

DRAFT
FOR DISCUSSION ONLY

OVERSIGHT OF CHARITABLE ASSETS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For October 23-25, 2009 Drafting Committee Meeting

Without Prefatory Notes or Comments

Copyright ©2009
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

October 6, 2009

DRAFTING COMMITTEE ON AN OVERSIGHT OF CHARITABLE ASSETS ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

K. KING BURNETT, P.O. Box 910, Salisbury, MD 21803-0910, *Chair*

JAMES BOPP, JR., 1 South 6th St., Terre Haute, IN 47807

MARY JO HOWARD DIVELY, Carnegie Mellon University, Warner Hall, 6th Floor, 5000 Forbes Ave., Pittsburgh, PA 15213

BARRY C. HAWKINS, 300 Atlantic St., Stamford, CT 06901

LYLE W. HILLYARD, 595 South Riverwood Pkwy., Suite 100, Logan, UT 84321

THOMAS L. JONES, University of Alabama School of Law, University Station, P.O. Box 865557, Tuscaloosa, AL 35486-0050

CARL H. LISMAN, 84 Pine St., P.O. Box 728, Burlington, VT 05402

JOHN J. MCAVOY, 3110 Brandywine St. NW, Washington, DC 20008

FREDERICK P. STAMP, JR., U.S. District Court, P.O. Box 791, Wheeling, WV 26003

DAVID S. WALKER, Drake University Law School, 2507 University Ave., Des Moines, IA 50311

LAURA BROWN CHISOLM, Case Western Reserve University, 11075 East Blvd., Cleveland, OH 44106, *Reporter*

EX OFFICIO

ROBERT A. STEIN, University of Minnesota Law School, 229 19th Ave. S., Minneapolis, MN 55455, *President*

BARRY C. HAWKINS, 300 Atlantic St., Stamford, CT 06901, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

BETSY BUCHALTER ADLER, 235 Montgomery St., Suite 1220, San Francisco, CA 94104-3103, *ABA Advisor*

SUSAN N. GARY, University of Oregon School of Law, 1515 Agate St., Eugene, OR 97403, *ABA Section Advisor*

CYNTHIA ROWLAND, One Ferry Building, Suite 200, San Francisco, CA 94111, *ABA Section Advisor*

LISA A. RUNQUIST, 17554 Community St., Northridge, CA 91325-3922, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

OVERSIGHT OF CHARITABLE ASSETS ACT

TABLE OF CONTENTS

SECTION 1. SHORT TITLE	1
SECTION 2. DEFINITIONS.....	1
SECTION 3. [ATTORNEY GENERAL] AUTHORITY TO PROTECT CHARITABLE ASSETS	2
SECTION 4. REGISTER OF CHARITABLE ENTITIES.....	3
SECTION 5. PUBLIC INSPECTION OF REGISTER.....	4
SECTION 6. INVESTIGATION BY THE [ATTORNEY GENERAL].....	5
SECTION 7. NOTICE TO [ATTORNEY GENERAL].....	7
SECTION 8. PROCEEDINGS CONCERNING CHARITABLE ENTITIES, CHARITABLE FIDUCIARIES, AND CHARITABLE ASSETS.....	8
SECTION 9. COOPERATION WITH OTHER OFFICIALS	10
SECTION 10. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT	11
SECTION 11. [UNIFORMITY].....	11
SECTION 12. EFFECTIVE DATE.....	11
SECTION 13. REPEAL.....	11

1 state?]

2 (4) “Charitable purposes” means the relief of poverty, the advancement of education or
3 religion, the promotion of health, the promotion of governmental purposes, other purposes the
4 achievement of which is beneficial to the community, and other civic or public purposes
5 described by section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)).

6 (5) “Document” means information that is inscribed on a tangible medium or that is
7 stored in an electronic or other medium and is retrievable in perceivable form.

8 **SECTION 3. [ATTORNEY GENERAL] AUTHORITY TO PROTECT**
9 **CHARITABLE ASSETS.**

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

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

19 (c) The provisions of this [act] apply regardless of any contrary provision in any
20 instrument creating a charitable entity, designating a charitable fiduciary, or transferring property
21 for charitable purposes to a charitable entity or a charitable fiduciary.

22 (d) The [attorney general] may bring an action to enjoin, correct, obtain damages for, or
23 seek other remedy to:

- 1 (1) enforce the due application of assets held by a charitable entity;
- 2 (2) remedy a departure from the purposes for which a charitable entity is formed;
- 3 (3) prevent or correct a breach of fiduciary duty in the administration of a
- 4 charitable entity or by a charitable fiduciary; or
- 5 (4) enforce the provisions of this [act].

6 (e) The [attorney general] may adopt rules and regulations reasonable and necessary for
7 the administration of this [act].

8 **SECTION 4. REGISTER OF CHARITABLE ENTITIES.**

9 (a) The [attorney general] shall establish and maintain a register of charitable entities
10 established or active in this state.

11 (b) Every charitable entity that has received property for charitable purposes shall
12 register with the [attorney general] within [30 days, 2 months, 3 months, 6 months] after the date
13 the charitable entity first receives possession or control of property authorized or required to be
14 applied [, either presently or in the future,] for charitable purposes, or the effective date of this
15 [act], whichever is earlier.

16 (c) The registration must include:

17 (1) a true copy of the charitable entity's articles of incorporation, trust
18 instrument, or other instrument creating the entity;

19 (2) a true copy of the charitable entity's by-laws; and

20 (3) an inventory of the assets of the charitable entity.

21 (d) [filing fee?]

22 (e) The secretary of state shall provide a copy of the articles of incorporation and
23 amended articles of incorporation of filed with the Secretary of State by a charitable entity

1 pursuant to [nonprofit corporation statute provision].

2 (f) Whenever an estate involves, or may involve, the distribution of property to a
3 charitable entity or cause the creation of a charitable entity, the [probate court] shall at the time
4 of the distribution of the estate forward to the [attorney general] a true copy of the decree of
5 distribution. [does this process need different descriptors in different states?]

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

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

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

12 (h) The [attorney general] may obtain from public records, taxing authorities, charitable
13 fiduciaries, and other sources whatever copies of instruments, other records, and other
14 information needed for the establishment and maintenance of the register.

15 (i) The custodian of the records of a court having jurisdiction of probate matters or of
16 charitable trusts and any custodian of records of any department, agency, or political subdivision
17 of this state shall furnish to the [attorney general] free of charge copies of any records and files
18 relating to the subject of this act as the [attorney general] requires.

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

23 (a) the [attorney general] shall withhold from public inspection copies of any report filed

1 with any other governmental agency of this state, another state, the United States, or any
2 government subdivision thereof which is required by law to be kept confidential; and

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

6 **SECTION 6. INVESTIGATION BY THE [ATTORNEY GENERAL].**

7 (a) [When it appears to the [attorney general] that it is in the public interest], the
8 [attorney general], on behalf of the state, may conduct an investigation [upon application to and
9 approval of a judge of the _____ court] to ascertain:

- 10 (1) the condition of a charitable entity's affairs;
11 (2) whether a charitable entity has departed from the charitable purposes for
12 which it was formed or to which property is specifically dedicated;
13 (3) whether a charitable fiduciary has committed a breach of fiduciary duty; or
14 (4) whether a charitable entity or charitable fiduciary has caused a misapplication
15 of charitable assets.

16 (b) In conducting an investigation under [pursuant to] subsection (a), the [attorney
17 general] may:

- 18 (1) examine under oath any person in connection with the affairs of the charitable
19 entity;
20 (2) examine any document relevant to the investigation; and
21 (3) [pursuant to an order of the _____ court] impound any document and retain it
22 in the [attorney general]'s possession until the completion of all proceedings to which the
23 documentary material is relevant.

1 (c) The [attorney general] shall issue an order to any person whose attendance is
2 required, setting forth the time when and the place where attendance is required and shall cause
3 the order to be served upon the person in the manner provided for service of process in civil
4 cases at least [5? 10? 14?] days before the date fixed for attendance. Such an order shall have the
5 same force and effect as a subpoena.

6 (d) A person upon whom a notice is served pursuant to the provisions of subsection (c)
7 shall comply with its terms unless excused from compliance by the order of a court of the state.
8 Any person who fails to appear, or with intent to avoid, evade, or prevent compliance with a civil
9 investigation under this chapter, removes from any place, conceals, withholds, or destroys, alters,
10 or by any other means falsifies any document, or knowingly conceals any relevant information,
11 shall be assessed a civil penalty of not more than _____.

12 (e) Upon application of the [attorney general], obedience to an order issued pursuant to
13 subsection (c) may be enforced by the _____ court having jurisdiction of the charitable
14 entity in the county where the entity has its principal place of business or the person receiving
15 the notice resides or is found, in the same manner as though the notice were a subpoena. The
16 court, after hearing, for cause, and upon application of any person aggrieved by the order, may
17 amend, suspend or postpone all or any part of the notice.

18 (f) No person shall be excused from testifying or from producing documentary materials
19 in an investigation by the [attorney general] or in any hearing before the [attorney general] on the
20 ground that the testimony or evidence may tend to incriminate that person or subject that person
21 to a penalty or forfeiture; but no person may be prosecuted or subjected to any penalty or
22 forfeiture on account of any matter concerning which the person, after claiming this privilege,
23 has, by order of the [attorney general], testified under oath or produced documentary evidence.

1 (g) Any document or other information produced pursuant to this section may not be
2 disclosed to any person other than the authorized agent or representative of the [attorney
3 general], unless ordered by a court of the state for good cause shown, with the consent of the
4 person producing the document or information, or pursuant to section 9 of this act.

5 **SECTION 7. NOTICE TO [ATTORNEY GENERAL].**

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

11 (b) Dissolution.

12 (1) A charitable entity that is a corporation must give written notice to the
13 [attorney general] that it intends to dissolve at or before the time it delivers articles of dissolution
14 to the [secretary of state] pursuant to [dissolution provisions of nonprofit corporation statute].
15 The notice must include a copy of the plan of dissolution.

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

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

20 (B) the entity's receipt of the [attorney general]'s consent in writing to the
21 plan of dissolution; or

22 (C) the entity's receipt of written notice that the [attorney general] will
23 take no action with respect to the transfer.

1 (3) When substantially all of the assets of a charitable entity have been
2 transferred pursuant to a plan of dissolution, the entity shall deliver to the [attorney general] a list
3 of the names and addresses of those, other than creditors, to whom the assets were transferred.
4 The list must include a description of what assets each transferee received .

5 (c) Disposition of assets. A charitable entity shall give written notice to the [attorney
6 general] at least [20, 30, 60] days before it sells, leases, exchanges, or otherwise disposes of [all
7 or substantially all of its property] [more than 50% of the fair market value of its tangible and
8 intangible assets, including goodwill, within a period of 36 consecutive months] unless:

9 (1) the transaction or series of transactions that result in the transfer is in the
10 usual or regular course of the entity’s activities; or

11 (2) the [attorney general] has given the entity a written waiver of this section.

12 (d) Merger. A charitable entity shall give written notice to the [attorney general] at least
13 [20, 30, 60] days before the consummation of any merger with any other entity. The notice must
14 include a copy of the proposed plan of merger.

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

18 **SECTION 8. PROCEEDINGS CONCERNING CHARITABLE ENTITIES,**
19 **CHARITABLE FIDUCIARIES, AND CHARITABLE ASSETS.**

20 (a) Notice to [attorney general] of proceedings. Any person who commences any of the
21 following kinds of proceeding in any court of this state shall give written notice to the [attorney
22 general] no later than the commencement of the proceeding. The notice must include a copy of
23 the complaint.

1 (1) Any action against or on behalf of a charitable entity brought pursuant to
2 [nonprofit corporation statutes] by someone other than the [attorney general].

3 (2) Any action against any charitable fiduciary concerning the application of
4 funds held for charitable purposes or the breach of fiduciary duty owed to a charitable entity.

5 (3) Any proceeding brought by a charitable entity, charitable fiduciary, or other
6 person holding charitable assets:

7 (A) seeking instructions relating to the administration or use of the
8 charitable assets or income produced by the assets;

9 (B) seeking construction of the instrument under which the assets are
10 held; or

11 (C) seeking modification of the terms under which the assets are held.

12 (4) Any proceeding affecting a charitable trust, including but not limited to:

13 (A) an action to terminate the trust;

14 (B) an action seeking instructions regarding the use or distribution of
15 charitable property; or

16 (C) an action seeking to depart from the objects of the trust as stated in
17 the instrument creating the trust, including a proceeding in which the doctrine of cy pres is
18 invoked.

19 (D) an action to construe, nullify, or impair the provisions of a
20 testamentary or other instrument creating or affecting a charitable trust.

21 (E) an action to determine matters relating to the probate and
22 administration of an estate involving a charitable trust.

23 (5) Any proceeding to contest or set aside the probate of an alleged will under

1 which anything of value [threshold amount?] is given for charitable purposes.

2 (b) [Attorney general] participation in proceedings involving charitable entities.

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

6 (A) if no proceeding has been commenced, the [attorney general] may
7 take appropriate action including, but not limited to, seeking injunctive relief; or

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

10 (2) The [attorney general] may join or enter into a compromise, settlement
11 agreement, contract, or judgment relating to a proceeding involving a charitable entity, charitable
12 property, or charitable fiduciary.

13 (3) A compromise, settlement agreement, contract, or judgment relating to a
14 proceeding involving a charitable entity is voidable on motion of the [attorney general] unless
15 the [attorney general] has declined in writing to be a party to the proceeding or approved the
16 compromise, settlement agreement, contract, or judgment.

17 **SECTION 9. COOPERATION WITH OTHER OFFICIALS.**

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

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

23 (2) make available to the official any statement, document, or other information

1 relating to a charitable entity or charitable fiduciary that is relevant to the official’s oversight of
2 charitable entities and charitable assets; or

3 (3) acquire from an official or agency of this state, another state, the United
4 States, or any political subdivision statements, documents, or other information relevant to an
5 investigation pursuant to Section 6 or a proceeding under Section 8.

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

10 **SECTION 10. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
11 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
12 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
13 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
14 36 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
15 U.S.C. Section 7003(b).

16 **SECTION 11. [UNIFORMITY].** This act shall be construed so as to protect the rights
17 and interest of the people of the state and the uncertain and indefinite beneficiaries of property
18 dedicated to charitable purposes and to promote uniformity of the law with respect to its subject
19 matter in the states that adopt it.

20 **SECTION 12. EFFECTIVE DATE.** This [act] takes effect

21 **SECTION 13. REPEAL.** The following acts and parts of acts are repealed.