall have no obligation to determine, the presence or value of any asset in a safe deposit box. Any person that makes such payment or delivery upon presentation of a certificate of qualification issued pursuant to subsection C is discharged and released from any or all claims or liabilities for such payment or delivery. Such payor is not required to see the application of such payment or delivery or to inquire into the assets paid or delivered by other parties to a fiduciary that qualifies pursuant to subsection A. A person presented with a certificate of qualification issued pursuant to subsection C shall not be liable for, or subject to, any claims, damages, fines or penalties for paying or distributing assets the person believed in good faith to have a value of $25,000 or less or for the failure to pay or deliver assets the person believed in good faith to have a value of more than $25,000.

E. A court clerk shall not be liable for any misrepresentations of a personal representative, guardian, conservator, or committee with regard to whether the estate qualifies for the small asset estate exemption under this section or for the performance of any of the clerk's duties under this section, except in the case of the clerk's gross negligence or intentional misconduct.

1918, p. 469; 1934, p. 24; Michie Code 1942, § 5371a; 1946, p. 492; Code 1950, § 26-4; 1964, c. 172; 1976, c. 338; 1980, c. 653; 1994, c. 25;1997, c. 801;1998, c. 117;2003, c. 195;2012, c. 614; 2014, c. 532;2015, c. 610;2018, c. 575.

§ 64.2-1412. How trustee required to give bond; when to be removed and another appointed
After reasonable notice to a trustee, whether appointed by will, deed, or other writing, the circuit court that has jurisdiction to administer the trust may, on motion of any interested person, order the trustee to give bond with surety before the court, or before the clerk of the court, within a reasonable time and in a penalty to be prescribed by the court, for the faithful execution of the trust if the court deems the bond is proper for the security of the trust estate. If the order is not complied with, or whenever for any cause it appears proper, the court may remove the trustee and appoint another in his place.

Code 1919, § 6301; Code 1950, § 26-1; 2012, c. 614.

§ 64.2-1413. Placing certain trust assets in designated financial institutions; waiver or reduction of bond of fiduciary
A. If the circuit court having jurisdiction of any estate in the process of administration by any guardian, conservator, curator, executor, administrator, trustee, receiver, or other fiduciary, determines that the size of the bond required of the fiduciary would be burdensome or for other cause, the court may order a portion or all of the personal assets of the estate, as the court deems

proper, to be placed with a designated bank, trust company, or savings institution, insured by the Federal Deposit Insurance Corporation or other federal insurance agency and doing business in the Commonwealth, with consideration being given to any bank, trust company, or savings institution proposed by the fiduciary. When the original assets are placed with a designated financial institution, the financial institution shall issue in the name of the estate and file with the court a receipt for such assets and shall give the fiduciary a copy of the receipt. The receipt shall acknowledge that:

1. The original assets received by the financial institution, or the duly collected proceeds from such assets, and all interest, dividends, principal, and other indebtedness subsequently collected by the financial institution on account thereof, are to be held by the financial institution in safekeeping, subject to such instructions of the fiduciary to the financial institution that have been authorized by orders of the court; and

2. Accountings therefor shall be made to the fiduciary at reasonably frequent intervals agreeable to the fiduciary. After the receipt of the financial institution for the original assets placed with the financial institution has been filed with the court, the court shall enter an order waiving the bond to be given or previously given by the fiduciary or reduce it so that the bond applies only to the estate remaining in the possession of the fiduciary, whichever the court deems best for the estate.

B. Whenever the court has ordered any assets of an estate be placed with a financial institution pursuant to subsection A, any person or corporation having possession or control of any of the assets, or owing interest, dividends, principal, or other indebtedness on account thereof, shall, on the due dates thereof, upon the demand of the financial institution whether the fiduciary has duly qualified or not, pay and deliver the assets, interest, dividends, principal, and other indebtedness to the financial institution. The receipt and acceptance thereof by the financial institution shall relieve the person or corporation from all further responsibility.

C. Any bank, trust company, or savings institution designated by the court pursuant to subsection A may accept or reject the designation in any particular instance. The financial institution shall evidence its acceptance or rejection by filing the same with the court or the clerk of the court making the designation within 15 days after actual knowledge of the designation shall have come to the attention of the financial institution. In the event of acceptance, the financial institution shall be allowed as a proper charge against the assets placed with it such reasonable amount for its services and expenses as the court making the designation may order.

1972, c. 321, § 26-45.2; 1990, c. 3; 1997, c. 801;2012, c. 614.

§ 64.2-1414. Effect of orders of qualification of bank as committee or guardian
If a bank qualifies as committee or guardian and the order of qualification fails to specify that the bank is to be guardian or committee of the person, it shall be deemed a qualification solely as committee, conservator, or guardian of the estate.

2010, c. 794, § 26-7.5; 2012, c. 614.

§ 64.2-1415. Liability for losses by negligence or failure to make defense
A. If any personal representative, guardian, conservator, curator, or committee, or any agent or attorney-at-law, by his negligence or improper conduct, loses any debt or other money, he shall be charged with the principal of what is so lost, and interest thereon, in like manner as if he had

received such principal.

B. If any personal representative, guardian, conservator, curator, or committee pays any debt the recovery of which could be prevented by reason of illegality of consideration, lapse of time, or otherwise, knowing the facts by which the recovery could have been prevented, no credit shall be allowed to him for such payment.

Code 1919, § 5406; Code 1950, § 26-5; 1997, c. 801;2012, c. 614.

§ 64.2-1416. Liability of fiduciary for actions of cofiduciary

A. As used in this section, "fiduciary" has the same meaning as provided in § 8.01-2, except that it shall not include trustees subject to the requirements and provisions of the Uniform Trust Code (§ 64.2-700 et seq.).

B. Any power vested in three or more fiduciaries may be exercised by a majority of the fiduciaries, but a fiduciary who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise. A dissenting fiduciary is not liable for the consequences of an act in which he joins at the direction of the majority of the fiduciaries if he expressed his dissent in writing to any of his cofiduciaries, if the act is not of itself a patent breach of trust.

C. A fiduciary shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any cofiduciary, or for those of any banker, broker, or other person with whom the trust money or securities may be lawfully deposited, or for any loss that does not result from his own default or negligence.

D. Whenever the instrument under which a fiduciary or fiduciaries are acting reserves the authority to direct the making or retention of any investment for the settlor, testator, or creator or vests such authority in an advisory or investment committee or any other person, including a cofiduciary, to the exclusion of the fiduciary or the exclusion of one or more of several fiduciaries,, the excluded fiduciary or cofiduciary shall be liable, if at all, only as a ministerial agent and shall not be liable as fiduciary or cofiduciary for any loss resulting from the making or retention of any investment pursuant to such authorized direction.

E. This section does not excuse a cofiduciary from liability for failing to (i) participate in the administration of trust, (ii) attempt to prevent a breach of trust, or (iii) seek advice and guidance from the circuit court in an apparently recurring situation unless otherwise expressly provided by the instrument under which the cofiduciary is acting.

1978, c. 327, § 26-5.2; 1980, c. 440; 2005, c. 935;2012, c. 614.

§ 64.2-1417. How judgment may be entered against personal representative, conservator, or committee

A judgment or decree against the personal representative of a decedent, committee of a convict, or conservator of an incapacitated person as defined in § 64.2-2000 for a debt due from the decedent, convict, or incapacitated person may, without taking an account of the transactions of the representative, conservator, or committee, be entered to be paid out of the estate of the decedent, convict, or incapacitated person in, or that shall come into, the possession of the representative, conservator, or committee to be administered. If the circuit court holds that the proceeding for the debt would not have been brought if the fiduciary had prudently discharged his duty, the amount of the judgment or decree for costs shall be paid out of the estate of the representative, conservator, or committee.

Code 1919, § 5407; 1950, p. 356, § 26-6; 1997, c. 921;2012, c. 614.

§ 64.2-1418. Court order for payments due from fiduciaries; effect

When a report of the accounts of any guardian, curator, conservator, committee, or trustee is confirmed, either in whole or in a qualified manner, the circuit court for the clerk's office where the report is filed may order payment of what appears due on such accounts to such persons as would be entitled to recover the same by suit. Any guardian, curator, conservator, committee, or trustee who has, in good faith and in compliance with the order of such court, paid and delivered the money and other estate in his possession to whomsoever the court has adjudged is entitled thereto, shall be fully protected against the demands of creditors and all other persons.

Code 1919, § 5433; 1942, p. 480; Code 1950, § 26-7; 1997, c. 801;2012, c. 614.

§ 64.2-1419. Execution of fiduciary bond or appointment of agent designates clerk as attorney for service of process

A. Every person who qualifies in a circuit court or clerk's office as a personal representative of a decedent, guardian, conservator, committee, trustee, or receiver, and the surety upon any such fiduciary's bond, shall, by executing the bond required of the fiduciary, be deemed to have designated the clerk of the court in which the qualification is had, and his successor in office, as the true and lawful attorney of the fiduciary upon whom service of any notice, process, or rule issuing from a court of the Commonwealth or a commissioner of such court may be executed, whenever the fiduciary cannot be found and served within the Commonwealth after the exercise of due diligence. This section only applies if the proceeding relates to the proper administration or distribution of the fiduciary estate, including a proceeding to assert a claim against the estate or to remove the fiduciary or to obtain a personal judgment against him and his surety, either or both, for nonfeasance, misfeasance, or malfeasance in the performance of the fiduciary's duties. The designation shall terminate and no longer be in effect when the fiduciary's final account shall stand confirmed as provided in § 64.2-1212 or by order of court.

B. Every nonresident trustee who, pursuant to § 64.2-427 or 64.2-428, files a consent in writing with a clerk of a circuit court that any service of process or notice may be by service upon a resident of the Commonwealth at such address as the trustee may appoint in the written instrument filed with the clerk shall, by filing such consent, be deemed to have designated the clerk of the court in which the consent is filed, and his successor in office, as the true and lawful attorney of the nonresident trustee upon whom service of any notice, process, or rule issuing from a court of the Commonwealth may be executed, whenever the resident appointed to receive service cannot be found and served within the Commonwealth after the exercise of due diligence.

1954, c. 601, § 26-7.1; 1997, c. 801;2000, c. 320;2012, c. 614.

§ 64.2-1420. Clerk to mail notice, process, or rule to person served

Whenever any notice, process, or rule is served on the clerk of a circuit court pursuant to § 64.2-1419, the clerk shall mail the notice, process, or rule forthwith by certified or registered mail, postage prepaid, to the person thus served, to his last known address as shown by the court papers, the cost thereof to be paid in advance by the person desiring the service. In lieu of using certified or registered mail, the clerk of court may also use overnight delivery, with the cost thereof to be paid in advance by the person desiring service.

1954, c. 601, § 26-7.2; 2004, c. 367;2012, c. 614.

§ 64.2-1421. What judgment or decree based upon service upon clerk shall specifically adjudicate
Any judgment or decree based upon service of notice, process, or rule upon the clerk of the circuit court shall specifically adjudicate that due diligence has been used and that the person thus served cannot be found and served within the Commonwealth, that the requirements of § 64.2-1420 have been complied with, and that the fiduciary's final account does not stand confirmed as provided in § 64.2-1212 or by order of court.

1954, c. 601, § 26-7.3; 2012, c. 614.

§ 64.2-1422. Environmental liability of fiduciaries
A. As used in this section:

"Environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health.

"Fiduciary" includes guardians, committees, conservators, trustees, executors, administrators and administrators with the will annexed, curators of decedents' wills, and attorneys-in-fact or agents acting for principals under written powers of attorney, and any combination of individuals, corporations, and other entities serving in those capacities.

"Individual capacity" means the nonfiduciary capacity of any individual, corporation, or other entity serving as a fiduciary.

B. As to any property held in trust or in an estate, a fiduciary shall not be considered in its individual capacity to be (i) the owner or operator of that property as defined under any applicable environmental law or (ii) a party otherwise liable under any environmental law unless the fiduciary's acts or omissions outside the scope of its fiduciary duties constitute conduct that independently would give rise to individual liability.

C. A fiduciary shall not be liable in its individual capacity to any beneficiary or other party for any decrease in value of assets in trust or in an estate by reason of the fiduciary's investigation or evaluation of potential contamination of property held in the trust or estate or the fiduciary's compliance with any environmental law, specifically including any reporting or disclosure requirement under such law.

D. Neither a fiduciary's acceptance of property nor its failure to inspect property shall be deemed to create any implication as to whether or not there is or may be any liability under any environmental law with respect to such property.

E. Nothing in this section shall affect or modify any defense to individual liability under any environmental law available to any fiduciary under any other provision of state or federal law, including the common law.

1994, c. 476, § 26-7.4; 1997, c. 801;2012, c. 614.

§ 64.2-1423. Trustee not disqualified due to status as stockholder, employee, or officer of corporate noteholder; sale of property by trustee not voidable
A. The fact that a trustee in a deed of trust to secure a debt due to a corporation is a stockholder, member, employee, officer, or director of, or counsel to, the corporation does not disqualify the trustee from exercising the powers conferred by the deed of trust, nor does it render voidable a

sale by the trustee in the exercise of the powers conferred on him by the deed of trust so long as the trustee did not participate in the corporation's decision as to the amount to be bid at the sale of the trust property.

B. In addition to the provisions of subsection A, if the lender secured by the deed of trust bids the amount secured, including interest through the date of sale and costs of foreclosure, the trustee's participation in fixing the bid price by the lender shall not be deemed improper and the sale shall not be rendered voidable solely by reason of the trustee's participation.

C. All sales made before July 1, 1990, by any trustee by virtue of a deed of trust and any deed made by the trustee in pursuance of such sales are hereby declared to be valid and effective in all respects, if otherwise valid according to laws then in force, the same as if the trustee had not been a stockholder, member, employee, officer, or director of, or counsel to, the corporation thereby secured.

1920, p. 502; 1932, p. 523; Michie Code 1942, § 6304b; Code 1950, § 26-58; 1990, c. 763; 2012, c. 614.

§ 64.2-1424. Resignation by fiduciary of his trust
The circuit court in which or before the clerk of which a fiduciary qualified may allow any personal representative, guardian, conservator, or committee to resign his trust conditioned upon his accounts as the fiduciary being stated and settled in the mode prescribed by law. Such resignation shall not invalidate any act done or affect any liability incurred by him while holding such trust.

Code 1919, § 5419; 1938, p. 790; Code 1950, § 26-46; 1997, c. 801;2012, c. 614.

§ 64.2-1425. How securities transferred to successor
When any securities for money loaned or invested shall be standing in the name of any fiduciary who has died or resigned or whose power has been revoked, and the fiduciary or his personal representative has not transferred the securities to his successor, the circuit court in which the fiduciary qualified, upon the petition of the successor or of any other interested person, may direct that the securities be transferred to the successor, a receiver of the court, or otherwise, and may direct that the dividends, interest, or proceeds of the securities be received or paid in such manner as the court deems proper.

Code 1919, § 5432; Code 1950, § 26-56; 2012, c. 614.

Article 2. Nonresident Trustees

§ 64.2-1426. Nonresident fiduciaries
A. A natural person who is not a resident of the Commonwealth may be appointed or allowed to qualify or act as the personal representative, or trustee under a will, of any decedent, or appointed as the guardian of an infant's estate or the guardian or conservator of the property of an incapacitated person under Chapter 20 (§ 64.2-2000 et seq.) or Chapter 21 (§ 64.2-2100 et seq.).

Qualification of such person as a personal representative, or trustee under a will, of any decedent shall be subject to the provisions of Article 1 (§ 64.2-500 et seq.) of Chapter 5.

At the time of qualification or appointment, each such nonresident shall file with the clerk of the circuit court of the jurisdiction wherein the qualification is had or appointment is made his consent in writing that service of process in any action or proceeding against him as personal representative, trustee under a will, conservator, or guardian, or any other notice with respect to the administration of the estate, trust, or person in his charge in the Commonwealth may be by service upon the clerk of the court in which he is qualified or appointed, or upon such resident of the Commonwealth and at such address as the nonresident may appoint in the written instrument. In the event of the death, removal, resignation, or absence from the Commonwealth of a resident agent or any successor named by a similar instrument filed with the clerk, or if a resident agent or any such successor cannot with due diligence be found for service at the address designated in such instrument, then any process or notice may be served on the clerk of the circuit court. Notwithstanding §§ 64.2-505 and 64.2-2011, where any nonresident qualifies, other than as a guardian of an incapacitated person, pursuant to this subsection, bond with surety shall be required in every case, unless a resident personal representative, trustee, or fiduciary qualifies at the same time or the court or clerk making the appointment waives surety under the provisions of § 64.2-1411.

B. A corporation shall not be appointed or allowed to qualify or act as personal representative, as trustee under a will, or as one of the personal representatives or trustees under a will of any decedent, or appointed or allowed to qualify or act as guardian of an infant, as one of the guardians of an infant, as guardian of the person or property of an incapacitated person under Chapter 20 (§ 64.2-2000 et seq.) or Chapter 21 (§ 64.2-2100 et seq.), or as one of the guardians or conservators, unless the corporation is authorized to do business in the Commonwealth. Nothing in this section shall be construed to impair the validity of any appointment or qualification made prior to January 1, 1962, nor to affect in any way the other provisions of this chapter or of § 64.2-609. The provisions of this section shall not authorize or allow any appointment or qualification prohibited by § 6.2-803.

C. The fact that an individual nominated or appointed as the guardian of the person of an infant is not a resident of the Commonwealth shall not prevent the qualification of the individual to serve as the sole guardian of the person of the infant.

1924, p. 415; 1936, p. 760; Michie Code 1942, § 5400a; 1950, p. 724, § 26-59; 1962, c. 576; 1983, c. 467; 1984, c. 39; 1986, cc. 53, 543; 1989, c. 535; 1995, cc. 678, 684;1996, c. 680;1997, c. 921;2001, c. 836;2011, c. 518;2012, c. 614.

§ 64.2-1427. How property of nonresident infant or incapacitated person transferred to foreign guardian, conservator, or committee

When any nonresident infant or incapacitated person is entitled to property or money in the Commonwealth, a petition to remove the property or money to the domicile of the infant or incapacitated person may be filed by his guardian, conservator, committee, or other fiduciary lawfully appointed and qualified in the state or country of his residence, in the circuit court of the county or city in which the property or money, or some part thereof, is located. If entitlement to the property or money was acquired other than by a will or was acquired by a will that restricts the transfer out of the Commonwealth, the infant or incapacitated person, and the guardian of the infant or the conservator or other fiduciary of the incapacitated person appointed in the Commonwealth, if there is one, shall be made a party defendant to this petition. The court shall appoint a guardian ad litem for the infant or incapacitated person who, as well as the conservator or other fiduciary, if there is one, shall answer the petition on oath. Upon a hearing of the case on its merits, or upon the petition without hearing if entitlement to the property or money was acquired by a will that does not restrict the transfer out of the Commonwealth, the court may order the fiduciary to pay and deliver to the foreign guardian, conservator, committee, or fiduciary, or his agent or attorney, all personal property and money in his possession belonging to the infant or incapacitated person, and authorize the foreign guardian, conservator, committee, or fiduciary to sue for, recover, and receive all money and personal property, including the accruing rents of his real estate, that belongs to the infant or incapacitated person in the same manner as if he were appointed a guardian, conservator, committee, or fiduciary of the infant or incapacitated person in the Commonwealth, and to remove the money and personal property to the state or country in which the foreign fiduciary was appointed and qualified.

Code 1919, § 5350; Code 1950, § 26-60; 1968, c. 399; 1983, c. 487; 1997, c. 801;2012, c. 614.

§ 64.2-1428. Transfer of proceeds of sale of real estate of nonresident beneficiary to foreign fiduciary

When the proceeds of sale of the real estate of an infant, incapacitated person, or cestui que trust are invested, or required to be invested under the direction of the circuit court, and the infant, incapacitated person, or cestui que trust does not reside in the Commonwealth, on the petition of a guardian, committee, conservator, or trustee lawfully appointed or qualified in the state or country of residence of the infant, incapacitated person, or cestui que trust, the court under whose direction such proceeds are so invested, or required to be invested, may, with the consent of the persons residing in the Commonwealth who would be the heirs of the infant, incapacitated person, or cestui que trust, if he were dead, order such proceeds to be paid and delivered to the foreign guardian, committee, conservator, or trustee, or his agent or attorney, and removed by him to the state or country in which he was appointed and qualified. The court may refuse to permit the payment and delivery if the court determines that the removal of the trust subject will defeat or conflict with the provisions of the deed, will, or other instrument creating the trust.

Code 1919, § 5351; Code 1950, § 26-61; 1997, c. 801;2012, c. 614.

§ 64.2-1429. Notice and bond required prior to transfer

No order shall be made pursuant to §§ 64.2-1427 and 64.2-1428 until (i) notice of the petition has been published once a week for four successive weeks in a newspaper published in the county or city in which the petition is filed, or if there is none, then in a newspaper published in an adjoining county; (ii) it is shown by authentic documentary evidence that the foreign guardian, conservator, or committee has, in the state or country where he qualified, given bond with surety sufficient to insure his accountability for the whole amount of the estate in his possession or that may be received by him; and (iii) the circuit court determines that the removal of such money or property from the Commonwealth will not impair the rights or be prejudicial to the interests either of the infant or incapacitated person or of any other person.

Code 1919, § 5352; 1930, p. 736; Code 1950, § 26-62; 1997, c. 801;2012, c. 614.

§ 64.2-1430. When bond may be dispensed with

In any case in which the circuit court finds that the laws of the state or country in which the infant or incapacitated person resides and the foreign guardian, conservator, or committee was appointed and qualified do not provide for the giving of a bond by the guardian, conservator, or committee, the court, in its discretion, may permit the money and other estate of the infant or incapacitated person to be paid and delivered to the foreign fiduciary although he has not given the bond required by § 64.2-1429.

Code 1919, § 5352; 1930, p. 736; Code 1950, § 26-63; 1997, c. 801;2012, c. 614.

§ 64.2-1431. Sale of property and payment of proceeds to nonresident trustee

If, in any proceeding under § 64.2-1427 or in case of an interest in property acquired by a will that does not restrict the transfer of property out of the Commonwealth upon petition under § 64.2-1427, the circuit court may order the property, or any part of it, to be sold, and the proceeds to be paid to the foreign guardian, conservator, committee, or nonresident trustee.

Code 1919, § 5355; Code 1950, § 26-66; 1968, c. 399; 1997, c. 801;2005, c. 935;2012, c. 614.

§ 64.2-1432. Discharge from liability of resident guardian, committee, conservator, or trustee

When any guardian, committee, conservator, trustee, or other person in the Commonwealth shall pay over, transfer, or deliver any estate in his possession or vested in him, under any order or decree made in pursuance of this chapter, he shall be discharged from all responsibility therefor.

Code 1919, § 5356; Code 1950, § 26-67; 1997, c. 801;2012, c. 614.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Subtitle IV. Fiduciaries and Guardians
Part A. Fiduciaries

Chapter 15. Investments

§ 64.2-1500. Court orders regarding money in possession of fiduciary

If a report made pursuant to § 64.2-1210 or a special report of the commissioner of accounts shows that money is in the possession of a fiduciary, the circuit court in which the report is filed may order that the money be invested or loaned out, or make such other order respecting the money as the court deems proper.

Code 1919, § 5430; Code 1950, § 26-38; 2012, c. 614.

§ 64.2-1501. Time within which guardian of an estate, conservator, or other fiduciary to invest funds; reasonable diligence required

A. Whenever a guardian of an estate, conservator, or other fiduciary charged with the investment of funds collects any principal, he shall have a reasonable time, not to exceed four months, to invest or loan the funds and shall not be charged with interest thereon until the expiration of such time. A guardian of an estate, conservator, or any other fiduciary shall only be required to invest in accordance with the provisions of §§ 64.2-1502 through 64.2-1506 and the Uniform Prudent Investor Act (§ 64.2-780 et seq.) and, if he invests in accordance with these provisions, he shall be accountable only for such interest and profits as are earned. If any funds are otherwise invested without the previous consent of the court having jurisdiction of such trust funds, the burden shall be on the guardian of an estate, conservator, or other fiduciary before his settlement is approved by the commissioner of accounts to show to the satisfaction of the commissioner of accounts that, after exercising reasonable diligence, he was unable to invest the funds in accordance with these provisions and that the investment made was reasonable and proper under all of the circumstances and fair to the beneficiary of the funds.

B. This section shall not be construed as altering the provisions of any will, deed, or other instrument that give the fiduciary discretion as to the rate of interest, character of security, nature or investment under the trust, or time within which the trust funds are to be loaned or invested.

Code 1919, § 5325; 1938, p. 203; 1946, p. 223; Code 1950, § 26-39; 1997, c. 842;1999, c. 772; 2012, c. 614.

§ 64.2-1502. In what securities fiduciaries may invest; definitions

A. As used in this section:

"Fiduciary" has the same meaning as provided in § 8.01-2 and also includes an attorney-in-fact or agent acting for a principal under a written power of attorney, a custodian under § 64.2-1911, and a custodial trustee under § 64.2-906.

"National rating service" means 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 § 2.2-4519, 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 this subdivision, 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 federal 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 in the 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 § 2.2-4519 as in effect prior to July 1, 1992, which continue to be held on July 1, 1992, shall be subject to § 64.2-781, and any reference to the Virginia "legal list" or to § 2.2-4519 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 the Uniform Prudent Investor Act (§ 64.2-780 et seq.).

E. 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 the fiduciary for the presumption under subsection B to apply.

1992, c. 810, § 26-40.01; 1996, c. 508;1999, c. 772;2005, c. 62;2007, c. 517;2012, c. 614.

§ 64.2-1503. Investment in bonds or other obligations issued, guaranteed, or assured by Inter-American Development Bank

Executors, administrators, trustees, and other fiduciaries, both individual and corporate, may invest the funds held by them in a fiduciary capacity in bonds and other obligations issued, guaranteed, or assured by the Inter-American Development Bank, which are and shall be considered lawful investments.

1968, c. 65, § 26-40.1; 2012, c. 614.

§ 64.2-1504. Investments in municipal bonds by banks or trust companies

Subject to the Uniform Prudent Investor Act (§ 64.2-780 et seq.) and the common law duties of a fiduciary, unless the governing instrument or a court order specifically directs otherwise, a bank or trust company serving as personal representative, trustee, guardian, agent, or in any other fiduciary capacity, may purchase during the existence of any underwriting or selling syndicate any state or municipal security otherwise authorized by this title in spite of the fact that the fiduciary, or an affiliate thereof under common ownership, participates or has participated as a member of a syndicate underwriting such security if the fiduciary purchases the security from another syndicate member or from an affiliate thereof and not from itself or any of its affiliates.

1988, c. 347, § 26-40.2; 1999, c. 772;2012, c. 614.

§ 64.2-1505. Investments that cease to be eligible may be retained

Investments made under the provisions of § 64.2-1502, if in conformity with the requirements of that section at the time the investments were made, may be retained even though they cease to be eligible for purchase under the provisions of that section, but shall be subject to the provisions of the Uniform Prudent Investor Act (§ 64.2-780 et seq.).

Code 1919, § 5431; 1942, p. 662; Code 1950, § 26-44; 1992, c. 810; 1999, c. 772;2012, c. 614.

§ 64.2-1506. Investment in mutual fund affiliated with fiduciary

Unless prohibited or otherwise limited by the instrument under which a fiduciary is acting, including a fiduciary of an agency account, the fiduciary may invest in a mutual company, investment trust, or investment company sponsored, advised, or sold by the fiduciary or an affiliate if the investment is otherwise appropriate as an investment. In such case, the fiduciary shall not take a commission as fiduciary to the extent that the fiduciary, or its affiliate or division, receive compensation for services relating to advice or services to such mutual fund, investment trust, or investment company, unless (i) otherwise expressly agreed in writing by the creator of the trust or affected beneficiary or (ii) the fiduciary discloses by statement, prospectus, or otherwise to all current income beneficiaries of an account the rate, formula, or other method by which the compensation received or to be received by the fiduciary or affiliate or division of the fiduciary for such advice and services is determined. In such case, the compensation for such advice and services shall not exceed the customary or prevailing amount that is charged by a fiduciary, or its affiliate or division, for providing comparable advice and services for the benefit of nonfiduciary accounts.

1990, c. 66, § 26-44.1; 1992, c. 684; 2012, c. 614.

FAQs about Retirement Plans and ERISA

U.S. Department of Labor
Employee Benefits Security Administration

What is ERISA?

The Employee Retirement Income Security Act of 1974, or ERISA, protects the assets of millions of Americans so that funds placed in retirement plans during their working lives will be there when they retire.

ERISA is a federal law that sets minimum standards for retirement plans in private industry. For example, if your employer maintains a retirement plan, ERISA specifies when you must be allowed to become a participant, how long you have to work before you have a non-forfeitable interest in your benefit, how long you can be away from your job before it might affect your benefit, and whether your spouse has a right to part of your benefit in the event of your death. Most of the provisions of ERISA are effective for plan years beginning on or after January 1, 1975.

ERISA does not require any employer to establish a retirement plan. It only requires that those who establish plans must meet certain minimum standards. The law generally does not specify how much money a participant must be paid as a benefit.

ERISA does the following:

- Requires plans to provide participants with information about the plan including important information about plan features and funding. The plan must furnish some information regularly and automatically. Some is available free of charge, some is not.
- Sets minimum standards for participation, vesting, benefit accrual and funding. The law defines how long a person may be required to work before becoming eligible to participate in a plan, to accumulate benefits, and to have a non-forfeitable right to those benefits. The law also establishes detailed funding rules that require plan sponsors to provide adequate funding for your plan.
- Requires accountability of plan fiduciaries. ERISA generally defines a fiduciary as anyone who exercises discretionary authority or control over a plan's management or assets, including anyone who provides investment advice to the plan. Fiduciaries who do not follow the principles of conduct may be held responsible for restoring losses to the plan.
- Gives participants the right to sue for benefits and breaches of fiduciary duty.
- Guarantees payment of certain benefits if a defined plan is terminated, through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation.

What is a defined benefit plan?

A defined benefit plan, funded by the employer, promises you a specific monthly benefit at retirement. The plan may state this promised benefit as an exact dollar amount, such as $100 per month at retirement. Or, more often, it may calculate your benefit through a formula that includes factors such as your salary, your age, and the number of years you worked at the company. For example, your pension benefit might be equal to 1 percent of your average salary for the last 5 years of employment times your total years of service.

What is a defined contribution plan?

A defined contribution plan, on the other hand, does not promise you a specific benefit amount at retirement. Instead, you and/or your employer contribute money to your individual account in the plan. In many cases, you are responsible for choosing how these contributions are invested, and deciding how much to contribute from your paycheck through pretax deductions. Your employer may add to your account, in some cases by matching a certain percentage of your contributions. The value of your account depends on how much is contributed and how well the investments perform. At retirement, you receive the balance in your account, reflecting the contributions, investment gains or losses, and any fees charged against your account. The 401(k) plan is a popular type of defined contribution plan. There are four types of 401(k) plans: traditional 401(k), safe harbor 401(k), SIMPLE 401(k), and automatic enrollment 401(k) plans. The SIMPLE IRA plan, SEP, employee stock ownership plan (ESOP), and profit sharing plan are other examples of defined contribution plans.

What are simplified employee retirement plans (SEPs)?

Simplified Employee Pension Plan (SEP) – A plan in which the employer makes contributions on a tax-favored basis to individual retirement accounts (IRAs) owned by the employees. If certain conditions are met, the employer is not subject to the reporting and disclosure requirements of most retirement plans. Under a SEP, an IRA is set up by or for an employee to accept the employer's contributions.

What are 401(k) plans?

401(k) Plan – In this type of defined contribution plan, the employee can make contributions from his or her paycheck before taxes are taken out. The contributions go into a 401(k) account, with the employee often choosing the investments based on options provided under the plan. In some plans, the employer also makes contributions, matching the employee's contributions up to a certain percentage. SIMPLE and safe harbor 401(k) plans have additional employer contribution and vesting requirements.

What are profit sharing plans or stock bonus plans?

Profit Sharing Plan – A profit sharing plan allows the employer each year to determine how much to contribute to the plan (out of profits or otherwise) in cash or employer stock. The plan contains a formula for allocating the annual contribution among the participants.

What are employee stock ownership plans (ESOPs)?

Employee Stock Ownership Plan (ESOP) – A type of defined contribution plan that is invested primarily in employer stock.

Who can participate in your employer's retirement plan?

Once you have learned what type of retirement plan your employer offers, you need to find out when you can participate in the plan and begin to earn benefits. Plan rules can vary as long as they meet the requirements under Federal law. You need to check with your plan or review the plan booklet (called the Summary Plan Description) to learn your plan's rules and requirements. Your plan may require you to work for the company for a period of time before you may participate in the plan. In addition, there typically is a time frame for when you begin to accumulate benefits and earn the right to them (sometimes referred to as "vesting").

Find out if you are within the group of employees covered by your employer's retirement plan. Federal law allows employers to include certain groups of employees and exclude others from a retirement plan. For example, your employer may sponsor one plan for salaried employees and another for union employees. Part-time employees may be eligible if they work at least 1,000 hours per year, which is about 20 hours per week. So if you work part-time, find out if you are covered.

When can your participation begin?

Once you know you are covered, you need to find out when you can begin to participate in the plan. You can find this information in your plan's Summary Plan Description. Federal law sets minimum requirements, but a plan may be more generous. Generally, a plan may require an employee to be at least 21 years old and to have a year of service with the company before the employee can participate in a plan. However, plans may allow employees to begin participation before reaching age 21 or completing one year of service. For administrative reasons, your participation may be delayed up to 6 months after you meet these age and service criteria, or until the start of the next plan year, whichever is sooner. The plan year is the calendar year, or an alternative 12-month period, that a retirement plan uses for plan administration. Because the rules can vary, it is important that you learn the rules for your plan.

Employers have some flexibility to require additional years of service in some circumstances. For example, if your plan allows you to vest (discussed in detail later) immediately upon participating in the plan, it may require that you work for the company for two years before you may participate in the plan.

Federal law also imposes other participation rules for certain circumstances. For example, if you were an older worker when you were hired, you cannot be excluded from participating in the plan just because you are close to retirement age.

Some 401(k) and SIMPLE IRA plans enroll employees automatically. This means that you will automatically become a participant in the plan unless you choose to opt out. The plan will deduct a set contribution level from your paycheck and put it into a predetermined investment. If your employer has an automatic enrollment plan, you should receive a notice describing the automatic contribution process, when your participation begins, your opportunity to opt out of the plan or change your contribution level, and where your automatic contributions are invested. If you are in a 401(k), the notice will also describe your right to change investments, or if you are in a SIMPLE IRA plan, your right to change the financial institution where your contributions are invested.

When do you begin to accumulate benefits?

Once you begin to participate in a retirement plan, you need to understand how you accrue or earn benefits. Your accrued benefit is the amount of retirement benefits that you have accumulated or that have been allocated to you under the plan at any particular point in time.

Defined benefit plans often count your years of service in order to determine whether you have earned a benefit and also to calculate how much you will receive in benefits at retirement. Employees in the plan who work part-time, but who work 1,000 hours or more each year, must be credited with a portion of the benefit in proportion to what they would have earned if they were employed full time. In a defined contribution plan, your benefit accrual is the amount of contributions and earnings that have accumulated in your 401(k) or other retirement plan account, minus any fees charged to your account by your plan.

Special rules for when you begin to accumulate benefits may apply to certain types of retirement plans. For example, in a Simplified Employee Pension Plan (SEP), all participants who earn at least $550 a year from their employers are entitled to receive a contribution.

Can a plan reduce promised benefits?

Defined benefit plans may change the rate at which you earn future benefits but cannot reduce the amount of benefits you have already accumulated. For example, a plan that accrues benefits at the rate of $5 a month for years of service through 2010 may be amended to provide that for years of service beginning in 2011 benefits will be credited at the rate of $4 per month. Plans that make a significant reduction in the rate at which benefits accumulate must provide you with written notice generally at least 45 days before the change goes into effect.

Also, in most situations, if a company terminates a defined benefit plan that does not have enough funding to pay all of the promised benefits, the Pension Benefit Guaranty Corporation (PBGC) will pay plan participants and beneficiaries some retirement benefits, but possibly less than the level of benefits promised. (For more information, see the PBGC's Website at **pbgc.gov**.)

In a defined contribution plan, the employer may change the amount of employer contributions in the future. Depending on the plan terms, the employer may also be able to stop making contributions for a few years or indefinitely.

An employer may terminate a defined benefit or a defined contribution plan, but may not reduce the benefit you have already accrued in the plan.

How soon do you have a right to your accumulated benefits?

You immediately vest in your own contributions and the earnings on them. This means you have earned the right to these amounts without the risk of forfeiting them. But note – there are restrictions on actually taking them out of the plan.

However, you do not necessarily have an immediate right to any contributions made by your employer. Federal law provides a maximum number of years a company may require employees to work to earn the vested right to all or some of these benefits.

In a defined benefit plan, an employer can require that employees have 5 years of service in order to become 100 percent vested in the employer funded benefits (called cliff vesting). Employers also can choose a graduated vesting schedule, which requires an employee to work 7 years in order to be 100 percent vested, but provides at least 20 percent vesting after 3 years, 40 percent after 4 years, 60 percent after 5 years, and 80 percent after 6 years of service. Plans may provide a different schedule as long as it is more generous than these vesting schedules. (Unlike most defined benefit plans, in a cash balance plan, employees vest in employer contributions after 3 years.)

In a defined contribution plan such as a 401(k) plan, you are always 100 percent vested in your own contributions to a plan, and in any subsequent earnings from your contributions. However, in most defined contribution plans you may have to work several years before you are vested in the employer's matching contributions. (There are exceptions, such as the SIMPLE 401(k) and the safe harbor 401(k), in which you are immediately vested in all required employer contributions. You also vest immediately in the SIMPLE IRA and the SEP.)

Currently, employers have a choice of two different vesting schedules for employer matching 401(k) contributions. Your employer may use a schedule in which employees are 100 percent vested in employer contributions after 3 years of service (cliff vesting). Under graduated vesting, an employee must be at least 20 percent vested after 2 years, 40 percent after 3 years, 60 percent after 4 years, 80 percent after 5 years, and 100 percent after 6 years. If your automatic enrollment 401(k) plan requires employer contributions, you vest in those contributions after 2 years. Automatic enrollment 401(k) plans with optional matching contributions follow one of the vesting schedules noted above.

Employers making other contributions to defined contribution plans, such as a 401(k) plan, also can choose between two vesting schedules. For those contributions made since 2007, they can choose between the graduated and cliff vesting schedules. For contributions made prior to 2007, they can choose between schedules.

You may lose some of the employer-provided benefits you have earned if you leave your job before you have worked long enough to be vested. However, once vested, you have the right to receive the vested portion of your benefits even if you leave your job before retirement. But even though you have the right to certain benefits, your defined contribution plan account value could decrease after you leave your job as a result of investment performance.

Note: If you leave your company and return, you may be able to count your earlier period of employment towards the years of service needed for vesting in the employer-provided benefits. Unless your break in service with the company was 5 years or a time equal to the length of your pre-break employment, whichever is greater, you likely can count that time prior to your break. Because these rules are very specific, you should read your plan document carefully if you are contemplating a short-term break from your employer, and then discuss it with your plan administrator. If you left employment prior to January 1, 1985, different rules apply. For more information, contact the Department of Labor toll free at 1-866-444-3272.

For Reserve and National Guard units called to active duty, the Uniformed Services Employment and Reemployment Rights Act (USERRA) requires that the period of military duty be counted as covered service with the employer for eligibility, vesting, and benefit accrual purposes. Returning service members are treated as if they had been continuously employed regardless of the type of retirement plan the employer has adopted. However, a person who is reemployed is entitled to accrued benefits resulting from employee contributions only to the extent that he or she actually makes the contributions to the plan.

Information Provided By the Retirement Plan

Each retirement plan is required to have a formal, written plan document that details how it operates and its requirements. As noted previously, there is also a booklet that describes the key plan rules, called the Summary Plan Description (SPD), which should be much easier to read and understand. The SPD also should include a summary of any material changes to the plan or to the information required to be in the SPD. In many cases, you can start with the SPD and then look at the plan document if you still have questions.

In addition, plans must provide you with a number of notices.

For example, defined contribution plans, such as 401(k) plans, generally are required to provide advance notice to employees when a "blackout period" occurs. A blackout period is when a participant's right to direct investments, take loans, or obtain distributions is suspended for a period of at least three consecutive business days. Blackout periods can often occur when plans change recordkeepers or investment options.

Some plan information, such as the Summary Plan Description, must be provided to you automatically and without charge at the time periods indicated below. You may request a Summary Plan Description at other times, but your employer might charge you a copying fee. You must ask the plan if you want other information, such as a copy of the written plan document or the plan's Form 5500 annual financial report, and you may have to pay a copying fee. Many employers provide benefit information on a Website.

In some cases, plans provide information more frequently than required by Federal law. For instance, some plans allow participants to check their statements online or by telephone.

The plan's annual financial report (Form 5500) is also available (there is a copying fee if over 100 pages) by contacting the U.S. Department of Labor, EBSA Public Disclosure Facility, Room N-1515, 200 Constitution Avenue, NW, Washington, D.C. 20210, Tel: 202-693-8673. For annual reports for 2009 and later years, you can also find the report online at **efast.dol.gov**. In addition, if your plan administrator does not provide you, as a participant covered under the plan, with a copy of the Summary Plan Description automatically or after you request it, you may contact the Department of Labor toll free at 1-866-444-3272 for help.

What plan information should you review regularly?

If you are in a defined benefit plan, you will receive an individual benefit statement once every 3 years. Review its description of the total benefits you have earned and whether you are vested in those benefits. Also check to make sure your date of birth, date of hire, and the other information included is correct. You will also receive an annual notice of the plan's funding status.

Defined contribution plans, including 401(k) plans, also must send participants individual benefit statements either quarterly, if participants direct investments of their accounts, or annually, if they do not. When you receive a statement, check it to make sure all of the information is accurate. This information may include:

- Salary level
- Amounts that you and your employer have contributed
- Years of service with the employer
- Home address
- Social Security number
- Beneficiary designation
- Marital status
- The performance of your investments (defined contribution plan participants)
- Fees paid by the plan and/or charged to participants. (For more information, see the Department of Labor brochure *A Look at 401(k) Plan Fees* at **dol.gov/ebsa** or call the Department of Labor toll free at 1-866-444-3272.) Check with your plan to see if this information is included in materials on your investment options, the benefit statement, the Summary Plan Description or the plan's Annual Report (Form 5500).

When can you begin to receive retirement benefits?

There are several points to keep in mind in determining when you can receive benefits:

1. Federal law provides guidelines for when plans must start paying retirement benefits. Under Federal law, your plan must allow you to begin receiving benefits
   - the later of - Reaching age 65 or the age your plan considers to be normal retirement age (if earlier)
   - Or - 10 years of service
   - Or - Terminating your service with the employer
2. Plans can choose to start paying benefits sooner. The plan documents will state when you may begin receiving payments from your plan.
3. You must file a claim for benefits for your payments to begin. This takes some time for administrative reasons.

For administrative reasons, benefits do not begin immediately after meeting these conditions. At a minimum, your plan must provide that you will start receiving benefits within 60 days after the end of the plan year in which you satisfy the conditions. Also, you need to file a claim under your plan's procedures.

Under certain circumstances, your benefit payments may be suspended if you continue to work beyond normal retirement age. The plan must notify you of the suspension during the first calendar month or payroll period in which payments are withheld. This information should also be included in the Summary Plan Description. A plan also must advise you of its procedures for requesting an advance determination of whether a particular type of reemployment would result in a suspension of benefit payments. If you are a retiree and are considering taking a job, you may wish to write to your plan administrator and ask if your benefits would be suspended.

Listed below are some permitted variations:

- Although defined benefit plans and money purchase plans generally allow you to receive benefits only when you reach the plan's retirement age, some have provisions for early retirement.
- 401(k) plans often allow you to receive your account balance when you leave your job.
- 401(k) plans may allow for distributions while still employed if you have reached age 59½ or if you suffer a hardship.
- Profit sharing plans may permit you to receive your vested benefit after a specific number of years or whenever you leave your job.
- A phased retirement option allows employees at or near retirement age to reduce their work hours to part time, receive benefits, and continue to earn additional funds.
- ESOPs do not have to pay out any benefits until 1 year after the plan year in which you retire, or as many as 6 years if you leave for reasons other than retirement, death, or disability.

Warning

1. You may owe current income taxes – and possibly tax penalties -- on your distribution if you take money out before age 59½, unless you transfer it to an IRA or another tax-qualified retirement plan.
2. Taking all or a portion of your funds out of your account before retirement age will mean you have less in retirement benefits.

When is the latest you may begin to take payment of your benefits?

Federal law sets a mandatory date by which you must start receiving your retirement benefits, even if you would like to wait longer. This mandatory start date generally is set to begin on April 1 following the calendar year in which you turn 70½ or, if later, when you retire. However, your plan may require you to begin receiving distributions even if you have not retired by age 70½.

In what form will your benefits be paid?

If you are in a defined benefit or money purchase plan, the plan must offer you a benefit in the form of a life annuity, which means that you will receive equal, periodic payments, often as a monthly benefit, which will continue for the rest of your life. Defined benefit and money purchase plans may also offer other payment options, so check with the plan. If you are in a defined contribution plan (other than a money purchase plan), the plan may pay your benefits in a single lump sum payment as well as offer other options, including payments over a set period of time (such as 5 or 10 years) or an annuity with monthly lifetime payments.

Can a benefit continue for your spouse should you die first?

In a defined benefit or money purchase plan, unless you and your spouse choose otherwise, the form of payment will include a survivor's benefit. This survivor's benefit, called a qualified joint and survivor annuity (QJSA), will provide payments over your lifetime and your spouse's lifetime. The benefit payment that your surviving spouse receives must be at least half of the benefit payment you received during your joint lives. If you choose not to receive the survivor's benefit, both you and your spouse must receive a written explanation of the QJSA and, within certain time limits, you must make a written waiver and your spouse must sign a written consent to the alternative payment form without a survivor's benefit. Your spouse's signature must be witnessed by a notary or plan representative.

In most 401(k) plans and other defined contribution plans, the plan is written so different protections apply for surviving spouses. In general, in most defined contribution plans, if you should die before you receive your benefits, your surviving spouse will automatically receive them. If you wish to select a different beneficiary, your spouse must consent by signing a waiver, witnessed by a notary or plan representative.

If you were single when you enrolled in the plan and subsequently married, it is important that you notify your employer and/or plan administrator and change your status under the plan. If you do not have a spouse, it is important to name a beneficiary.

If you or your spouse left employment prior to January 1, 1985, different rules apply. For more information on these rules, contact the Department of Labor toll free at 1-866-444-3272.

Can you borrow from your 401(k) plan account?

401(k) plans are permitted to – but not required to – offer loans to participants. The loans must charge a reasonable rate of interest and be adequately secured. The plan must include a procedure for applying for the loans and the plan's policy for granting them. Loan amounts are limited to the lesser of 50 percent of your account balance or $50,000 and must be repaid within 5 years (unless the loan is used to purchase a principal residence).

Can you get a distribution from your plan if you are not yet 65 or your plan's normal retirement age but are facing a significant financial hardship?

Again, defined contribution plans are permitted to – but not required to – provide distributions in case of hardship. Check your plan booklet to see if it does permit them and what circumstances are included as hardships.

If you are in a defined benefit plan (other than a cash balance plan), you most likely will be required to leave the benefits with the retirement plan until you become eligible to receive them. As a result, it is very important that you update your personal information with the plan administrator regularly and keep current on any changes in your former employer's ownership or address.

If you are in a cash balance plan, you probably will have the option of transferring at least a portion of your account balance to an individual retirement account or to a new employer's plan.

If you leave your employer before retirement age and you are in a defined contribution plan (such as a 401(k) plan), in most cases you will be able to transfer your account balance out of your employer's plan.

What choices do you have for taking your defined contribution benefits?

- **A lump sum –** you can choose to receive your benefits as a single payment from your plan, effectively cashing out your account. You may need to pay income taxes on the amount you receive, and possibly a penalty.

- **A rollover to another retirement plan –** you can ask your employer to transfer your account balance directly to your new employer's plan if it accepts such transfers.

- **A rollover to an IRA –** you can ask your employer to transfer your account balance directly to an individual retirement account (IRA).

- If your account balance is less than $5,000 when you leave the employer, the plan can make an immediate distribution without your consent. If this distribution is more than $1,000, the plan must automatically roll the funds into an IRA it selects, unless you elect to receive a lump sum payment or to roll it over into an IRA you choose. The plan must first send you a notice allowing you to make other arrangements, and it must follow rules regarding what type of IRA can be used (i.e., it cannot combine the distribution with savings you have deposited directly in an IRA). Rollovers must be made to an entity that is qualified to offer individual retirement plans. Also, the rollover IRA must have investments designed to preserve principal. The IRA provider may not charge more in fees and expenses for such plans than it would to its other individual retirement plan customers.

Please note: If you elect a lump sum payment and do not transfer the money to another retirement account (employer plan or IRA other than a Roth IRA), you will owe a tax penalty if you are under age 59½ and do not meet certain exceptions. In addition, you may have less to live on during your retirement. Transferring your retirement plan account balance to another plan or an IRA when you leave your job will protect the tax advantages of your account and preserve the benefits for retirement.

What happens if you leave a job and later return?

If you leave an employer for whom you have worked for several years and later return, you may be able to count those earlier years toward vesting. Generally, a plan must preserve the service credit you have accumulated if you leave your employer and then return within five years. Service credit refers to the years of service that count towards vesting. Because these rules are very specific, you should read your plan document carefully if you are contemplating a short-term break from your employer, and then discuss it with your plan administrator. If you left employment prior to January 1, 1985, different rules apply.

If you retire and later go back to work for a former employer, you must be allowed to continue to accrue additional benefits, subject to a plan limit on the total years of service credited under the plan.

How do you make a claim for benefits?

Federal retirement law requires all plans to have a reasonable written procedure for processing your benefits claim and appeal if your claim is denied. The Summary Plan Description (SPD) should include your plan's claims procedures. Usually, you fill out the required paperwork and submit it to the plan administrator, who then can tell you what your benefits will be and when they will start.

If there is a problem or a dispute about whether you qualify for benefits or what amount you should receive, check your plan's claims procedure. Federal law outlines the following claims procedures requirements:

- Once your claim is filed, the plan can take up to 90 days to reach a decision, or 180 days if it notifies you that it needs an extension.

- If your claim is denied, you must receive a written notice, including specific information about why your claim was denied and how to file an appeal.

- You have 60 days to request a full and fair review of your denied claim, using your plan's appeals procedure.

- The plan can take up to 60 days to review your appeal, as well as an additional 60 days if it notifies you of the need for an extension. The plan must then send a written notice telling you whether the appeal was granted or denied.

- If the appeal is denied, the written notice must tell you the reason, describe any additional appeal levels, and give you a statement regarding your rights to seek judicial review of the plan's decision.

If you believe the plan failed to follow ERISA's requirements, you may decide to seek legal advice if the plan denies your appeal. You also can contact the Department of Labor concerning your rights under ERISA by calling toll free 1-866-444-3272.

For more information on claims procedures, see the Department of Labor publication *Filing a Claim for Your Retirement Benefits* at **dol.gov/ebsa** or call toll free 1-866-444-3272.

Does your plan have to identify those responsible for operating the plan?

In every retirement plan, there are individuals or groups of people who use their own judgment or discretion in administering and managing the plan or who have the power to or actually control the plan's assets. These individuals or groups are called plan fiduciaries. Fiduciary status is based on the functions that the person performs for the plan, not just the person's title.

A plan must name at least one fiduciary in the written plan document, or through a process described in the plan, as having control over the plan's operations. This fiduciary can be identified by office or by name. For some plans, it may be an administrative committee or the company's board of directors. Usually, a plan's fiduciaries will include the trustee, investment managers, and the plan administrator. The plan administrator is usually the best starting point for questions you might have about the plan.

What are the responsibilities of plan fiduciaries?

Fiduciaries have important responsibilities and are subject to certain standards of conduct because they act on behalf of the participants in the plan. These responsibilities include:

- Acting solely in the interest of plan participants and their beneficiaries, with the exclusive purpose of providing benefits to them;
- Carrying out their duties with skill, prudence, and diligence;
- Following the plan documents (unless inconsistent with ERISA);
- Diversifying plan investments;
- Paying only reasonable expenses of administering the plan and investing its assets; and
- Avoiding conflicts of interest.

The fiduciary also is responsible for selecting the investment providers and the investment options, and for monitoring their performance. Some plans, such as most 401(k) or profit sharing plans, can be set up to permit participants to choose the investments in their accounts (within certain investment options provided by the plan). If the plan is properly set up to give participants control over their investments, then the fiduciary is not liable for losses resulting from the participant's investment decisions. Department of Labor rules provide guidance designed to make sure participants have sufficient information on the specifics of their investment options so they can make informed decisions. This information includes:

- A description of each investment option, including the investment goals, risk, and return characteristics;
- Information about any designated investment managers;
- An explanation of when and how to request changes in investments, plus any restrictions on when you can change investments;
- A statement of the fees that may be charged to your account when you change investment options or buy and sell investments; and
- The name, address, and telephone number of the plan fiduciary or other person designated to provide certain additional information on request.

A statement that the plan is intended to follow the Department of Labor rules and that the fiduciaries may be relieved of liability for losses that are the direct and necessary result of a participant's investment instructions also must be included.

For an automatic enrollment plan, such as a 401(k), the plan fiduciary selects the investments for employees' automatic contributions if the employees do not provide direction. If the plan is properly set up, using certain default investments that generally minimize the risk of large losses and provide long term growth, and providing notice of the plan's automatic enrollment process, then the fiduciary may be relieved of liability for losses resulting from investing in these default alternatives for participants. The plan also must provide a broad range of investments for participants to choose from and information on the plan's investments so participants can make informed decisions. Department of Labor rules provide guidance on the default investment alternatives that can be used and the notice and information to be provided to participants.

What if a plan fiduciary fails to carry out its responsibilities?

Fiduciaries that do not follow the required standards of conduct may be personally liable. If the plan lost money because of a breach of their duties, fiduciaries would have to restore those losses, or any profits received through their improper actions. For example, if an employer did not forward participants' 401(k) contributions to the plan, they would have to pay back the contributions to the plan as well as any lost earnings, and return any profits they improperly received. Fiduciaries also can be removed from their positions as fiduciaries if they fail to follow the standards of conduct.

When does the employer need to deposit employee contributions in the plan?

If you contribute to your retirement plan through deductions from your paycheck, then the employer must follow certain rules to make sure that it deposits the contributions in a timely manner. The law says that the employer must deposit participant contributions as soon as it is reasonably possible to separate them from the company's assets, but no later than the 15th business day of the month following the payday. For small plans (those with fewer than 100 participants), salary reduction contributions deposited with the plan no later than the 7th business day following withholding by the employer will be considered contributed in compliance with the law. In the Annual Report (Form 5500), the plan administrator is required to include information on whether deposits of contributions were made on a timely basis. For more information, see the Department of Labor's "Ten Warnings Signs That Your 401(k) Contributions Are Being Misused" at **dol.gov/ebsa** for indicators of possible delays in depositing contributions.

What are the plan fiduciaries' obligations regarding the fees and expenses paid by the plan? Can the plan charge my defined contribution plan account for fees?

Plan fiduciaries have a specific obligation to consider the fees and expenses paid by your plan for its operations. ERISA's fiduciary standards, discussed above, mean that fiduciaries must establish a prudent process for selecting investment alternatives and service providers to the plan; ensure that fees paid to service providers and other expenses of the plan are reasonable in light of the level and quality of services provided; select investment alternatives that are prudent and adequately diversified; and monitor investment alternatives and service providers once selected to see that they continue to be appropriate choices.

The plan may deduct fees from your defined contribution plan account. Plan administration fees and investment fees can be deducted from your account either as a direct charge or indirectly as a reduction of your account's investment returns. Fees for individual services, such as for processing a loan from the plan or a Qualified Domestic Relations Order, also may be charged to your account.

For more information, see the Department of Labor brochure *A Look at 401(k) Plan Fees* at **dol.gov/ebsa** or call the Department of Labor toll free at 1-866-444-3272.

What happens when a plan is terminated?

Federal law provides some measures to protect employees who participated in plans that are terminated, both defined benefit and defined contribution. When a plan is terminated, the current employees must become 100 percent vested in their accrued benefits. This means you have a right to all the benefits that you have earned at the time of the plan termination, even benefits in which you were not vested and would have lost if you had left the employer. If there is a partial termination of a plan, (for example, if your employer closes a particular plant or division that results in the end of employment of a substantial percentage of plan participants) the affected employees must be immediately 100 percent vested to the extent the plan is funded.

What if your terminated defined benefit plan does not have enough money to pay the benefits?

The Federal government, through the Pension Benefit Guaranty Corporation (PBGC), insures most private defined benefit plans. For terminated defined benefit plans with insufficient money to pay all of the benefits, the PBGC will guarantee the payment of your vested pension benefits up to the limits set by law. For further information on plan termination guarantees, contact the Pension Benefit Guaranty Corporation toll free at 1-800-400-3272 or visit PBGC's Website at **pbgc.gov**.

What happens if a defined contribution plan is terminated?

The PBGC does not guarantee benefits for defined contribution plans. If you are in a defined contribution plan that is in the process of terminating, the plan fiduciaries and trustees should take actions to maintain the plan until they terminate it and pay out the assets.

Is your accrued benefit protected if your plan merges with another plan?

Your plan rules and investment choices are likely to change if your company merges with another. Your employer may choose to merge your plan with another plan. If your plan is terminated as a result of the merger, the benefits that you have accrued cannot be reduced. You must receive a benefit that is at least equal to the benefit you were entitled to before the merger. In a defined contribution plan, the value of your account may still fluctuate after the merger based on the performance of the investments.

Special rules apply to mergers of multiemployer defined benefit plans, which generally are under the jurisdiction of the PBGC. Contact the PBGC for further information.

What if your employer goes bankrupt?

Generally, your retirement assets should not be at risk if your employer declares bankruptcy. Federal law requires that retirement plans fund promised benefits adequately and keep plan assets separate from the employer's business assets. The funds must be held in trust or invested in an insurance contract. The employers' creditors cannot make a claim on retirement plan funds. However, it is a good idea to confirm that any contributions your employer deducts from your paycheck are forwarded to the plan's trust or insurance contract in a timely manner.

Significant business events such as bankruptcies, mergers, and acquisitions can result in employers abandoning their individual account plans (e.g., 401(k) plans), leaving no plan fiduciary to manage it. In this situation, participants often have great difficulty in accessing the benefits they have earned and have no one to contact with questions. Custodians such as banks, insurers, and mutual fund companies are left holding the assets of these plans but do not have the authority to terminate the plans and distribute the assets. In response, the Department of Labor issued rules to create a voluntary process for the custodian to wind up the plan's business so that benefit distributions can be made and the plan terminated. Information about this program can be found on the Department of Labor's Website at **dol.gov/ebsa**.

Can other people make claims against your benefit (divorce)?

In general, your retirement plan is safe from claims by other people. Creditors to whom you owe money cannot make a claim against funds that you have in a retirement plan. For example, if you leave your employer and transfer your 401(k) account into an individual retirement account (IRA), creditors generally cannot get access to those IRA funds even if you declare bankruptcy.

Federal law does make an exception for family support and the division of property at divorce. A state court can award part or all of a participant's retirement benefit to the spouse, former spouse, child, or other dependent. The recipient named in the order is called the alternate payee. The court issues a specific court order, called a domestic relations order, which can be in the form of a state court judgment, decree or order, or court approval of a property settlement agreement. The order must relate to child support, alimony, or marital property rights, and must be made under state domestic relations law. The plan administrator determines if the order is a qualified domestic relations order (QDRO) under the plan's procedures and then notifies the participant and the alternate payee. If the participant is still employed, a QDRO can require payment to the alternate payee to begin on or after the participant's earliest possible retirement age available under the plan. These rules apply to both defined benefit and defined contribution plans. For additional information, see EBSA's publication, *QDROs – The Division of Retirement Benefits Through Qualified Domestic Relations Orders*, available by calling toll free 1-866-444-3272 or on the Website at **dol.gov/ebsa**.

If you are involved in a divorce, you should discuss these issues with your plan administrator and your attorney.

What do you do if you have a problem?

Sometimes, retirement plan administrators, managers, and others involved with the plan make mistakes. Some examples include:

- Your 401(k) or individual account statement is consistently late or comes at irregular intervals;
- Your account balance does not appear to be accurate;
- Your employer fails to transmit your contribution to the plan on a timely basis;
- Your plan administrator does not give or send you a copy of the Summary Plan Description; or
- Your benefit is calculated incorrectly.

It is important for you to know that you can follow up on any possible mistakes without fear of retribution. Employers are prohibited by law from firing or disciplining employees to avoid paying a benefit, as a reprisal for exercising any of the rights provided under a plan or Federal retirement law (ERISA), or for giving information or testimony in any inquiry or proceeding related to ERISA.

Start with your employer and/or plan administrator

If you find an error or have a question, in most cases, you can start by looking for information in your Summary Plan Description. In addition, you can contact your employer and/or the plan administrator and ask them to explain what has happened and/or make a correction.

Is it possible to sue under ERISA?

Yes, you have a right to sue your plan and its fiduciaries to enforce or clarify your rights under ERISA and your plan in the following situations:

- To appeal a denied claim for benefits after exhausting your plan's claims review process;
- To recover benefits due you;
- To clarify your right to future benefits;
- To obtain plan documents that you previously requested in writing but did not receive;
- To address a breach of a plan fiduciary's duties; or
- To stop the plan from continuing any act or practice that violates the terms of the plan or ERISA.

What is the role of the Labor Department?

The U.S. Department of Labor's Employee Benefits Security Administration (EBSA) is the agency responsible for enforcing the provisions of ERISA that govern the conduct of plan fiduciaries, the investment and protection of plan assets, the reporting and disclosure of plan information, and participants' benefit rights and responsibilities.

However, not all retirement plans are covered by ERISA. For example, Federal, state, or local government plans and some church plans are not covered.

The Department of Labor enforces the law by informally resolving benefit disputes, conducting investigations, and seeking correction of violations of the law, including bringing lawsuits when necessary.

The Department has benefits advisors committed to providing individual assistance to participants and beneficiaries. Participants will receive information on their rights and responsibilities under the law and help in obtaining benefits to which they are entitled.

Contact a benefits advisor by calling toll free at 1-866-444-3272 or electronically at **askebsa.dol.gov**.

What other Federal agencies can assist participants and beneficiaries?

The Pension Benefit Guaranty Corporation (PBGC) is a Federally created corporation that guarantees payment of certain pension benefits under most private defined benefit plans when they are terminated with insufficient money to pay benefits.

You may contact the PBGC at:

Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026
Tel: 202-326-4000
Toll free: 1-800-400-PBGC (7242)

The Treasury Department's Internal Revenue Service is responsible for the rules that allow tax benefits for both employees and employers related to retirement plans, including vesting and distribution requirements. The IRS maintains a taxpayer assistance line for retirement plans at: 1-877-829-5500 (toll-free number). The call center is open Monday through Friday.

L. 109–280 to certain eligible cooperative plans, PBGC settlement plans, and eligible government contractor plans, see sections 104, 105, and 106 of Pub. L. 109–280, set out as notes under section 401 of Title 26, Internal Revenue Code.

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term ''blackout period'' has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of title 26, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term ''qualified change in investment options'' means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) DEFAULT INVESTMENT ARRANGEMENTS.—

(A) IN GENERAL.—For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) NOTICE REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if each participant or beneficiary—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) FORM OF NOTICE.—The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to title 26 shall be a reference to title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

(Pub. L. 93–406, title I, § 404, Sept. 2, 1974, 88 Stat. 877; Pub. L. 96–364, title III, § 309, Sept. 26, 1980, 94 Stat. 1296; Pub. L. 101–508, title XII, § 12002(b)(1), (2)(A), Nov. 5, 1990, 104 Stat. 1388–565, 1388–566; Pub. L. 104–188, title I, § 1421(d)(2), Aug. 20, 1996, 110 Stat. 1799; Pub. L. 107–16, title VI, § 657(c)(1), June 7, 2001, 115 Stat. 136; Pub. L. 107–147, title IV, § 411(t), Mar. 9, 2002, 116 Stat. 51; Pub. L. 109–280, title VI, §§ 621(a), 624(a), Aug. 17, 2006, 120 Stat. 978, 980; Pub. L. 110–458, title I, § 106(d), Dec. 23, 2008, 122 Stat. 5107.)

REFERENCES IN TEXT

The enactment of the Omnibus Budget Reconciliation Act of 1990, referred to in subsec. (d)(2)(B), is the enactment of Pub. L. 101–508, which was approved Nov. 5, 1990.

AMENDMENTS

2008—Subsec. (c)(5). Pub. L. 110–458 substituted ''participant or beneficiary'' for ''participant'' wherever appearing.

2006—Subsec. (c)(1). Pub. L. 109–280, § 621(a)(1), designated existing provisions as subpar. (A), redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, of subpar. (A), in cl. (ii), inserted '', except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary'' before period at end, and added subpars. (B) and (C).

Subsec. (c)(4). Pub. L. 109–280, § 621(a)(2), added par. (4).

Subsec. (c)(5). Pub. L. 109–280, § 624(a), added par. (5).

2002—Subsec. (c)(3)(A). Pub. L. 107–147, § 411(t)(1), struck out ''the earlier of'' after ''the earlier of'' in introductory provisions.

Subsec. (c)(3)(B). Pub. L. 107–147, § 411(t)(2), substituted ''a transfer that'' for ''if the transfer''.

2001—Subsec. (c)(3). Pub. L. 107–16 added par. (3).

1996—Subsec. (c). Pub. L. 104–188 designated existing provisions as par. (1), redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, and added par. (2).

1990—Subsec. (a)(1)(D). Pub. L. 101–508, § 12002(b)(2)(A), substituted ''and subchapter III'' for ''or subchapter III''.

Subsec. (d). Pub. L. 101–508, § 12002(b)(1), added subsec. (d).

1980—Subsec. (a)(1)(D). Pub. L. 96–364 inserted reference to subchapter III of this chapter.

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by Pub. L. 110–458 effective as if included in the provisions of Pub. L. 109–280 to which the amendment relates, except as otherwise provided, see section 112 of Pub. L. 110–458, set out as a note under section 72 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109–280, title VI, § 621(b), Aug. 17, 2006, 120 Stat. 979, provided that:

''(1) IN GENERAL.—The amendments made by this section [amending this section] shall apply to plan years beginning after December 31, 2007.

''(2) SPECIAL RULE FOR COLLECTIVELY BARGAINED AGREEMENTS.—In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified on or before the date of the enactment of this Act [Aug. 17, 2006], paragraph (1) shall be applied to benefits pursuant to, and individuals covered by, any such agreement by substituting for 'December 31, 2007' the earlier of—

''(A) the later of—

''(i) December 31, 2008, or

''(ii) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after such date of enactment), or

''(B) December 31, 2009.''

Pub. L. 109–280, title VI, § 624(b), Aug. 17, 2006, 120 Stat. 980, provided that:

''(1) IN GENERAL.—The amendments made by this section [amending this section] shall apply to plan years beginning after December 31, 2006.

''(2) REGULATIONS.—Final regulations under section 404(c)(5)(A) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1104(c)(5)(A)] (as added by this section) shall be issued no later than 6 months after the date of the enactment of this Act [Aug. 17, 2006].''

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–147 effective as if included in the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16, to which such amendment relates, see section 411(x) of Pub. L. 107–147, set out as a note under section 25B of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 2001 AMENDMENT

Amendment by Pub. L. 107–16 applicable to distributions made after Mar. 28, 2005, see section 657(d) of Pub. L. 107–16, set out as a note under section 401 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–188 applicable to taxable years beginning after Dec. 31, 1996, see section 1421(e) of Pub. L. 104–188, set out as a note under section 72 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–508 applicable to reversions occurring after Sept. 30, 1990, but not applicable to any reversion after Sept. 30, 1990, if (1) in the case of plans subject to subchapter III of this chapter, notice of intent to terminate under such subchapter was provided to participants (or if no participants, to Pension Benefit Guaranty Corporation) before Oct. 1, 1990, (2) in the case of plans subject to subchapter I of this chapter (and not subchapter III), notice of intent to reduce future accruals under section 1054(h) of this title was provided to participants in connection with termination before Oct. 1, 1990, (3) in the case of plans not subject to subchapter I or III of this chapter, a request for a determination letter with respect to termination was filed with Secretary of the Treasury or Secretary's delegate before Oct. 1, 1990, or (4) in the case of plans not subject to subchapter I or III of this chapter and having only one participant, a resolution terminating the plan was adopted by employer before Oct. 1, 1990, see section 12003 of Pub. L. 101–508, set out as a note under section 4980 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–364 effective Sept. 26, 1980, except as specifically provided, see section 1461(e) of this title.

REGULATIONS

Pub. L. 109–280, title VI, § 625, Aug. 17, 2006, 120 Stat. 980, provided that:

''(a) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act [Aug. 17, 2006], the Secretary of Labor shall issue final regulations clarifying that the selection of an annuity contract as an optional form of distribution from an individual account plan to a participant or beneficiary—

''(1) is not subject to the safest available annuity standard under Interpretive Bulletin 95–1 (29 CFR 2509.95–1), and

''(2) is subject to all otherwise applicable fiduciary standards.

''(b) EFFECTIVE DATE.—This section shall take effect on the date of enactment of this Act [Aug. 17, 2006].''

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this part call for the promulgation of regulations, see sections 1031 and 1114 of this title.

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1998

For provisions directing that if any amendments made by subtitle D [§§ 1401–1465] of title I of Pub. L. 104–188 require an amendment to any plan or annuity contract, such amendment shall not be required to be made before the first day of the first plan year beginning on or after Jan. 1, 1998, see section 1465 of Pub. L. 104–188, set out as a note under section 401 of Title 26, Internal Revenue Code.

§ 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable

Subsec. (c)(5). Pub. L. 109–280, § 624(a), added par. (5).

2002—Subsec. (c)(3)(A). Pub. L. 107–147, § 411(t)(1), struck out ''the earlier of'' after ''the earlier of'' in introductory provisions.

Subsec. (c)(3)(B). Pub. L. 107–147, § 411(t)(2), substituted ''a transfer that'' for ''if the transfer''.

2001—Subsec. (c)(3). Pub. L. 107–16 added par. (3).

1996—Subsec. (c). Pub. L. 104–188 designated existing provisions as par. (1), redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, and added par. (2).

1990—Subsec. (a)(1)(D). Pub. L. 101–508, § 12002(b)(2)(A), substituted ''and subchapter III'' for ''or subchapter III''.

Subsec. (d). Pub. L. 101–508, § 12002(b)(1), added subsec. (d).

1980—Subsec. (a)(1)(D). Pub. L. 96–364 inserted reference to subchapter III of this chapter.

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by Pub. L. 110–458 effective as if included in the provisions of Pub. L. 109–280 to which the amendment relates, except as otherwise provided, see section 112 of Pub. L. 110–458, set out as a note under section 72 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109–280, title VI, § 621(b), Aug. 17, 2006, 120 Stat. 979, provided that:

''(1) IN GENERAL.—The amendments made by this section [amending this section] shall apply to plan years beginning after December 31, 2007.

''(2) SPECIAL RULE FOR COLLECTIVELY BARGAINED AGREEMENTS.—In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified on or before the date of the enactment of this Act [Aug. 17, 2006], paragraph (1) shall be applied to benefits pursuant to, and individuals covered by, any such agreement by substituting for 'December 31, 2007' the earlier of—

''(A) the later of—

''(i) December 31, 2008, or

''(ii) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after such date of enactment), or

''(B) December 31, 2009.''

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''(1) IN GENERAL.—The amendments made by this section [amending this section] shall apply to plan years beginning after December 31, 2006.

''(2) REGULATIONS.—Final regulations under section 404(c)(5)(A) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1104(c)(5)(A)] (as added by this section) shall be issued no later than 6 months after the date of the enactment of this Act [Aug. 17, 2006].''

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Amendment by Pub. L. 107–147 effective as if included in the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16, to which such amendment relates, see section 411(x) of Pub. L. 107–147, set out as a note under section 25B of Title 26, Internal Revenue Code.

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EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–364 effective Sept. 26, 1980, except as specifically provided, see section 1461(e) of this title.

REGULATIONS

Pub. L. 109–280, title VI, § 625, Aug. 17, 2006, 120 Stat. 980, provided that:

''(a) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act [Aug. 17, 2006], the Secretary of Labor shall issue final regulations clarifying that the selection of an annuity contract as an optional form of distribution from an individual account plan to a participant or beneficiary—

''(1) is not subject to the safest available annuity standard under Interpretive Bulletin 95–1 (29 CFR 2509.95–1), and

''(2) is subject to all otherwise applicable fiduciary standards.

''(b) EFFECTIVE DATE.—This section shall take effect on the date of enactment of this Act [Aug. 17, 2006].''

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this part call for the promulgation of regulations, see sections 1031 and 1114 of this title.

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1998

For provisions directing that if any amendments made by subtitle D [§§ 1401–1465] of title I of Pub. L. 104–188 require an amendment to any plan or annuity contract, such amendment shall not be required to be made before the first day of the first plan year beginning on or after Jan. 1, 1998, see section 1465 of Pub. L. 104–188, set out as a note under section 401 of Title 26, Internal Revenue Code.

§ 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable

efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term ‘‘trustee responsibility’’ means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

(d) Investment managers

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

(Pub. L. 93–406, title I, § 405, Sept. 2, 1974, 88 Stat. 878.)

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Virginia Administrative Code
Title 14. Insurance
Agency 5. State Corporation Commission, Bureau Of Insurance
Chapter 45. Rules Governing Suitability in Annuity Transactions

14VAC5-45-40. Duties of insurers and agents.

A. In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the agent, or the insurer where no agent is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to his investments and other insurance products and as to his financial situation and needs, including the consumer's suitability information, and that there is a reasonable basis to believe all of the following:

1. The consumer has been reasonably informed of various features of the annuity, such as the potential surrender period and surrender charge; potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity; mortality and expense fees; investment advisory fees; potential charges for and features of riders; limitations on interest returns; insurance and investment components; and market risk;

2. The consumer would benefit from certain features of the annuity, such as tax deferred growth, annuitization, or death or living benefit;

3. The particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and riders and similar product enhancements, if any, are suitable (and in the case of an exchange or replacement, the transaction as a whole is suitable) for the particular consumer based on the consumer's suitability information; and

4. In the case of an exchange or replacement of an annuity, the exchange or replacement is suitable, including taking into consideration whether:

    a. The consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living, or other contractual benefits), or be subject to increased fees, investment advisory fees, or charges for riders and similar product enhancements;

    b. The consumer would benefit from product enhancements and improvements; and

    c. The consumer has had another annuity exchange or replacement, and, in particular, an exchange or replacement within the preceding 36 months.

B. Prior to the execution of a purchase, exchange, or replacement of an annuity resulting from a recommendation, an agent, or insurer where no agent is involved, shall make reasonable efforts to obtain the consumer's suitability information.

C. Except as permitted under subsection D of this section, an insurer shall not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity is suitable based on the consumer's suitability information.

D. 1. Except as provided in subdivision 2 of this subsection, neither an agent, nor an insurer where no agent is involved, shall have any obligation to a consumer under subsection A or C of this section related to any annuity transaction if:

a. No recommendation is made;

b. A recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;

c. A consumer refuses to provide relevant suitability information requested by the insurer or agent and the annuity transaction is not recommended;

d. A consumer decides to enter into an annuity transaction that is not based on a recommendation of the insurer or agent; or

e. A consumer fails to provide complete or accurate information.

2. An insurer or agent's recommendation subject to subdivision 1 of this subsection shall be reasonable under all the circumstances actually known to the insurer or agent at the time of the recommendation.

E. An agent, or where no agent is involved the responsible insurer representative, shall at the time of sale:

1. Make a record of any recommendation subject to subsection A of this section;

2. Obtain a customer signed statement, documenting a customer's refusal to provide suitability information, if any; and

3. Obtain a customer signed statement acknowledging that an annuity transaction is not recommended if a customer decides to enter into an annuity transaction that is not based on the agent's or insurer's recommendation.

F. 1. An insurer either shall assure that a system to supervise recommendations that is reasonably designed to achieve compliance with this chapter is established and maintained by complying with subdivisions 3 and 4 of this subsection or shall establish and maintain such a system, including the following:

a. The insurer shall maintain reasonable procedures to inform its agents of the requirements of this chapter and shall incorporate the requirements of this chapter into relevant agent training manuals;

b. The insurer shall establish standards for agent product training and shall maintain reasonable procedures to require its agents to comply with the requirements of 14VAC5-45-45;

c. The insurer shall provide product-specific training and training materials that explain all material features of its annuity products to its agents;

d. The insurer shall maintain procedures for review of each recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria;

e. The insurer shall maintain reasonable procedures to detect recommendations that are not suitable. This may include confirmation of consumer suitability information, systematic customer surveys, interviews, confirmation letters, and programs of internal monitoring. Nothing in this subdivision prevents an insurer from complying with this subdivision by applying sampling procedures, or by confirming suitability information after issuance or delivery of the annuity; and

f. The insurer shall annually provide a report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.

2. An agent and independent agency either shall adopt a system established by an insurer to supervise recommendations of its agents that is reasonably designed to achieve compliance with this chapter or shall establish and maintain such a system, including, but not limited to:

a. Maintaining written procedures; and

b. Conducting periodic reviews of records that are reasonably designed to assist in detecting and preventing violations of this chapter.

3. An insurer may contract with a third party, including an agent or independent agency, to establish and maintain a system of supervision as required by subdivision 1 of this subsection with respect to agents under contract with or employed by the third party.

4. An insurer shall make reasonable inquiry to assure that the third party contracting under subdivision 3 of this subsection is performing the functions required under subdivision 1 of this subsection and shall take action that is reasonable under the circumstances to enforce the contractual obligation to perform the functions. An insurer may comply with its obligation to make reasonable inquiry by doing all of the following:

a. The insurer annually obtains a certification from a third party senior manager who has responsibility for the delegated functions that the manager has a reasonable basis to represent, and does represent, that the third party is performing the required functions; and

b. The insurer, based on reasonable selection criteria, periodically selects third parties contracting under subdivision 3 of this subsection for a review to determine whether the third parties are performing the required functions. The insurer shall perform those procedures to conduct the review that are reasonable under the circumstances.

5. An insurer that contracts with a third party pursuant to subdivision 3 of this subsection and that complies with the requirements to supervise in subdivision 4 of this subsection shall have fulfilled its responsibilities under subdivision 1 of this subsection.

6. An insurer, agent, or independent agency is not required by subdivision 1 or 2 of this subsection to:

a. Review, or provide for review of, all agent-solicited transactions; or

b. Include in its system of supervision an agent's recommendations to consumers of products other than the annuities offered by the insurer, agent, or independent agency.

7. An agent or independent agency contracting with an insurer pursuant to subdivision 3 of this subsection, when requested by the insurer pursuant to subdivision 4 of this subsection, shall promptly give a certification as described in subdivision 4 or give a clear statement that it is unable to meet the certification criteria.

8. No person may provide a certification under subdivision 4 a of this subsection unless:

a. The person is a senior manager with responsibility for the delegated functions; and

b. The person has a reasonable basis for making the certification.

G. An agent shall not dissuade or attempt to dissuade a consumer from:

1. Truthfully responding to an insurer's request for confirmation of suitability information;

2. Filing a complaint; or

3. Cooperating with the investigation of a complaint.

H. Sales made in compliance with FINRA requirements pertaining to suitability and supervision of annuity transactions shall satisfy the requirements under this chapter:

1. This subsection applies to FINRA broker-dealer sales of annuities if the suitability and supervision is similar to those applied to variable annuity sales. However, nothing in this subsection shall limit the commission's ability to enforce (including investigate) the provisions of this chapter.

2. For subdivision 1 of this subsection to apply, an insurer shall:

a. Monitor the FINRA member broker-dealer using information collected in the normal course of an insurer's business; and

b. Provide to the FINRA member broker-dealer information and reports that are reasonably appropriate to assist the FINRA member broker-dealer to maintain its supervision system.

I. Compliance with FINRA Rule 2111 (https://www.finra.org/rules-guidance/rulebooks/finra-rules/2111) pertaining to suitability shall satisfy the requirements under this section for the recommendation of variable annuities. However, nothing in this subsection shall limit the commission's ability to enforce the provisions of this chapter.

Statutory Authority

§§ 12.1-13 and 38.2-223 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 23, Issue 9, eff. April 1, 2007; amended, Virginia Register Volume 33, Issue 15, eff. April 1, 2017; Volume 37, Issue 4, eff. October 12, 2020.

interest in relation to the property or affairs of the principal.

E. If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise shall be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

F. Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

G. An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person; however, nothing herein is intended to abrogate any duty of the agent under the Uniform Prudent Investor Act (§ 64.2-780 et seq.).

H. Except as otherwise provided in the power of attorney, an agent shall disclose receipts, disbursements, or transactions conducted on behalf of the principal if requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

I. Except as otherwise provided in the power of attorney, an agent shall, on reasonable request made by a person listed in subdivisions A 3 through A 9 of § 64.2-1614 who has a good faith belief that the principal suffers an incapacity or, if deceased, suffered incapacity at the time the agent acted, disclose to such person the extent to which he has chosen to act and the actions taken on behalf of the principal within the five years prior to either (i) the date of the request or (ii) the date of the death of the principal, if the principal is deceased at the time such request is made, and shall permit reasonable inspection of records pertaining to such actions by such person. In all cases where the principal is deceased at the time such request is made, such request shall be made within one year after the date of the death of the principal. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

2010, cc. 455, 632, § 26-85; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.