

DRAFT
FOR DISCUSSION ONLY

**UNIFORM MANAGEMENT OF INSTITUTIONAL
FUNDS ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

WITH PREFATORY NOTE AND REPORTER'S NOTES

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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October 10, 2003

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

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UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

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UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Management of Institutional Funds Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Charitable purposes” means the relief of poverty, the advancement of education or religion; the promotion of health, governmental, or municipal purposes; or other charitable purposes the achievement of which is beneficial to the community.

(~~2~~ 2) “Endowment fund” means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of a gift instrument. ~~An endowment fund~~ The term may ~~consist of multiple~~ include two or more institutional funds; collectively managed; ~~together for the same purpose.~~

(~~2~~ 3) “Gift instrument” means a will, deed, grant, conveyance, agreement in a record, memorandum, appropriation, record, or other governing document, under which property is granted to, transferred to, or held by an institution as an institutional fund. The term can include more than one document ~~creating one or more institutional funds~~ and includes any institutional solicitations in the form of a record from which an institutional fund resulted.

(~~3~~ 4) “Institution” means any ~~nonprofit corporation, trust, unincorporated association, entity,~~ including any government or governmental subdivision or agency, ~~or any other legal entity~~ organized and operated exclusively for charitable purposes. ~~the relief of poverty; the advancement of education or religion; the promotion of health, governmental, or municipal purposes; or other charitable purposes the achievement of which is beneficial to the community; or a governmental organization to the extent that it holds funds exclusively for any of these purposes.~~

(~~4~~ 5) “Institutional fund” means a fund held by an institution for its exclusive use, benefit, or

1 purposes. The term does not include programmatic investments and does not include a fund in which a
2 beneficiary that is not an institution has an interest, other than rights that could arise upon violation or
3 failure of the purposes of the fund. The term may include ~~multiple~~ two or more funds collectively
4 managed, ~~by the institution for its exclusive use, benefit, or purposes.~~

5 (5 6) “Programmatic investment” means an investment held by an institution to accomplish a
6 charitable purpose of the institution and not exclusively for the production of income or the appreciation
7 of the property.

8 (6 7) “Record” means information that is inscribed on a tangible medium or that is stored in an
9 electronic or other medium and is retrievable in perceivable form.

10 **Comment**

11 **Subsection (1). Charitable Purpose.** The definition of charitable purposes uses the same
12 formulation as that in UTC Section 405 and Restatement (Second) of Trusts Section 368. The definition
13 is the standard legal definition of charitable purposes as it has developed from the definition of charity
14 set forth in the English Statute of Charitable Uses, enacted in 1601.

15
16 **Subsection (12). Endowment fund.** An endowment fund is an institutional fund or a part of an
17 institutional fund that is not wholly expendable by the institution on a current basis. An institution may
18 manage several funds together if the funds all have the same purpose. These funds would be considered
19 one endowment fund for purposes of this [act].

20
21 A restriction on use that makes a fund an endowment fund arises from the terms of the gift
22 instrument. A solicitation that suggests in writing that any gifts received pursuant to the solicitation will
23 be held as an endowment may be integrated with the other writings and may be considered part of the gift
24 instrument. Whether the terms of the solicitation become part of the instrument will depend upon the
25 circumstances of the gift and whether a subsequent writing superseded the terms of the solicitation.

26
27 **Subsection (23). Gift instrument.** Gift instrument refers to documents or records that are used
28 for donative transfers and that establish the terms of the gift. A gift instrument may be a writing of any
29 form, including electronic, and may result from solicitation activities or the bylaws of the institution or
30 from other rules of an existing fund. A gift instrument may consist of multiple documents and records.
31 The term also includes an appropriation by a legislature or other public or governmental body for the
32 benefit of an institution.

33
34 **Subsection (34). Institution.** The Act applies generally to institutions organized and operated
35 exclusively for charitable purposes, using the definition of charitable purposes from Section 405 of the
36 Uniform Trust Code. The term includes charitable organizations created as nonprofit corporations,
37 trusts, unincorporated associations, governmental subdivisions or agencies, or any other form of entity,
38 however organized, that is organized and operated for charitable purposes. The term “trust” is intended
39 to mean a trustee acting under a charitable trust. The term includes a trust organized and operated for

1 charitable purposes, regardless of whether a corporation or a charity acts as trustee. The term does not
2 include charitable remainder trusts and charitable lead trusts.

3
4 UMIFA (1972) did not include trusts within its definition of institution. UMIFA (200-) applies
5 to trusts, to nonprofit corporations and to entities operated for charitable purposes regardless of their
6 form of organization. UMIFA appropriately includes trusts because the rules for the management
7 investment of charitable funds should be the same regardless of organizational structure. Many of the
8 provisions of UMIFA come from trust law, so charitable trusts have already been subject to many of
9 these rules.

10
11 The definition of institution includes governmental organizations that hold funds exclusively for
12 the purposes listed in the definition. Some organizations created by state government may fall outside
13 the definition due to the way in which the state created the organizations. Because state arrangements are
14 so varied, creating a definition that encompasses all charitable entities created by states is not feasible.
15 States should consider the core principles of UMIFA for application to governmental institutions. For
16 example, the control over a state university may be held by a State Board of Regents. In that situation,
17 the state may have created a governing structure by statute or in the state constitution so that the
18 university is, in effect, privately chartered. The drafting committee does not intend to exclude these
19 universities from the definition of institution, but additional state legislation may be necessary to address
20 particular situations.

21
22 **Subsection (45). Institutional Fund.** Institutional fund means any fund held by an institution
23 for its own use, benefit or purposes, whether expendable currently or subject to restrictions. An
24 institutional fund does not include programmatic investments. For example, an institution that holds
25 conservation easements for the purpose of enforcing the easements holds them in furtherance of its
26 charitable purpose and not as an investment. The institution may appropriately invest in these assets
27 even though, if viewed as an investment, the rate of return would be low. The investment rules of
28 UMIFA do not apply to programmatic investments.

29
30 A fund held by an institution is not an institutional fund if any beneficiary of the fund is not an
31 institution. For example, a charitable remainder trust held by a charity as trustee for the benefit of the
32 donor during the donor's lifetime, with the remainder interest held by the charity, is not an institutional
33 fund. However, if a governing instrument provides that a fund will revert to the donor if, and only if, the
34 institution ceases to exist, then the fund will be considered an institutional fund.

35
36 **Subsection (7). Record.** This definition was added to clarify that the definition of instrument
37 includes electronic records as defined in Section 2(8) of the Uniform Electronic Transactions Act (1999).

38
39
40 **SECTION 3. DONOR INTENT.** The intent of a donor as contained in a gift instrument
41 ~~creating an institutional fund~~ shall control investment and expenditure determinations made by the
42 institution under this [act]-, subject to the doctrine of charitable purposes. ~~An institution may determine~~
43 ~~the intent of a donor from any applicable gift instrument and from any other evidence that clarifies the~~
44 ~~intent of the donor.~~

1 **Comment**

2 Section 3 expresses the primacy of donor’s intent in decision making under the Act. The
3 provision did not appear in UMIFA (1972), but the section states a common law rule that applied to
4 institutions governed by UMIFA (1972). The Committee included Section 3 in order ~~wanted~~ to
5 emphasize the importance of donor’s intent. The Act does not permit an institution to act without regard
6 to donor’s intent, but rather provides guidance in interpreting donor’s intent. Sometimes donor’s intent
7 can be determined by looking directly at a document signed by the donor, but often evidence of donor’s
8 intent will come from several documents, including solicitations by the institution. If the donor is a
9 governmental entity, the intent may come from the legislature or from a governmental agency. If the
10 donor accedes to an expression of intent developed by the institution or intent expressed in a statutory
11 program, then that will be considered the donor’s intent.
12

13 Although donor’s intent is paramount, trust law and corporate law set limits on what the donor of
14 a charitable institution can require. For example, UTC Section 404 states that the purposes of a trust
15 must be lawful and not contrary to public policy and must be for the benefit of its beneficiaries.
16 Corporate law provides similar restrictions. For example, Section 3.01 of the Revised Model Nonprofit
17 Corporation Act (“RMNCA”) requires that the purposes be lawful. Charitable institutions that wish to
18 obtain tax exempt status must also comply with the regulations under Section 501(c)(3) of the Internal
19 Revenue Code. ~~to obtain tax exempt status.~~
20
21

22 **SECTION 4. STANDARD OF CARE; PRUDENCE. PRUDENT INVESTING AND**
23 **MANAGING OF INSTITUTIONAL FUNDS.**

24 (a) An institution shall exercise the standard of care consistent with its form of organization. An
25 institution in corporate form shall be governed by the applicable corporate law of this State, and an
26 institution in trust form shall be governed by the applicable trust law of this State.

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

31 ~~prudent investor would means that an institution shall consider:~~

32 (1) the terms of the gift instrument;

33 (+ 2) the purposes of the institution;

34 (2 3) the purposes of the institutional fund;

35 (3 4) the expenditure requirements of the fund;

1 This section adopts the prudence standard for investment decision making. The section directs
2 the governing board to act as a prudent investor would, using a portfolio approach in making investments
3 and considering the risk and return objectives of the fund. The section lists the factors that commonly
4 bear on decisions in fiduciary investing and also incorporates the duty to diversify investments absent a
5 conclusion that special circumstances make a decision not to diversify reasonable.
6

7 Section 7 4 is derived from UPIA, which updated trust investment law by adopting modern
8 portfolio theory. See UPIA (1994), Prefatory Note. UPIA drew upon revised standards for prudent trust
9 investment promulgated by the American Law Institute in its Restatement (Third) of Trusts: Prudent
10 Investor Rule (1992). For an explanation of the Prudent Investor Act, see John H. Langbein, *The*
11 *Uniform Prudent Investor Act and the Future of Trust Investing*, 81 Iowa L. Rev. 641 (1996).
12

13 UPIA applies to trusts and not to nonprofit corporations, but the Prefatory Note to UPIA explains
14 that “the standards of the Act can be expected to inform the investment responsibilities of directors and
15 officers of charitable corporations.” Further, comment b to Restatement (Third) of Trusts: Prudent
16 Investor Rule Section 379, at 190-91 states that “absent a contrary statute or other provision, prudent
17 investor rule applies to investment of funds held for charitable corporations.” Section 7 4 makes clear
18 that the investment rules that apply to charitable trusts through UPIA apply to charitable corporations as
19 well.
20

21 Subsection (b)(1), directing the institution to consider the terms of the gift instrument, means that
22 the institution must consider the donor’s intent in making decisions under Section 4 but does not mean
23 that the donor can or should control the management of the institution.
24

25 Subsection (a b)(8 9) reflects the fact that some organizations will invest in taxable investments
26 that may be considered unrelated business taxable income for income tax purposes.
27

28 Subsection (d e) assumes that prudence requires diversification but permits an institution to
29 determine that nondiversification is appropriate under the circumstances applicable to a fund. UPIA
30 Section 3 and Restatement [cite- Section 127] take the same approach.
31

32 As with UPIA, Section 7 4 creates a standard of conduct that governs an institution and the
33 institution itself cannot choose whether or not to be bound by Section 7 4.
34

35 Sections ~~6 through~~ 8 4, 5 and 7 apply to all funds held by an institution, regardless of whether the
36 institution obtained the funds by gift or otherwise and regardless of whether or not the funds are
37 restricted.
38

39 **Comment**

40
41 The Drafting Committee discussed at great length the standard that should govern nonprofit
42 managers. Since the decision in *Stern v. Lucy Webb Hayes National Training School for Deaconesses*,
43 381 F. Supp. 1003 (1974), the trend has been to hold directors of nonprofit corporations to a standard
44 similar to the corporate standard. Courts have described this shift from a standard closer to a trust-law
45 standard as a move to hold directors liable for gross negligence and not ordinary negligence. The
46 concern may be in part to limit personal liability of directors, so that charitable institutions will not find
47 themselves without directors altogether. Thus, business judgment standards (or “best judgment”
48 standards) have been applied in determining director liability. For trusts, the standards relating to trustee
49 liability have been shifting, too. For example, UTC Section 1010 limits the personal liability of trustees

1 on contracts if the fiduciary capacity was disclosed. And although a shift toward corporate rules has
2 occurred with respect to director liability, courts continue to apply trust rules to *cy pres* modifications.
3 The Committee concluded that although courts and statutes may state that different standards exist, when
4 the standards are applied the results for charitable institutions are likely to be the same regardless of
5 whether they are organized as corporations or as trusts.
6

7 Although the prudence standard adopted in UMIFA (200-) is derived from trust law, the
8 Committee believes that the standard is consistent with the business judgment standard under corporate
9 law, as applied to charitable institutions. That is, a manager operating a charitable organization under the
10 business judgment rule would look to the same factors as those identified by the prudent investor rule.
11 Prudence is an evolving concept that has been influenced by trust law, and the trust law norms probably
12 already inform managers of nonprofit corporations. The Drafting Committee decided that by adopting
13 the language of UPIA, UMIFA could clarify that UPIA's articulation of the standards of prudent
14 investing applies to all charitable institutions. The Committee believed that the greater precision of the
15 prudence norms of the Restatement and UPIA could helpfully inform managers of charitable institutions.
16

17
18 **SECTION 6 5. INVESTMENT AUTHORITY.** In addition to an investment authorized by law
19 other than this [act] or by any gift instrument, and subject to any specific limitations set forth in a gift
20 instrument or in law other than this [act], an institution:

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

25 (2) may invest in any kind of property or type of investment consistent with the standards of
26 Section 4 ~~this [act]~~;

27 (3) may make programmatic investments;

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

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

1 **Comment**

2
3 UMIFA (200-) derives its rules on investment authority from UPIA. Subsection (1) requires the
4 institution to review property on receipt and make decisions concerning investment of the property.
5 Subsection (1) authorizes a governing board to consider factors such as the mission of the institution, the
6 current programs of the institution and the desire to cultivate additional donations from a donor, in
7 addition to factors related more directly to the asset's potential as an investment, in deciding whether to
8 retain property. This subsection is based on UPIA Section 4.
9

10 Subsection (2) provides for broad investment authority. This subsection is derived from UPIA
11 Section 2(e).
12

13 UMIFA applies only to investment assets and not to assets used in furtherance of an institution's
14 purposes. Thus, subsection (3) specifically authorizes an institution to make programmatic investments
15 and excludes those investments from the other rules applicable to investment decision making. A
16 programmatic investment must have relevance to the purposes of the institution. A university located in
17 a city might want to invest in a neighborhood near the university to improve the conditions in that
18 neighborhood. The investment would be considered programmatic because of its general relevance to the
19 purposes of the university. The act makes no distinction between assets an institution owns at inception
20 and retains and those assets the institution decides to acquire. In either case, the controlling issue is
21 whether the assets are related to the purposes of the institution and not the projected rate of return for the
22 investment. Values other than the generation of economic benefits to the institution legitimate
23 programmatic investments.
24
25

26 **SECTION 5 6. EXPENDITURE OF ENDOWMENT FUNDS; RULE OF**
27 **CONSTRUCTION.**

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

- 31 (1) the terms of the gift instrument;
- 32 (2) the purposes of the institution;
- 33 (3) the purposes of the endowment fund;
- 34 (4) the long-term and short-term needs of the institution in carrying out its purposes;
- 35 (5) other resources of the institution;
- 36 (6) general economic conditions;
- 37 (7) the possible effect of inflation or deflation;

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

2 (9) the investment policy of the institution; ~~and~~

3 (10) the duration of the endowment fund; ~~and~~

4 (11) any other relevant circumstances.

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

7 (c) In determining the intent of a donor, a designation of a gift as an endowment, or a direction or
8 authorization in the instrument to use only “income”, interest”, “dividends”, or “rents, issues, or profits”,
9 or “to preserve the principal intact”, or words of similar import, does not limit ~~the standard set forth in~~
10 subsection (a) the authority to expend funds under subsection (a). Unless a gift instrument specifically
11 ~~directs~~ limits the authority of the institution to ignore the standard set forth in ~~under~~ subsection (a), the
12 use of one of these terms shall be interpreted as the expression of the intent of the donor to create a fund
13 that will exist in perpetuity or for a period specified by the donor. These rules of construction apply to
14 instruments executed or in effect before or after the effective date of this [act].

15 **Comment**

16
17 **Purpose and Scope of Revisions.** This section revises the provision in UMIFA (1972) that
18 permitted the expenditure of appreciation of an endowment fund to the extent the fund had appreciated in
19 value above the fund’s historic dollar value. UMIFA (1972) defined historic dollar value to mean the
20 value of all contributions to the fund. The new approach abandons the use of historic dollar value as a
21 floor for expenditures and provides more flexibility to the governing board in making decisions about
22 whether to expend any part of an endowment fund.
23

24 Section 5 6 permits expenditures from an endowment fund to the extent the governing board
25 determines that the expenditures are prudent after considering the factors listed in subsection (a). These
26 factors emphasize the importance of keeping the purposes of the institution and of the endowment fund in
27 mind while also considering economic conditions. As under UMIFA (1972), expenditures are not
28 dependent on the characterization of assets as income or principal and are not limited to the amount of
29 income and unrealized appreciation.
30

31 Institutions have operated effectively under UMIFA (1972), and the experience has been that
32 institutions have operated more conservatively than historic dollar value would have permitted.
33 Institutions have no incentive to spend everything the law permits them to spend, and good practice has
34 been to provide for modest expenditures while maintaining the purchasing power of a fund. This has
35 been true even though UMIFA (1972) does not require an institution to maintain a fund’s purchasing

1 power and allows an institution to spend any amounts in a fund above historic dollar value. The Drafting
2 Committee concluded that eliminating historic dollar value and providing institutions with more
3 discretion would not lead to depletion of endowment funds. Instead, UMIFA (200-) should encourage
4 institutions to establish a spending approach that will be responsive to short-term fluctuations in the
5 value of the fund. Section ~~5~~ 6 allows an institution to maintain appropriate levels of distributions in
6 times of economic downturn or economic strength. In some years, accumulation rather than spending
7 will be appropriate, and in other years an institution may appropriately make distributions even if a fund
8 has generated no investment return that year.

9
10 Several levels of safeguards exist to prevent institutions from depleting endowment funds or
11 diverting funds from the purposes for which they were created. Donors can restrict gifts and can provide
12 specific instructions to donee institutions as to appropriate uses for assets contributed. Within
13 institutions, fiduciary duties govern the persons making decisions on expenditures. Those persons must
14 operate with the best interests of the institution in mind and in keeping with the intent of donors. If an
15 institution diverts assets from its charitable purposes, the state attorney general can enforce the charitable
16 interests of the public. By relying on these safeguards while providing institutions with adequate
17 discretion to make decisions on appropriate expenditures, the act creates a standard that takes into
18 consideration the diversity of the charitable sector. The Committee expects that industry standards will
19 continue to evolve and inform institutions as the institutions apply this standard.

20
21 UMIFA (200-) gives institutions guidance on factors to consider in exercising discretion, but
22 does not take away the discretion by providing a cap or floor for distribution. The Drafting Committee
23 discussed whether to provide a safe harbor for spending within a range based on percentages of the assets
24 of the fund. The Committee concluded that specifying a range for appropriate distributions was unwise
25 because a fixed range could not take into account the factors listed in subsection (a) or changes in market
26 conditions. A fixed range might be appropriate under current conditions but would be unlikely to remain
27 appropriate over time. Institutions have done a good job of developing spending policies under UMIFA
28 (1972) and should be able to continue to develop spending policies that take into consideration the
29 specific needs of a particular fund. Prudent decision making after considering all the factors is the
30 standard under UMIFA (200-). A safe-harbor would simply create a new standard that could not take
31 into account the needs of individual institutions and funds.

32
33 For a discussion of spending approaches, see Joel C. Dobris, *New Forms of Private Trusts for the*
34 *Twenty-First Century—Principal and Income*, 31 Real. Prop., Prob. & Tr. J. 1 (1996). For example,
35 Dobris suggests spending 5% or 4% of a five-year moving average of market values might be
36 appropriate. *Id.*, at 39.

37
38 In making decisions about expenditures of endowment funds, donor's intent always controls.
39 UMIFA (200-) does not allow an institution to convert an endowment fund into a non-endowment fund
40 nor does the Act allow the institution to ignore a donor's intent that a fund be maintained as an
41 endowment. Rather, the Act provides rules of construction to assist institutions in interpreting donor's
42 intent. The Act assumes that if a donor wants an institution to spend "only the income" from a fund,
43 what the donor intends is that the fund continue in perpetuity and the institution expend amounts that
44 represent a reasonable return on investments. The donor is unlikely to be concerned about designation of
45 returns as "income" or "principal" under accounting principles. Rather the donor likely assumes that the
46 institution will use modern investing strategies like total-return investing to provide enough funds to
47 distribute while maintaining the long-term viability of the fund. The Act provides default rules to
48 construe donor's intent.

1 If a donor indicates that the rules on investing or expenditures under the Act do not apply to a
2 particular fund, then as a practical matter the institution will probably invest the fund separately. Thus, a
3 decision to direct expenditure rules may have consequences for the way the institution invests the fund.
4

5 Endowment funds include funds that may last in perpetuity but also funds that should continue
6 for a fixed term of years. The Act requires the institution to consider the intended duration of the fund in
7 making determinations about spending. For example, if a donor directs that a fund be spent over 20
8 years, Section 5 will guide the institution in making distribution decisions. The institution would
9 amortize the fund over 20 year rather than try to maintain the fund in perpetuity.
10

11 As a rule of construction, Section 3 6 applies retroactively. Retroactive application is
12 appropriate, because Section 3 6 does not alter the substance of an existing contract, but rather serves as
13 a default rule that implements donor’s intent. The Colorado Supreme Court recently considered the
14 question of retroactive application of a default statute involving the donative aspect of an insurance
15 contract. See *In re Estate of DeWitt*, 54 P. 3d 849 (Colo. 2002). In holding that the statute did not
16 violate the Contracts Clause, the court cited approvingly from the JEB Statement Regarding the
17 Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents, 17 Am. Coll. Tr. &
18 Est. Couns. 184 app. II (1991). The JEB Statement explains why retroactive application of default
19 statutes is appropriate and is not unconstitutional and states, “The JEB is aware of no authority for the
20 application of the Contracts Clause to state legislation applying altered rules of construction or other
21 default rules to pre-existing documents in any field of law, and especially not in the filed of estates,
22 trusts, and donative transfers.” JEB Statement, at 4 (citing J. Nowak & R. Rotunda, Constitutional Law §
23 11.8, at 394 et seq. (4th ed. 1991).
24
25

26 ~~**SECTION 7. PRUDENT INVESTING AND MANAGING OF INSTITUTIONAL FUNDS;**~~

27 ~~(a) In managing an institutional fund, investing as a~~
28

29 **SECTION 8 7. DELEGATION OF INVESTMENT MANAGEMENT.**

30 (a) Subject to any specific limitations set forth in a gift instrument or in law other than this [act],

31 ~~An~~ institution may delegate to agents outside the institution investment and management functions that
32 a prudent institution could properly delegate under the circumstances. An institution shall act prudently
33 in:

34 (1) selecting an agent;

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

37 (3) periodically reviewing the agent’s actions in order to monitor the agent’s

1 performance and the agent’s compliance with the terms of the delegation.

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

4 (c) Members of the governing body of an institution who comply with the requirements of
5 subsection (a) are not liable to the institution for the decisions or actions of the agent to whom the
6 function was delegated.

7 (e d) By accepting the delegation of an investment or management function from an institution
8 that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all
9 proceedings arising from the delegation.

10 **Comment**

11 The rules on delegation of investment and management functions are based on UPIA Section 9.
12 Although institutions organized as nonprofit corporations were not subject to the same restrictive rules
13 on delegation that applied to trustees of charitable trusts, the goal of this section is to adopt a standard
14 that is consistent with the approach taken by UPIA. The rules in this Section 7 do not represent a
15 substantive change from the rules in Section 5 of UMIFA (1972).

16
17
18 **SECTION 9 8. RELEASE OR MODIFICATION OF RESTRICTIONS ON USE OR**
19 **INVESTMENT.**

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

25 (b) An institution may release or modify, in whole or in part, a restriction imposed by a gift
26 instrument on the use or investment of an institutional fund if the fund has a total value of less than
27 [\$50,000] and if the institution concludes that the restriction is unlawful, impracticable, impossible to
28 achieve, or wasteful. The institution must use the property in a manner that the governing body of the

1 institution determines, in good faith, to ~~reasonably approximate~~ be consistent with the purposes
2 expressed in the gift instrument. An institution can act under this subsection without notification to or
3 approval from any person, court, or governmental agency outside the institution.

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

10 **Comment**

11
12 Section 8 expands the rules on releasing or modifying restrictions that are found in Section 7 of
13 UMIFA (1972). Subsection (a) restates the rule from UMIFA (1972) allowing the release of a restriction
14 with donor consent. Subsection (c) describes the application of court-ordered cy-pres but does not
15 require notice to the donor as was required in UMIFA (1972). Subsection (b), a new provision, permits
16 an institution to apply cy-pres on its own for small funds.
17

18 Subsection (a) permits the release of a restriction if the donor consents. A release with donor
19 consent cannot change the charitable beneficiary of the fund. Although the donor has the power to
20 consent to a release of a restriction, this section does not create a power in the donor that will cause a
21 federal tax problem for the donor. The gift to the institution is a completed gift for tax purposes, the
22 property cannot be diverted from the charitable beneficiary, and the donor has no retained interest in the
23 fund.
24

25 Subsection (b) permits an institution to release or modify a restriction on its own, without donor
26 consent or court approval, if the amount of the fund is small and if the institution applies a *cy pres*
27 approach to the release or modification. The subsection assumes that an institutional fund with a value
28 of \$50,000 or less is sufficiently small that an institution should be able to release or modify a restriction
29 on the fund without the expense of a judicial proceeding. The amount has been placed in brackets to
30 signal to enacting jurisdictions that they may wish to designate a higher or lower figure.
31

32 The circumstances for the application of the authority granted to an institution in subsection (b)
33 are the same as those in Section 413 of the UTC: unlawful, impracticable, impossible to achieve, or
34 wasteful. The institution must change the restriction in a manner that is in keeping with the intent of the
35 donor and the purpose of the fund. For example, if the value of a fund is too small to justify the cost of
36 administration of the fund as a separate fund, the term “wasteful” would allow the institution to combine
37 the fund with another fund with similar purposes. If a fund had been created for nursing scholarships and
38 the institution closed its nursing school, the institution might appropriately decide to use the fund for
39 other scholarships at the institution.
40

1 In using the authority granted under subsection (b), the institution must make a good faith
2 determination of which alternative use for the fund is reasonably approximate to the original intent. The
3 institution can not divert the fund to an entirely different use. For example, the fund for nursing
4 scholarships could not be used to build a football stadium.
5

6 Subsection (c) allows a court to release or modify a restriction, regardless of the size of the fund.
7 The institution must notify the Attorney General if the institution initiates a proceeding under this
8 subsection. Subsection (c) applies in the same manner as the codification of *cy pres* in Section 413 of the
9 UTC.
10

11
12 **SECTION ~~10~~ 9. SEVERABILITY.** If any provision of this [act] or its application to any person
13 or circumstances is held invalid, the invalidity does not affect other provisions or applications of this
14 [act] which can be given effect without the invalid provision or application, and to this end the provisions
15 of this [act] are severable.
16

17 **SECTION ~~10~~ 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying
18 and construing this Uniform Act, consideration must be given to the need to promote uniformity of the
19 law with respect to its subject matter among states that enact it.
20

21 **SECTION ~~12~~ 11. REPEAL.** The following acts and parts of acts are repealed: