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FOR DISCUSSION ONLY

REVISION OF UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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REVISION OF UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

Prefatory Note

In 1972 the National Conference of Commissioners on Uniform State Laws approved the Uniform Management of Institutional Funds Act [hereafter referred to as UMIFA (1972)]. At that time uncertainty existed as to the standards that governed directors of charitable corporations in managing and investing the funds of the charitable organizations. Directors of a charity organized as a nonprofit corporation had been held to the investment standards that applied to trustees of private trusts. *See Lynch v. John M. Redfield Foundation*, 9 Cal. App. 3d 293 (1970), (stating that directors of a charitable corporation are essentially trustees and as such are held to an investment duty similar to that of a trustee of a private trust). *See also* Restatement (Second) of (Trusts) Section 389 (1959). For directors of large institutions, the then-current restrictions on trust investing made the use of modern investment strategies problematic.

UMIFA (1972) provided guidance and authority to the governing boards of those charitable organizations within its scope on several issues. The statute gave a governing board broad investment authority and indicated that a governing board was not restricted to investments authorized for trustees. The statute permitted a board to delegate authority to independent financial advisors. With respect to endowment funds, the statute authorized a governing board to expend unrealized appreciation, even if the endowment fund provided only for the distribution of "income." This provision enabled fund managers to use modern investment techniques such as total return investing and unitrust-style spending. UMIFA (1972) also permitted the governing board to release restrictions on the use or investment of institutional funds if the restrictions had become "obsolete, inappropriate, or impracticable" and if the governing board could obtain the consent of either the donor or the court. This provision gave the board more flexibility than the doctrine of cy pres.

The investment standards adopted by UMIFA (1972) foreshadowed a more extensive treatment of trust investment law in the Uniform Prudent Investor Act (1994) [hereafter referred to as UPIA]. UPIA applies modern portfolio theory to trusts, including charitable trusts. The Uniform Principal and Income Act (1997) furthered the principles of UPIA, providing tools for the use of investment techniques authorized under UPIA. The Uniform Trust Code (2000) [hereafter referred to as the UTC] expanded the application of the doctrine of cy pres. These Uniform Acts have informed the work of the Drafting Committee of the Uniform Management of Institutional Funds Act (200-) [hereafter UMIFA (200-)].

Objectives of the Act. UMIFA (200-) conforms its investment provisions to those of UPIA. The investment standards of UPIA already apply to charitable trusts, so the changes in the Act make the application of these standards consistent regardless of

1 whether a charitable organization is organized as a trust or as a nonprofit corporation.
2 The rules governing expenditures from endowment funds have been modified to give a
3 governing board more flexibility in making expenditure decisions, so that the board can
4 cope with fluctuations in the value of the endowment. These rules are available to
5 decision makers of charities organized either as charitable trusts or as nonprofit
6 corporations. The provisions governing the release of restrictions have been changed to
7 permit more efficient management of institutional funds.
8
9 **Other Legal Rules.** UMIFA (200-) addresses investment issues and issues relating
10 to endowment funds but is not a comprehensive statute addressing all legal issues that
11 apply to charitable organizations. A charitable organization will continue to be governed
12 by rules applicable to charitable trusts, if it is organized as a trust, or rules applicable to
13 nonprofit corporations, if it is organized as a nonprofit corporation.

1
2 **UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT**
3
4 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Management
5 of Institutional Funds Act.
6
7 **SECTION 2. DEFINITIONS.** In this [act]:
8 (1) "Endowment fund" means an institutional fund, or any part thereof, not wholly
9 expendable by the institution on a current basis under the terms of a gift instrument. An
10 endowment fund may consist of multiple institutional funds, managed together for the
11 same purpose.
12 (2) "Gift instrument" means a will, deed, grant, conveyance, agreement,
13 memorandum, appropriation, record, or other governing document, under which property
14 is granted to, transferred to, or held by an institution as an institutional fund. The term
15 can include more than one document creating one or more institutional funds and
16 includes any institutional solicitations in the form of a record from which an institutional
17 fund resulted.
18 (3) "Institution" means any nonprofit corporation, trust, unincorporated
19 association, government or governmental subdivision or agency, or any other legal entity
20 organized and operated exclusively for the relief of poverty; the advancement of
21 education or religion; the promotion of health, governmental, or municipal purposes; or
22 other charitable purposes the achievement of which is beneficial to the community; or a

1 governmental organization to the extent that it holds funds exclusively for any of these

2 purposes.

3 (4) "Institutional fund" means a fund held by an institution for its exclusive use,

4 benefit, or purposes. The term does not include programmatic investments and does not

5 include a fund in which a beneficiary that is not an institution has an interest, other than

6 rights that could arise upon violation or failure of the purposes of the fund. The term may

7 include multiple funds managed by the institution for its exclusive use, benefit, or

8 purposes.

9 (5) "Programmatic investment" means an investment held by an institution to

10 accomplish a purpose of the institution and not exclusively for the production of income

11 or the appreciation of the property.

12 (6) "Record" means information that is inscribed on a tangible medium or that is

13 stored in an electronic or other medium and is retrievable in perceivable form.

14 **Preliminary Comments**

15 **Subsection (1). Endowment fund.** An endowment fund is an institutional fund or a
16 part of an institutional fund that is not wholly expendable by the institution on a current
17 basis. An institution may manage several funds together if the funds all have the same
18 purpose. These funds would be considered one endowment fund for purposes of this
19 [act].
20
21 A restriction on use that makes a fund an endowment fund arises from the terms of
22 the gift instrument. A solicitation that suggests in writing that any gifts received pursuant
23 to the solicitation will be held as an endowment may be integrated with the other writings
24 and may be considered part of the gift instrument. Whether the terms of the solicitation
25 become part of the instrument will depend upon the circumstances of the gift and whether
26 a subsequent writing superseded the terms of the solicitation.
27
28 **Subsection (2). Gift instrument.** Gift instrument refers to documents or records that
29 are used for donative transfers and that establish the terms of the gift. A gift instrument

1 may be a writing of any form, including electronic, and may result from solicitation
2 activities or the bylaws of the institution or from other rules of an existing fund. A gift
3 instrument may consist of multiple documents and records. The term also includes an
4 appropriation by a legislature or other public or governmental body for the benefit of an
5 institution.
6
7 **Subsection (3). Institution.** The Act applies generally to institutions organized and
8 operated exclusively for charitable purposes, using the definition of charitable purposes
9 from Section 405 of the Uniform Trust Code. The term includes charitable organizations
10 created as nonprofit corporations, trusts, unincorporated associations, governmental
11 subdivisions or agencies, or any other form of entity, however organized, that is
12 organized and operated for charitable purposes. The term "trust" is intended to mean a
13 trustee acting under a charitable trust. The term does not include charitable remainder
14 trusts and charitable lead trusts.
15
16 The definition of institution includes governmental organizations that hold funds
17 exclusively for the purposes listed in the definition. Some organizations created by state
18 government may fall outside the definition due to the way in which the state created the
19 organizations. Because state arrangements are so varied, creating a definition that
20 encompasses all charitable entities created by states is not feasible. States should
21 consider the core principles of UMIFA for application to governmental institutions. For
22 example, the control over a state university may be held by a State Board of Regents. In
23 that situation, the state may have created a governing structure by statute or in the state
24 constitution so that the university is, in effect, privately chartered. The drafting
25 committee does not intend to exclude these universities from the definition of institution,
26 but additional state legislation may be necessary to address particular situations.
27
28 **Subsection (4). Institutional Fund.** Institutional fund means any fund held by an
29 institution for its own use, benefit or purposes, whether expendable currently or subject to
30 restrictions. An institutional fund does not include programmatic investments. For
31 example, an institution that holds conservation easements for the purpose of enforcing the
32 easements holds them in furtherance of its charitable purpose and not as an investment.
33 The institution may appropriately invest in these assets even though, if viewed as an
34 investment, the rate of return would be low. The investment rules of UMIFA do not
35 apply to programmatic investments.
36
37 A fund held by an institution is not an institutional fund if any beneficiary of the fund
38 is not an institution. For example, a charitable remainder trust held by a charity as trustee
39 for the benefit of the donor during the donor's lifetime, with the remainder interest held
40 by the charity, is not an institutional fund. However, if a governing instrument provides
41 that a fund will revert to the donor if, and only if, the institution ceases to exist, then the
42 fund will be considered an institutional fund.
43

Subsection (7). Record. This definition was added to clarify that the definition of instrument includes electronic records as defined in Section 2(8) of the Uniform Electronic Transactions Act (1999).

SECTION 3. DONOR INTENT.

The intent of a donor creating an institutional fund shall control determinations made by the institution under this [act]. An institution may determine the intent of a donor from any applicable gift instrument and from any other evidence that clarifies the intent of the donor.

Preliminary Comments

Section 3 expresses the primacy of donor's intent in decision making under the Act. The Committee wanted to emphasize the importance of donor's intent. The Act does not permit an institution to act without regard to donor's intent, but rather provides guidance in interpreting donor's intent. Sometimes donor's intent can be determined by looking directly at a document signed by the donor, but often evidence of donor's intent will come from several documents, including solicitations by the institution. If the donor is a governmental entity, the intent may come from the legislature or from a governmental agency. If the donor accedes to an expression of intent developed by the institution or intent expressed in a statutory program, then that will be considered the donor's intent.

Although donor's intent is paramount, trust law and corporate law set limits on what the donor of a charitable institution can require. For example, UTC Section 404 states that the purposes of a trust must be lawful and not contrary to public policy and must be for the benefit of its beneficiaries. Corporate law provides similar restrictions. For example, Section 3.01 of the Revised Model Nonprofit Corporation Act ("RMNCA") requires that the purposes be lawful. Charitable institutions must also comply with the regulations under Section 501(c)(3) of the Internal Revenue Code to obtain tax exempt status.

SECTION 4. STANDARD OF CARE; PRUDENCE.

(a) An institution shall exercise the standard of care consistent with its form of organization. An institution in corporate form shall be governed by the applicable

corporate law of this State, and an institution in trust form shall be governed by the applicable trust law of this State.

(b) An institution shall invest and manage an institutional fund as a prudent investor would. This [act] provides guidance as to the meaning of prudence for an institution making decisions consistent with this [act], except as may be provided by other law relating to governmental institutions and their institutional funds.

Preliminary Comments

The Drafting Committee discussed at great length the standard that should govern nonprofit managers. Since the decision in *Stern v. Lucy Webb Hayes National Training School for Deaconesses,* 381 F. Supp. 1003 (1974), the trend has been to hold directors of nonprofit corporations to a standard similar to the corporate standard. Courts have described this shift from a standard closer to a trust-law standard as a move to hold directors liable for gross negligence and not ordinary negligence. The concern may be in part to limit personal liability of directors, so that charitable institutions will not find themselves without directors altogether. Thus, business judgment standards (or "best judgment" standards) have been applied in determining director liability. For trusts, the standards relating to trustee liability have been shifting, too. For example, UTC Section 1010 limits the personal liability of trustees on contracts if the fiduciary capacity was disclosed. And although a shift toward corporate rules has occurred with respect to director liability, courts continue to apply trust rules to *cy pres* modifications. The Committee concluded that although courts and statutes may state that different standards exist, when the standards are applied the results for charitable institutions are likely to be the same regardless of whether they are organized as corporations or as trusts.

Although the prudence standard adopted in UMIFA (200-) is derived from trust law, the Committee believes that the standard is consistent with the business judgment standard under corporate law, as applied to charitable institutions. That is, a manager operating a charitable organization under the business judgment rule would look to the same factors as those identified by the prudent investor rule. Prudence is an evolving concept that has been influenced by trust law, and the trust law norms probably already inform managers of nonprofit corporations. The Drafting Committee decided that by adopting the language of UPIA, UMIFA could clarify that UPIA's articulation of the standards of prudent investing applies to all charitable institutions. The Committee believed that the greater precision of the prudence norms of the Restatement and UPIA could helpfully inform managers of charitable institutions.

SECTION 5. EXPENDITURE OF ENDOWMENT FUNDS; RULE OF CONSTRUCTION.

(a) An institution may expend so much of an endowment fund as the institution determines to be prudent for the uses, benefits, and purposes for which the endowment fund is established. In making its determination, the institution shall exercise reasonable care, skill, and caution and shall consider:

(1) the terms of the gift instrument;

(2) the purposes of the institution;

(3) the purposes of the endowment;

(4) the long-term and short-term needs of the institution in carrying out its purposes;

(5) other resources of the institution;

(6) general economic conditions;

(7) the possible effect of inflation or deflation;

(8) preservation of the purchasing power of the endowment;

(9) the investment policy of the institution; and

(10) duration of the endowment.

(b) An institution may accumulate so much of the income of an institutional fund as the institution determines to be prudent under the standard established by subsection (a).

(c) In determining the intent of a donor, a designation of a gift as an endowment, or a direction or authorization in the instrument to use only "income", interest",

1 “dividends”, or “rents, issues, or profits”, or “to preserve the principal intact”, or words of

2 similar import, does not limit the standard set forth in subsection (a). Unless a gift

3 instrument specifically directs the institution to ignore the standard set forth in subsection

4 (a), the use of one of these terms shall be interpreted as the expression of the intent of the

5 donor to create a fund that will exist in perpetuity or for a period specified by the donor.

6 These rules of construction apply to instruments executed or in effect before or after the

7 effective date of this [act].

8 **Preliminary Comments**

9 **Purpose and Scope of Revisions.** This section revises the provision in UMIFA
10 (1972) that permitted the expenditure of appreciation of an endowment fund to the extent
11 the fund had appreciated in value above the fund’s historic dollar value. UMIFA (1972)
12 defined historic dollar value to mean the value of all contributions to the fund. The new
13 approach abandons the use of historic dollar value as a floor for expenditures and
14 provides more flexibility to the governing board in making decisions about whether to
15 expend any part of an endowment fund.
16
17 Section 5 permits expenditures from an endowment fund to the extent the governing
18 board determines that the expenditures are prudent after considering the factors listed in
19 subsection (a). These factors emphasize the importance of keeping the purposes of the
20 institution and of the endowment fund in mind while also considering economic
21 conditions. As under UMIFA (1972) Expenditures are not dependent on the
22 characterization of assets as income or principal and are not limited to the amount of
23 income and unrealized appreciation.
24
25 Institutions have operated effectively under UMIFA (1972), and the
26 experience has been that institutions have operated more conservatively than historic
27 dollar value would have permitted. Institutions have no incentive to spend everything the
28 law permits them to spend, and good practice has been to provide for modest
29 expenditures while maintaining the purchasing power of a fund. This has been true even
30 though UMIFA (1972) does not require an institution to maintain a fund’s purchasing
31 power and allows an institution to spend any amounts in a fund above historic dollar
32 value. The Drafting Committee concluded that eliminating historic dollar value and
33 providing institutions with more discretion would not lead to depletion of endowment
34 funds. Instead, UMIFA (200-) should encourage institutions to establish a spending
35 approach that will be responsive to short-term fluctuations in the value of the fund.

Section 5 allows an institution to maintain appropriate levels of distributions in times of economic downturn or economic strength. In some years, accumulation rather than spending will be appropriate, and in other years an institution may appropriately make distributions even if a fund has generated no investment return that year.

Several levels of safeguards exist to prevent institutions from depleting endowment funds or diverting funds from the purposes for which they were created. Donors can restrict gifts and can provide specific instructions to donee institutions as to appropriate uses for assets contributed. Within institutions, fiduciary duties govern the persons making decisions on expenditures. Those persons must operate with the best interests of the institution in mind and in keeping with the intent of donors. If an institution diverts assets from its charitable purposes, the state attorney general can enforce the charitable interests of the public. By relying on these safeguards while providing institutions with adequate discretion to make decisions on appropriate expenditures, the act creates a standard that takes into consideration the diversity of the charitable sector. The Committee expects that industry standards will continue to evolve and inform institutions as the institutions apply this standard.

UMIFA (200-) gives institutions guidance on factors to consider in exercising discretion, but does not take away the discretion by providing a cap or floor for distribution. The Drafting Committee discussed whether to provide a safe harbor for spending within a range based on percentages of the assets of the fund. The Committee concluded that specifying a range for appropriate distributions was unwise because a fixed range could not take into account the factors listed in subsection (a) or changes in market conditions. A fixed range might be appropriate under current conditions but would be unlikely to remain appropriate over time. Institutions have done a good job of developing spending policies under UMIFA (1972) and should be able to continue to develop spending policies that take into consideration the specific needs of a particular fund. Prudent decision making after considering all the factors is the standard under UMIFA (200-). A safe-harbor would simply create a new standard that could not take into account the needs of individual institutions and funds.

For a discussion of spending approaches, see Joel C. Dobris, *New Forms of Private Trusts for the Twenty-First Century—Principal and Income*, 31 Real. Prop., Prob. & Tr. J. 1 (1996). For example, Dobris suggests spending 5% or 4% of a five-year moving average of market values might be appropriate. *Id.*, at 39.

In making decisions about expenditures of endowment funds, donor's intent always controls. UMIFA (200-) does not allow an institution to convert an endowment fund into a non-endowment fund nor does the Act allow the institution to ignore a donor's intent that a fund be maintained as an endowment. Rather, the Act provides rules of construction to assist institutions in interpreting donor's intent. The Act assumes that if a donor wants an institution to spend "only the income" from a fund, what the donor

intends is that the fund continue in perpetuity and the institution expend amounts that represent a reasonable return on investments. The donor is unlikely to be concerned about designation of returns as "income" or "principal" under accounting principles. Rather the donor likely assumes that the institution will use modern investing strategies like total-return investing to provide enough funds to distribute while maintaining the long-term viability of the fund. The Act provides default rules to construe donor's intent.

If a donor indicates that the rules on investing or expenditures under the Act do not apply to a particular fund, then as a practical matter the institution will probably invest the fund separately. Thus, a decision to direct expenditure rules may have consequences for the way the institution invests the fund.

Endowment funds include funds that may last in perpetuity but also funds that should continue for a fixed term of years. The Act requires the institution to consider the intended duration of the fund in making determinations about spending. For example, if a donor directs that a fund be spent over 20 years, Section 5 will guide the institution in making distribution decisions. The institution would amortize the fund over 20 year rather than try to maintain the fund in perpetuity.

As a rule of construction, Section 3 applies retroactively. Retroactive application is appropriate, because Section 3 does not alter the substance of an existing contract, but rather serves as a default rule that implements donor's intent. The Colorado Supreme Court recently considered the question of retroactive application of a default statute involving the donative aspect of an insurance contract. *See* In re Estate of DeWitt, 54 P. 3d 849 (Colo. 2002). In holding that the statute did not violate the Contracts Clause, the court cited approvingly from the JEB Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents, 17 Am. Coll. Tr. & Est. Couns. 184 app. II (1991). The JEB Statement explains why retroactive application of default statutes is appropriate and is not unconstitutional and states, "The JEB is aware of no authority for the application of the Contracts Clause to state legislation applying altered rules of construction or other default rules to pre-existing documents in any field of law, and especially not in the filed of estates, trusts, and donative transfers." JEB Statement, at 4 (citing J. Nowak & R. Rotunda, Constitutional Law § 11.8, at 394 et seq. (4th ed. 1991).

SECTION 6. INVESTMENT AUTHORITY. In addition to an investment authorized by law other than this [act] or by any gift instrument, and subject to any specific limitations set forth in a gift instrument or in law other than this [act], an

institution:

(1) within a reasonable time after receiving property, shall review the property and make and implement decisions concerning the retention and disposition of the assets, in order to bring the portfolio of the institutional fund into compliance with the purposes, terms, distribution requirements, and other circumstances of the institution, and the requirements of this [act];

(2) may invest in any kind of property or type of investment consistent with the standards of this [act];

(3) may make programmatic investments;

(4) may include all or any part of an institutional fund in any pooled or common fund maintained by the institution; and

(5) may invest all or any part of the institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar investments by which funds are commingled.

Preliminary Comments

UMIFA (200-) derives its rules on investment authority from UPIA. Subsection (1) requires the institution to review property on receipt and make decisions concerning investment of the property. Subsection (1) authorizes a governing board to consider factors such as the mission of the institution, the current programs of the institution and the desire to cultivate additional donations from a donor, in addition to factors related more directly to the asset's potential as an investment, in deciding whether to retain property. This subsection is based on UPIA Section 4.

Subsection (2) provides for broad investment authority. This subsection is derived from UPIA Section 2(e).

1 UMIFA applies only to investment assets and not to assets used in furtherance of an
2 institution's purposes. Thus, subsection (3) specifically authorizes an institution to make
3 programmatic investments and excludes those investments from the other rules applicable
4 to investment decision making. A programmatic investment must have relevance to the
5 purposes of the institution. A university located in a city might want to invest in a
6 neighborhood near the university to improve the conditions in that neighborhood. The
7 investment would be considered programmatic because of its general relevance to the
8 purposes of the university. The act makes no distinction between assets an institution
9 owns at inception and retains and those assets the institution decides to acquire. In either
10 case, the controlling issue is whether the assets are related to the purposes of the
11 institution and not the projected rate of return for the investment. Values other than the
12 generation of economic benefits to the institution legitimate programmatic investments.
13

14 **SECTION 7. PRUDENT INVESTING AND MANAGING OF**

15 **INSTITUTIONAL FUNDS.**

16 (a) In managing an institutional fund, investing as a prudent investor would means

17 that an institution shall consider:

18 (1) the purposes of the institution;

19 (2) the purposes of the institutional fund;

20 (3) the expenditure requirements of the fund;

21 (4) long-term and short-term needs of the institution in carrying out its

22 purposes;

23 (5) present and anticipated financial resources of the institution;

24 (6) general economic conditions;

25 (7) the possible effect of inflation or deflation;

26 (8) the expected tax consequences, if any, of investment decisions or

27 strategies;

28 (9) the role that each investment or course of action plays within the overall

1 investment portfolio of the institutional fund;

2 (10) the expected total return from income and the appreciation of

3 investments;

4 (11) other resources of the institution;

5 (12) the needs of the institution and the institutional fund to make distributions

6 and to preserve capital;

7 (13) an asset's special relationship or special value, if any, to the purposes of

8 any gift instrument, or to the institution;

9 (14) the expected costs of investment and management decisions or strategies;

10 and

11 (15) any other relevant circumstances.

12 (b) An institution's investment and management decisions about an individual

13 asset must be made not in isolation but in the context of the institutional fund's portfolio

14 of investments as a whole and as a part of an overall investment strategy having risk and

15 return objectives reasonably suited to the fund and to the institution.

16 (c) An institution shall make a reasonable effort to verify the facts relevant to the

17 investment and management of institutional fund assets.

18 (d) An institution shall diversify the investments of an institutional fund unless the

19 institution reasonably determines that, because of special circumstances, the purposes of

20 the fund are better served without diversifying.

1 **Preliminary Comments**

2 This section adopts the prudence standard for investment decision making. The
3 section directs the governing board to act as a prudent investor would, using a portfolio
4 approach in making investments and considering the risk and return objectives of the
5 fund. The section lists the factors that commonly bear on decisions in fiduciary investing
6 and also incorporates the duty to diversify investments absent a conclusion that special
7 circumstances make a decision not to diversify reasonable.
8
9 Section 7 is derived from UPIA, which updated trust investment law by adopting
10 modern portfolio theory. *See* UPIA (1994), Prefatory Note. UPIA drew upon revised
11 standards for prudent trust investment promulgated by the American Law Institute in its
12 Restatement (Third) of Trusts: Prudent Investor Rule (1992). For an explanation of the
13 Prudent Investor Act, see John H. Langbein, *The Uniform Prudent Investor Act and the*
14 *Future of Trust Investing*, 81 Iowa L. Rev. 641 (1996).
15
16 UPIA applies to trusts and not to nonprofit corporations, but the Prefatory Note to
17 UPIA explains that "the standards of the Act can be expected to inform the investment
18 responsibilities of directors and officers of charitable corporations." Further, comment b
19 to Restatement (Third) of Trusts: Prudent Investor Rule Section 379, at 190-91 states that
20 "absent a contrary statute or other provision, prudent investor rule applies to investment
21 of funds held for charitable corporations." Section 7 makes clear that the investment
22 rules that apply to charitable trusts through UPIA apply to charitable corporations as well.
23
24 Subsection (a)(8) reflects the fact that some organizations will invest in taxable
25 investments that may be considered unrelated business taxable income for income tax
26 purposes.
27
28 Subsection (d) assumes that prudence requires diversification but permits an
29 institution to determine that nondiversification is appropriate under the circumstances
30 applicable to a fund. UPIA Section 3 and Restatement [cite- Section 127] take the same
31 approach.
32
33 As with UPIA, Section 7 creates a standard of conduct that governs an institution and
34 the institution itself cannot choose whether or not to be bound by Section 7.
35
36 Sections 6 through 8 apply to all funds held by an institution, regardless of whether
37 the institution obtained the funds by gift or otherwise and regardless of whether or not the
38 funds are restricted.
39

1 **SECTION 8. DELEGATION OF INVESTMENT MANAGEMENT.**

2 (a) An institution may delegate to agents outside the institution investment and
3 management functions that a prudent institution could properly delegate under the
4 circumstances. An institution shall act prudently in:

5 (1) selecting an agent;

6 (2) establishing the scope and terms of the delegation, consistent with the
7 purposes of the institutional fund; and

8 (3) periodically reviewing the agent's actions in order to monitor the agent's
9 performance and the agent's compliance with the terms of the delegation.

10 (b) In performing a delegated function, an agent owes a duty to the institution to
11 exercise reasonable care, skill, and caution to comply with the terms of the delegation.

12 (c) By accepting the delegation of an investment or management function from an
13 institution that is subject to the laws of this state, an agent submits to the jurisdiction of
14 the courts of this state in all proceedings arising from the delegation.

15 **Preliminary Comments**

16 The rules on delegation of investment and management functions are based on UPIA
17 Section 9. Although institutions organized as nonprofit corporations were not subject to
18 the same restrictive rules on delegation that applied to trustees of charitable trusts, the
19 goal of this section is to adopt a standard that is consistent with the approach taken by
20 UPIA.
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SECTION 9. RELEASE OR MODIFICATION OF RESTRICTIONS ON USE OR INVESTMENT.

(a) The donor, in writing, may release, in whole or in part, a restriction imposed by a gift instrument on the use or investment of an institutional fund. A release under this subsection may not allow a fund to be used for purposes other than the relief of poverty, the advancement of education or religion, the promotion of health, governmental, or municipal purposes, or other charitable purposes of the institution affected.

(b) An institution may release or modify, in whole or in part, a restriction imposed by a gift instrument on the use or investment of an institutional fund if the fund has a total value of less than [$50,000] and if the institution concludes that the restriction is unlawful, impracticable, impossible to achieve, or wasteful. The institution must use the property in a manner that the governing body of the institution determines, in good faith, to reasonably approximate the purposes expressed in the gift instrument. An institution can act under this subsection without notification to or approval from any person, court, or governmental agency outside the institution.

(c) An institution may apply to the [appropriate] court for release or modification of a restriction imposed by a gift instrument on the use or investment of an institutional fund. The institution shall notify the [Attorney General] who must be given an opportunity to be heard. If the court finds that the restriction is unlawful, impracticable, impossible to achieve, or wasteful, it, by order, may release or modify the restriction, in whole or in part, in a manner that the court determines to reasonably approximate the purposes expressed in the gift instrument.

Preliminary Comments

Subsection (a) permits the release of a restriction if the donor consents. A release with donor consent cannot change the charitable beneficiary of the fund. Although the donor has the power to consent to a release of a restriction, this section does not create a power in the donor that will cause a federal tax problem for the donor. The gift to the institution is a completed gift for tax purposes, the property cannot be diverted from the charitable beneficiary, and the donor has no retained interest in the fund.

Subsection (b) permits an institution to release or modify a restriction on its own, without donor consent or court approval, if the amount of the fund is small and if the institution applies a *cy pres* approach to the release or modification. The subsection assumes that an institutional fund with a value of $50,000 or less is sufficiently small that an institution should be able to release or modify a restriction on the fund without the expense of a judicial proceeding. The amount has been placed in brackets to signal to enacting jurisdictions that they may wish to designate a higher or lower figure.

The circumstances for the application of the authority granted to an institution in Subsection (b) are the same as those in Section 413 of the UTC: unlawful, impracticable, impossible to achieve, or wasteful. The institution must change the restriction in a manner that is in keeping with the intent of the donor and the purpose of the fund. For example, if the value of a fund is too small to justify the cost of administration of the fund as a separate fund, the term “wasteful” would allow the institution to combine the fund with another fund with similar purposes. If a fund had been created for nursing scholarships and the institution closed its nursing school, the institution might appropriately decide to use the fund for other scholarships at the institution.

In using the authority granted under Subsection (b), the institution must make a good faith determination of which alternative use for the fund is reasonably approximate to the original intent. The institution can not divert the fund to an entirely different use. For example, the fund for nursing scholarships could not be used to build a football stadium.

Subsection (c) allows a court to release or modify a restriction, regardless of the size of the fund. The institution must notify the Attorney General if the institution initiates a proceeding under this subsection. Subsection (c) applies in the same manner as the codification of *cy pres* in Section 413 of the UTC.

SECTION 10. SEVERABILITY. If any provision of this [act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or

1 application, and to this end the provisions of this [act] are severable.

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3 **SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

4 applying and construing this Uniform Act, consideration must be given to the need to

5 promote uniformity of the law with respect to its subject matter among states that enact it.

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7 **SECTION 12. REPEAL.**

8 The following acts and parts of acts are repealed: