DRAFT

FOR DISCUSSION ONLY

UNIFORM

MANAGEMENT OF INSTITUTIONAL FUNDS

ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

April 25-27, 2003
Chicago, Illinois

WITH PREFATORY NOTE AND REPORTER'S NOTES

April 4, 2003

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

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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 Trust Code (2000) [hereafter referred to as the UTC] expanded the application of the doctrine of cy pres in a manner similar to the release of restriction provision in UMIFA (1972). Both of 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 whether a charitable organization is organized as a trust or as a nonprofit corporation. The rules governing expenditures from endowment funds have been modified to give a governing board more flexibility in making expenditure decisions, so that the board can cope with fluctuations in the value of the endowment. These rules are available to decision makers of charities organized either as charitable trusts or as nonprofit corporations. The provisions governing the release of restrictions have been changed to reflect the cy pres standards in the UTC and to permit more efficient management of institutional funds. Finally, UMIFA (200-) provides that under limited circumstances a donor can enforce a written restriction on the use of a gift. This latter provision is more restrictive than the UTC Section 405(c) but creates a right of enforcement that did not exist under UMIFA (1972).

Other Legal Rules. UMIFA (200-) addresses investment issues and issues relating to endowment funds but is not a comprehensive statute addressing all legal issues that apply to charitable organizations. A charitable organization will continue to be governed by rules applicable to charitable trusts, if it is organized as a trust, or rules applicable to nonprofit corporations, if it is organized as a nonprofit corporation.

Standard of Conduct. Shortly after the promulgation of UMIFA (1972), the United States District Court for the District of Columbia announced in the Sibley Hospital case that the corporate standard of care, rather than the trust standard, applied to directors of a nonprofit corporation. *Stern v. Lucy Webb Hayes National Training School for Deaconesses*, 381 F. Supp. 1003 (DC 1974). A number of states have adopted the corporate standard by statute, and the Revised Model Nonprofit Corporation Act (1988) (hereafter referred to as RMNCA), drafted by a subcommittee of Committee on Corporate Laws of the American Bar Association, also uses the corporate standard.

Although language from business statutes was used in creating the standard of care in the RMNCA, the fact that directors of a charitable corporation have a duty to act in the best interests of a charity suggests that describing the standard applied to charitable corporations as a business standard is not accurate. Governing boards of charitable organizations have a duty to manage the organization for the charitable purposes of the organization and for the public good. The fact that the public has an interest in charitable organizations is reflected in the authority of the Attorney General to supervise charities. The comments to the RMNCA note that directors of a nonprofit have different goals and resources than directors of a business corporation. For that reason, the standards of care applicable to trustees of charitable trusts and to directors of charitable corporations, at least as to investment decision-making, have been considered to be the same. See Harvey P. Dale, *Nonprofit Directors and Officers - Duties and Liabilities for Investment Decisions,* 1994 N.Y.U. Conf. Tax Plan. 501(c)(3) Org's. Ch. 4; Bevis Longstreth, Modern Investment Management and the Prudent Man Rule 7 (1986).

The Drafting committee determined that the standard of care for investment decision making should be consistent for trustees and directors. The standard incorporated in UMIFA (200-) applies to the governing boards of charitable corporations the standards that already apply, through UPIA, to charitable trusts. In addition, the standards for the use of endowment funds under UMIFA (200-) are available to both charitable trusts and charitable corporations.

Default Rules. Section 3 of UMIFA is a default rule, and an instrument making a gift or creating an endowment can change the application of the rule. Either a donor or the institution itself can change the effect of Section 3. In contrast, the other provisions of UMIFA can be changed only by a donor with respect to the donor's gift and only if the restriction on the gift does not violate public policy. Provisions of UMIFA other than Section 3 cannot be changed by the institution itself.

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

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

SECTION 2. DEFINITIONS. In this [~~Act~~ act]:

(1) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the ~~applicable gift~~ instrument making the gift, as modified from time to time pursuant to Section 9 of this [act].

(2) "Governing board" means the body responsible for ~~the~~ management of an institution or ~~of an~~ institutional fund.

(3) "Institution" means any incorporated or unincorporated organization organized and operated exclusively for 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. ~~For purposes of Section 3 only, "institution" means a trust to the extent that it holds fund exclusively for any of these purposes~~.

(4) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes. The term ~~excludes~~ does not include a fund held for an institution by a trustee that is not an institution~~. The term also excludes~~ or a fund in which a beneficiary that is not an institution has an interest, other than ~~possible~~ rights that could arise upon violation or failure of the purposes of the fund.

~~(5) "historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the institution is conclusive.~~

(5) "~~Gift~~ Instrument" means a will~~;~~, deed~~;~~, grant~~;~~, conveyance~~;~~, agreement~~;~~, memorandum~~;~~, ~~electronic record; writing;~~ or other ~~governing document, including the terms of any institutional solicitations from which an institutional fund resulted,~~ record under which property is granted to, transferred to or held by an institution as an institutional fund.

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

~~(7) "program-related asset" means an asset held by the institution for the primary purpose of accomplishing a purpose of the institution and not primarily for the production of income or the appreciation of the property.~~

Comment

Subsection (1). Endowment fund. An endowment fund is an institutional fund or a part of an institutional fund that is not wholly expendable by the institution on a current basis. A restriction on use that makes a fund an endowment fund arises from the terms of the instrument making the gift. A solicitation that suggests in writing that any gifts received pursuant to the solicitation will be held as an endowment may be integrated with the other writings and may be considered part of the instrument making the gift. Whether the terms of the solicitation become part of the instrument will depend upon the circumstances of the gift and whether a subsequent writing superceded the terms of the solicitation.

Subsection (3). Institution. The Act applies generally to institutions organized and operated for charitable purposes, using the definition of charitable purposes from Section 405 of the Uniform Trust Code. The definition includes charitable organizations created as nonprofit corporations or as unincorporated associations but not organizations created as trusts. Thus, community foundations in corporate form are included in this definition, but community foundations organized as trusts are not. The definition does not include trusts because many of the provisions included in UMIFA already apply to trusts through UPIA (1997) and the UTC (2000). UMIFA is needed for charities organized as corporations because those charities do not have the benefit of these statutes. However, Section 3 applies to charitable organizations created as trusts, because the provisions of that section are not otherwise available to trusts.

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

Subsection (4). Institutional Fund. Institutional fund means any fund held by an institution for its own use, benefit or purposes, whether expendable currently or subject to restrictions. An institutional fund does not include program-related assets. Program-related assets are those held by the institution primarily to accomplish a purpose of the institution and not primarily for the production of income or the appreciation of the property. For example, an institution that holds conservation easements for the purpose of enforcing the easements holds them in furtherance of its charitable purpose and not as an investment. The investment rules of UMIFA do not apply to program-related assets.

A fund held by a trustee that is not an institution as defined in UMIFA is not an institutional fund. Thus, a fund managed by a bank or trust company as trustee is not an institutional fund, even if an institution is the sole beneficiary of the fund. A fund held by an institution is not an institutional fund if any beneficiary of the fund is not an institution. For example, a charitable remainder trust held by a charity as trustee for the benefit of the donor during the donor's lifetime with the remainder interest held by the charity is not an institutional fund.

Subsection (5). Instrument. Instrument refers only to documents or records that are used for donative transfers. This definition replaces "gift instrument" from the prior Act, but deleting the word "gift" is not intended to suggest that an instrument can have a purpose other than a donative one. The instrument establishes the terms of the gift. The instrument may be a writing of any form, including electronic, and may result from solicitation activities or the bylaws of the institution or from other rules of an existing fund.

Subsection (6). 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. APPROPRIATION OF APPRECIATION.**~~

~~The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by Section 6. This Section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution.~~

~~**SECTION 4. RULE OF CONSTRUCTION.**~~

~~Section 2 does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended. A restriction upon the expenditure of net appreciation may not be implied from a designation of a gift as an endowment, or from a direction or authorization in the applicable gift instrument to use only "income," "interest," "dividends," or "rents, issues or profits," or "to preserve the principal intact," or a direction which contains other words of similar import. This rule of construction applies to gift instruments executed or in effect before or after the effective date of this Act.~~

SECTION 3. EXPENDITURE OF ENDOWMENT FUNDS.

(a) [Inclusion of Trusts.] For purposes of this section, institution includes a trust to the extent it holds funds exclusively for 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.

~~(a)~~ (b) [Expenditure.] A governing board may expend so much of an endowment fund as the governing board determines to be prudent for the uses, benefits, and purposes for which the endowment fund is established. ~~consistent with the goal of conserving the purchasing power of the endowment fund.~~ In making its determination, the governing board shall ~~use~~ exercise reasonable care, skill, and caution ~~in considering the following~~ and shall consider:

(1) the purposes of the institution;

(2) the intent of the donors of the endowment fund;

(3) the terms of the ~~applicable~~ instrument making the gift;

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

(5) general economic conditions;

(6) the possible effect of inflation or deflation;

(7) other resources of the institution; and

(8) perpetuation of the endowment.

(c) ~~Expenditures~~ An expenditure made under ~~this~~ subsection (b) ~~will be considered to be~~ is prudent if the amount expended is consistent with the goal of preserving the purchasing power of the endowment fund.

~~(b)~~ (d) [Construing Terms.] A restriction upon the expenditures ~~of an endowment fund~~ that may be made under this Section 3 ~~The creation of an endowment fund~~ may not be ~~implied~~ inferred from a designation of a gift as an endowment, or from a direction or authorization in the instrument to use only “income~~;~~”, interest~~;~~”, “dividends~~;~~”, or “rents, issues, or profits~~;~~”, or “to preserve the principal intact~~;~~”, or words of similar import.

~~(c)~~ (e) [Contraindiction.] ~~The provisions of subsection (a) shall~~ Subsection (a) does not apply to an ~~instruments~~ instrument if the instrument ~~so indicates by stating~~ states, “I direct that the expenditure provision of [subsection ~~(a)~~ (b) of Section 3 of [UMIFA]] not apply to this gift” or uses words of similar import.

~~(d)~~ (f) This section does not limit the authority of a governing board to expend funds as permitted under ~~other~~ law~~,~~ other than this [act], the terms of the instrument, or the [articles of incorporation or trust agreement] of the institution.

~~(e)~~ (g) [Effective Date.] ~~Except as otherwise provided, this~~ This section applies to instruments executed or in effect before or after the effective date of this [~~Act~~ act].

Comment

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

Section 3 permits expenditures from an endowment fund to the extent the governing board determines that the expenditures are prudent and after exercising reasonable care, skill and caution in considering factors listed in Section 3. These factors emphasize the importance of keeping the purposes of the institution and the intent of donors in mind while also considering economic conditions. Expenditures are not dependent on the characterization of assets as income or principal and are not limited to the amount of income and unrealized appreciation.

The drafting committee intends that institutions preserve principal in endowment funds but recognizes that a total-return approach to spending makes sense for many institutions. A governing board acting prudently will not likely spend the entire endowment fund, but, depending on other facts, a governing board’s decision to spend more than current income may well be prudent. For example, during an economic downturn, spending by institutions may be necessary and prudent to fulfill their purposes, even if income is limited or nonexistent.

The intent of Section 3 is not to allow a governing board to convert an endowment fund into a non-endowment fund, but rather to preserve the purchasing power of the value of an endowment fund. An institution should be able to establish a spending approach that will be responsive to short-term fluctuations in the value of the fund. Section 3 allows an institution to maintain appropriate levels of spending in times of economic downturn or economic strength. Under some circumstances, authorizing expenditures from an endowment fund may be consistent with the purposes of the institution and of the fund, even if current income and appreciation is low or nonexistent.

The section does not provide a safe harbor that would permit spending at a fixed percent of assets. Doing so would adversely affect the approach adopted in Section 3, that of allowing the institution to make determinations based on the list of factors set out in Section 3. 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.

Subsection (f). Provisions in the articles of incorporation of an institution can give a governing board authority to make distributions beyond those authorized by this section. The drafting committee recognizes that a change to the articles of incorporation could affect the expectations of a donor who contributed to an endowment fund. Although an institution may be able to amend its governing documents to create a different standard, other laws governing the institution would curb any tendency to make amendments in derogation of rights of donors. Further, governing documents typically do not contain detail with respect to investments or expenditures.

Application to Trusts. Section 3 applies to trusts as well as to nonprofit corporations. These provisions are not available for charitable trusts under the existing laws that apply to charitable trusts. The section creates an opt-in standard that can be used by any institution.

Section 3 does not limit the variance power of community foundations.

SECTION 4. INSTITUTIONAL FUNDS: INVESTMENT AND MANAGEMENT; STANDARD OF CONDUCT.

(a) ~~Members of a~~ A governing board shall invest and manage an institutional fund as a prudent investor would ~~by considering the purposes, distribution requirements, and other circumstances of the fund~~. In satisfying this standard, the governing board shall exercise reasonable care, skill, and caution~~.~~ and shall consider:

(1) the purposes of the fund;

(2) the distribution requirements of the fund;

~~(1)~~ (3) long-term and short-term needs of the institution in carrying out its purposes;

~~(2)~~ (4) its present and anticipated financial resources;

~~(3)~~ (5) general economic conditions;

~~(4)~~ (6) the possible effect of inflation or deflation;

~~(5)~~ (7) the expected tax consequences, if any, of investment decisions or strategies;

~~(6)~~ (8) the role that each investment or course of action plays within the overall investment portfolio of the institutional fund;

~~(7)~~ (9) the expected total return from income and the appreciation of its investments;

~~(8)~~ (10) other resources of the institution;

~~(9)~~ (11) the needs of the institution and the institutional fund for liquidity, regularity of income, and preservation or appreciation of capital; ~~and~~

~~(10)~~ (12) an asset's special relationship or special value, if any, to the purposes of ~~the applicable gift~~ any instrument making a gift, or to the institution~~.~~; and

(13) any other relevant circumstances.

(b) A governing board's investment and management decisions about an individual ~~assets shall~~ asset must be made ~~not in isolation but~~ in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

~~(c) Among circumstances that a governing board shall consider are:~~

~~(d)~~ (c) A governing board shall make a reasonable effort to verify the facts relevant to the investment and management of institutional fund assets.

~~(c)~~ <u>(d)</u> A governing board shall diversify the investments of an institutional fund unless the board reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversifying.

~~(f)~~ <u>(e)</u> A governing board shall invest and manage the assets of an institutional fund solely in the interest of the institution.

Comment

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

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

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

Subsection (c)(7) reflects the fact that some organizations will invest in taxable investments that may be considered unrelated business taxable income for income tax purposes.

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

Sections 4 through 7 apply to all funds held by an institution, regardless of whether the institution obtained the funds by gift or otherwise and regardless of whether or not the funds are restricted.

SECTION 5. INVESTMENT AUTHORITY. In addition to an investment ~~otherwise~~ authorized by law other than this [act], or ~~by the applicable gift~~ any instrument making a gift, and without restriction to investments a fiduciary may make, ~~the~~ a governing board, subject to any specific limitations set forth in ~~the applicable gift~~ an instrument making a gift or in the applicable law other than law relating to investments by a fiduciary ~~may~~:

~~(2)~~ (1) within a reasonable time after receiving property ~~contributed by a donor, the governing board~~ 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 ~~with~~ the requirements of this [~~Act~~ act];

~~(1)~~ (2) may invest in any kind of property or type of investment consistent with the standards of this [~~Act~~ act];

~~(3) invest in and retain program-related assets for as long as the governing board deems [prudent] [in the best interests of the institution] [advisable].~~

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

(4) 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 organizations in which funds are commingled and investment determinations are made by persons other than the governing board.

Comment

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.

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

UMIFA applies only to investment assets and not to program-related assets. Thus, a decision to invest in assets used in furtherance of the institution's purposes will not be subject to the prudence standard. In contrast, "social investing" that involves accepting below-market returns in favor of benefits to particular social causes will not be considered prudent. If the returns on investments are comparable to market returns, then a governing board can consider the social purposes of particular investments in making investment decisions. However, the fact that an investment benefits a desirable – from the standpoint of the institution – cause is not sufficient to relieve a governing board from the duty to invest prudently.

SECTION 6. DELEGATION OF INVESTMENT MANAGEMENT.

(a) Except as ~~otherwise~~ provided by ~~applicable~~ law <u>other than this act</u> relating to governmental institutions or funds, a governing board may delegate investment and management functions that a prudent governing body could properly delegate under the circumstances. A governing board shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;

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

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

(b) In performing a delegated function, an agent owes a duty to the governing board to exercise reasonable care to comply with the terms of the delegation.

(c) The members of a governing board who comply with the requirements of subsection (a) are not liable for the decisions or actions of the agent to ~~whom~~ which the function was delegated.

(d) By accepting the delegation of an investment or management function from a governing board of an institution that is subject to the laws of this ~~State~~ state, an agent submits to the jurisdiction of the courts of this ~~State~~ state in all ~~actions~~ proceedings arising from the delegation.

Comment

The rules on delegation of investment and management functions are based on UPIA Section 9. Although institutions organized as nonprofit corporations were not subject to the same restrictive rules on delegation that applied to trustees of charitable trusts, the goal of this section is to adopt a standard that is consistent with the approach taken by UPIA.

In selecting the persons to whom investment authority is delegated, fiduciaries must exercise the standard of conduct set forth in Section 3 of this Act.

Members of the governing board have a duty to prevent a breach by other members.

~~(c)~~ **SECTION 7. INVESTMENT COSTS.** In investing and managing ~~trust~~ assets of an institutional fund, a governing board may only incur costs that are appropriate and reasonable in relation to the assets and the purposes of the institution.

SECTION 8. ENFORCEMENT OF RESTRICTED GIFTS.

(a) If an ~~gift~~ instrument making a gift restricts the use of assets ~~transferred to an institution~~ having at the time of the gift a value of more than [$500,000], the donor may maintain a proceeding to enforce the restriction on the gift.

(b) A right held by a donor under subsection (a) may only be exercised by the donor personally and may not be exercised on the donor's behalf by a conservator or guardian or by the personal representative of the donor's estate.

(c) A donor's right to maintain a proceeding under subsection (a) is limited to enforcing a restriction on the donor's gift and does not give a donor standing to challenge other actions by the governing board.

~~(d) A donor may maintain a proceeding under subsection (a) only if the gift to be enforced had a value that was either (i) greater than [$500,000] at the time the donor made the gift or (ii) greater than [5%] of the value of the assets of the institution at the time the donor begins the proceeding.~~

~~(e)~~ (d) A donor's right to maintain a proceeding under subsection (a) ceases on the earlier to occur of the donor's death and [30 years] after the date of the donation that was subject to the restriction.

Comment

Section 8 creates a right in a donor to enforce a restriction on a gift. The section limits the grant of standing to bring a legal proceeding to enforce the gift in a number of ways. The right is created only if the donor included a restriction on a gift in the gift instrument, and the right is a right only to enforce that restriction not to challenge other actions taken by the institution.

Only the donor, and not someone acting on the donor's behalf, can exercise the right to enforce a restriction. Thus, a conservator appointed for the donor cannot act. The right is extinguished at the donor's death, and neither a personal representative nor family members of the donor are given standing under this section. If the right does not end sooner, the right terminates 30 years after the date of the gift.

A further limit on the right granted in Section 8 is a substantial threshold dollar amount. A donor can enforce a restriction only if the value of the gift exceeded $500,000. The amount is bracketed to indicate that adopting states may choose to change the minimum amount required for standing. In reaching the minimum dollar amount, gifts that are all part of a unified plan of giving can be aggregated, but disparate gifts either by the same donor or by multiple donors cannot be aggregated. For example, if a husband and wife or mother and son make gifts over a five year period as part of a pledge for a particular purpose, the value of those gifts would be aggregated. In contrast, a group of unrelated donors, each making a gift of $50,000 to the same building fund, cannot join together to enforce a restriction on the use of their gifts.

Section 8 is a response to the Drafting Committee's concern that if a donor has included a restriction on a gift in the instrument making the gift, the donor should not also need to reserve a right of reverter or a right to redirect in the gift instrument. In *Herzog*, Carl J. Herzog Found., Inc. v. University of Bridgeport, 699 A.2d 995 (Conn. 1997), the court stated that unless a donor not only restricted the uses to which the gift could be put but also reserved a right of reverter or a right to redirect the gift to the restricted purposes, the donor lacked standing to enforce the restriction. The Drafting Committee noted the limited enforcement resources available through state attorneys general and the "special, personal interest in the enforcement of the gift restriction" that a donor has. See Smithers v. St. Luke's—Roosevelt Hospital Center, 281 A.D.2d 127 (NY 2001) (citing Note, Protecting the Charitable Investor: A Rationale for Donor Enforcement of Restricted Gifts, 8 B.U. Pub. Int. L.J. 361 (1999)).

The limits on the right of standing in Section 8 reflect competing concerns that numerous lawsuits brought by donors of small amounts could result in significant cost of time and money for institutions. The Drafting Committee concluded that the limits on the right of standing adequately balanced the concerns of donors and institutions. Beyond the limited right granted in Section 8, a donor can reserve the right to enforce a restriction on a gift by including a provision to that effect in the instrument making the gift.

If a donor enforces a restriction on a gift under the authority of Section 8, the court can use injunctive relief to enforce the restriction or, if the restriction is unlawful, impracticable, impossible to achieve, or wasteful, then the court can order the release of the restriction under the authority of Section 9. Section 8 does not create a power of reversion in the donor, and Section 8 does not authorize the return of the gift to the donor.

Section 8 is provided in addition to any other rights available by law, and the rights granted to donors under this section are in addition to rights vested in the state attorney general. With few exceptions, only a state attorney general has had the right to enforce breaches of fiduciary duties, including failure to carry out an institution's purposes, for charitable trusts and nonprofit corporations. Courts have occasionally permitted persons with "special interests" in an institution to maintain proceeding. [citations] Scholars have discussed the advantages and disadvantages of this doctrine. [citations] Section 8 neither expands nor abrogates the special interests doctrine. Nor does Section 8 affect rights to standing under a relator statute, *see, e.g.,* CAL. CORP CODE § 5142(a) (West 1990).

Section 8 does not create rights in a donor other than the right to enforce a restriction. For example, Section 8 does not create a right to an accounting from the institution.

SECTION 9. RELEASE OF RESTRICTIONS ON USE OR INVESTMENT.

(a) ~~With the written consent of the~~ The donor, ~~a governing board~~ in writing, may release, in whole or in part, a restriction imposed by the applicable instrument on the use or investment of an institutional fund.

(b) If ~~written consent of~~ the donor cannot ~~be obtained~~ release by reason of the donor's death, disability, unavailability, or impossibility of identification, a governing board may release, in whole or in part, a restriction imposed by the ~~applicable gift~~ instrument making the gift on the use or investment of an institutional fund if the fund has a total value of less than ~~[$50,000]~~ [$100,000] and if the governing board concludes that the value of the fund is insufficient to justify the cost of administration as a separate institutional fund.

(c) If ~~written consent of~~ the donor cannot ~~be obtained~~ release by reason of ~~his [or her]~~ the donor's death, disability, unavailability, or impossibility of identification, ~~the~~ a governing board may apply in the name of the institution to the [appropriate] court for release of a restriction imposed by the ~~applicable~~ instrument making the gift on the use or investment of an institutional fund. The governing board shall notify the [Attorney General] ~~shall be notified of the application and shall~~ 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, ~~may~~ by order, may release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.

(d) A release under this section may not allow a fund to be used for purposes other than the ~~educational, religious, or charitable~~ 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.

(e) This section does not limit the application of the doctrine of cy pres.

Comment

In subsection (a) a release of a restriction is permitted 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 a court to release a restriction if the court determines that the value of the fund is too small to justify its continued administration as a separate fund. This subsection is similar to Uniform Trust Code § 414(a) which provides for modification or termination of uneconomic trusts. Subsection (b) permits a governing board to release a restriction without a court proceeding, but the governing board must obtain the donor's consent unless the consent cannot be obtained for one of the reasons listed. The subsection assumes that an institutional fund with a value of $100,000 or less is sufficiently likely to be inefficient to administer that a governing board should be able to terminate it without the expense of a judicial termination proceeding. The amount has been placed in brackets to signal to enacting jurisdictions that they may wish to designate a higher or lower figure.

Subsection (c) allows a court to release a restriction, using the standard adopted in Uniform Trust Code § 413 for the application of *cy pres*. This subsection does not require the court to apply the established doctrine of *cy pres* in making a determination to release a restriction. This subsection applies only to the release of a restriction and does not limit the doctrine of *cy pres* as otherwise applied.

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

SECTION 11. UNIFORMITY OF APPLICATON AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among ~~States~~ states that enact it.

SECTION 12. REPEAL.

The following acts and parts of acts are repealed: