

D R A F T
FOR DISCUSSION ONLY

OVERSIGHT OF CHARITABLE ASSETS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For February 12 – 13, 2010 Committee Meeting

Without Prefatory Note and with Comments

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ON UNIFORM STATE LAWS

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February 5, 2010

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OVERSIGHT OF CHARITABLE ASSETS ACT

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1 **OVERSIGHT OF CHARITABLE ASSETS ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the [Uniform][Model]

3 Oversight of Charitable Assets Act.

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Charitable asset” means real or personal property that has been given or solicited for
6 **charitable purposes**.

7 (2) **“Charity”** means a corporation, trust, unincorporated association, or other legal
8 entity holding or administering property for or solicited for **charitable purposes**, whether
9 pursuant to corporate articles of incorporation, trust declaration or agreement, will, or other
10 instrument, which is organized under the laws of this state, has its principal place of business in
11 this state, or holds substantial charitable assets within this state. A corporation, trust,
12 unincorporated association or other legal entity organized under the laws of another state is not a
13 **“charity”** for purposes of this [act] by reason of maintaining a bank, custody, investment, or
14 similar account in this state. [A financial institution or investment company is not a **“charity”**
15 for purposes of this act by reason of holding charitable assets in accounts that belong to other
16 **persons**.]

17 (3) **“Charitable fiduciary”** means:

- 18 (A) a chief executive officer, director, manager, officer, or trustee of a **charity**; or
19 (B) a **person** holding property for or property solicited for any charitable
20 purpose.

21 (4) **“Charitable purpose”** means the relief of poverty, the advancement of education or
22 religion, the promotion of health, the promotion of a governmental purpose, or any other purpose
23 the achievement of which is beneficial to the community.

(5) **“Document”** 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.

(6) **“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.

Comment

Subsection (2). Charity. Charity is defined broadly in the Act, with the definition explicitly including entities of any legal form that hold or administer property dedicated to or solicited for charitable purposes. The definition of “charity” is broad enough to take in not only organizations traditionally thought of as charitable, but also non-charitable organizations that hold or administer assets dedicated to charitable purposes or that have been solicited for charitable purposes. Because the definition underlies the obligation to register with the attorney general, it limits the term to organizations that have significant contacts in the state. The drafting committee believes that the threshold strikes an appropriate balance between the risk of overburdening charities that have little contact with a particular state and the need for the attorney general to be alerted to the existence of charitable organizations and assets in the state that might call for oversight. Simply having a bank or investment account in the state does not cause an entity to fall within the definition, and financial institutions and investment companies are not included within the definition by virtue of having accounts owned by charities.

Subsection (3). Charitable fiduciary. The definition includes any legal entity holding property dedicated to charitable purposes or property solicited for charitable purposes, as well as an officer, director, trustee, or manager of a charity. Thus, it would include, for instance, a financial institution or investment company that holds accounts belonging to charities. The term “charitable fiduciary” comes into play in the act only in the context of breach of fiduciary duty to a charity; thus, the broader reach of the term is appropriate.

Subsection (4). Charitable purposes. The definition of charitable purpose follows that of UTC § 405, Restatement (Third) of Trusts § 28 (2003), and UPMIFA § 2(1) (2006). This long-familiar standard derives from the English Statute of Charitable Uses, enacted in 1601.

Some 17 states have created statutory definitions of charitable purpose for various purposes. *See, e.g.*, 10 Pa. Cons. Stat. § 162.3 (2005) (defining charitable purpose within the Solicitation of Funds for Charitable Purposes Act to include “humane,” “patriotic,” “social welfare and advocacy,” and “civic” purposes). The definition in subsection (4) applies for purposes of this Act and does not affect other definitions of charitable purpose.

Subsection (5). Document. Document is defined, using the Uniform Law Commission standard definition, in order to use one word instead of several when the act deals with papers, reports, instruments, and records, and to make clear that information in electronic form is

1 included.

2
3 **Subsection (6). Person.** The Act uses as the definition of person the definition approved
4 by the Uniform Law Commission.
5

6 **SECTION 3. [ATTORNEY GENERAL] AUTHORITY TO PROTECT**
7 **CHARITABLE ASSETS.**

8 (a) It is the duty of the [attorney general] to represent the public interest in the protection
9 of charitable assets, to enforce the due application of assets held by a **charity** to the purposes for
10 which the entity is established or for which the assets were given to the entity, and to prevent and
11 correct breaches of fiduciary duty in the administration of charities by charitable fiduciaries.

12 (b) The powers and duties of the [attorney general] provided in this [act] are in addition
13 to any other powers and duties arising from the common law or other statutes, and are not
14 intended to limit or restrict the authority of the [attorney general] or the rights of others provided
15 by common law or statute.

16 (c) The [attorney general] may conduct an investigation or bring an action to enjoin,
17 correct, obtain damages for, or seek other remedy to:

18 (1) prevent or correct the diversion of charitable assets;

19 (2) remedy a departure from the purposes for which a **charity** is established or for
20 which charitable assets were given to the entity;

21 (3) prevent or correct a breach of fiduciary duty in the administration of a **charity**
22 or by a **charitable fiduciary**; or

23 (4) enforce the provisions of this [act].

24 **Comment**

25 One of the major goals of the Act is to articulate the attorney general's oversight
26 authority to protect charitable assets. In most states, whether or not that function is embodied in

1 a statute, the authority is inherent in the common law powers of the attorney general. In at least
2 a few states, however, it has been held that no such common law authority exists, and in some
3 other states, whether it exists and what it consists of is not so clear. The drafting committee
4 intends that the Act clarify and articulate attorney general authority to protect charitable assets.
5 At the same time, that authority is not unlimited. The attorney general's legitimate role is to
6 correct abuses, but not to take over governance or to substitute the attorney general's judgment
7 for the legitimate judgment of the charity's board or trustees; to protect the interests of the
8 indefinite beneficiaries of charity, while recognizing that charitable assets are private, not quasi-
9 public property; and to protect the donor's expressed intent and hold the charity to its expressed
10 purposes.

11
12 Subsection (b) reflects the committee's desire to articulate that the statute does not
13 replace any common law or other statutory powers the attorney general may have. The language
14 of this provision also specifies that the act does not limit or restrict the rights of others provided
15 by common law or statute. Thus, existing (or evolving) state law with respect to standing of
16 those other than the attorney general is undisturbed by the Act.
17

18 **SECTION 4. REGISTER OF CHARITIES.**

19 (a) The [attorney general] shall establish and maintain a register of charities.

20 (b) Every **charity** that has received property for **charitable purposes** shall register with
21 the [attorney general] within [30 days, 2 months, 3 months, 6 months] after the date the **charity**
22 first receives possession or control of property of which any part of the income or principal is
23 authorized or required to be expended, either presently or in the future, for **charitable purposes**,
24 or the effective date of this [act], whichever is earlier.

25 (c) The registration must include:

- 26 (1) the name, address, and statutory agent of the entity;
- 27 (2) a short statement of the **charity**'s purpose;
- 28 (3) a true copy of the **charity**'s articles of incorporation, trust instrument, or other
29 instrument creating the entity; and
- 30 (4) a true copy of the **charity**'s by-laws.

1 **Comment**

2 The main thrust of the 1954 Uniform Supervision of Trustees for Charitable Purposes Act
3 was to provide a mechanism to facilitate the supervisory role of the Attorney General by
4 providing for registration that would alert the Attorney General to the existence and
5 administration of charitable trusts. This Act continues to incorporate that function. The drafting
6 committee has opted to keep the registration obligation simple, so as to avoid overburdening
7 either charitable organizations or attorney generals' offices. It is expected that the registration
8 function will move to an electronic system, thereby dissipating some of the burden. Only entities
9 that meet the Act's definition of "charity"- that is, entities organized in the state, having a
10 principal place of business in the state, or holding substantial charitable assets in the state – have
11 the obligation to register in the state. While a large organization that operates in many states will
12 likely have an obligation to register in multiple states, the committee hopes that the Act's move
13 toward uniformity will minimize the burden of multiple registrations.
14

15 **SECTION 5. PUBLIC INSPECTION OF REGISTER.** The register and **documents**
16 filed with the [attorney general] pursuant to Section 4 [and periodic reports, if act ultimately
17 incorporates periodic reporting requirement] are matters of public record and shall be open to
18 public inspection, subject to reasonable regulation by the [attorney general], except that:

19 (a) the [attorney general] shall withhold from public inspection copies of any report filed
20 with any other governmental agency of this state, another state, the United States, or any
21 government subdivision thereof which is required by law to be kept confidential; and

22 (b) the [attorney general] shall, upon the written request of a **charity** or **charitable**
23 **fiduciary**, withhold from public inspection any part of a **document** filed which does not relate to
24 **charitable purposes** or charitable assets and that is not otherwise a public record.

25 **Comment**

26 Charity regulators involved in the drafting process noted that availability of information
27 to the public serves an important function. The Act opens the registration and supporting
28 documents to the public, with the exception of documents made confidential by any other law
29 and, upon request of a charity or charity fiduciary, any part of a document that does not relate to
30 charitable assets and is not otherwise a public record.
31

32 **SECTION 6. INVESTIGATION BY THE [ATTORNEY GENERAL].** When it

appears to the [attorney general] that it is in the public interest, the [attorney general], on behalf of the state, may conduct an investigation to ascertain:

(a) whether a **charity** or **charitable fiduciary** has caused a misapplication of charitable assets;

(b) whether a **charity** has departed from the **charitable purposes** for which it was formed or to which property is specifically dedicated;

(c) whether a **charitable fiduciary** has committed a breach of fiduciary duty.

Comment

The Act articulates the Attorney General's authority to undertake an investigation as a means of fulfilling the duty articulated in Section 3. The committee discussed the threshold for initiating an investigation. Some states (e.g., Massachusetts) require the court approval or a sworn complaint prior to beginning an investigation. Others do not, and specify no particular threshold standard to justify commencing an investigation. The committee concluded that a less demanding threshold standard is appropriate. Information often comes to the attorney general in a form much less formal than a sworn complaint; for example, information about abuses and misdeeds is often brought to light in newspaper stories. The committee was sensitive to the burden that an investigation can impose on a charity, but concluded that a reasonable amount of discretion and flexibility in the attorney general is more often likely to diminish the burden on charities than to justify inappropriate intrusion.

There is variation among the states, specified elsewhere in statutes, as to process and procedure relating to attorney general investigative authority. It is expected that states adopting the Act will appropriately cross-reference this section with the appropriate statutory provisions.

SECTION 7. NOTICE TO [ATTORNEY GENERAL].

(a) Amendment of governing **documents**. Every **charity** registered with the [attorney general] shall file with the [attorney general] any amendment to its articles of incorporation, trust instrument, or other **document** creating the entity within [20, 30, 60 days] after adoption of the amendment if the amendment changes the purposes of the entity or results in a material change to the structure, governance, or activities of the entity.

(b) Dissolution.

1 (1) A **charity** that is a corporation must give written notice to the [attorney
2 general] that it intends to dissolve at or before the time it delivers articles of dissolution to the
3 [secretary of state] pursuant to [dissolution provisions of nonprofit corporation statute]. The
4 notice must include a copy of the plan of dissolution.

5 (2) No assets may be transferred in connection with the dissolution process until
6 the earlier of:

7 (A) twenty days after the notice required by subsection (1) has been
8 delivered to the [attorney general];

9 (B) the **charity**'s receipt of the [attorney general]'s consent in writing to
10 the plan of dissolution; or

11 (C) the **charity**'s receipt of written notice that the [attorney general] will
12 take no action with respect to the transfer.

13 (3) When substantially all of the assets of a **charity** have been transferred
14 pursuant to a plan of dissolution, the **charity** shall deliver to the [attorney general] a list of the
15 names and addresses of those, other than creditors, to whom the assets were transferred. The list
16 must include a description of what assets each transferee received.

17 (c) Disposition of assets. A **charity** shall give written notice to the [attorney general] at
18 least [20, 30, 60] days before it sells, leases, exchanges, or otherwise disposes of all or
19 substantially all of its property unless:

20 (1) the transaction or series of transactions that result in the transfer is in the
21 usual or regular course of the **charity**'s activities; or

22 (2) the [attorney general] has given the **charity** a written waiver of this section.

23 (d) Merger. A **charity** shall give written notice to the [attorney general] at least [20, 30,

60] days before the consummation of any merger with any other entity. The notice must include a copy of the proposed plan of merger.

(e) Termination of charitable trust. A **charity** that is a trust shall give notice to the [attorney general] no later than [20, 30, 60] days before the termination of the trust pursuant to [provision in trust statutes allowing termination of small trust] or the **document** establishing the trust.

(f) Estate distribution. Whenever an estate involves, or may involve, the distribution of property to a **charity** or cause the creation of a **charity**, the [probate court] shall at the time of the distribution of the estate forward to the [attorney general] a true copy of the decree of distribution.

(g) State tax exemption. An officer, agency, board, or commission of this state or political subdivision that receives applications for exemption from taxation of charitable entities shall:

(1) annually provide the [attorney general] with a list of all applications approved during the year; and

(2) notify the [attorney general] of any revocation or suspension of tax-exempt status previously granted.

Comment

The drafting committee chose to forgo elaborate registration and reporting requirements in favor of requiring notice to the attorney general of a variety of transactions and events that raise particular opportunities for misdirection of charitable assets, so that the attorney general has an opportunity to monitor the events in time to prevent problems in addition to correcting problems that have already arisen.

Subsection (a) requires a charity to file with the attorney general any amendment to its governing documents that changes the purpose of the charity or results in a material change to the structure, governance, or activities of the charity. [Need examples here of “material” changes]. **Subsections (b) through (e)** specify a variety of circumstances that involve the

1 termination of a charity or the rearrangement of charitable assets that require notice to the
2 attorney general by the charity. **Subsection (f)** requires the probate court (or equivalent body) to
3 notify the attorney general of the distribution of an estate that may involve the distribution of
4 charitable assets. **Subsection (g)** provides for annual notification to the attorney general of
5 approvals of applications for charitable exemption from state and local tax, as well as
6 revocations of charitable tax exemptions. The obligation to notify the attorney general is placed
7 on officers and agencies that are responsible for evaluating and acting on tax exemption
8 applications.
9

10 **SECTION 8. NOTICE OF PROCEEDINGS CONCERNING CHARITABLE**

11 **ENTITIES, CHARITABLE FIDUCIARIES, AND CHARITABLE ASSETS.** Any **person**
12 who asserts a claim in any of the following kinds of proceeding in any court of this state shall
13 give written notice to the [attorney general] [no later than the commencement of the proceeding].
14 The notice must include a copy of the pleading.

15 (a) Any action against or on behalf of a **charity** brought pursuant to [nonprofit
16 corporation statutes] by someone other than the [attorney general].

17 (b) Any action against any **charitable fiduciary** concerning the misapplication of
18 charitable assets or the breach of fiduciary duty owed to a **charity**.

19 (c) Any proceeding:

20 (1) seeking instructions relating to the administration, use, or distribution of
21 charitable assets or income produced by charitable assets;

22 (2) seeking construction of an instrument under which charitable assets are held;
23 or

24 (3) seeking modification of the terms under which charitable assets are held.

25 (d) Any proceeding affecting a charitable trust:

26 (1) seeking to terminate the trust;

27 (2) seeking instructions regarding the use or distribution of charitable property;

(3) seeking to depart from the objects of the trust or modify the administration of the trust, including a proceeding in which the doctrine of cy pres or deviation is invoked; or

(4) seeking to remove or replace a trustee.

(e) Any proceeding to construe, nullify, or impair the provisions of a testamentary or other instrument creating or affecting a charitable trust in which matters affecting charitable assets may be decided.

(f) Any proceeding relating to the probate and administration of an estate involving a charitable trust which matters affecting charitable assets may be decided.

(g) Any proceeding to contest or set aside the probate of an alleged will under which property worth at least \$25,000 is given for **charitable purposes**.

Comment

The list of kinds of proceedings that require notice to the attorney general is adapted from provisions found in charitable corporation, trust, and probate sections of various state codes, although no one state provides model for the entire section. The drafting committee concluded that the attorney general ought to be made aware of a wide range of proceedings that might affect charitable assets or the structure or governance of a charity. [Might include examples here, too.]

The timing of the notice is described in brackets as “no later than the commencement of the proceeding.” The committee expects that states adopting the Act will tailor the language to be consistent with that state’s particular rules of civil procedure.

SECTION 9. ATTORNEY GENERAL PARTICIPATION IN PROCEEDINGS INVOLVING CHARITIES.

(a) Whenever any provision of this [act], [the nonprofit corporation statutes], or [other?] requires that notice be given to the [attorney general] before or after commencing a proceeding or permits the [attorney general] to commence a proceeding:

(1) if no proceeding has been commenced, the [attorney general] may take appropriate action including seeking injunctive relief; or

(2) if a proceeding has been commenced by a **person** other than the [attorney general], the [attorney general], as of right, may intervene in the proceeding.

(b) The [attorney general] may join or enter into a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a **charity**, charitable property, or **charitable fiduciary**.

(c) A compromise, settlement agreement, contract, or judgment relating to a proceeding involving a **charity** is voidable on motion of the [attorney general] unless the [attorney general] has declined in writing to be a party to the proceeding or approved the compromise, settlement agreement, contract, or judgment.

Comment

This section articulates attorney general authority to bring an action or intervene in a proceeding brought by someone else. The committee intends to make the attorney general a proper party to a wide array of proceedings involving charities, charitable fiduciaries, or charitable assets, so that the attorney general may exercise the discretion to participate or refrain from participating in court proceedings that relate the attorney general duty and authority under this Act.

SECTION 10. COOPERATION WITH OTHER OFFICIALS.

(a) The [attorney general] may cooperate with any official of this state, another state, the United States, or any political subdivision or agency thereof charged with overseeing charitable entities or charitable assets. In order to cooperate, the [attorney general] may:

(1) notify the official of the commencement, status, or resolution of an investigation or proceeding pursuant to this [act];

(2) make available to the official any statement, **document**, or other information relating to a **charity** or **charitable fiduciary** that is relevant to the official's oversight of charitable entities and charitable assets; or

1 (3) acquire from the official statements, **document**s, or other information
2 relevant to an investigation pursuant to Section 6 or a proceeding under Section 8.

3 (b) The custodian of the records of a court having jurisdiction of probate matters or of
4 charitable trusts and any custodian of records of any department, agency, or political subdivision
5 of this state shall furnish to the [attorney general] copies of any records and files relating to the
6 subject of this act as the [attorney general] requires.

7 (c) Any statement, **document**, or other information provided to another official or
8 agency or received from another official or agency pursuant to subsection (a) or (b) shall be
9 withheld from public inspection if the statement, **document**, or other information is required or
10 permitted to be kept confidential by the law of either the sending or receiving government.

11 **Comment**

12 This section authorizes cooperation between a state attorney general and relevant officials
13 of other states and the federal government. Subsection (b) provides that the most protective
14 confidentiality rules of the cooperating governments will govern the confidentiality of shared
15 information.
16

17 **SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
18 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
19 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
20 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
21 36 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
22 U.S.C. Section 7003(b).

23 **SECTION 12. [UNIFORMITY].** This act shall be construed so as to protect the rights
24 and interest of the people of the state and the uncertain and indefinite beneficiaries of property
25 dedicated to **charitable purposes** and to promote uniformity of the law with respect to its

1 subject matter in the states that adopt it.

2 **SECTION 13. EFFECTIVE DATE.** This [act] takes effect

3 **SECTION 14. REPEAL.** The following acts and parts of acts are repealed.