

**HOUSE . . . . . No. 1436**

---

**The Commonwealth of Massachusetts**

PRESENTED BY:

*Josh S. Cutler*

*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 adoption of the accompanying bill:

An Act relative to total return unitrusts.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
<i>Josh S. Cutler</i>	<i>6th Plymouth</i>	<i>1/20/2023</i>

**HOUSE . . . . . No. 1436**

By Representative Cutler of Pembroke, a petition (accompanied by bill, House, No. 1436) of Josh S. Cutler relative to total return unitrusts. The Judiciary.

**The Commonwealth of Massachusetts**

**In the One Hundred and Ninety-Third General Court  
(2023-2024)**

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,  
2 is hereby amended by inserting after section 25A the following section:

3 SECTION 25B. Total Return Unitrusts.

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

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

10 “Income trust” means a trust, created by either an inter vivos or a testamentary  
11 instrument, which directs or permits the trustee to distribute the net income of the trust to 1 or  
12 more persons, either in fixed proportions or in amounts or proportions determined by the trustee.

13 Notwithstanding the foregoing, no trust that otherwise is an “income trust” shall qualify  
14 hereunder if it may be subject to taxation under I.R.C. § 2001 or §2501 [26 U.S.C. § 2001 or §  
15 2501] until the expiration of the 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  
25 by distributions of income and principal of the trust.

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

34           (b) A trustee of an income trust, other than an interested trustee, or where 2 or more  
35 persons are acting as trustee, a majority of the trustees who are not an interested trustee (in either  
36 case 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  
41 to 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  
44 from the 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  
46 distributions 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  
50 of such 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  
53 income of the trust or unitrust amounts;

54 (iii) All living persons who would receive principal of the trust if the trust were to  
55 terminate at 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  
61 is legally competent; and

62 (D) No person receiving such notice objects, by written instrument delivered to the  
63 trustee, to the 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  
65 or, 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  
71 to 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  
74 from the 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  
76 distributions 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  
80 fiduciary 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  
85 of such 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  
88 income of the trust or unitrust amounts;

89 (iii) all living persons who would receive principal of the trust if the trust were to  
90 terminate at the time of the giving of such notice (without regard to the exercise of any power of

91 appointment) or, if the trust does not provide for its termination, all living persons who would  
92 receive or be eligible to receive distributions of income or principal of the trust if the persons  
93 identified in 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  
96 this subsection is legally competent; and

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

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

113 which a fair market value cannot be readily ascertained shall be valued using such valuation  
114 methods as are deemed reasonable and appropriate. Such assets may be excluded from valuation,  
115 provided all income received with respect to such assets is distributed to the extent distributable  
116 in accordance with the terms of the governing instrument.

117 (f) The percentage to be used in determining the unitrust amount shall be a reasonable  
118 current return from the trust, in any event not less than three percent nor more than five percent,  
119 taking into account the intentions of the trustor of the trust as expressed in the governing  
120 instrument, the needs of the beneficiaries, general economic conditions, projected current  
121 earnings and 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  
123 without regard to the provisions of subsection (h), for (i) a trust for which a marital deduction has  
124 been 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  
130 determining 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  
133 such year (or portion thereof) but only to the extent that the amount so allocated together with all



134 other amounts allocated to trust income for such year (or portion thereof) does not exceed the  
135 unitrust 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  
137 such year (or portion thereof) but only to the extent that the amount so allocated together with all  
138 other 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  
142 subject to the 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  
145 year in 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  
147 kind;

148 (4) if the trust is reconverted to an income trust, the effective date of such reconversion;

149 and

150 (5) such other administrative issues as may be necessary or appropriate to carry out the  
151 purposes of this section.

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

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

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

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

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

166 (3) one or more persons to whom the trustee could distribute income have a power of  
167 withdrawal over the trust that is not subject to an ascertainable standard under I.R.C. § 2041 or §  
168 2514 [26 U.S.C. § 2041 or § 2514] or that can be exercised to discharge a duty of support he or  
169 she possesses; or

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

172 A provision in the governing instrument that “The provisions of Mass. Gen. Laws c. 203  
173 § 25 ½, as amended, or any corresponding provision of future law, shall not be used in the  
174 administration of this trust.” or similar words reflecting such intent shall be sufficient to preclude  
175 the use of this section.

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

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