

DRAFT

FOR DISCUSSION ONLY

UNIFORM
MANAGEMENT OF INSTITUTIONAL FUNDS
ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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October 20, 2002

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

The Committee acting for the National Conference of Commissioners on Uniform State Laws in preparing the Revised Uniform Management of Institutional Funds Act is as follows:

JOHN L. MCCLAUGHERTY, P.O. Box 553, Charleston, WV 25322, *Chair*

BARRY C. HAWKINS, One Landmark Square, 17th Floor, Stamford, CT 06901

SHELDON F. KURTZ, 6 Glendale Terr., Iowa City, IA 52245

JOHN H. LANGBEIN, Yale Law School, P.O. Box 208215, New Haven, CT 06520

JEREMIAH MARSH, 3500 Three First National Plaza, 70 W. Madison Street, Chicago, IL 60602-4283,
Enactment Plan Coordinator

MATTHEW S. RAE, JR., 520 S. Grand Ave., 7th Floor, Los Angeles, CA 90071-2645

RICHARD V. WELLMAN, University of Georgia, School of Law, Athens, GA 30602

SUSAN N. GARY, 1515 Agate St., Eugene, OR 97403, *Reporter*

EX OFFICIO

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

REX BLACKBURN, Suite 220, 1101 W. River St. , Boise, ID 83707, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

CAROL G. KROCH, RR 1 E College Rd.E, P.O. Box 2316, Princeton, NJ 08543-2316, *American Bar Association Advisor*

CYNTHIA ROWLAND, 222 Kearny St., 7th Flr., San Francisco, CA 94108, *American Bar Association Advisor*

JOHN K. NOTZ, JR., 3400 Quaker Tower, 321 N. Clark St., Chicago, IL 60610-4795, *American Bar Association Section Advisor*

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Missouri–Columbia, School of Law, 313 Hulston Hall,
Columbia, MO 65211, *Executive Director*

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Rd., Norman, OK73019,
Executive Director Emeritus

WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

211 E. Ontario Street, Suite 1300

Chicago, Illinois 60611

312/915-0195

www.nccusl.org

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

TABLE OF CONTENTS

SECTION 1. SHORT TITLE
SECTION 2. DEFINITIONS
SECTION 3. APPROPRIATION OF APPRECIATION
SECTION 4. RULE OF CONSTRUCTION
SECTION 5. INVESTMENT AUTHORITY
SECTION 6. DELEGATION OF INVESTMENT MANAGEMENT
SECTION 7. STANDARD OF CONDUCT
SECTION 8. ENFORCEMENT OF RESTRICTED GIFTS
SECTION 9. RELEASE OF RESTRICTION ON USE OR INVESTMENT
SECTION 10. SEVERABILITY
SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION
SECTION 12. REPEAL

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

PREFATORY NOTE

[Include discussion of fiduciary standards under trust law and corporate law.]

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) “institution” means any incorporated or unincorporated organization, trust or foundation 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.

Reporter’s Notes

The definition of “institution” intentionally excludes entities organized for profit and also excludes nongovernmental organizations not organized and operated for charitable purposes. The definition includes community foundations and community trusts.

(2) “institutional fund” means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include (i) a fund held for an institution by a trustee that is not an institution, [unless the fund is held exclusively for the benefit of a community foundation or community trust,] or (ii) 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;

Reporter’s Notes

If (i) is included and the bracketed language is not included in the final version, the Reporter’s Notes should include the following:

The drafting committee considered removing exclusion (i) due to changed circumstances. [I need more information here.] By leaving exclusion (i) in the statute, the statute excludes community

trusts and foundations.

(3) “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;

(4) “governing board” means the body responsible for the management of an institution or of an institutional 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.

(6) “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) under which property is transferred to or held by an institution as an institutional fund.

Reporter’s Notes

“Electronic record” is defined in Section 2(8) of the Uniform Electronic Transactions Act (1999).

(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.

Reporter’s Notes

A program-related asset is one that significantly furthers the accomplishment of the institution’s

purposes and is one that would not have been made but for the relationship between the asset and the institution's purposes.

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 3 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 5. INVESTMENT AUTHORITY.

In addition to an investment otherwise authorized by law or by the applicable gift instrument, and without restriction to investments a fiduciary may make, the governing board, subject to any specific limitations set forth in the applicable gift instrument or in the applicable law other than law relating to investments by a fiduciary, may:

(1) invest in any kind of property or type of investment consistent with the standards of this [Act].

(2) 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.

(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].

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

(5) invest all or any part of an 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.

Reporter's Notes

Subsections (2) and (3) authorize 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.

SECTION 5. DELEGATION OF INVESTMENT MANAGEMENT.

(a) Except as otherwise provided by applicable law 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) of this section are not liable for the decisions or actions of the agent to whom 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, an agent submits to the jurisdiction of the courts of this State in all actions arising from the delegation.

(e) In investing and managing trust assets, a governing board may only incur costs that are

appropriate and reasonable in relation to the assets and the purposes of the institution.

Reporter's Notes

In selecting the persons to whom investment authority is delegated, fiduciaries must exercise the standard of conduct set forth in Section 7 of this Act.

SECTION 7. STANDARD OF CONDUCT.

(a) Members of 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.

(b) A governing board's investment and management decisions about individual assets shall 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:

- (1) long- and short-term needs of the institution in carrying out its educational, religious, charitable or other eleemosynary purposes;
- (2) its present and anticipated financial requirements;
- (3) general economic conditions;
- (4) the possible effect of inflation or deflation;
- (5) the expected tax consequences, if any, of investment decisions or strategies;
- (6) the role that each investment or course of action plays within the overall investment

portfolio of the institutional fund;

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

(8) other resources of the institution;

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

(10) an asset's special relationship or special value, if any, to the purposes of the applicable gift instrument or to the institution.

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

(e) 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) A governing board shall invest and manage the assets of an institutional fund solely in the interest of the institution.

Reporter's Notes

Whether the governing board can act by majority decision or must act unanimously in making determinations under this Section will depend on the state laws that govern the decision-making process. Directors of nonprofit corporations can make these decisions by majority vote, and Section 703 of the Uniform Trust Code provides that co-trustees can act by majority decision. In jurisdictions that have not adopted UTC § 703 or a similar rule, the trustees must act unanimously. Section 703 is a default rule and may be changed by the governing instrument of the trust to require unanimous action by co-trustees.

SECTION 8. ENFORCEMENT OF RESTRICTED GIFTS.

(a) If a gift instrument restricts the use of assets transferred to an institution, then the donor

may maintain a proceeding to enforce the restriction on the gift.

(b) Any right held by the donor under subsection (a) may be exercised on the donor's behalf by his [or her] 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 the 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) A donor's right to maintain a proceeding under subsection (a) ceases [30 years] after the date of the last donation that was subject to the restriction.

Reporter's Notes

If the donor has included a restriction on the gift in the gift instrument, the donor does not 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 donor should not have to do both.

Section 8 is provided in addition to any other rights available by law, including rights to standing under a relator statute, *see, e.g.*, CAL. CORP CODE § 5142(a) (West 1990), or rights that persons with special interests may have. 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. Section 8 grants standing to a donor only if the donor has, in a gift instrument

restricted the purposes to which the gift can be put.

The right to maintain a proceeding under this section is limited to the gift itself and cannot extend to other decisions of a governing board. For example, if a donor made a gift to a nursing school to provide scholarships to nursing students and the institution that operated the nursing school decided to close the nursing school, the donor could not challenge the decision to close the nursing school but could challenge the use of the donor's gift for purposes other than scholarships to nursing students.

SECTION 9. RELEASE OF RESTRICTIONS ON USE OR INVESTMENT.

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

(b) If written consent of the donor cannot be obtained by reason of his [or her] death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the [appropriate] court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The [Attorney General] shall be notified of the application and shall 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 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.

(c) If written consent of the donor cannot be obtained by reason of his [or her] death, disability, unavailability, or impossibility of identification, the governing board may release, in whole or in part, a restriction imposed by the applicable 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 governing board

concludes that the value of the fund is insufficient to justify the cost of administration as a separate institutional fund.

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

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

Reporter's Notes

In subsection (a) release of a restriction is permitted if the donor consents. If a donor consents to a change in a restriction on a gift, then the governing board should no longer be bound by the restriction.

A release under subsection (a) 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) 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.

Subsection (c) permits a court to release a restriction if the court determines that the value of the fund no longer 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 (c) 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 \$50,000 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.

SECTION 10. SEVERABILITY.

If any provision of this Act or the application thereof to any person or circumstances is held

invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared severable.

SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This Act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

SECTION 12. REPEAL.

The following acts and parts of acts are repealed: