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**REPORT BY THE  
TRUSTS, ESTATES AND SURROGATE'S COURTS COMMITTEE**

**MEMORANDUM IN SUPPORT OF PROPOSED AMENDMENT TO SECTION  
11-2.3 (b)(5) OF THE ESTATES, POWERS, AND TRUSTS LAW**

This brief memorandum is offered by the Trusts, Estates and Surrogate's Courts Committee of the New York City Bar Association (the "Committee") in support of a proposed amendment to Estates, Powers and Trust Law ("EPTL") Section 11-2.3(b)(5) prepared by the Trusts and Estates Law Section of the New York State Bar Association.

The Prudent Investor Act ("PIA"), codified in EPTL 11-2.3, requires a trustee "to pursue an overall strategy to enable the trustee to make appropriate present and future distributions to or for the benefit of the beneficiaries under the governing instrument, in accordance with risk and return objectives reasonably suited to the whole portfolio." (EPTL Section 11-2.3(b)(3)). The prudent investor standard specifically authorizes a trustee "to adjust between principal and income to the extent the trustee considers advisable to enable the trustee to make present and future distributions in accordance with [EPTL Section 11-2.3(b)(3)]...if the trustee determines...that such an adjustment would be fair and reasonable to all the beneficiaries" (EPTL Section 11-2.3 (b)(5)).

The proposed amendment would make one change to current law, as follows:

Any exercise of the power to adjust, whether from income to principal or from principal to income, shall constitute a re-characterization of the transferred amount from income to principal or principal to income, as the case may be, for purposes of calculating trustees' commissions under Surrogate's Court Procedure Act Section 2309. Such re-characterization shall be deemed to take effect on the date such transfer, from income to principal or from principal to income, as the case may be, is made on a trust's records.

As is described in more detail in the New York State Bar Association's memorandum in support of this proposal, it is unclear under current law whether and when adjusted amounts should be re-characterized for purposes of calculating trustee's commissions. This uncertainty creates the potential for conflict between co-trustees of a trust as to the method for computing commissions on re-characterized amounts.

The Committee believes that effectuating a re-characterization when making an adjustment pursuant to the PIA is consistent with the precepts of the PIA and serves to clarify the calculation of trustee's commissions in situations where such commissions are based on the amount of the trust's income or the trust's principal. The proposed amendment will result in a consistency of practice, eliminating uncertainty under current law. Thus the Committee supports the amendment.

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