

HOUSE BILL No. 2465

AN ACT concerning standards for investments by fiduciaries; prudent investor rule; amending K.S.A. 16-324, 17-1311 and 58-1202 and K.S.A. 2000 Supp. 58-9-104, 58-1204, 58-24a02, 72-17,125 and 74-8316 and repealing the existing sections; also repealing K.S.A. 17-5003, 17-5005, 17-5006 and 17-5007 and K.S.A. 2000 Supp. 17-5002.

*Be it enacted by the Legislature of the State of Kansas:*

New Section 1. (a) Administrators, executors, conservators, trustees, insurance companies and other financial institutions, charitable, educational, eleemosynary corporations and organizations are authorized, in addition to investments now authorized by law, to invest funds which they are authorized by law to invest, in shares or savings deposits of federally insured savings and loan associations or federally chartered savings banks with main or branch offices, as defined in K.S.A. 2000 Supp. 12-1675a, and amendments thereto, in the state of Kansas and in credit unions which are, in whole or in part, insured with an insurer or guarantee corporation as required under K.S.A. 17-2246, and amendments thereto, and such investment shall be deemed and held to be legal investments for such funds.

(b) The governing body of any municipal corporation or quasi-municipal corporation, county, township, school district, area vocational-technical school, community college, firemen's relief association, community mental health center, community facility for the mentally retarded or any other governmental entity, unit or division in the state of Kansas having authority to receive, hold and expend public moneys or funds may invest the same subject to and as provided by K.S.A. 9-1401, 9-1402, 9-1405, 9-1407, 12-1675 and 12-1676 and amendments thereto.

New Sec. 2. In addition to all other authority now provided by law for the investment of funds by executors, administrators, conservators, trustees or other fiduciaries, all executors, administrators, conservators, trustees or other fiduciaries may legally invest fiduciary or trust funds in any loan which has insurance or guaranty under the servicemen's readjustment act of 1944 as from time to time in force, or as to which a commitment for any such insurance or guaranty has been made without regard to the limitations, restrictions and requirements of any other statutes, or of any rules of law respecting investments by executors, administrators, conservators, trustees or other fiduciaries.

New Sec. 3. Nothing contained in K.S.A. 2000 Supp. 58-24a01, *et seq.*, and amendments thereto, shall be construed as authorizing any departure from, or variation of, the express terms or limitations set forth in any will, agreement, court order or other instrument creating or defining the fiduciary's duties and powers, but:

(a) Whenever any will, agreement, court order or other instrument creating or defining the fiduciary's duties and powers, directs, requires, authorizes or permits the fiduciary to invest in securities of a certain kind or class, the fiduciary, in the absence of an express provision to the contrary, may buy, hold and sell such securities either directly or in the form of shares of or other interests in any open-end or closed-end management type investment company or investment trust registered under the investment company act of 1940, or any common trust fund of a state or national bank or trust company as authorized by K.S.A. 9-1609, and amendments thereto, if the portfolio of such investment company, investment trust or common trust fund is limited to securities of the designated kind or class and to repurchase agreements fully collateralized by such securities.

(b) The fact that such bank or trust company or an affiliate of the bank or trust company provides services to the investment company or investment trust such as that of an investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager or otherwise and is receiving reasonable remuneration for those services, shall not preclude such bank or trust company from investing or reinvesting in the securities of an open-end or closed-end management investment company or investment trust registered under the investment company act of 1940 (15 U.S.C. section 80a-1 *et seq.*) as amended.

With respect to any fiduciary account funds so invested, the bank or trust company or an affiliate of the bank or trust company shall conspicuously disclose by statement, prospectus, or otherwise to all current income beneficiaries of a fiduciary account the rate, formula or other method by which the remuneration for those services, provided to the investment company or investment trust, is determined. The investment

into such investment company or investment trust must be in the best interest of the beneficiary of the fiduciary account, must meet the prudent investor standard, as defined in K.S.A. 2000 Supp. 58-24a02, and amendments thereto, and the total amount of all fees, charges and compensation derived from the fiduciary account, and remuneration for services provided to the investment company or investment trust, by the bank or trust company or an affiliate of the bank or trust company shall be reasonable.

New Sec. 4. Nothing contained in K.S.A. 2000 Supp. 58-24a01, *et seq.*, and amendments thereto, shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale or management of fiduciary property.

Sec. 5. K.S.A. 16-324 is hereby amended to read as follows: 16-324. A cemetery merchandise trust fund established pursuant to K.S.A. 16-321 or 16-322, and amendments thereto, shall at all times be in the custody of a trust company or a federally insured bank or savings and loan association which is authorized to do business in this state. Any cemetery merchandise trust funds may be invested, reinvested, exchanged, retained, sold and managed in the manner and subject to the requirements of K.S.A. ~~17-5004~~ 2000 Supp. 58-24a02, and amendments thereto, and, at the election of the trustee, as a part of common trust funds.

Sec. 6. K.S.A. 17-1311 is hereby amended to read as follows: 17-1311. ~~Such~~ A cemetery corporation shall maintain, in a trust company located within the state of Kansas, a state or national bank located within the state of Kansas, a state or federally chartered savings and loan association located within the state of Kansas or a federally chartered savings bank located within the state of Kansas, a percentage of the purchase price of each burial lot sold by it, or any payment ~~thereon~~ *on such burial lot*, not less than 15% ~~thereof~~ *of such purchase price*, for the permanent maintenance of the cemetery within which the burial lot lies, but the total amount set aside shall not be less than \$25 for each burial lot at the time of conveyance of such lot. Deposits to the permanent maintenance fund shall be made within 45 days of receipt of moneys for which deposits are required to be made. Moneys placed in such fund under the provisions of K.S.A. 17-1308, and amendments thereto, shall be credited for the purposes of fulfilling such requirement. Moneys in such fund may be held and invested to the same extent as is provided in K.S.A. ~~17-5004~~ 2000 Supp. 58-24a02, and amendments thereto, but the total amount of money invested in any mortgage upon real property shall not exceed an amount equal to 75% of the market value of such property at the time of such investment. The income of the permanent maintenance fund shall be used exclusively for the maintenance of the cemetery. No part of the principal of the fund shall ever be used for any purpose except for such investment. In no event shall any loan of the funds be made to any stockholder, officer or employee of such cemetery corporation, or to any person related, by blood or marriage, to a stockholder, officer or employee. The treasurer of such corporation may deposit, to the credit of such fund, donations or bequests for the fund and may retain property so acquired without limitation as to time and without regard to its suitability for original purchase. As used in this section, the term "burial lot" means a plotted space for one grave. Such maintenance shall include, but not be limited to, mowing, road maintenance and landscaping, but shall not include administrative costs, expense of audits or the portion of any capital expense for equipment used to maintain portions of a cemetery not sold for burial purposes or in use for grave sites.

Sec. 7. K.S.A. 2000 Supp. 58-9-104 is hereby amended to read as follows: 58-9-104. (a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, pursuant to K.S.A. ~~17-5004~~ 2000 Supp. 58-24a02, and amendments thereto, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in subsection (a) of K.S.A. 2000 Supp. 58-9-103, and amendments thereto, that the trustee is unable to comply with subsection (b) of K.S.A. 2000 Supp. 58-9-103, and amendments thereto.

(b) In deciding whether and to what extent to exercise the power

conferred by subsection (a), a trustee 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 trustee or received from the settlor;
- (6) the net amount allocated to income under the other sections of this act and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- (7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
- (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 trustee 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 trustee 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 trustee 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 trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;
- (7) if the trustee is a beneficiary of the trust; or
- (8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by 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 trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in 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 trustee 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 trustee the power of adjustment conferred by subsection (a).

Sec. 8. K.S.A. 58-1202 is hereby amended to read as follows: 58-1202. (a) The trustee has all powers conferred upon the trustee by the provisions of ~~this~~ *the uniform trustees' powers act* unless limited in the trust instrument.

(b) An instrument which is not a trust under subsection (1) of K.S.A. 58-1201, and amendments thereto, may incorporate any part of the uniform trustees' powers act by reference.

(c) Unless the instrument expressly states otherwise the prudent investor rule, as expressed in K.S.A. ~~17-5004~~ *2000 Supp. 58-24a02, and amendments thereto*, shall apply as the standard for the exercise of the powers conferred upon a trustee by the uniform trustees' powers act.

Sec. 9. K.S.A. 2000 Supp. 58-1204 is hereby amended to read as follows: 58-1204. Except as provided in K.S.A. 9-2107 and ~~17-5004~~ *K.S.A. 2000 Supp. 58-24a02*, and amendments thereto, the trustee shall not transfer such trustee's office to another or delegate the entire administration of the trust to a cotrustee or another.

Sec. 10. K.S.A. 2000 Supp. 58-24a02 is hereby amended to read as follows: 58-24a02. (a) A fiduciary shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the fiduciary shall exercise reasonable care, skill and caution.

(b) A fiduciary's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a fiduciary shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries: (1) General economic conditions;

(2) the possible effect of inflation or deflation;

(3) the expected tax consequences of investment decisions or strategies;

(4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property and real property;

(5) the expected total return from income and the appreciation of capital;

(6) other resources of the beneficiaries who are eligible to receive discretionary payments of trust income or principal assets;

(7) needs for liquidity, regularity of income and preservation or appreciation of capital; and

(8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A fiduciary shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A fiduciary may invest in any kind of property or type of investment consistent with the standards of this act.

(f) A fiduciary who has special skills or expertise or is placed in a fiduciary capacity in reliance upon the fiduciary's representation that the fiduciary has special skills or expertise, has a duty to use those special skills or expertise.

(g) *In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property of a trust which is revocable or amendable, a trustee following written directions regarding the property of the trust that are received by the trustee from the person or persons then having the power to revoke or amend the trust or from the person or persons other than the trustee, to whom the grantor delegates the right to give such written directions to the trustee shall be deemed to have complied with the standards provided in subsections (a) through (d). The trustee is authorized to follow such written directions regardless of any fiduciary obligations to which the directing party may also be subject.*

Sec. 11. K.S.A. 2000 Supp. 72-17,125 is hereby amended to read as follows: 72-17,125. (a) The board of education of any school district to which K.S.A. 72-1727, 72-1760, 72-1781, 72-1789, 72-17,100, 72-17,108 or 72-17,121, and amendments thereto, apply, and the retirement fund

of which has a balance greater than \$50,000, may invest and reinvest moneys in the retirement fund of the school district and to acquire, retain, manage, including the exercise of any voting rights, and dispose of investments of such fund in accordance with this subsection and K.S.A. 72-17,126 to 72-17,131, inclusive, and amendments thereto. The provisions and standards provided in K.S.A. ~~17-5004~~ *2000 Supp. 58-24a02* and amendments thereto shall apply in investing or reinvesting moneys in such fund.

(b) The board of education of any school district to which K.S.A. 72-1727, 72-1760, 72-1781, 72-1789, 72-17,100, 72-17,108 or 72-17,121, and amendments thereto, apply, and the retirement fund of which has a balance of \$50,000 or less, may invest and reinvest moneys in such fund only in direct obligations of, or obligations the principal of which and interest on which are unconditionally guaranteed by, the United States of America, or in time deposit open accounts in any bank located in Kansas, except that the amount so invested in a bank shall be secured in the manner prescribed by subsections (a) to (e), inclusive, of K.S.A. 75-4218, and amendments thereto.

Sec. 12. K.S.A. 2000 Supp. 74-8316 is hereby amended to read as follows: 74-8316. (a) The Kansas technology enterprise corporation is hereby authorized to facilitate the establishment of a technology-based venture-capital fund in which the corporation may invest only moneys from the economic development initiatives fund specifically so allocated. The corporation may credit also the fund with gifts, donations or grants received from any source other than state government and with proceeds from the fund. Investments in the fund shall qualify for the income tax credit allowed pursuant to K.S.A. 74-8304, and amendments thereto.

(b) The technology-based venture-capital fund may invest the assets as follows:

(1) To carry out the purposes of this act through investments in qualified securities and through the forms of financial assistance authorized by this act, including:

- (A) Loans, loans convertible to equity, and equity;
- (B) leaseholds;
- (C) management or consultant service agreements;
- (D) loans with warrants attached that are beneficially owned by the fund;
- (E) loans with warrants attached that are beneficially owned by a party other than the fund; and
- (F) the fund, in connection with the provision of any form of financial assistance, may enter into royalty agreements with an enterprise.

(2) To invest in such other investments as are lawful for Kansas fiduciaries pursuant to K.S.A. ~~17-5001 et seq.~~ *2000 Supp. 58-24a02* and amendments thereto.

(c) Distributions received by the corporation may be reinvested in any fund consistent with the purposes of this act.

(d) The corporation may invest only in a fund whose investment guidelines permit the fund's purchase of qualified securities issued by an enterprise as a part of a resource and technology project subject to the following:

- (1) Receipt of an application from the enterprise which contains:
  - (A) A business plan including a description of the enterprise and its management, product and market;
  - (B) a statement of the amount, timing and projected use of the capital required;
  - (C) a statement of the potential economic impact of the enterprise, including the number, location and types of jobs expected to be created; and
  - (D) such other information as the fund manager or the fund's board of directors shall request.
- (2) Approval of the investment by the fund may be made after the fund manager or the fund's board of directors finds, based upon the application submitted by the enterprise and such additional investigation as the fund manager or the fund's board of directors shall make and incorporate in its minutes, that:
  - (A) The proceeds of the investment will be used only to cover the

venture-capital needs of the enterprise except as authorized by this section;

- (B) the enterprise has a reasonable possibility of success;
- (C) the fund's participation is instrumental to the success of the enterprise because funding otherwise available for the enterprise is not available on commercially feasible terms;
- (D) the enterprise has the reasonable potential to create a substantial amount of employment within the state;
- (E) the entrepreneur and other founders of the enterprise have already made or are contractually committed to make a substantial financial and time commitment to the enterprise;
- (F) the securities to be purchased are qualified securities;
- (G) there is a reasonable possibility that the fund will recoup at least its initial investment; and
- (H) binding commitments have been made to the fund by the enterprise for adequate reporting of financial data to the fund, which shall include a requirement for an annual report, or if required by the fund manager, an annual audit of the financial and operational records of the enterprise, and for such control on the part of the fund as the fund manager shall consider prudent over the management of the enterprise, so as to protect the investment of the fund, including in the discretion of the fund manager and without limitation, the right of access to financial and other records of the enterprise.

(e) All investments made pursuant to this section shall be evaluated by the fund's investment committee and the fund shall be audited annually by an independent auditing firm.

(f) The fund shall not make investments in qualified securities issued by enterprises in excess of the amount necessary to own more than 49% of the qualified securities in any one enterprise at the time of the purchase by the fund, after giving effect to the conversion of all outstanding convertible qualified securities of the enterprise, except that in the event of severe financial difficulty of the enterprise, threatening, in the judgment of the fund manager, the investment of the fund therein, a greater percentage of such securities may be owned by the fund.

(g) At least 75% of the total investment of the fund must be in Kansas businesses.

Sec. 13. K.S.A. 16-324, 17-1311, 17-5003, 17-5005, 17-5006, 17-5007 and 58-1202 and K.S.A. 2000 Supp. 17-5002, 58-9-104, 58-1204, 58-24a02, 72-17,125 and 74-8316 are hereby repealed.

Sec. 14. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the HOUSE, and passed that body

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\_\_\_\_\_  
*Speaker of the House.*

\_\_\_\_\_  
*Chief Clerk of the House.*

Passed the SENATE \_\_\_\_\_

\_\_\_\_\_  
*President of the Senate.*

\_\_\_\_\_  
*Secretary of the Senate.*

APPROVED \_\_\_\_\_

\_\_\_\_\_  
*Governor.*