

HOUSE No.

The Commonwealth of Massachusetts

PRESENTED BY:

Bradley H. Jones, Jr.

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to total return unitrusts.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Viriato Manuel deMacedo	1st Plymouth
Bradley H. Jones, Jr.	20th Middlesex
George N. Peterson, Jr.	9th Worcester
Elizabeth Poirier	14th Bristol

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 1512 OF 2007-2008.]

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO TOTAL RETURN UNITRUSTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 203 of the General Laws, as appearing in the 2006 Official Edition, is
2 hereby amended by inserting after section 25A the following section:

3

4 SECTION 25B. Total Return Unitrusts.

5 (a) For purposes of this section, the following words shall have the following meanings:

6 “Disinterested person” means a person who is not a “related or subordinate party” (as defined in
7 § 672(c) of the Internal Revenue Code [26 U.S.C. §1, et seq.] or any successor provision thereof
8 (hereinafter referred to in this section as the “I.R.C.”)) with respect to the person then acting as
9 trustee of the trust and excludes the trustor of the trust and any interested trustee.

10 “Income trust” means a trust, created by either an inter vivos or a testamentary instrument, which
11 directs or permits the trustee to distribute the net income of the trust to 1 or more persons, either
12 in fixed proportions or in amounts or proportions determined by the trustee. Notwithstanding the
13 foregoing, no trust that otherwise is an “income trust” shall qualify hereunder if it may be subject
14 to taxation under I.R.C. § 2001 or §2501 [26 U.S.C. § 2001 or § 2501] until the expiration of the
15 period for filing the return therefor (including extensions).

16 “Interested distributee” means a person to whom distributions of income or principal can
17 currently be made who has the power to remove the existing trustee and designate as successor a

18 person who may be a “related or subordinate party” (as defined in I.R.C. § 672(c) [26 U.S.C. §
19 672(c)]) with respect to such distributee.

20 “Interested trustee” means :

21 a. An individual trustee to whom the net income or principal of the trust can currently be
22 distributed or would be distributed if the trust were then to terminate and be distributed,

23 b. Any trustee who may be removed and replaced by an interested distributee and/or

24 c. An individual trustee whose legal obligation to support a beneficiary may be satisfied by
25 distributions of income and principal of the trust.

26 “Total return unitrust” means an income trust which has been converted under and meets the
27 provisions of this section.

28 “Trustee” means all persons acting as trustee of the trust (except where expressly noted
29 otherwise), whether acting in their discretion or on the direction of 1 or more persons acting in a
30 fiduciary capacity.

31 “Trustor” means an individual who created an inter vivos or a testamentary trust.

32 “Unitrust amount” means an amount computed as a percentage of the fair market value of the
33 trust.

34 (b) A trustee of an income trust, other than an interested trustee, or where 2 or more persons are
35 acting as trustee, a majority of the trustees who are not an interested trustee (in either case
36 hereafter “trustee”), may, in its sole discretion and without the approval of the court having
37 jurisdiction of the income trust:

38 (1) Convert an income trust to a total return unitrust;

39 (2) Reconvert a total return unitrust to an income trust; or

40 (3) Change the percentage used to calculate the unitrust amount and/or the method used to
41 determine the fair market value of the trust if:

42 (A) The trustee adopts a written policy for the trust providing:

43 (i) In the case of a trust being administered as an income trust, that future distributions from the
44 trust will be unitrust amounts rather than net income;

45 (ii) In the case of a trust being administered as a total return unitrust, that future distributions
46 from the trust will be net income rather than unitrust amounts; or

47 (iii) That the percentage used to calculate the unitrust amount and/or the method used to
48 determine the fair market value of the trust will be changed as stated in the policy;

49 (B) The trustee sends written notice of its intention to take such action, along with copies of such
50 written policy and this section, to:

51 (i) The trustor of the trust, if living;

52 (ii) All living persons who are currently receiving or eligible to receive distributions of income
53 of the trust or unitrust amounts;

54 (iii) All living persons who would receive principal of the trust if the trust were to terminate at
55 the time of the giving of such notice (without regard to the exercise of any power of
56 appointment) or, if the trust does not provide for its termination, all living persons who would
57 receive or be eligible to receive distributions of income or principal of the trust if the persons
58 identified in paragraph 2 of this subparagraph b were deceased; and

59 (iv) All persons acting as adviser or protector of the trust;

60 (C) At least one person receiving notice under clauses (i) and (ii) of subdivision (1) above is
61 legally competent; and

62 (D) No person receiving such notice objects, by written instrument delivered to the trustee, to the
63 proposed action of the trustee within 60 days of receipt of such notice.

64 (c) If there is no trustee of the trust other than an interested trustee, the interested trustee or,
65 where two or more persons are acting as trustee and are interested trustees, a majority of such
66 interested trustees may, in its sole discretion and without the approval of the court having
67 jurisdiction of the trust:

68 (1) Convert an income trust to a total return unitrust;

69 (2) Reconvert a total return unitrust to an income trust; or

70 (3) Change the percentage used to calculate the unitrust amount and/or the method used to
71 determine the fair market value of the trust if:

72 (A) the trustee adopts a written policy for the trust providing:

73 (i) In the case of a trust being administered as an income trust, that future distributions from the
74 trust will be unitrust amounts rather than net income;

75 (ii) In the case of a trust being administered as a total return unitrust, that future distributions
76 from the trust will be net income rather than unitrust amounts; or

77 (iii) That the percentage used to calculate the unitrust amount and/or the method used to
78 determine the fair market value of the trust will be changed as stated in the policy;

79 (B) the trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary
80 capacity, determines for the trustee:

81 (i) the percentage to be used to calculate the unitrust amount;

82 (ii) the method to be used in determining the fair market value of the trust; and

83 (iii) which assets, if any, are to be excluded in determining the unitrust amount;

84 (C) the trustee sends written notice of its intention to take such action, along with copies of such
85 written policy and this section, and the determinations of the disinterested person to:

86 (i) the trustor of the trust, if living;

87 (ii) all living persons who are currently receiving or eligible to receive distributions of income of
88 the trust or unitrust amounts;

89 (iii) all living persons who would receive principal of the trust if the trust were to terminate at the
90 time of the giving of such notice (without regard to the exercise of any power of appointment) or,
91 if the trust does not provide for its termination, all living persons who would receive or be
92 eligible to receive distributions of income or principal of the trust if the persons identified in
93 clause (ii) of subparagraph C were deceased; and

94 (iv) all persons acting as adviser or protector of the trust;

95 (D) at least one person receiving notice under clauses (ii) and (iii) of subparagraph (C) of this
96 subsection is legally competent; and

97 (E) no person receiving such notice objects, by written instrument delivered to the trustee, to the
98 proposed action of the trustee or the determinations of the disinterested person within sixty (60)
99 days of receipt of such notice.

100 (d) If any trustee desires to (i) convert an income trust to a total return unitrust, (ii) reconvert a
101 total return unitrust to an income trust, or (iii) change the percentage used to calculate the
102 unitrust amount and/or the method used to determine the fair market value of the trust but does
103 not have the ability to or elects not to do it under the provisions of subsection (b) or (c) above,
104 the trustee may petition the court having jurisdiction of the trust for such order as the trustee
105 deems appropriate. In the event, however, there is only one trustee of such trust and such trustee
106 is an interested trustee or in the event there are two or more trustees of such trust and a majority
107 of them are interested trustees, the Court, in its own discretion or on the petition of such trustee
108 or trustees or any person interested in the trust, may appoint a disinterested person who, acting in

109 a fiduciary capacity, shall present such information to the court as shall be necessary to enable
110 the court to make its determinations under this section.

111 (e) The fair market value of the trust shall be determined at least annually, using such valuation
112 date or dates or averages of valuation dates as are deemed appropriate. Assets for which a fair
113 market value cannot be readily ascertained shall be valued using such valuation methods as are
114 deemed reasonable and appropriate. Such assets may be excluded from valuation, provided all
115 income received with respect to such assets is distributed to the extent distributable in
116 accordance with the terms of the governing instrument.

117 (f) The percentage to be used in determining the unitrust amount shall be a reasonable current
118 return from the trust, in any event not less than three percent nor more than five percent, taking
119 into account the intentions of the trustor of the trust as expressed in the governing instrument, the
120 needs of the beneficiaries, general economic conditions, projected current earnings and
121 appreciation for the trust, and projected inflation and its impact on the trust.

122 (g) The unitrust amount shall not be less than the net income of the trust, determined without
123 regard to the provisions of subsection (h), for (i) a trust for which a marital deduction has been
124 taken for federal tax purposes under I.R.C. § 2056 or § 2523 [26 U.S.C. § 2056 or § 2523]
125 (during the lifetime of the spouse for whom the trust was created), or (ii) a trust to which the
126 generation-skipping transfer tax due under I.R.C. § 2601 [26 U.S.C. § 2601] does not apply by
127 reason of any effective date or transition rule.

128 (h) Following the conversion of an income trust to a total return unitrust, the trustee:

129 (1) shall treat the unitrust amount as if it were net income of the trust for purposes of determining
130 the amount available, from time to time, for distribution from the trust; and

131 (2) may allocate to trust income for each taxable year of the trust (or portion thereof):

132 (A) net short-term capital gain described in I.R.C. § 1222(5) [26 U.S.C. § 1222(5)] for such year
133 (or portion thereof) but only to the extent that the amount so allocated together with all other
134 amounts allocated to trust income for such year (or portion thereof) does not exceed the unitrust
135 amount for such year (or portion thereof); and

136 (B) net long-term capital gain described in I.R.C. § 1222(7) [26 U.S.C. § 1222(7)] for such year
137 (or portion thereof) but only to the extent that the amount so allocated together with all other
138 amounts, including amounts described in paragraph a. of this subdivision, allocated to trust
139 income for such year (or portion thereof) does not exceed the unitrust amount for such year (or
140 portion thereof).

141 (i) In administering a total return unitrust, the trustee may, in its sole discretion but subject to the
142 provisions of the governing instrument, determine:

- 143 (1) the effective date of the conversion;
- 144 (2) the timing of distributions (including provisions for prorating a distribution for a short year in
145 which a beneficiary's right to payments commences or ceases);
- 146 (3) whether distributions are to be made in cash or in kind or partly in cash and partly in kind;
- 147 (4) if the trust is reconverted to an income trust, the effective date of such reconversion; and
- 148 (5) such other administrative issues as may be necessary or appropriate to carry out the purposes
149 of this section.

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

152 (k) In the case of a trust for which a marital deduction has been taken for federal tax purposes
153 under I.R.C. § 2056 or § 2523 [26 U.S.C. § 2056 or § 2523], the spouse otherwise entitled to
154 receive the net income of the trust shall have the right, by written instrument delivered to the
155 trustee, to compel the reconversion during his or her lifetime of the trust from a total return
156 unitrust to an income trust, notwithstanding anything in this section to the contrary.

157 (l) This section shall be construed as pertaining to the administration of a trust and shall be
158 available to any trust that is administered in Massachusetts under Massachusetts law unless:

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

161 (2) the trust is a trust described in I.R.C. § 170(f)(2)(B), § 664(d), § 1361(d), § 2702(a)(3) or §
162 2702(b) [26 U.S.C. § 170(f)(2)(B), § 664(d), § 1361(d), § 2702(a)(3) or § 2702(b)];

163 (3) one or more persons to whom the trustee could distribute income have a power of withdrawal
164 over the trust that is not subject to an ascertainable standard under I.R.C. § 2041 or § 2514 [26
165 U.S.C. § 2041 or § 2514] or that can be exercised to discharge a duty of support he or she
166 possesses; or

167 (4) the governing instrument expressly prohibits use of this section by specific reference to the
168 section.

169 A provision in the governing instrument that "The provisions of Mass. Gen. Laws c. 203 § 25 ½,
170 as amended, or any corresponding provision of future law, shall not be used in the administration
171 of this trust." or similar words reflecting such intent shall be sufficient to preclude the use of this
172 section.

173 (m) Any trustee or disinterested person who in good faith takes or fails to take any action under
174 this section shall not be liable to any person affected by such action or inaction, regardless of

175 whether such person received written notice as provided in this section and regardless of whether
176 such person was under a legal disability at the time of the delivery of such notice. Such person's
177 exclusive remedy shall be to obtain an order of the court having jurisdiction of the trust directing
178 the trustee to convert an income trust to a total return unitrust, to reconvert from a total return
179 unitrust to an income trust or to change the percentage used to calculate the unitrust amount.

180 (n) This section shall be effective upon enactment and shall be available to trusts in existence at
181 the date of enactment or created thereafter.

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