2009 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1074

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB1074**

House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: 01/16/2009

Recorder Job Number: 7133

Committee Clerk Signature	Kathy Roden

Minutes:

Chairman Grande: Opened the hearing on HB1074 and the clerk read the title.

Rep. Bill Kretschmar, Dist. 28: I am introducing this bill as a member of the ND Uniform Law Commission. The Uniform Prudent Management of Institutional Funds Act (UPMIFA) was promulgated in 2006. It is a replacement for a previous Act which was adopted in 1972 and ND adopted it 1975. Basically, it is an improvement on the older Act to make sure that the best of practices are used in institutional funds for charitable purposes and to modernize the old Act, to bring it up in line with investment practices that are carried out today. Rep. Kretschmar submitted the **UPMIFA highlights (See attachment #1)**.

Chairman Grande: Rep. Kretschmar, do you know, states that are doing a repeal of 1567.

Rep. Kretschmar: That's the current law in ND and was the old Act.

Chairman Grande: And now are we going to replace it under that exact same piece of code?

Rep. Kretschmar: Where they put it, I'm not sure.

Chairman Grande: It just wasn't stated in the title, so that's where my concern was where it was going to fall.

Rep. Kretschmar: They will probably put it in the same code, I would guess.

Chairman Grande: So it will actually be repeal and replace?

Rep. Kretschmar: That would be correct.

Chairman Grande: So I would have LC check that to make sure the title is proper. Any other questions from the committee? Thank you. Anyone else wish to speak in favor of HB1074?

Gerald Skogley, board member of ND Association of Nonprofit Organizations (NDANO): I am testifying in support of HB1074 on behalf of NDANO. Mr. Skogley submitted a one-page written testimony, **see attachment #2**.

Chairman Grande: Any questions. Thank you. Anyone else in favor of HB1074.

Rod Backman, registered lobbyist for Jamestown College: At this point I will introduce **Polly Peterson, VP of Institutional Advancement at Jamestown College** to introduce this bill.

Polly Peterson: I too would like to speak on behalf of Jamestown College on HB1074. Historically, we think the bill is important to pass. Prior to 1972, when this UMIFA passed, the interpretation or reason for it was that non-profit institutions get funds in many ways and the donor has the opportunity to restrict the funds. One of the ways to restrict is by investing in endowment. By that they mean they don't want us to spend it all right away. The question remains then, "what do you get to spend?" Interest? Dividends? Gains and Losses? So for some time prior to that, institutions referred to trust law to determine spending. Trust law has ambiguity in it that it meant only interest and only dividends. Then we said as charities that we would invest in bonds that meant we could have the most money to spend however, in the long term it wasn't best because you never grew. In 1972 UMIFA was passed that said we are going to interpret that for you to mean as total spending concept and encouraged us to determine what to spend. We averaged it all together and multiplied it together and that is what we spend. The limitations of that was that if referred to historic dollar value. We could never

spend below historic dollar value. That's the way the rule stands today. This UPMIFA extends that to say "is that the intent of the donor?" Let's go back and interpret the intent of the donor and set policy that is prudent and holds the institution accountable for sound management of te investment. It goes one step further in that it says we are not going to hold you to historic value. You need to maintain the purchasing power of that investment so that 30 years from now somebody sets up a scholarship at JC, their scholarship will help a student pay for their education in terms of those dollars. For example a $100 thousand dollar investment and we spend 5%, which is prudent; we would give a $5,000 scholarship. 25 years from now a $5,000 scholarship doesn't have the same effect as it does today. In times like this when institutions have seen significant declines in their endowment, there are times when the endowment goes below the historic value. We tell donors we will use the income off their investment to spend it on what they ask us to spend it on. Those dollars are intended to be used. So this restores and insures that we look long term at the purchasing power of the dollar. Polly also submitted a three-page written testimony, **see attachment #3**. I would like to address the last page of my testimony; your consideration of retroactive application would be much appreciated. Our concern is at what point do we use this?

Chairman Grande: Any questions?

Rep. Winrich: Does the bill as written require an amendment for the retroactivity?

Chairman Grande: That's my concern; I was hoping that is what Rep. Kretschmar was going to address. I'm still hoping that someone will, because this is an awful lot of change. If you want this done in a uniform fashion, I don't want to take it to the floor asking for a uniform Act if we don't know what it is.

Parrell Grossman, director of Consumer Protection and Anti-trust Div.: The AG is monitoring this legislation; we've done some limited research on it as a result of inquiries we've

received from some of the charities and specifically the UND Foundation. I believe that particular issue is addressed in the bill in terms of retroactivity in Section 7. In fact, that is true if we didn't have this particular requirement in there, you would have to keep 2 sets of books. This provision, if you pass it in its current form, applies this standard to existing endowments, going forward. If that decision is made a year from now and presumably you are no longer using historic value and those funds are still "under water" you could still apply these new rules. What it doesn't do, is to go back and bless something now. I understand if an entity right now spent funds that were "under water" this legislation wouldn't permit someone to go back retroactively approve that decision. Going forward, it does give the flexibility regardless of when that endowment was set up the new rules will apply. Spending funds under water now, could be a violation of the law. It is my understanding that this legislation states that and most states have done. It's not to say the legislature couldn't make the entire bill retroactive.

Chairman Grande: I received information from a couple of foundations asking that the date be moved from August 1, 2009 to January 1, 2009. Does that mean that any endowments or granting I want to do, this will go into effect from January 1, 2009 forward? What is the date trying to do? I understood that they wanted to capture February 20 granting. Grants going on Feb. 20, so we need a date of January 1, so that anything that was issued in Feb. could still fall under this new statute. Do I understand that correctly then?

Parrell Grossman: Yes. In effect, what they want to do is make that retroactive so that you could go back and capture that period. That's a decision for the legislature. I don't know if other states have done that but I think you are free to do that.

Rep. Winrich: I would assume because right now and probably by Feb 20, that universities are looking at granting scholarships for next fall and so that becomes an important consideration for those funds. Is that correct?

Parrell Grossman: I think that is correct. They will still be constrained by the donor's intentions. They will have to look at every one of those intentions if they can spend the funds or not. I think they are very concerned about the impact on their ability to award scholarship next year because they are in that process now. So that is why they want the retroactive part. I just want to note that it seems to be a departure from previous uniform laws when they have been adopted.

Rep. Boehning: If there is a $25,000 endowment under the new law, are they able to spend the principal or just the interest, dividend or gains?

Parrell Grossman: Under current law they would have to base it on historic value and couldn't do it. My understanding is the standard would change under this particular law, again depending on the donor intent. But the rules of construction would change unless the donor had specifically prohibited that. Most of those agreements would be drafted to give the maximum flexibility to the charitable institution to make those kinds of decisions long term. In my opinion, it's quite possible I think they could do that under this set of rules moving forward. How long is another question. At some point, it may run counter to what's provided in the law.

Rep. Boehning: What has happened in the past, we've had other market crashes, where the market has gone down...the dot com era. What happened at that time to these endowments? What approach did they take? What has happened when there has been a real market turn down?

Parrell Grossman: I'm not aware of that. I'm just getting up to speed on this. I think it is up to individual institutions. I don't know that case law is particularly clear in this area. There are arguments as to whether or not something has fallen below historic value or not depending on what time that item went up or down. At what point were those funds under water? I can't really say. I'm told that there are institutions that have continued to make disbursements

notwithstanding the fact that some would argue that in fact those funds are under water. This legislation provides flexibility that wasn't there prior.

Chairman Grande: Any other questions? Thank you Mr. Grossman. Anyone else wishing to speak in favor of HB1074? Against? Neutral?

Chairman Grande: Committee, I think you have in front of you testimony from Gary Preszler. And we will discuss amendments. Do you wish to speak on it?

Gary Preszler, State Land Commissioner: What we are looking at is the board is already under the prudent investment rules under section 15-03-04. I did have written testimony. **See attachment #4**. The prudent investment rule was adopted in 1992 and it had been adopted by 44 states. The prudent investment rule has a little higher and more modern standard than the prudent personal rule as set out in HB1074 on page 2 line 19. All we are doing is saying we are under the prudent investment rule and would like to remain. We want to propose amendments in chapter 15-67. The amendment would add after line 7 "Perpetual trust funds established by article IX of the Constitution of ND."

Chairman Grande: Any questions? Thank you. Neutral?

Steve Cochrane, State Investment Board: Have a similar situation to the Land Dept. in that we operate under the prudent investment rule and as you look at the language of the bill, well we felt that we certainly would be defined as a charitable institution, I think it could be construed that we do. I am seeking Aaron Webb from the AG office for his opinion. It seems as if we are in a position to ask to be exempted from inclusion in this bill.

Chairman Grande: Does Mr. Preszler's amendment address your concerns?

Steve Cochrane: It does somewhat but in the previous law, his fund is specifically accepted and the State Investment Board was not.

Chairman Grande: Do I need to add you to that list?

Steve Cochrane: If you could, I would appreciate that.

Aaron Web, assistant to the AG office: My first impression in regards to the bill and Steve's questions is that no they are not a charitable organization, but upon reading the bill and the former bill there are some changes that were made that potentially affect the State Investment Board. Under the old law 15-67-01, subsection 5, they do not define charitable purpose, instead they define institution and they do so by saying an institution includes "incorporated or unincorporated organizations organized and operating exclusively for education, religious, charitable or other [charitable] purposes or a government organization to the extent that it holds funds exclusively for any of these purposes". Under the new model law they provide that an institution means, "a government or governmental entity in the extent it holds funds exclusively for a charitable purpose". And then they define a "charitable purpose" meaning "the promotion of a governmental purpose". So basically if you read these 2 definitions together it's stating and institution means, "a government or governmental entity to the extent that it holds funds exclusively for the promotion of a governmental purpose". This is a circular definition putting anybody that is not otherwise excluded from the definitions, any government entity, will be a charity unless otherwise excluded. Unlike the previous testimony that had an exclusion under Section 5, we wouldn't be covered under that part of the constitution so we would require one of two things; we would require an exclusion under institutional funds for the State Investment Board for any funds invested with the State Investment Board **OR** to revert back to the old language used in the previous bill which would be in the definition of charitable purpose, although they didn't define it back then, **not** including the promotion of a governmental purpose generally, which brings all governmental entities into this. That is what would be required to clearly release the State Investment Board from new bill.

Chairman Grande: In current law, the last wording you were just using about non-governmental, which section am I looking at?

Aaron Webb: You would be looking at Page 1 of the bill, line 7 & 8. Under the old bill it does not include the promotion of a governmental purpose.

Chairman Grande: That is the part I'm looking for. I want the **old** law. **Current law.**

Aaron Webb: Oh, you want what is in the statute now? That doesn't define charitable purpose at all. It defines an institution subject to these statutes. In doing so, it provides for incorporated and unincorporated organizations operating exclusively for educational, religious, charitable and other charitable purposes. That is under page 219...

Chairman Grande: point 5 or 15-76-01.5

Aaron Webb: Yes.

Chairman Grande: So the wording "or a government organization to the extent that" that's the language I'm looking for?

Aaron Webb: No, it is hard to compare the two; because the old law or current law doesn't define "charitable purpose" it only defines an "institution". The new law defines both. So it's hard to compare the two. If you are looking at the new, introduced bill HB1074, in order to make it mirror the old law, the current law, although it defines "charitable purpose" separately, it would be to remove "the promotion of a governmental purpose". If that was to be done it would read very similarly to the old or current law as far as government entities are concerned.

Chairman Grande: So you want to remove on the proposed law, line 20....

Aaron Webb: No, if you provide an exception or exclusion for the State Investment Board, you don't need to change the laws as far as the SIB is concerned, kind of like the land department, they have an exemption to the law. It could be done in multiple ways.

Chairman Grande: Give me the **one** simple way.

Aaron Webb: Simple way is to add the exemption.

Chairman Grande: The exemption to read, "funds invested by the state investment board". Just put that as point "e"?

Chairman Grande: Mr. Grossman, clarify this for us. Clear my mind.

Parrell Grossman: Mr. Webb has explained this to take care of his client and I would be concerned of the impact this could have on the State Treasury. I think what we need to do is remove on lines 7 & 8, "the promotion of a governmental purpose." I think that would solve the concerns and that way 2 years down the road other state governments wouldn't be questioning if this applies to them.

Chairman Grande: Committee members, we are on page 1 of the bill, looking after the word "health" leave the comma, take out "the promotion of a governmental purpose" comma and then moving on from there.

Rep. Dahl: Could we still leave subsection 4b? That doesn't need to be changed?

Parrell Grossman: I think you do need to separately address Mr. Preszler's concerns.

Chairman Grande: That is his letter d we'd keep in, but what she is addressing is on page 1, under 4, "institution means" and then letter b, "a government or governmental entity...for a charitable purpose; or". Since it is exclusively for a charitable purpose, we can leave it in?

Aaron Webb: It would still read, "If you have a governmental entity that hold funds exclusively for" and all the rest are in charitable purpose, poverty, education, religion, it would still apply to those government entities, it just wouldn't apply for the general governmental purpose which includes everybody.

Chairman Grande: Sounds good. Ms. Schmidt, I just have one question; you can probably answer yes or no. The amendment that we are talking about, line 7 and part 8, those words of "governmental purposes" does this solve your dilemma.

Kelly Schmidt, ND State Treasurer: The AG office has not gone over this bill with my office at this point, but I believe being in the wonderful hands of the assistant AG, Parrell Grossman and Aaron Webb, I think this will take care of us.

Chairman Grande: Thank you. That's all I need. I just didn't want to be messing things up. Steve, does this take care of you?

Steve Cochrane: Yes, Madame Chair, it does, thank you.

Chairman Grande: So everybody knows where we are at with that? Anyone else? For? Against? Neutral? Closed.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB1074**

House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: 01/22/2009

Recorder Job Number: 7530

Committee Clerk Signature	Kathy Robin

Minutes:

Chairman Grande: Opened on 1074. Justice Gail Hagerty has come down to give us an explanation on this bill for us.

Justice Hagerty, District Judge in Bismarck: I tried to put together a section by section description of what the bill does. **(See written testimony)**. It has been adopted in 27 states. I think the institutions in our state are requesting that they have this tool available to them. It replaces a Uniform Act. We call this UPMIFA (Uniform Prudent Management of Institutional Funds Act). It was promulgated in 2006 to replace a 1972 Act that dealt with management of funds. That 1972 Act was adopted in ND and would be repealed by this Act. **Section 1** included the definitions that are used throughout the sections. **Section 2** deals with how you manage and invest institutional funds. There is a prudent standard. That is meaningful to people who work in investments and so it is kind of a term that deals with how you carefully and conservatively invest and take care of funds. The prudent standard is consistent with a business judgment rule and applies to charitable institutions. **Section 2** outlines the duties expected in conducting and managing investment activities. The overarching duty is to comply with the **donor intent**. So the first thing you want to do in managing these funds is to comply with the donor's intent and the terms of any gift instrument. A gift instrument is a document

where somebody makes a gift. When they set out what they want to do with the gift, then that is what needs to happen. **Section 2** requires a duty of loyalty and care. That would be the same kind of duty that anyone has in managing someone else's funds. There is a duty to minimize cost, investigate accuracy of information used for investment decisions. This section allows for pooling of funds for investment and management. It outlines factors that must be considered in management investment of funds and gives directions to diversify and make decisions in context of the portfolio and overall investment strategy. The prudence factors for management and investment of the funds would be: (See Section 2, paragraph 4of testimony). Those are factors that people would have available to them in deciding how to invest and what decisions to make. **Section 3** deals with appropriation of expenditure or accumulation. Under the old law, all that could be spent would be appreciation from the historic dollar value. Under the new law, there would be a new way of deciding and you wouldn't be limited to expenditures which would be appreciation of historic dollar value. There is still the prudence factor, but sometimes you need to have more flexibility to meet the intent of the donor and to meet the charitable purpose of the gift. Seven prudence factors for expenditure decisions are: (See Section 3, paragraph 2 of testimony). **Section 4** deals with management and investment functions to external agents so long as the decision maker uses skill, care and caution in selecting the agent. **Section 5** deals with modification of restrictions on management, investment of purpose. When the donor is no longer available, and the purpose of the fund or directions no longer makes sense, you would have the protection of going to a court to try to discern what the donor's intent would have been and how the funds can best be used to carry that out. It isn't something the institution can do on its own. **Section 6**: Compliance-Determination (See testimony). **Section 7**: Application to existing Institution Funds – I know you did have some discussion in the committee about whether the provision could be made

retroactive, I don't think that is a possibility. I understand some of institution might like to have that become law more quickly. But I don't know how you make it apply to this issue. **Section 8** relates to electronic signatures. That is just something that is included in almost all Uniform Laws now because of the way business is transacted. **Section 9** repeals ND's version of UMIFA; the older version.

Chairman Grande: The title doesn't tell me where in NDCC this will be placed.

Justice Hagerty: This was drafted by LC, the Uniform Law Commissioner, and so one of the things he does as Uniform Law Commissioner is put the Act into form for how the LC would like. I would assume the code reviser would put it in most likely where there has been a repeal.

Chairman Grande: We will get that, because we will need that in the bill before we can act on it. So we will add that in.

Rep. Boehning: When it gets passed, it goes to John Walstead who puts it in the appropriate area.

Chairman Grande: OK.

Rep. Dahl: This only applies to those funds existing on August 1, 2009?

Justice Hagerty: If there is a fund existing on that date, they would now be governed by this statute. And funds created after would be also.

Rep. Conklin: The way I read this, it allows these funds to dip into their principal. Is that correct?

Justice Hagerty: In a very limited manner, yes.

Rep. Conklin: If they can dip into the principal, why would we want to allow that? That's not what the donor had intended.

Justice Hagerty: If the donor has stated you can't get into the principal, you can't. But sometimes there isn't a statement to that affect. The people in Jamestown were talking about

how sometimes in order to carry out the intentions of the donor you have to make a very limited expenditure of the principal. So I think what this does is **limits** the amount of the principal you can spend.

Rep. Conklin: This limits what they can spend out of the principal?

Justice Hagerty: I think it does. Let me look hare.

Chairman Grande: Page 4, Section 3, number 4 on line 30.

Rep. Conklin: Why did the State Fund want to be exempt from this?

Justice Hagerty: I think they are exempt but if they want to make it clearer, I don't have a problem with that. I think this just deals with charitable funds.

Chairman Grande: Their mission of their funds is different than the mission of the universities or the non-profits. The mission of the funds that these guys want to be exempt from are to last forever and are funded by the citizens with their tax dollars. It has to be done in a prudent and conservative fashion. In statute it says they can only pay out "X" amount. They don't have discretion in this, nor should they.

Rep. Conklin: That's right. Why would we allow the universities to have that discretion?

Justice Hagerty: It would be the universities foundations where they receive private gifts.

Rep. Conklin: But they're still under code?

Chairman Grande: The foundation is not. The institution is, but the foundation is privately held.

Rep. Conklin: But the institution is making the decision.

Chairman Grande: No, the foundation is. Alumni, business people from the community that have been chosen to be on that board.

Rep. Boehning: Section 5, Page 6, Subsection 2. If they don't like the 7%, could churches be included in that? Churches or other functions could basically go to court and say there isn't

good documentation of some of these earlier funds that have been donated to the churches or whatever organization. They can go in and change the purpose of the charitable endowment?

Justice Hagerty: If it becomes that the restriction has become impracticable or wasteful, if it impairs the management of the investment or because of circumstances not anticipated by the donor, a modification or a restriction will further the purposes. You might say, I'm giving money to build a sanctuary for the church on the banks of Devils Lake and my money can only be used for that. That might no longer be a possible or practicable way. So you might be requesting the court to change, and you would limit the change to just what you needed to do to most comply with the donor's intent.

Rep. Boehning: Do they have to notify the descendents of those who gifted the endowment? Is there any notification that goes on?

Justice Hagerty: They notify the Attorney General because you may not be able to find the other people. The court could require that. I think the notification of the AG is meant to be a safeguard because in some cases there may not be anyone.

Rep. Boehning: How far down the line generationally could they go with this?

Justice Hagerty: First of all, if the documented gift is specific as to what they want to happen, that would have to be honored. So if you are ever going to change anything about this, you have to notify all my lineal descendents and to the extent possible you may be able to do that. If there was an action or request, the AG could notify people.

Chairman Grande: I think that answered our questions. I know I needed a walk-through on this. It was a lot of bill to read a lot of changes that I think the committee needed to hear. The discussion was closed. Committee work would begin 15 minutes after the floor closed.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1074

House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: 01/22/09

Recorder Job Number: 7609

Committee Clerk Signature	Lou Engelson

Minutes:

Chairman Grande opened the hearing on HB 1074. Let's get the amendments on this. The amendments that were brought forward. Let's take the State Land Department's amendment first. Page 2 after line 7 insert "d. Perpetual trust funds established by article IX of the Constitution of North Dakota." Do I have a motion?

Rep. Wolf: So moved.

Rep. Karls: Second.

Motion on amendment passed by voice vote.

Chairman Grande: Next set of amendments. Page 1, line 7 and then on to 8 to remove the words "the promotion of a governmental purpose,". Take that language off. That takes care of RIO and the Treasurer's Office. Do I have a motion?

Rep. Meier: So moved.

Rep. Karls: Second.

Motion on amendment passed by voice vote.

Chairman Grande: One other amendment that was brought out that I think was acceptable and that was after the Section 9 repealer, we probably put on a Section 10. It was "Emergency." There would be emergency clause language right there. We're not going to put

the January 1 language from what I understood, it's not a good thing to do. Do I have a motion on the emergency clause.

Rep Schneider: So moved.

Rep. Dahl: Second.

Motion on amendment passed by voice vote.

Chairman Grande: We're on 1074. We've got the three sets of amendments on. Do I have a motion?

Rep. Wolf: I move a do pass as amended.

Rep. Dahl: Second.

Chairman Grande: Any discussion?

The roll was called by the clerk.

8 yes, 2 no, 3 absent. Rep. Dahl was assigned to carry the bill.

Adopted by the Government and Veterans Affairs Committee
January 23, 2009

VR
1/23/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1074

Page 1, line 3, after "Act" insert "; and to declare an emergency"

Page 1, line 7, remove "the promotion of a"

Page 1, line 8, remove "governmental purpose,"

Page 2, line 4, remove "or"

Page 2, line 7, after "fund" insert "; or

d. Perpetual trust funds established by article IX of the Constitution of North Dakota"

Page 7, after line 16, insert:

"**SECTION 10. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

Date: 1-22-09
Roll Call Vote #:

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1074

House **Government and Veterans Affairs** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken DP as Amended

Motion Made By Wolf Seconded By Dahl

Representatives	Yes	No	Representatives	Yes	No
Chairman Grande	✓		Rep. Amerman	✓	
Vice Chairman Boehning	✓		Rep. Conklin		✓
Rep. Dahl	✓		Rep. Schneider		
Rep. Froseth		✓	Rep. Winrich		
Rep. Karls	✓		Rep. Wolf	✓	
Rep. Kasper					
Rep. Meier	✓				
Rep. Nathe	✓				

Total (Yes) 8 No 2

Absent 3

Floor Assignment Dahl

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1074: Government and Veterans Affairs Committee (Rep. Grande, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (8 YEAS, 2 NAYS, 3 ABSENT AND NOT VOTING). HB 1074 was placed on the Sixth order on the calendar.

Page 1, line 3, after "Act" insert "; and to declare an emergency"

Page 1, line 7, remove "the promotion of a"

Page 1, line 8, remove "governmental purpose,"

Page 2, line 4, remove "or"

Page 2, line 7, after "fund" insert "; or

d. Perpetual trust funds established by article IX of the Constitution of North Dakota"

Page 7, after line 16, insert:

"**SECTION 10. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

2009 SENATE GOVERNMENT AND VETERANS AFFAIRS

HB 1074

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No.1074

Senate Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: 03/20/09

Recorder Job Number: 11342

Committee Clerk Signature Katie Oliver

Minuets:

Chairman Dever opened the public hearing on HB1074. District judge Gail Hagerty was there to introduce the bill.

Gail Hagerty: District Judge from Bismarck. See attached testimony #1.

Senator Cook: Where does this go in code?

Gail Hagerty: The code reviser will decide where to put it and tell us.

Senator Cook: Considering the economic time where do you think that an investor would be judged as being prudent as far as where they make their investments today?

Gail Hagerty: I wish I knew that.

Senator Cook: Obviously somebody is going to judge whether the person was prudent or not, I assume.

Gail Hagerty: Yes someone will, but when you look at donor intent, my mom went to the University of South Dakota in the early 1940's only reason she could stay there is because someone found a scholarship for her when she was a sophomore. At this point in her life, when she is giving some money to the University of North Dakota she wants to know that the money will be available to students who may be impacted by economic downturn. When you

are looking at management of funds you don't want to tie the hands of the institutions so that in these times they can't carry through with donor intent.

Senator Nelson: What happens when the cause someone is promoting no longer exists?

Gail Hagerty: When that happens, we need to do as close to what the donor wanted to do with the funds. Infer the closest thing to donor intent to make wise use of their funds.

Dana Schar: Executive Director of North Dakota Association of Non Profit Organizations. I would like to introduce a board member, Gerald Skogley, to provide testimony on behalf of our organization.

Gerald Skogley: Board member of NDANP. See attached testimony #2.

Senator Oehlke: In section 4, was there any wording in the current legislation relative to investment management or choosing someone to do that. Can you tell me what the differences are between that and this?

Gerald Skogley: I think that allows for hiring of management and it specifies in more detail the kinds of investments that you can make and brings it up to a more modern standard. Before the 1975 enactment the only thing that any non profit could invest in was U.S. Treasuries or government bonds.

Senator Oehlke: It seems like this section put a lot of burden on the agent and takes a lot of burden away from the organization.

Gerald Skogley: I think that it is strong enough. The institution cannot eliminate its fiduciary responsibility. The board or committee assigned to that responsibility has to have overview of the manager that is investing the funds directly and if they don't perform to the standards that they have either established in writing or according to the code they should be dismissed.

Rod Bachman: Representing Jamestown College. The other supporters have covered the issues I just wanted to voice our support for this bill. What they tell me in financial aid is one of

the issues that they have now is that a person may have intended to give money for a scholarship off an endowment. As the law is right now you cannot make an annual gift if the funds will drop off. What this does is allow more flexibility and allows you to make some gifts even if it falls below.

Senator Cook: Is there any floor as to how low a fund could go below its historical cost?

Rod Bachman: I have not seen anything like that.

Senator Cook: Are there penalties for miss management?

Gail Hagerty: There are, they refer to court actions and a requirement for prudence.

Senator Dever: The question I have is that this being a uniform law is there latitude to do that?

Gail Hagerty: They can be amended. I like it where there are as few amendments as possible but sometimes the whole process is that these are state laws and so states still keep control over the law.

Senator Cook: The half a dozen state that are white on the map, any idea why they have not moved?

Gail Hagerty: In some cases the legislative process is just more difficult in some states.

Senator Horne: I am not familiar with Uniformed Law Commission, who is involved in it?

Gail Hagerty: It is a national organization; they look for areas of the law where it should be mostly the same in all states. We go to the annual meetings and look at what is out there and try to decide what we want introduce to the legislature. Each law is read out loud 2 times to a committee. Everybody can make motions comment and question.

Rod Bachman: The emergency clause, be aware of that whoever is caring the bill.

There was no further discussion and no further questions. Chairmen Dever closed the public hearing on HB1074

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No.1074

Senate Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: 03/20/09

Recorder Job Number: 11653

Committee Clerk Signature Katie Oliver

Minuets:

Chairman Dever called the committee to order and all members were present.

Senator Dever handed out amendments from Judge Gail Hagerty.

Senator Nelson made a motion to move the amendment brought by Judge Hagerty with a second by Senator Horne. There was no discussion and the motion passed 5-0. With the amended will in front of them, Senator Nelson made a motion for a do pass as amended with a second by Senator Oehlke. There was no discussion, roll was taken, and the motion passed 5-0 with Senator Nelson carrying the amended bill to the floor.

90224.0201
Title.0300

Adopted by the Government and Veterans Affairs Committee
April 2, 2009

4-2-9

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1074

Page 7, line 8, remove "August 1, 2009," and replace "July 31, 2009" with "the effective date of this Act"

Page 7, line 9, replace "August 1, 2009" with "the effective date of this Act"

Renumber accordingly

Date:
Roll Call Vote #:

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1074

Senate Government and Veteran's Affairs Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Amendments

Motion Made By Nelson Seconded By Co Horn

Representatives	Yes	No	Representatives	Yes	No
Dick Dever	X		Dwight Cook	X	
Dave Oehlke	X		Carolyn Nelson	X	
Robert M. Horne	X				

Total Yes 5 No 0

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date:
Roll Call Vote #:

Carrier Nelson

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1074

Senate Government and Veteran's Affairs Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass as Amended

Motion Made By Nelson Seconded By Oehlke

Representatives	Yes	No	Representatives	Yes	No
Dick Dever	X		Dwight Cook	X	
Dave Oehlke	X		Carolyn Nelson	X	
Robert M. Horne	X				

Total Yes 5 No 0

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1074, as engrossed: Government and Veterans Affairs Committee (Sen. Dever, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1074 was placed on the Sixth order on the calendar.

Page 7, line 8, remove "August 1, 2009," and replace "July 31, 2009" with "the effective date of this Act"

Page 7, line 9, replace "August 1, 2009" with "the effective date of this Act"

Renumber accordingly

2009 TESTIMONY

HB 1074

Comments on HB 1074
Submitted by: Laura Block CPA CFP
Chief Financial Officer, UND Foundation

The "P" is for prudence

While UPMIFA adds only one word to UMIFA, our existing statute's title, the underlying change in the law is powerful. This new law, if adopted, would eliminate the historic dollar value limitation on spending (the so-called "underwater funds" rule).

Under UPMIFA, the rules governing expenditures from endowment funds will be modified to give more flexibility in making investment and expenditure decisions within the general standard of prudence, so that our board and Investment Committee can cope with fluctuations in the value of our endowment.

An important change in the new act is the elimination of the rule governing funds whose value, due to stock market contractions of the type brought on by the economic crisis of the last months, is below the value of the gifts at the time they were given by donors. Under UMIFA, we are not allowed to spend from a fund if its asset value is below its historic dollar value. For example, our scholars were provided commitments that brought them to campus, many funded with these endowment funds, and our current statute would restrict us from providing support this year due to market contractions. Our students need help now more than ever. The University would be hard pressed to find funds to make up the loss disallowed from donor directed aid.

UPMIFA allows prudent spending, taking into account the economic conditions, expected inflation, investment returns, and other resources of the University. The University of North Dakota Foundation sets its spending rate each year, based on the above, through a Board Investment committee. The last three years this has been set at 4 percent. We have averaged a 5 percent payout, adjusting downward after the dot com crisis. We follow a rule that calculates this payout amount over a rolling three-year period to smooth the spending to the University.

Our donors truly give to immediately impact the University through the purpose their endowments are designated. Yet, just as importantly, donors also expect their

endowments to grow and keep pace with inflation so that same impact can last into perpetuity. Our Foundation Board has long endorsed the concept of intergenerational equity; we have set an investment goal of a 10% rate of return, with approximately half paid out for purpose, half set aside to keep pace with inflation. We acknowledge that downturns come and can result in large losses; these periods have historically followed with significant upswings offsetting the past. Our only mission is to support the University and we share our President's vision of moving from Great to Exceptional. Our annual support to the University of North Dakota from endowment has been approximately 5 million dollars; we do not wish to cease our impact on this leading University. We believe our donors are in concert.

Thank you.

North Dakota Senate Bill 1074 – UPMIFA

presented by Uniform Law Commission

The Uniform Prudent Management of Institutional Funds Act ("UPMIFA") was promulgated by the Uniform Law Commission in 2006 to update and replace the older 1972 Uniform Management of Institutional Funds Act ("UMIFA"). Although UMIFA has provided useful guidance, prudence norms have evolved over the past 35 years, and UPMIFA provides a modern articulation of prudence standards for the management and investment of charitable funds and the expenditure of endowment funds. UPMIFA draws upon the Revised Model Nonprofit Corporation Act ("RMNCA"), as well as the 1994 Uniform Prudent Investor Act ("UPIA") and its updated rules for investment decisions, duties, and protections related to trusts (including charitable trusts), and harmonizes the application of these standards for charitable organizations, whether organized as a trust (unless the trustees are non-charitable, in which case trust law governs), nonprofit corporation, or other entity. Finally, the act updates provisions governing the release and modification of restrictions on institutional funds for more efficient management while preserving the historic authority of states' Attorneys General.

UMIFA had been adopted in 48 jurisdictions, including North Dakota, and 27 jurisdictions have adopted UPMIFA over the past two years. Accordingly, Senate Bill 1074 would replace North Dakota's version of UMIFA with the new UPMIFA.

Key highlights of SB 1074, section-by-section, include:

Section 1: Definitions. Section 1 sets the operating definitions for the act.

Section 2: Standard of Conduct In Managing And Investing An Institutional Fund. Section 2 adopts the "prudence standard" for investment decision making. UPMIFA's prudence standard is consistent with the "business judgment rule" as applied to charitable institutions, and derived from the RMNCA and UPIA. By drawing in both sources, the new law clarifies that commonly accepted standards of prudent investment apply to all charitable organizations.

Section 2 outlines the duties expected in conducting and managing investment activity, including the overarching duty to comply with donor intent and the terms of the gift instrument. Section 2 also expressly includes the duty of loyalty and care (as would be exercised by an ordinarily prudent person in a like position under similar circumstances), the duty to minimize costs, and the duty to investigate the accuracy of information used for investment decisions. The section also allows for pooling of funds for investment and management purposes.

Finally, section 2 outlines factors that must be considered in the prudent management and investing of funds, and gives direction to diversify and make decisions in context of the portfolio and overall investment strategy.

The prudence factors for management and investment of institutional funds are: general economic conditions; possible effects of inflation or deflation; expected tax consequences (if any) of investment

decisions or strategies; the role of each investment or course of action in the overall investment portfolio of the fund; expected total return from income and the appreciation of investments; other institutional resources; needs of the institution and fund to make distributions and preserve capital; and an asset's special relationship or value to the charitable purposes of the institution.

Section 3: Appropriation For Expenditure Or Accumulation – Rules Of Construction. UMIFA permitted the expenditure of appreciation of an endowment fund to the extent that it had appreciated above the fund's historic dollar value ("HDV") (meaning the aggregate fair value of a fund when created, subsequent donations, and accumulations made at the direction of a gift instrument). UPMIFA replaces the concept of HDV with a more carefully articulated prudence standard for the process of making decisions about expenditures (in lieu of specific instructions from the donor's gift instrument or other agreement, of course). The seven prudence factors outlined in section 3 provide greater ability and flexibility to meet and effectuate donor intent than an arbitrary number fixed in time, and the factors continue to focus on and protect the purpose and duration of the endowment fund in question in accordance with the intent of the donor. UPMIFA's prudence factors encourage spending policies that will be responsive to fluctuations in fund values, maintain appropriate expenditures and accumulations during economic downturns and strengths, and guard against inappropriate depletion of endowment funds while still meeting the core "mission" of the funds. (Also, other safeguards for funds still exist, from donor restrictions to fiduciary duties of decision makers.)

The seven prudence factors for expenditure decisions are: the duration and preservation of the endowment fund; the purposes of the institution and the endowment fund; general economic conditions; possible effects of inflation and deflation; expected total return from income and the appreciation of investments; other resources of the institution; and the investment policy of the institution.

Section 4: Management and Investment Functions. Section 4 permits institutions' decision makers to delegate management and investment functions to external agents, so long as the decision makers use reasonable skill, care, and caution in selecting the external agent, defining the scope of the delegation, and reviewing agent performance. The agent owes a duty of reasonable care to the institution in complying with the scope and terms of the delegation, and is subject to court jurisdiction in North Dakota for issues arising from the delegation or performance. Decisions regarding expenditures cannot be delegated.

Section 5: Release Or Modification of Restrictions On Management, Investment, Or Purpose. Section 5 governs the release or modification of restrictions in a gift instrument on the management, investment, or overall purpose of an institutional fund. Under section 5, a donor may consent to a release or modification of restrictions, but funds must still be used for the charitable purposes of the institution. Courts may modify **restrictions** if they are impracticable or wasteful, impair the management or investment of a fund, or if the modification will further the purposes of the fund in a manner unanticipated by the donor. Modifications must be made in accordance with the donor's likely intentions in mind. The court may also modify the **purpose** of a fund if it has become unlawful, wasteful,

or impossible. Notice and opportunity to be heard must be given to the Attorney General in either court action.

If the institution itself finds that it has a qualified fund with restrictions that are impracticable, wasteful, or impossible, then the institution can modify that restriction without court action by giving 60-days notice to the Attorney General. This provision is only applicable to smaller and older funds, defined as 20 years or older and under $25,000.00, and the property must still be used consistently with the charitable purposes expressed in the gift.

Section 6: Compliance-Determination. Section 6 states that compliance with the act is judged on the facts and circumstances at hand when a particular decision is made, and hindsight is not applicable.

Section 7: Application To Existing Institutional Funds. Section 7 states that the new act will apply to funds created after August 1, 2009 or established after July 31, 2009. For those funds existing on August 1, 2009, the act applies only to decisions or actions made or taken after that date.

Section 8: Relation to ESIGN. Section 8 is standard boilerplate in most uniform acts following passage by Congress of the federal Electronic Signatures in Global and National Commerce Act (ESIGN). ESIGN expressly allows state electronic transactions law to control in many circumstances, and this represents the agreed upon language within the ULC to invoke this for uniform acts that may contemplate electronic transactions or records.

Section 9: Repeal. Section 9 repeals North Dakota's version of UMIFA, Chapter 15-67 of the North Dakota Century Code.

UPMIFA

Uniform Prudent Management of Institutional Funds Act

HIGHLIGHTS

- **Investment freedom.** Portfolio managers are not limited in the kinds of assets that may be sought for the portfolio. (Broader than UMIFA)
- **Costs.** Costs must be managed prudently in relationship to the assets, the purposes of the institution and the skills available to the institution. (Not addressed in UMIFA)
- **Expenditure of funds.** Total return expenditure is expressly authorized under comprehensive prudent standards relating to the whole economic situation of the charitable institution. (UMIFA does not address this standard)
- **Historic dollar value abolished.** UPMIFA abolishes the historic dollar value limitation on expenditure in UMIFA.
- **Seven percent rule.** States may adopt an optional rule that presumes expenditure exceeding 7% of total return is imprudent.
- **Release of restrictions for small institutional funds.** UPMIFA provides new procedures for releasing restrictions on small institutional funds (less than $25,000) held for a long period of time (20 years), requiring only notice to the Attorney General 60 days in advance of the release. (Not addressed in UMIFA)
- **Application.** UPMIFA applies to funds held in any form, including nonprofit corporate form, except charitable trusts, with a commercial or individual trustee. (UMIFA applies only to endowments held by a charitable institution for its own account.)

Attachment # 1

UPMIFA

WHY STATES SHOULD ADOPT THE ACT

This 2006 Uniform Prudent Management of Institutional Funds Act replaces and updates the 1972 Uniform Management of Institutional Funds Act. Its rules govern investment of the funds of charitable organizations and total return expenditure of those funds. It establishes a prudent management investment regime derived from the Uniform Prudent Investor Act (which applies only to trusts) and a prudent total return expenditure based upon performance of the portfolio held by a charitable institution. It also provides for delegation of authority for investment to outside agents and reformation of donor restrictions (cy pres) on funds when these are so outdated that the original objective can no longer be honored.

States should adopt the Uniform Prudent Management of Institutional Funds Act:

1. To make sure that the best investment practices govern the actual investment of institutional funds.

2. To withdraw obsolete rules governing prudent total return expenditure and provide a modern rule of prudence consistent with the rules that govern investment.

3. To eliminate differences in investment and expenditure rules that apply to different types of nonprofit organizations. The same rules govern all under UPMIFA.

4. To encourage growth of institutional funds while eliminating investment risks that threaten principal.

5. To assure that there are adequate assets in any institutional fund to meet program needs.

6. To make the law governing institutional funds uniform in every state.

A Few Facts About The...

UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

PURPOSE:
This act, like its predecessor the Uniform Management of Institutional Funds Act of 1972, provides statutory guidelines for management, investment, and expenditures of endowment funds held by charitable institutions. The new act expressly provides for diversification of assets, pooling of assets, and total return investment, to implement whole portfolio management, bringing the law governing charitable institutions in line with modern investment and expenditure practice.

ORIGIN:
Completed by the Uniform Law Commissioners in 2006.

STATE ADOPTIONS:
Alabama
Arizona
California
Connecticut
Colorado
Delaware
District of Columbia
Georgia
Idaho
Indiana
Iowa
Kansas
Minnesota
Montana
Nebraska
Nevada
New Hampshire
Oklahoma
Ohio
Oregon
South Carolina
South Dakota
Tennessee
Texas
Utah
Virginia
West Virginia

2009 INTRODUCTIONS:

For any further information regarding this Act, please contact
Kieran Marion or Katie Robinson at 312-450-6600.

111 North Wabash Ave., Suite 1010
Chicago, Illinois 60602

tel: (312) 450-6600 | fax: (312) 450-6601 | e-mail: nccusl@nccusl.org

UPMIFA

uniform prudent management of institutional funds act

A SUMMARY

At its annual meeting in July 2006, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Prudent Management of Institutional Funds Act (UPMIFA) and recommended it for enactment by the legislatures of the various states. UPMIFA is designed to replace the existing Uniform Management of Institutional Funds Act (UMIFA), which was approved by NCCUSL in 1972 and has since been enacted in 47 states. UMIFA was a pioneering statute, providing uniform and fundamental rules for the investment of funds held by charitable institutions and the expenditure of funds donated as "endowments" to those institutions. Those rules supported two general principles: 1) that assets would be invested prudently in diversified investments that sought growth as well as income, and 2) that appreciation of assets could prudently be spent for the purposes of any endowment fund held by a charitable institution. These two principles have been the twin lodestars of asset management for endowments since UMIFA became the law of the land in nearly all U.S. jurisdictions.

UPMIFA continues these fundamental principles as a needed upgrade of UMIFA. Both investment in assets and expenditure for charitable purposes have grown exponentially in the 35 years since UMIFA was drafted; asset management theory and practice have also advanced. UPMIFA, as an up-date and successor to UMIFA, establishes an even sounder and more unified basis for charitable fund management than UMIFA has done.

INVESTMENT

In 1972, UMIFA represented a revolutionary advance over prevailing practices which imposed upon endowments the limited investment opportunities available for managing trust assets – even endowments not organized as trusts. By stating the first prudent investor rule in statutory law, UMIFA allowed endowments to invest in any kind of assets, to pool endowment funds for investment purposes, and to delegate investment management to other persons (*e.g.*, professional investment advisors), as long as the governing board of the charitable institution exercised ordinary business care and prudence in making these decisions. A range of factors guided the exercise of prudence.

UPMIFA incorporates the experience gained in the last 35 years under UMIFA by providing even stronger guidance for investment management and enumerating a more exact set of rules for investing in a prudent manner. It requires investment "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." It requires prudence in incurring investment costs, authorizing "only costs that are appropriate and reasonable." Factors to be considered in investing are expanded to include, for example, the effects of inflation. UPMIFA emphasizes that investment decisions must be made in relation to the overall resources of the institution and its charitable purposes. No investment decision may be made in isolation, but must be made in light of the fund's entire portfolio, and as a part of an investment strategy "having risk and return objectives reasonably suited to the fund and to the institution." A charitable institution must diversify assets as an affirmative obligation unless "special circumstances" dictate otherwise. Assets must be reviewed within a reasonable time after they come into the possession of the institution in order to conform them to the investment

strategy and objectives of the fund. Investment experts, whether in-house or hired for the purpose, are held to a standard of care consistent with that expertise.

UMIFA initiated the era of modern portfolio management for charitable institutions. UPMIFA provides the standards and guidelines that subsequent experience tells us are the most appropriate for the purpose. Charitable institutions will have more precise standards to guide them. Courts will have more precise standards with which to measure prudence in the event of a challenge. The result should be more money for programs supported by charitable funds, including endowments.

EXPENDITURE

UMIFA initiated the concept of total return expenditure of endowment assets for charitable program purposes, expressly permitting prudent expenditure of both appreciation and income and replacing the old trust law concept that only income (*e.g.*, interest and dividends) could be spent. Thus, asset growth and income could be appropriated for program purposes, subject to the rule that a fund could not be spent below "historic dollar value."

UPMIFA builds upon UMIFA's rule on appreciation, but it eliminates the concept of "historic dollar value." UPMIFA, instead, provides better guidance on prudence and makes the need for a floor on spending unnecessary. UPMIFA states that the institution "may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines to be prudent for the uses, benefits, purposes and duration for which the endowment fund is established." Seven criteria guide the institution in its yearly expenditure decisions: "1) duration and preservation of the endowment fund; 2) the purposes of the institution and the endowment fund; 3) general economic conditions; 4) effect of inflation or deflation; 5) the expected total return from income and the appreciation of investments; 6) other resources of the institution; and, 7) the investment policy of the institution." These standards mirror the standards that apply to investment decision-making, thus unifying both investment and expenditure decisions more concretely.

UPMIFA includes an optional provision that allows states to enact another kind of safeguard against excessive expenditure. If a state does not want to rely solely upon the rule of prudence provided in UPMIFA, the state may adopt a provision that creates a rebuttable presumption of imprudence if an institution expends an amount greater than seven percent of fair market value of a fund, calculated in an averaging formula over three years. While the seven percent rule is likely not to be necessary, it is available for those states that may be uncomfortable with the general standards.

RELEASE OR MODIFICATION OF RESTRICTIONS

UPMIFA recognizes and protects donor intent more broadly than UMIFA did, in part by providing a more comprehensive treatment of the modification of restrictions on charitable funds. Sometimes a restriction imposed by a donor becomes impracticable or wasteful or may impair the management of a fund. The donor may consent to release the restriction, if the donor is still alive and able to do so, but if the donor is not available the charity can ask for court approval of a modification of the restriction. The trust law doctrines of cy pres (modifying a

purpose restriction) and deviation (modifying a management restriction) probably already apply to charitable funds held by nonprofit corporations. UPMIFA makes this clear. Under UMIFA, the only option with respect to a restriction was release of the restriction. UPMIFA instead authorizes a modification that a court determines to be in accordance with the donor's probable intention. If the charity asks for court approval of a modification, the charity must notify the state's chief charitable regulator and the regulator may participate in the proceeding.

UPMIFA adds a new provision that allows a charity to modify a restriction on a small (less than $25,000) and old (over 20 years old) fund without going to court. If a restriction has become impracticable or wasteful, the charity may notify the state charitable regulator, wait 60 days, and then, unless the regulator objects, modify the restriction in a manner consistent with the charitable purposes expressed in any documents that were part of the original gift.

CONCLUSION

UPMIFA reflects and incorporates the 35 years of experience that has accumulated under the original UMIFA. Rather than changing institutional investment or expenditure practices, it brings them up to date and unifies them across a broad range of charitable funds. The better charitable institutions manage investments and prudently control expenditures, the more money they should have for program purposes.

UPMIFA

uniform prudent management of institutional funds act

QUICK COMPARISON

UPMIFA	UMIFA
Scope: • Charitable organizations except for trusts unless a charity is the trustee	**Scope:** • Charitable organizations except for trusts unless a charity is the trustee
Investment Conduct: • Express cost management obligation • Whole portfolio management standard of performance • Express diversification requirement • Portfolio balancing required • Special skills standard of performance	**Investment Conduct:** • General obligation to invest prudently using ordinary business care

Expenditure of Funds:
• Express prudent total return standard, 7 factors:
  o Fund duration
  o Fund/institution purposes
  o General economic conditions
  o Effects, inflation/deflation
  o Expected total return
  o Other resources
  o Institutional investment policy
• Optional, over 7% of total return presumed imprudent
	Expenditure of Funds:
	• Net appreciation may be spent for purposes of endowment
	• Historic dollar value limitation

Delegation of Management/Investment:
• Prudent delegation in good faith, care standard of prudent person:
  o To select agent
  o Establish scope and terms of delegation
  o Requires periodic review and supervision of agent
• Agent has duty of reasonable care
• Agent subject to court jurisdiction
• Delegation to committees, officers or employees as authorized by other law
	Delegation of Management/Investment:
	• Delegation allowed without express standards

UPMIFA

Uniform Prudent Management of Institutional Funds Act

UPMIFA	UMIFA

Release or Modification of Restrictions:
Restriction
• Court may release or modify if restriction is:
  o Impracticable or wasteful
  o Impairs management or investment
  o Meets unanticipated circumstances that allow release or modification furthering purposes of the fund
• Notice to Attorney General required
Purpose
• Court may release or modify if purpose is:
  o Unlawful to retain
  o Impracticable
  o Impossible to achieve
  o Wasteful
• Must be consistent with donor's intent
• Notice to Attorney General Required
Small Old Fund
• Institution may institute release or modification without court approval
• Notice to Attorney General required
	Release or Modification of Restrictions:
	• Court release if restriction obsolete, inappropriate or impracticable
	• Notice to Attorney General required
	• Cy pres (modification of purpose) not limited or addressed

NDANO NORTH DAKOTA ASSOCIATION OF NONPROFIT ORGANIZATIONS

PO Box 1091 • Bismarck, ND 58502 • Phone: 701-258-9101 • 888-396-3266 • Fax: 701-223-4645 • www.ndano.org

Testimony of Gerald Skogley

To
House Government and Veterans Affairs Committee
In Support of HB 1074
Friday, January 16, 2009

Chairman Grande and Members of the Committee, my name is Gerald Skogley. I am testifying today in support of HB 1074 on behalf of the North Dakota Association of Nonprofit Organizations (NDANO), of which I am a Board Member.

NDANO represents more than 150 members from all parts of the state working in many different areas – from human services and the environment to education and the arts. As a membership organization dedicated to strengthening North Dakota nonprofits, NDANO encourages best practices and accountability in nonprofit management.

The Uniform Prudent Management of Institutional Funds Act (UPMIFA) sets fair and reasonable standards of accountability for management of funds in the North Dakota nonprofit sector. In particular, the bill does three things: 1) provides guidance on prudent investing by providing more detail to nonprofits about investment of their funds; 2) sets rules for the spending of endowments, moving away from a "historic" dollar value limitation into a "prudent" spending rule based on donor intent and permanent duration of the endowment; and 3) modifies restrictions on gifts made to nonprofits when amounts are small and older than 20 years.

As the Vice-President for Finance of the University of North Dakota in 1975, I was instrumental in the passage of the present statute. I believe that the proposed changes do much to modernize the original intent of the legislation. We support a DO PASS on HB 1074.

Thank you for your consideration. I would be happy to answer any questions.

Attachment # 2

Government and Veterans Affairs January 16, 2009

HB 1074

Testimony by Polly Peterson
VP Institutional Advancement
Jamestown College

Chairman Grande & members of the committee my name is Polly Peterson, I am here today representing Jamestown College, to speak in favor of HB 1074

In 1972, when the Uniform Law Commission promulgated UMIFA, uncertainty about the standards that governed directors of nonprofits had existed. Institutions and states looked to trust law for guidance but trust law at that time restricted investment decision making in a number of ways, particularly in how it defined income and principal and the resulting impact on spending and investment. Consequently, UMIFA created a new set of rules that made total-return investing possible for charities organized as nonprofit corps. Since 1972 however, trust law has evolved and the Uniform Prudent Investor Act (UPIA), a trust law statute now adopted in 44 states, provides modern guidance for the prudence standard fiduciaries should follow in making investment decisions.

Although the comments to UPIA suggest that the standards articulated in that statute also apply to nonprofits, making the standard explicitly applicable to all charities makes sense. Consequently, with this and other changes in mind, the Uniform Law Commission decided to update UMIFA, hence UPMIFA. To date 39 states have approved UPMIFA.

In summary, UPMIFA does three things:

- Updates the prudence standard that applies to the management and investment of charitable funds by requiring management to:
  - Meet their fiduciary duty of care
  - Minimize costs
  - Investigate with respect to investment decision making
  - Consider general economic conditions
  - Make decisions on a portfolio basis
  - Allocate risk and return across the portfolio

Attachment #3

- Consider the needs of the charity both to make distributions and to preserve capital
- Allows management to pool funds for purposes of management and investment, and the possibility of better investment results
- Reminds management that "donor intent" as expressed in the gift agreement is of primary responsibility

➢ Modernizes the rules governing expenditures from endowments
- To provide better guidance on spending endowment funds
- To give institutions the ability to cope more easily with fluctuations in the value of the endowment.
- Specifically, UPMIFA
  - Eliminates UMIFA language relating to historic dollar value (HDV) which allows a nonprofit to spend from an endowment fund only the amount of appreciation above HDV that the charity deems prudent, and never below HDV.
  - Adopts a more articulated prudence standard that emphasizes the perpetuation of the "purchasing power" of the fund, not just of the original dollars (HDV) contributed to the fund.
  - Suggests that an appropriation for expenditure in any year greater than 7% of the FMV of an endowment fund, calculated on the basis of MV determined at least quarterly and averaged over a period not less than 3 years, creates a rebuttable presumption of imprudence.
  - Gives effect to the presumed intent of the donor- to make sure there are enough funds to distribute while maintaining the long-term viability of the fund.

➢ Adopts provisions governing the release and modification of restrictions on charitable funds to permit more efficient management when the restriction of such fund becomes impracticable, wasteful, or impairs the management or investment of the fund. To release or modify the restriction the institution must notify the attorney general and after 60 days may do so if:
- Total value of the fund is less than $25,000

- More than 20 years have elapsed since the fund was established
- The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

Case for retroactive application of UPMIFA:

UPMIFA simply gives meaning to a donor's direction to "pay only the income" from an endowment. It (as is UMIFA), as a rule of constructional, simply resolves ambiguity because the words used by a donor do not convey a specific meaning. Changing a statutory constructional rule does not change the underlying intent but rather, changes the way an ambiguity is resolved. The change should better effectuate the intent of the donors and thus provide better protection for the donors and for the charities. Therefore, UPMIFA should apply to all endowment funds retroactively. Unless retroactive application is allowed, charities will face very difficult and costly administrative burdens, essentially requiring them to maintain two sets of records for every endowment fund created before enactment that receives contributions after enactment.

TESTIMONY OF GARY D. PRESZLER
STATE LAND COMMISSIONER
North Dakota State Land Department

NEUTRAL ON HOUSE BILL NO. 1074

HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
January 16, 2009

HB 1074 adopts a new version of the Uniform Prudent Management of Institutional Funds and repeals the previous version of this law. This uniform law governs various aspects of how charitable trust funds and endowments are invested and managed.

Under the definition for "institution" included in HB 1074, the Board of University and School Lands (Land Board) would be considered a government entity and governed by this Act, although the exclusivity, "for a charitable purpose" should preclude the Land Board from the Act (page 1, lines 20 and 21). But the definitions are ambiguous as "institutional fund" exclusions do not include the Land Board as does the current Act that is being repealed. Although the Land Board believes in all of the principals and requirements set out in this bill, I am here today to respectfully request that this bill be amended to exempt the perpetual trust funds managed by the Land Board.

NDCC Section 15-03-04 currently holds the Land Board to a "prudent investor" standard when investing the assets of the permanent trust funds under its control. NDCC 15-03-04 specifically states:

> The "prudent investor rule" means that in making investments the board shall exercise the same judgment and care, under the circumstances then prevailing and limitations of North Dakota and federal law, that an institutional investor of ordinary prudence, discretion, and intelligence exercises in the management of large investments entrusted to it, not in regard to speculation but in regard to the permanent disposition of funds, considering probable safety of capital as well as probable income.

The "prudent person" language currently included in various sections in HB 1074 is a lower standard than the "prudent investor" standard to which the Land Board is currently held. It requires that funds be invested as an "ordinarily prudent person in a like position would exercise under similar circumstances". A "prudent investor" must use a standard of care that another institutional investor would use.

Because of these different standards, the Land Board was exempted from the provisions of NDCC 15-67, which is being repealed and replaced by the provisions in this bill. We respectfully request that you consider our proposed amendment to HB 1074 to once again similarly exempt the Board from the provisions of the Uniform Prudent Management of Institutional Funds.

Attachment #4

State Land Department
January 16, 2009

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1074

Page 2, after line 7, insert "d. Perpetual trust funds established by article IX of the Constitution of North Dakota."

Renumber accordingly

Comments to the North Dakota House of Representatives Government and Veterans Affairs Committee, Representative Betty Grande, Chair

Submitted by James C. Miller, Executive Director, NDSU Development Foundation 1-16-2009 regarding H.B. 1074 relating to the Uniform Management of Institutional Funds Act (UPMIFA)

The Uniform Prudent Management of Institutional Funds Act (UPMIFA) replaces the Uniform Management of Institutional Funds Act (UMIFA).

The changes UMIFA made to the law permitted charitable organizations to use modern investment techniques such as total-return investing and to determine endowment fund spending based on spending rates rather than on determinations of "income" and "principal."

UMIFA was drafted almost 35 years ago, and portions of it are now out of date. The new Act provides charities modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending. The Uniform Prudent Investor Act (UPIA), an Act promulgated in 1994 and already enacted in 43 jurisdictions, served as a model for many of the revisions. UPIA updates rules on investment decision making for trusts, including charitable trusts, and imposes additional duties on trustees for the protection of beneficiaries. UPMIFA applies these rules and duties to charities organized as nonprofit corporations.

In applying principles based on UPIA to charities organized as nonprofit corporations, UPMIFA combines the approaches taken by UPIA and by the Revised Model Nonprofit Corporation Act (RMNCA). UPMIFA reflects the fact that standards for managing and investing institutional funds are and should be the same regardless of whether a charitable organization is organized as a trust, a nonprofit corporation, or some other entity.

UPMIFA provides guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations, and UPMIFA imposes additional duties on those who manage and invest charitable funds. These duties provide additional protections for charities and also protect the interests of donors who want to see their contributions used wisely.

UPMIFA modernizes the rules governing expenditures from endowment funds, both to provide stricter guidelines on spending from endowment funds and to give institutions the ability to cope more easily with fluctuations in the value of the endowment.

Finally, UPMIFA updates the provisions governing the release and modification of restrictions on charitable funds to permit more efficient management of those funds. UPMIFA's modification rules preserve the historic position of the attorneys general in most states as the overseers of charities.

Among the expressly enumerated prudence factors in UPMIFA is "the preservation of the endowment fund," a standard not articulated in UMIFA.

UPMIFA requires a charity and those who manage and invest funds to:

1. Give primary consideration to donor intent as expressed in a gift instrument,
2. Act in good faith,
3. Incur only reasonable costs in investing and managing charitable funds,
4. Make a reasonable effort to verify relevant acts,
5. Made decisions about each asset in the context of the portfolio of investments, as part of an overall investment strategy,
6. Diversify investments unless due to special circumstances, the purposes of the fund are better served without diversification,
7. Dispose of unsuitable assets, and
8. Develop an investment strategy appropriate for the fund and the charity.

UMIFA does not articulate these requirements.

UPMIFA strengthens the rules governing management and investment decision making by charities and providing more guidance for those who manage and invest the funds.

UPMIFA improves the protection of donor intent with respect to expenditures from endowments. When a donor expresses intent clearly in a written gift instrument, the Act requires that the charity follow the donor's instructions. When a donor's intent is not expressed, UPMIFA directs the charity to spend an amount that is prudent, consistent with the purpose of the fund, relevant economic factors, and the donor's intent that the fund continue in perpetuity.

UPMIFA improves the endowment-spending rule by eliminating the concept of historic dollar value and providing better guidance regarding the operation of the prudence standard.

UPMIFA includes as an optional provision a presumption of imprudence if a charity spends more than seven percent of an endowment fund in any one year. This is meant to protect against spending an endowment too quickly.

UPMIFA clarifies that the doctrines of cy pres and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts. Under UPMIFA, the court will determine whether and how to apply cy pres or deviation and the attorney general will receive notice and have the opportunity to participate in the proceeding. The one addition to existing law is that UPMIFA gives a charity the authority to modify a restriction on a fund that is both old and small.

With respect to small, old funds, the charity must notify the attorney general of the charity's intended action. If the attorney general has concerns, he or she can seek the agreement of the charity to change or abandon the modifications, and if that fails can commence a court action to enjoin it. Thus, in all types of modifications the attorney general continues to protect both the donor's intent and the public's interest.

For matters not governed by UPMIFA, 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.

Although UPMIFA applies a number of rules from trust law to institutions organized as nonprofit corporations, in two respects UPMIFA creates rules that do not exist under the common law applicable to trusts. The endowment spending rule and the provisions for modifying a small, old fund.

On a personal note, my wife and I have an endowed account with the NDSU Development Foundation. As a result of turmoil in the financial markets and if UPMIFA is not adopted with an effective date of January 1, 2009, the Development Foundation will be forced to reduce or eliminate distributions for the upcoming fiscal year. This will have a severe impact on students and faculty in fiscal year 2010. As with most endowment donors, we do not feel this is a favorable result of our generosity.

I encourage the Government and Veterans Affairs Committee to act unanimously to pass H.B. 1074 with its emergency clause for the following reasons:

1. To insure that the best investment practices govern the actual investment of institutional funds,
2. To withdraw obsolete rules governing prudent total return expenditure and provide a modern rule of prudence consistent with the rules that govern investment,
3. To eliminate differences in investment and expenditure rules that applies to different types of nonprofit organizations. The same rules govern all under UPMIFA,
4. To encourage growth of institutional funds while eliminating investment risks that threaten principal,
5. To assure there are adequate assets in any institutional fund to meet program needs, and
6. To make the law governing institutional funds uniform in every state.

Presently UPMIFA had been enacted in 25 states and the District of Columbia.

I appreciate the opportunity to speak to members of the Government and Veterans Affairs Committee.

Submitted by:

UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FIFTEENTH YEAR
HILTON HEAD, SOUTH CAROLINA

July 7-14, 2006

WITH PREFATORY NOTE AND COMMENTS

November 8, 2007

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DRAFTING COMMITTEE ON UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

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UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

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UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

Prefatory Note

Reasons for Revision. The Uniform Prudent Management of Institutional Funds Act (UPMIFA) replaces the Uniform Management of Institutional Funds Act (UMIFA). The National Conference of Commissioners on Uniform State Laws approved UMIFA in 1972, and 47 jurisdictions have enacted the act. UMIFA provided guidance and authority to charitable organizations within its scope concerning the management and investment of funds held by those organizations, UMIFA provided endowment spending rules that did not depend on trust accounting principles of income and principal, and UMIFA permitted the release of restrictions on the use or management of funds under certain circumstances. The changes UMIFA made to the law permitted charitable organizations to use modern investment techniques such as total-return investing and to determine endowment fund spending based on spending rates rather than on determinations of "income" and "principal."

UMIFA was drafted almost 35 years ago, and portions of it are now out of date. The prudence standards in UMIFA have provided useful guidance, but prudence norms evolve over time. The new Act provides modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending. The Uniform Prudent Investor Act (UPIA), an Act promulgated in 1994 and already enacted in 43 jurisdictions, served as a model for many of the revisions. UPIA updates rules on investment decision making for trusts, including charitable trusts, and imposes additional duties on trustees for the protection of beneficiaries. UPMIFA applies these rules and duties to charities organized as nonprofit corporations. UPMIFA does not apply to trusts managed by corporate and other fiduciaries that are not charities, because UPIA provides management and investment standards for those trusts.

In applying principles based on UPIA to charities organized as nonprofit corporations, UPMIFA combines the approaches taken by UPIA and by the Revised Model Nonprofit Corporation Act (RMNCA). UPMIFA reflects the fact that standards for managing and investing institutional funds are and should be the same regardless of whether a charitable organization is organized as a trust, a nonprofit corporation, or some other entity. *See* Bevis Longstreth, Modern Investment Management and the Prudent Man Rule 7 (1986) (stating "[t]he modern paradigm of prudence applies to all fiduciaries who are subject to some version of the prudent man rule, whether under ERISA, the private foundation provisions of the Code, UMIFA, other state statutes, or the common law."); 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.

UPMIFA provides guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations, and UPMIFA imposes additional duties on those who manage and invest charitable funds. These duties provide additional protections for charities and also protect the interests of donors who want to see their contributions used wisely.

UPMIFA modernizes the rules governing expenditures from endowment funds, both to provide stricter guidelines on spending from endowment funds and to give institutions the ability to cope more easily with fluctuations in the value of the endowment.

Finally, UPMIFA updates the provisions governing the release and modification of restrictions on charitable funds to permit more efficient management of these funds. These provisions derive from the approach taken in the Uniform Trust Code (UTC) for modifying charitable trusts. Like the UTC provisions, UPMIFA's modification rules preserve the historic position of the attorneys general in most states as the overseers of charities.

As under UMIFA, the new Act applies to charities organized as charitable trusts, as nonprofit corporations, or in some other manner, but the rules do not apply to funds managed by trustees that are not charities. Thus, the Act does not apply to trusts managed by corporate or individual trustees, but the Act does apply to trusts managed by charities.

Prudent Management and Investment. UMIFA applied the 1972 prudence standard to investment decision making. In contrast, UPMIFA will give charities updated and more useful guidance by incorporating language from UPIA, modified to fit the special needs of charities. The revised Act spells out more of the factors a charity should consider in making investment decisions, thereby imposing a modern, well accepted, prudence standard based on UPIA.

Among the expressly enumerated prudence factors in UPMIFA is "the preservation of the endowment fund," a standard not articulated in UMIFA.

In addition to identifying factors that a charity must consider in making management and investment decisions, UPMIFA requires a charity and those who manage and invest its funds to:

1. Give primary consideration to donor intent as expressed in a gift instrument,
2. Act in good faith, with the care an ordinarily prudent person would exercise,
3. Incur only reasonable costs in investing and managing charitable funds,
4. Make a reasonable effort to verify relevant facts,
5. Make decisions about each asset in the context of the portfolio of investments, as part of an overall investment strategy,
6. Diversify investments unless due to special circumstances, the purposes of the fund are better served without diversification,
7. Dispose of unsuitable assets, and
8. In general, develop an investment strategy appropriate for the fund and the charity.

UMIFA did not articulate these requirements.

Thus, UPMIFA strengthens the rules governing management and investment decision making by charities and provides more guidance for those who manage and invest the funds.

Donor Intent with Respect to Endowments. UPMIFA improves the protection of donor intent with respect to expenditures from endowments. When a donor expresses intent clearly in a written gift instrument, the Act requires that the charity follow the donor's instructions. When a donor's intent is not so expressed, UPMIFA directs the charity to spend an amount that is prudent, consistent with the purposes of the fund, relevant economic factors, and the donor's intent that the fund continue in perpetuity. This approach allows the charity to give effect to donor intent, protect its endowment, assure generational equity, and use the endowment to support the purposes for which the endowment was created.

Retroactivity. Like UMIFA, UPIA, the Uniform Principal and Income Act of 1961, and the Uniform Principal and Income Act of 1997, UPMIFA applies retroactively to institutional funds created before and prospectively to institutional funds created after enactment of the statute. Regarding the considerations motivating this treatment of the issues, see the comment to Section 4.

Endowment Spending. UPMIFA improves the endowment spending rule by eliminating the concept of historic dollar value and providing better guidance regarding the operation of the prudence standard. Under UMIFA a charity can spend amounts above historic dollar value that the charity determines to be prudent. The Act directs the charity to focus on the purposes and needs of the charity rather than on the purposes and perpetual nature of the fund. Amounts below historic dollar value cannot be spent. The Drafting Committee concluded that this endowment spending rule created numerous problems and that restructuring the rule would benefit charities, their donors, and the public. The problems include:

1. Historic dollar value fixes valuation at a moment in time, and that moment is arbitrary. If a donor provides for a gift in the donor's will, the date of valuation for the gift will likely be the donor's date of death. (UMIFA left uncertain what the appropriate date for valuing a testamentary gift was.) The determination of historic dollar value can vary significantly depending upon when in the market cycle the donor dies. In addition, the fund may be below historic dollar value at the time the charity receives the gift if the value of the asset declines between the date of the donor's death and the date the asset is actually distributed to the charity from the estate.

2. After a fund has been in existence for a number of years, historic dollar value may become meaningless. Assuming reasonable long term investment success, the value of the typical fund will be well above historic dollar value, and historic dollar value will no longer represent the purchasing power of the original gift. Without better guidance on spending the increase in value of the fund, historic dollar value does not provide adequate protection for the fund. If a charity views the restriction on spending

simply as a direction to preserve historic dollar value, the charity may spend more than it should.

3. The Act does not provide clear answers to questions a charity faces when the value of an endowment fund drops below historic dollar value. A fund that is so encumbered is commonly called an "underwater" fund. Conflicting advice regarding whether an organization could spend from an underwater fund has led to difficulties for those managing charities. If a charity concluded that it could continue to spend trust accounting income until a fund regained its historic dollar value, the charity might invest for income rather than on a total-return basis. Thus, the historic dollar value rule can cause inappropriate distortions in investment policy and can ultimately lead to a decline in a fund's real value. If, instead, a charity with an underwater fund continues to invest for growth, the charity may be unable to spend anything from an underwater endowment fund for several years. The inability of a charity to spend anything from an endowment is likely to be contrary to donor intent, which is to provide current benefits to the charity.

The Drafting Committee concluded that providing clearly articulated guidance on the prudence rule for spending from an endowment fund, with emphasis on the permanent nature of the fund, would provide the best protection of the purchasing power of endowment funds.

Presumption of Imprudence. UPMIFA includes as an optional provision a presumption of imprudence if a charity spends more than seven percent of an endowment fund in any one year. The presumption is meant to protect against spending an endowment too quickly. Although the Drafting Committee believes that the prudence standard of UPMIFA provides appropriate and adequate protection for endowments, the Committee provided the option for states that want to include a mechanical guideline in the statute. A major drawback to any statutory percentage is that it is unresponsive to changes in the rate of inflation or deflation.

Modification of Restrictions on Charitable Funds. UPMIFA clarifies that the doctrines of cy pres and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts. Courts have applied trust law rules to nonprofit corporations in the past, but the Drafting Committee believed that statutory authority for applying these principles to nonprofit corporations would be helpful. UMIFA permitted release of restrictions but left the application of cy pres uncertain. Under UPMIFA, as under trust law, the court will determine whether and how to apply cy pres or deviation and the attorney general will receive notice and have the opportunity to participate in the proceeding. The one addition to existing law is that UPMIFA gives a charity the authority to modify a restriction on a fund that is both old and small. For these funds, the expense of a trip to court will often be prohibitive. By permitting a charity to make an appropriate modification, money is saved for the charitable purposes of the charity. Even with respect to small, old funds, however, the charity must notify the attorney general of the charity's intended action. Of course, if the attorney general has concerns, he or she can seek the agreement of the charity to change or abandon the modification, and if that fails, can commence a court action to enjoin it. Thus, in all types of modification the attorney general continues to be the protector both of the donor's intent and of the public's interest in charitable funds.

Other Organizational Law. For matters not governed by UPMIFA, 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.

Relation to Trust Law. Although UPMIFA applies a number of rules from trust law to institutions organized as nonprofit corporations, in two respects UPMIFA creates rules that do not exist under the common law applicable to trusts. The endowment spending rule of Section 4 and the provision for modifying a small, old fund in subsection (d) of Section 6 have no counterparts in the common law or the UTC. The Drafting Committee believes that these rules could be useful to charities organized as trusts, and the Committee recommends conforming amendments to the UTC and the Principal and Income Act to incorporate these changes into trust law.

UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

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

SECTION 2. DEFINITIONS. In this [act]:

(1) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(2) "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(3) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) "Institution" means:

(A) a person, other than an individual, organized and operated exclusively for charitable purposes;

(B) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; or

(C) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

(A) program-related assets;

(B) a fund held for an institution by a trustee that is not an institution; or

(C) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) "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.

Comment

Subsection (1). Charitable Purpose. The definition of charitable purpose follows that of UTC § 405 and Restatement (Third) of Trusts § 28 (2003). This long-familiar standard derives from the English Statute of Charitable Uses, enacted in 1601.

Some 17 states have created statutory definitions of charitable purpose for various purposes. *See, e.g.*, 10 PA. CONS. STAT. § 162.3 (2005) (defining charitable purpose within the Solicitation of Funds for Charitable Purposes Act to include "humane," "patriotic," social welfare and advocacy," and "civic" purposes). The definition in subsection (1) applies for purposes of this Act and does not affect other definitions of charitable purpose.

Subsection (2). 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 that makes a fund an endowment fund arises from the terms of a gift instrument. If an institution has more than one endowment fund, under Section 3 the institution can manage and invest some or all endowment funds together. Section 4 and Section 6 must be applied to

individual funds and cannot be applied to a group of funds that may be managed collectively for investment purposes.

Board-designated funds are institutional funds but not endowment funds. The rules on expenditures and modification of restrictions in this Act do not apply to restrictions that an institution places on an otherwise unrestricted fund that the institution holds for its own benefit. The institution may be able to change these restrictions itself, subject to internal rules and to the fiduciary duties that apply to those that manage the institution.

If an institution transfers assets to another institution, subject to the restriction that the other institution hold the assets as an endowment, then the second institution will hold the assets as an endowment fund.

Subsection (3). Gift Instrument. The term gift instrument refers to the records that establish the terms of a gift and may consist of more than one document. The definition clarifies that the only legally binding restrictions on a gift are the terms set forth in writing.

As used in this definition, "record" is an expansive concept and means a writing in any form, including electronic. The term includes a will, deed, grant, conveyance, agreement, or memorandum, and also includes writings that do not have a donative purpose. For example, under some circumstances the bylaws of the institution, minutes of the board of directors, or canceled checks could be a gift instrument or be one of several records constituting a gift instrument. Although the term can include any of these records, a record will only become a gift instrument if both the donor and the institution were or should have been aware of its terms when the donor made the gift. For example, if a donor sends a contribution to an institution for its general purposes, then the articles of incorporation may be used to clarify those purposes. If, in contrast, the donor sends a letter explaining that the institution should use the contribution for its "educational projects concerning teenage depression," then any funds received in response must be used for that purpose and not for broader purposes otherwise permissible under the articles of incorporation.

Solicitation materials may constitute a gift instrument. For example, a solicitation that suggests in writing that any gifts received pursuant to the solicitation will be held as an endowment may be integrated with other writings and may be considered part of the gift instrument. Whether the terms of the solicitation become part of the gift instrument will depend upon the circumstances, including whether a subsequent writing superseded the terms of the solicitation. Each gift received in response to a solicitation will be subject to any restrictions indicated in the gift instrument pertaining to that gift. For example, if an initial gift establishes an endowment fund, and the charity then solicits additional gifts "to be held as part of the Charity X Endowment Fund," those additional gifts will each be subject to the restriction that the gifts be held as part of that endowment fund.

The term gift instrument includes matching funds provided by an employer or some other person. Whether matching funds are treated as part of the endowment fund or otherwise will depend on the terms of the matching gift.

The term gift instrument also includes an appropriation by a legislature or other public or governmental body for the benefit of an institution.

Subsection (4). Institution. The Act applies generally to institutions organized and operated exclusively for charitable purposes. The term includes charitable organizations created as nonprofit corporations, unincorporated associations, governmental subdivisions or agencies, or any form of entity, however organized, that is organized and operated exclusively for charitable purposes. The term includes a trust organized and operated exclusively for charitable purposes, but only if a charity acts as trustee. This approach leaves unchanged the coverage of UMIFA. The exclusion of "individual" from the definition of institution is not intended to exclude a corporation sole.

Although UPMIFA does not apply to all charitable trusts, many of UPMIFA's provisions derive from trust law. Prudent investor standards apply to trustees of charitable trusts in states that have adopted UPIA. Trustees of charitable trusts can use the doctrines of cy pres and deviation to modify trust provisions, and the UTC includes a number of modification provisions. The Uniform Principal and Income Act permits allocation between principal and income to facilitate total-return investing. Charitable trusts not included in UPMIFA, primarily those managed by corporate trustees and individuals, will lose the benefits of UPMIFA's endowment spending rule and the provision permitting a charity to apply cy pres, without court supervision, for modifications to a small, old fund. Enacting jurisdictions may choose to incorporate these rules into existing trust statutes to provide the benefits to charitable funds managed by corporate trustees.

The definition of institution includes governmental organizations that hold funds exclusively for the purposes listed in the definition. A governmental entity created by state law may fall outside the definition on account of the form of organization under which the state created it. Because state arrangements are so varied, creating a definition that encompasses all charitable entities created by states is not feasible. States should consider applying the core principles of UPMIFA to such governmental institutions. For example, the control over a state university may be held by a State Board of Regents. In that situation, the state may have created 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 (5). Institutional Fund. The term institutional fund includes any fund held by an institution for charitable purposes, whether the fund is expendable currently or subject to restrictions. The term does not include a fund held by a trustee that is not an institution.

Some institutions combine assets from multiple funds for investment purposes, and some institutions invest funds from different institutions in a common fund. Typically each fund is assigned units representing the share value of the individual fund. The assets are invested collectively, permitting more efficient investment and improved diversification of the overall

portfolio. The collective fund makes annual distributions to the individual funds based on the units held by each fund. For purposes of Section 3 [and Section 5], the collective fund is considered one institutional fund. Section 4 and Section 6 apply to each fund individually and not to the collective fund.

Assets held by an institution primarily for program-related purposes rather than exclusively for investment are not subject to UPMIFA. For example, a university may purchase land adjacent to its campus for future development. The purchase might not meet prudent investor standards for commercial real estate, but the purchase may be appropriate because the university needs to build a new dormitory. The classroom buildings, administration buildings, and dormitories held by the university all have value as property, but the university does not hold those buildings as financial assets for investment purposes. The Act excludes from the prudent investor norms those assets that a charity uses to conduct its charitable activities, but does not exclude assets that have a tangential tie to the charitable purpose of the institution but are held primarily for investment purposes.

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. However, this subsection treats as an institution a charitable remainder trust that continues to operate for charitable purposes after the termination of the noncharitable interests. The Act will have only a limited effect on a charitable remainder trust that terminates after the noncharitable interest ends. During the period required to complete the distribution of the trust's property, the prudence norm will apply to the actions of the trustee, but the short timeframe will affect investment decision making.

Subsection (6). Person. The Act uses as the definition of person the definition approved by the National Conference of Commissioners on Uniform State Laws. The definition of institution uses the term person, but to be an institution a person must be organized and operated exclusively for charitable purposes. A person with a commercial purpose cannot be an institution. Thus, although the definition of person includes "business trust" and "any other . . . commercial entity," the Act does not apply to an entity organized for business purposes and not exclusively for charitable purposes. Further, the definition of person includes trusts, but only trusts managed by charities can be institutional funds. UPMIFA does not apply to trusts managed by corporate trustees or by individual trustees.

If a governing instrument provides that a fund will revert to the donor if, and only if, the institution ceases to exist or the purposes of the fund fail, then the fund will be considered an institutional fund until such contingency occurs.

Subsection (7). Program-Related Asset. Although UPMIFA does not apply to program-related assets, if program-related assets serve, in part, as investments for an institution, then the institution should identify categories for reporting those investments and should establish investment criteria for the investments that are reasonably related to achieving the institution's charitable purposes. For example, a program providing below-market loans to

inner-city businesses may be "primarily to accomplish a charitable purpose of the institution" but also can be considered, in part, an investment. The institution should create reasonable credit standards and other guidelines for the program to increase the likelihood that the loans will be repaid.

Subsection (8). 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. STANDARD OF CONDUCT IN MANAGING AND INVESTING INSTITUTIONAL FUND.

(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this [act], each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(1) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(2) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) general economic conditions;

(B) the possible effect of inflation or deflation;

(C) the expected tax consequences, if any, of investment decisions or strategies;

(D) the role that each investment or course of action plays within the overall investment portfolio of the fund;

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

(F) other resources of the institution;

(G) the needs of the institution and the fund to make distributions and to preserve capital; and

(H) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather 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.

(3) Except as otherwise provided by law other than this [act], an institution may invest in any kind of property or type of investment consistent with this section.

(4) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this [act].

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

Comment

Purpose and Scope of Revisions. This section adopts the prudence standard for investment decision making. The section directs directors or others responsible for managing and investing the funds of an institution 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 incorporates the duty to diversify investments absent a conclusion that special circumstances make a decision not to diversify reasonable. Thus, the section follows modern portfolio theory for investment decision making. Section 3 applies to all funds held by an institution, regardless of whether the institution obtained the funds by gift or otherwise and regardless of whether the funds are restricted.

The Drafting Committee discussed extensively the standard that should govern nonprofit managers. UMIFA states the standard as "ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision." Since the decision in *Stern v. Lucy Webb Hayes National Training School for Deaconesses,* 381 F. Supp. 1003 (1974), the trend has been to hold directors of nonprofit corporations to a standard nominally similar to the corporate standard but with the recognition that the facts and circumstances considered include the fact that the entity is a charity and not a business corporation.

The language of the prudence standard adopted in UPMIFA is derived from the RMNCA and from the prudent investor rule of UPIA. The standard is consistent with the business

judgment standard under corporate law, *as applied to charitable institutions*. That is, a manager operating a charitable organization under the business judgment rule would look to the same factors as those identified by the prudent investor rule. The standard for prudent investment set forth in Section 3 first states the duty of care as articulated in the RMNCA, but provides more specific guidance for those managing and investing institutional funds by incorporating language from UPIA. The criteria derived from UPIA are consistent with good practice under current law applicable to nonprofit corporations.

Trust law norms already inform managers of nonprofit corporations. The Preamble to UPIA explains: "Although the Uniform Prudent Investor Act by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations." *See also*, Restatement (Third) of Trusts: Prudent Investor Rule § 379, Comment b, at 190 (1992) (stating that "absent a contrary statute or other provision, the prudent investor rule applies to investment of funds held for charitable corporations."). Trust precedents have routinely been found to be helpful but not binding authority in corporate cases.

The Drafting Committee decided that by adopting language from both the RMNCA and UPIA, UPMIFA could clarify that common standards of prudent investing apply to all charitable institutions. Although the principal trust authorities, UPIA § (2)(a), Restatement (Third) of Trusts §337, UTC § 804, and Restatement (Second) of Trusts § 174 (prudent administration) use the phrase "care, skill and caution," the Drafting Committee decided to use the more familiar corporate formulation as found in RMNCA. The standard also appears in Sections 3, 4 and 5 of UPMIFA. The Drafting Committee does not intend any substantive change to the UPIA standard and believes that "reasonable care, skill, and caution" are implicit in the term "care" as used in the RMNCA. The Drafting Committee included the detailed provisions from UPIA, because the Committee believed that the greater precision of the prudence norms of the Restatement and UPIA, as compared with UMIFA, could helpfully inform managers of charitable institutions. 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), and for a discussion of the effect UPIA has had on investment decision making, see Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J. L. & Econ. (forthcoming 2007).

Section 3 has incorporated the provisions of UPIA with only a few exceptions. UPIA applies to private trusts and is entirely default law. The settlor of a private trust has complete control over virtually all trust provisions. See UTC § 105. Because UPMIFA applies to charitable organizations, UPMIFA makes the duty of care, the duty to minimize costs, and the duty to investigate mandatory. The duty of loyalty is mandatory under applicable organization law, corporate or trust. Other than these duties, the provisions of Section 3 are default rules. A gift instrument or the governing instruments of an institution can modify these duties, but the charitable purpose doctrine limits the extent to which an institution or a donor can restrict these duties. In addition, subsection (a) of Section 3 reminds the decision maker that the intent of a donor expressed in a gift instrument will control decision making. Further, the decision maker must consider the charitable purposes of the institution and the purposes of the institutional fund

for which decisions are being made. These factors are specific to charitable organizations; UPIA § 2(a) states the duty to consider similar factors in the private trust context.

UPMIFA does not include the duty of impartiality, stated in UPIA § 6, because nonprofit corporations do not confront the multiple beneficiaries problem to which the duty is addressed. Under UPIA, a trustee must treat the current beneficiaries and the remainder beneficiaries with due regard to their respective interests, subject to alternative direction from the trust document. A nonprofit corporation typically creates one charity. The institution may serve multiple beneficiaries, but those beneficiaries do not have enforceable rights in the institution in the same way that beneficiaries of a private trust do. Of course, if a charitable trust is created to benefit more than one charity, rather than being created to carry out a charitable purpose, then UPIA will apply the duty of impartiality to that trust.

In other respects, the Drafting Committee made changes to language from UPIA only where necessary to adapt the language for charitable institutions. No material differences are intended. Subsection (e)(1)(D) of Section 3 of UPMIFA does not include a clause that appears at the end of UPIA § 2(c)(4) ("which may include financial assets, interest in closely held enterprises, tangible and intangible personal property, and real property."). The Drafting Committee deemed this clause unnecessary for charitable institutions. The language of subsection (e)(1)(G) reflects a modification of the language of UPIA § (2)(c)(7). Other minor modifications to the UPIA provisions make the language more appropriate for charitable institutions.

The duties imposed by this section apply to those who govern an institution, including directors and trustees, and to those to whom the directors or managers delegate responsibility for investment and management of institutional funds. The standard applies to officers and employees of an institution and to agents who invest and manage institutional funds. Volunteers who work with an institution will be subject to the duties imposed here, but state and federal statutes may provide reduced liability for persons who act without compensation. UPMIFA does not affect the application of those shield statutes.

Subsection (a). Donor Intent and Charitable Purposes. Subsection (a) states the overarching duty to comply with donor intent as expressed in the terms of the gift instrument. The emphasis in the Act on giving effect to donor intent does not mean that the donor can or should control the management of the institution. The other fundamental duty is the duty to consider the charitable purposes of the institution and of the institutional fund in making management and investment decisions. UPIA § 2(a) states a similar duty to consider the purposes of a trust in investing and managing assets of a trust.

Subsection (b). Duty of Loyalty. Subsection (b) reminds those managing and investing institutional funds that the duty of loyalty will apply to their actions, but Section 3 does not state the loyalty standard that applies. The Drafting Committee was concerned, at least nominally, that different standards of loyalty may apply to directors of nonprofit corporations and to trustees of charitable trusts. The RMNCA provides that under the duty of loyalty a director of a nonprofit corporation should act "in a manner the director reasonably believes to be in the best

interests of the corporation." RMNCA § 8.30. The trust law articulation of the loyalty standard uses "sole interests" rather than "best interests." As the Restatement of Trusts explains, "[t]he trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." Restatement (Second) of Trusts § 170 (1). Although the standards for loyalty, like the standard of care, are merging, *see* Evelyn Brody, *Charitable Governance: What's Trust Law Got to do With It?* Chi.-Kent L. Rev. (2005); John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest*, 114 Yale L.J. 929 (2005), the Drafting Committee concluded that formulating a duty of loyalty provision for UPMIFA was unnecessary. Thus the duty of loyalty under nonprofit corporation law will apply to charities organized as nonprofit corporations, and the duty of loyalty under trust law will apply to charitable trusts.

Subsection (b). Duty of Care. Subsection (b) also applies the duty of care to performance of investment duties. The language derives from § 8.30 of the RMNCA. This subsection states the duty to act in good faith, "with the care an ordinarily prudent person in a like position would exercise under similar circumstances." Although the language in the RMNCA and in UPMIFA is similar to that of § 8.30 of the Model Business Corporation Act (3d ed. 2002), the standard as applied to persons making decisions for charities is informed by the fact that the institution is a charity and not a business corporation. Thus, in UPMIFA the references to "like position" and "similar circumstances" mean that the charitable nature of the institution affects the decision making of a prudent person acting under the standard set forth in subsection (b). The duty of care involves considering the factors set forth in subsection (e)(1).

Subsection (c)(1). Duty to Minimize Costs. Subsection (c)(1) tracks the language of UPIA § 7 and requires an institution to minimize costs. An institution may prudently incur costs by hiring an investment advisor, but the costs incurred should be appropriate under the circumstances. *See* UPIA § 7 cmt; Restatement (Third) of Trusts: Prudent Investor Rule § 227, cmt. M, at 58 (1992); Restatement (Second) of Trusts § 188 (1959). The duty is consistent with the duty to act prudently under § 8.30 of the RMNCA.

Subsection (c)(2). Duty to Investigate. This subsection incorporates the traditional fiduciary duty to investigate, using language from UPIA § 2(d). The subsection requires persons who make investment and management decisions to investigate the accuracy of the information used in making decisions.

Subsection (d). Pooling Funds. An institution holding more than one institutional fund may find that pooling its funds for investment and management purposes will be economically beneficial. The Act permits pooling for these purposes. The prohibition against commingling no longer prevents pooling funds for investment and management purposes. *See* UPIA § 3, cmt. (duty to diversify aided by pooling); UPIA § 7, cmt. (pooling to minimize costs); Restatement (Third) of Trusts: Duty to Segregate and Identify Trust Property § 84 (T.D. No. 4 2005). Funds will be considered individually for other purposes of the Act, including for the spending rule for endowment funds of Section 4 and the modification rules of Section 6.

Subsection (e)(1). Prudent Decision Making. Subsection (e)(1) takes much of its language from UPIA § 2(c). In making decisions about whether to acquire or retain an asset, the

institution should consider the institution's mission, its current programs, 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.

Subsection (e)(1)(C) reflects the fact that some organizations will invest in taxable investments that may generate unrelated business taxable income for income tax purposes.

Assets held primarily for program-related purposes are not subject to UPMIFA. The management of those assets will continue to be governed by other laws applicable to the institution. Other assets may not be held primarily for program-related purposes but may have both investment purposes and program-related purposes. Subsections (a) and (e)(1)(H) indicate that a prudent decision maker can take into consideration the relationship between an investment and the purposes of the institution and of the institutional fund in making an investment that may have a program-related purpose but not be primarily program-related. The degree to which an institution uses an asset to accomplish a charitable purpose will affect the weight given that factor in a decision to acquire or retain the asset.

Subsection (e)(2). Portfolio Approach. This subsection reflects the use of portfolio theory in modern investment practice. The language comes from UPIA § 2(b), which follows the articulation of the prudent investor standard in Restatement (Third) of Trusts: Prudent Investor Rule § 227(a) (1992).

Subsection (e)(3). Broad Investment Authority. Consistent with the portfolio theory of investment, this subsection permits a broad range of investments. The language derives from UPIA § 2(e).

Section 4 of UMIFA indicated that an institution could invest "without restriction to investments a fiduciary may make." The committee removed this language from subsection (e)(3) as unnecessary, because states no longer have legal lists restricting fiduciary investing to the specific types of investments identified in statutory lists.

Subsection (e)(3) also provides that other law may limit the authority under this subsection. In addition, all of subsection (e) is subject to contrary provisions in a gift instrument, and a gift instrument may restrict the ability to invest in particular assets. For example, the gift instrument for a particular institutional fund might preclude the institution from investing the assets of the fund in companies that produce tobacco products.

In her book, Governing Nonprofit Organizations: Federal and State Law and Regulation 434 (Harv. Univ. Press 2004), Marion R. Fremont-Smith reports that some large charities pledge their endowment funds as security for loans. Subsection (e)(3) permits this sort of debt financing, subject to the guidelines of subsection (e)(1).

Subsection (e)(4). Duty to Diversify. This subsection assumes that prudence requires diversification but permits an institution to determine that nondiversification is appropriate under exceptional circumstances. A decision not to diversify must be based on the needs of the charity

and not solely for the benefit of a donor. A decision to retain property in the hope of obtaining additional contributions from the same donor may be considered made for the benefit of the charity, but the appropriateness of that decision will depend on the circumstances. This subsection derives its language from UPIA § 3. *See* UPIA § 3 cmt. (discussing the rationale for diversification); Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

Subsection (e)(5). Disposing of Unsuitable Assets. This subsection imposes a duty on an institution to review the suitability of retaining property contributed to the institution within a reasonable period of time after the institution receives the property. Subsection (e)(5) requires the institution to make a decision but does not require a particular outcome. The institution may consider a variety of factors in making its decision, and a decision to retain the property either for a period of time or indefinitely may be a prudent decision.

Section 4(2) of UMIFA specifically authorized an institution to retain property contributed by a donor. The comment explained that an institution might retain property in the hope of obtaining additional contributions from the donor. Under UPMIFA the potential for developing additional contributions by retaining property contributed to the institution would be among the "other circumstances" that the institution might consider in deciding whether to retain or dispose of the property. The institution must weigh the potential for obtaining additional contributions with all other factors that affect the suitability of retaining the property in the investment portfolio.

The language of subsection (e)(5) comes from UPIA § 4, which restates Restatement (Third) of Trusts: Prudent Investor Rule § 229 (1992), which adopted language from Restatement (Second) of Trusts § 231 (1959). *See* UPIA § 4 cmt.

Subsection (e)(6). Special Skills or Expertise. Subsection (e)(6) states the rule provided in UPIA § 2(f) requiring a trustee to use the trustee's own skills and expertise in carrying out the trustee's fiduciary duties. The comment to RMNCA § 8.30 describes the existence of a similar rule under the law of nonprofit corporations. Section 8.30(a)(2) provides that in discharging duties a director must act "with the care an ordinarily prudent person in a like position would exercise under similar circumstances. . . ." The comment explains that"[t]he concept of 'under similar circumstances' relates not only to the circumstances of the corporation but to the special background, qualifications, and management experience of the individual director and the role the director plays in the corporation." After describing directors chosen for their ability to raise money, the comment notes that "[n]o special skill or expertise should be expected from such directors unless their background or knowledge evidences some special ability."

The intent of subsection (e)(6) is that a person managing or investing institutional funds must use the person's own judgment and experience, including any particular skills or expertise, in carrying out the management or investment duties. For example, if a charity names a person as a director in part because the person is a lawyer, the lawyer's background may allow the lawyer to recognize legal issues in connection with funds held by the charity. The lawyer should identify the issues for the board, but the lawyer is not expected to provide legal advice. A lawyer is not expected to be able to recognize every legal issue, particularly issues outside the lawyer's

area of expertise, simply because the board member is lawyer. *See* ALI Principles of the Law of Nonprofit Organizations, Preliminary Draft No. 3 (May 12, 2005) § 315 (Duty of Care), cmt. c.

UMIFA contained two provisions that authorized investments in pooled or common investment funds. UMIFA §§ 4(3), 4(4). The Drafting Committee concluded that Section 3(e)(3) of UPMIFA authorizes these investments. The decision not to include the two provisions in UPMIFA implies no disapproval of such investments.

SECTION 4. APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION.

(a) Subject to the intent of a donor expressed in the gift instrument [and to subsection (d)], an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(1) the duration and preservation of the endowment fund;

(2) the purposes of the institution and the endowment fund;

(3) general economic conditions;

(4) the possible effect of inflation or deflation;

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

(6) other resources of the institution; and

(7) the investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under subsection (a), a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends", or "rents, issues, or profits", or "to preserve the principal intact", or words of similar import:

(1) create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(2) do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (a).

[(d) The appropriation for expenditure in any year of an amount greater than seven percent of the fair market value of an endowment fund, calculated on the basis of market values determined at least quarterly and averaged over a period of not less than three years immediately preceding the year in which the appropriation for expenditure is made, creates a rebuttable presumption of imprudence. For an endowment fund in existence for fewer than three years, the fair market value of the endowment fund must be calculated for the period the endowment fund has been in existence. This subsection does not:

(1) apply to an appropriation for expenditure permitted under law other than this [act] or by the gift instrument; or

(2) create a presumption of prudence for an appropriation for expenditure of an amount less than or equal to seven percent of the fair market value of the endowment fund.]

Comment

Purpose and Scope of Revisions. This section revises the provision in UMIFA 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 defined historic dollar value to mean all contributions to the fund, valued at the time of contribution. Instead of using historic dollar value as a limitation, UPMIFA applies a more carefully articulated prudence standard to the process of making decisions about expenditures from an endowment fund. The expenditure rule of Section 4 applies only to the extent that a donor and an institution have not reached some other agreement about spending from an endowment. If a gift instrument sets forth specific requirements for spending, then the charity must comply with those requirements. However, if the gift instrument uses more general language, for example directing the charity to "hold the fund as an endowment" or "retain principal and spend income," then Section 4 provides a rule of construction to guide the charity.

Prior to the promulgation of UMIFA, "income" for trust accounting purposes meant interest and dividends but not capital gains, whether or not realized. Many institutions assumed that trust accounting principles applied to charities organized as nonprofit corporations, and the rules limited the institutions' ability to invest their endowment funds effectively. UMIFA addressed this problem by construing "income" in gift instruments to include a prudent amount of capital gains, both realized and unrealized. Under UMIFA an institution could spend appreciation in addition to spending income determined under trust accounting rules. This rule of construction likely carried out the intent of the donor better than a rule limiting spending to trust accounting income, while permitting the charity to invest in a manner that could generate better returns for the fund.

UPMIFA also applies a rule of construction to terms like "income" or "endowment." The assumption in the Act is that a donor who uses one of these terms intends to create a fund that will generate sufficient gains to be able to make ongoing distributions from the fund while at the same time preserving the purchasing power of the fund. Because historic dollar value under UMIFA was a number fixed in time, the use of that approach may not have adequately captured the intent of a donor who wanted the endowment fund to continue to maintain its value in current dollars. UPMIFA takes a different approach, directing the institution to determine spending based on the total assets of the endowment fund rather than determining spending by adding a prudent amount of appreciation to trust accounting income.

UPMIFA requires the persons making spending decisions for an endowment fund to focus on the purposes of the endowment fund as opposed to the purposes of the institution more generally, as was the case under UMIFA. When the institution considers the purposes and duration of the fund, the institution will give priority to the donor's general intent that the fund be maintained permanently. Although the Act does not require that a specific amount be set aside as "principal," the Act assumes that the charity will act to preserve "principal" (i.e., to maintain the purchasing power of the amounts contributed to the fund) while spending "income" (i.e. making a distribution each year that represents a reasonable spending rate, given investment performance and general economic conditions). Thus, an institution should monitor principal in an accounting sense, identifying the original value of the fund (the historic dollar value) and the increases in value necessary to maintain the purchasing power of the fund.

Subsection (a). Expenditure of Endowment Funds. Subsection (a) uses the RMNCA articulation of the standard of care for decision making under Section 4. The change in language does not reflect a substantive change. The comment to Section 3 more fully describes that standard of care.

Section 4 permits expenditures from an endowment fund to the extent the institution determines that the expenditures are prudent after considering the factors listed in subsection (a). These factors emphasize the importance of the intent of the donor, as expressed in a gift instrument. Section 4 looks to written documents as evidence of donor's intent and does not require an institution to rely on oral expressions of intent. By requiring written evidence of intent, the Act protects reliance by the donor and the institution on the written terms of a donative agreement. Informal conversations may be misremembered and may be subject to multiple interpretations. Of course, oral expressions of intent may guide an institution in further carrying out a donor's wishes and in understanding a donor's intent.

The factors in subsection (a) require attention to the purposes of the institution and the endowment fund, economic conditions, and present and reasonably anticipated resources of the institution. As under UMIFA, determinations under Section 4 do not depend on the characterization of assets as income or principal and are not limited to the amount of income and unrealized appreciation. The authority in Section 4 is permissive, however, and an institution organized as a trust may continue to make spending decisions under trust accounting principles so long as doing so is prudent.

Institutions have operated effectively under UMIFA and have operated more conservatively than the historic dollar value rule would have permitted. Institutions have little incentive to maximize allowable spending. Good practice has been to provide for modest expenditures while maintaining the purchasing power of a fund. Institutions have followed this practice even though UMIFA (1) does not require an institution to maintain a fund's purchasing power and (2) does allow an institution to spend any amounts in a fund above historic dollar value, subject to the prudence standard. The Drafting Committee concluded that eliminating historic dollar value and providing institutions with more discretion would not lead to depletion of endowment funds. Instead, UPMIFA should encourage institutions to establish a spending policy that will be responsive to short-term fluctuations in the value of the fund. Section 4 allows an institution to maintain appropriate levels of expenditures in times of economic downturn or economic strength. In some years, accumulation rather than spending will be prudent, and in other years an institution may appropriately make expenditures even if a fund has not generated investment return that year.

Several levels of safeguard exist to prevent an institution from depleting an endowment fund or diverting assets from the purposes for which the fund was created. In comparison with UMIFA, UPMIFA provides greater direction to the institution with respect to making a prudent determination about spending from an endowment. UMIFA told the decision maker to consider "long and short term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions." UPMIFA

clarifies that in making spending decisions the institution should attempt to ensure that the value of the fund endures while still providing that some amounts be spent for the purposes of the endowment fund. In UPMIFA prudent decision making emphasizes the endowment aspect of the fund, rather than the overall purposes or needs of the institution.

In addition to the guidance provided by Section 4, other safeguards exist. Donors can restrict gifts and can provide specific instructions to donee institutions regarding appropriate uses for assets contributed. Within institutions, fiduciary duties govern the persons making decisions on expenditures. Those persons must operate both with the best interests of the institution in mind and in keeping with the intent of donors. If an institution diverts an institutional fund from the charitable purposes of the institution, the state attorney general can enforce the charitable interests of the public. By relying on these safeguards while providing institutions with adequate discretion to make appropriate expenditures, the Act creates a standard that takes into consideration the diversity of the charitable sector. The committee expects that accumulated experience with such spending formulas will continue to inform institutional practice under the Act.

Distinguishing Legal and Accounting Standards. Deleting historic dollar value does not transform any portion of an endowment fund into unrestricted assets from a legal standpoint. An endowment fund is restricted because of the donor's intent that the fund be restricted by the prudent spending rule, that the fund not be spent in the current year, and that the fund continue to maintain its value for a long time. Regardless of the treatment of endowment fund from an accounting standpoint, legally an endowment fund should not be considered unrestricted. Subsection (a) states that endowment funds will be legally restricted until the institution appropriates funds for expenditure. The UMIFA statutes in Utah and Maine contain similar language. 13 Me. Rev. Stat. Ann. tit. 13 § 4106 (West 2005); Utah Code Ann. 1953 § 13-29-3 (2005). *See, also*, advisory published by Mass. Attorney General, "The Attorney General's Position on FASB Statement of Financial Accounting Standards No. 117, ¶ 22 and Related G.L.C. 180A Issues" (January 2004) http://www.ago.state.ma.us/filelibrary/fasb.pdf (last visited May 22, 2006) (concerning the treatment of endowments as legally restricted assets).

The term "endowment fund" includes funds that may last in perpetuity but also funds that are created to last for a fixed term of years or until the institution achieves a specified objective. Section 4 requires the institution to consider the intended duration of the fund in making determinations about spending. For example, if a donor directs that a fund be spent over 20 years, Section 4 will guide the institution in making distribution decisions. The institution would amortize the fund over 20 years rather than try to maintain the fund in perpetuity. For an endowment fund of limited duration, spending at a rate higher than rates typically used for endowment spending will be both necessary and prudent.

Subsection (c). Rule of Construction. Donor's intent must be respected in the process of making decisions to expend endowment funds. Section 4 does not allow an institution to convert an endowment fund into a non-endowment fund nor does the section allow the institution to ignore a donor's intent that a fund be maintained as an endowment. Rather, subsection (c) provides rules of construction to assist institutions in interpreting donor's intent. Subsection (c)

assumes that if a donor wants an institution to spend "only the income" from a fund, the donor intends that the fund both support current expenditures and be preserved permanently. The donor is unlikely to be concerned about designation of particular returns as "income" or "principal" under accounting principles. Rather the donor is more likely to assume that the institution will use modern total-return investing techniques to generate enough funds to distribute while maintaining the long-term viability of the fund. Subsection (c) is an intent effectuating provision that provides default rules to construe donor's intent.

As subsection (b) explains, a donor who wants to specify particular spending guidelines can do so. For example, a donor might require that a charity spend between three and five percent of an endowed gift each year, regardless of investment performance or other factors. Because the charity agrees to the restriction in accepting the gift, the restriction will govern spending decisions by the charity. Another donor might want to limit expenditures to trust accounting income and not want the institution to be able to expend appreciation. An instruction to "pay only the income" will not be specific enough, but an instruction to "pay only interest and dividend income earned by the fund and not to make other distributions of the kind authorized by Section 4 of UPMIFA" should be sufficient. If a donor indicates that the rules on investing or expenditures under Section 4 do not apply to a particular fund, then as a practical matter the institution will probably invest the fund separately. Thus, a decision by a donor to require fund specific expenditure rules will likely also have consequences in the way the institution invests the fund.

Retroactive Application of the Rule of Construction. A constructional rule resolves an ambiguity, in this case, because donors use words like endowment or income without specific directions regarding the intended meaning. Changing a statutory constructional rule does not change the underlying intent, and instead changes the way an ambiguity is resolved, in an attempt to increase the likelihood of giving effect to the intent of most donors.

If a donor has stated in a gift instrument specific directions as to spending, then the institution must respect those wishes, but many donors do not give precise instructions about how to spend endowment funds. In Section 4 UPMIFA provides guidance for giving effect to a donor's intent when the donor has not been specific. Like Section 3 of UMIFA, Section 4 of UPMIFA is a rule of construction, so it does not violate either donor intent or the Constitution.

The issue of whether to apply a rule of construction retroactively was considered in connection with UMIFA. When the New Hampshire legislature considered UMIFA, the Senate asked the New Hampshire Supreme Court for an opinion regarding whether UMIFA, if adopted, would violate a provision of the state constitution prohibiting retrospective laws, and also whether the statute would encroach on the functions of the judicial branch. The opinion answered no to both questions. Opinion of the Justices, Request of the Senate No. 6667, 113 N.H. 287, 306 A.2d 55 (1973).

More recently the Colorado Supreme Court considered the retroactive application of another constructional statute, one that deems the designation of a spouse as the beneficiary of a life insurance policy to be revoked in a case in which the marriage was dissolved after the

naming of the spouse as beneficiary. In re Estate of DeWitt, 54 P. 3d 849 (Colo. 2002). In holding that retroactive application of the statute did not violate the Contracts Clause, the court cited approvingly from a statement prepared by the Joint Editorial Board for Uniform Trusts and Estates Acts (JEB). JEB Statement Regarding the Constitutionality of Changes in Default Rules as Applied to PreExisting Documents, 17 Am. Coll. Tr. & Est. Couns. Notes 184 app. II (1991).

The JEB Statement explains that the purpose of the anti-retroactivity norm is to protect a transferor who relies on existing rules of law. By definition, however, rules of construction apply only in situations in which a transferor did not spell out his or her intent and hence did not rely on the then-current rule of construction. *See also In re Gardner's Trust*, 266 Minn. 127, 132, 123 N.W. 2d 69, 73 (1963) ("[I]t is doubtful whether the testatrix had any clear intention in mind at the time the will was executed. It is equally plausible that if she had thought about it at all she would have desired to have the dividends go where the law required them to go at the time they were received by the trustee.") (Uniform Principal and Income Act).

Non-retroactivity would produce serious practical problems: If the Act were not retroactive, a charity would need to keep two sets of books for each endowment fund created before the enactment of UPMIFA, if new funds were added after the enactment. The burden that such a rule would impose is out of proportion to the benefit sought.

Subsection (d). Rebuttable Presumption of Imprudence. The Drafting Committee debated at length whether to include a presumption of imprudence for spending above a fixed percentage of the value of the fund. The Drafting Committee decided to include a presumption in the Act in brackets, as an option for states to consider, and to include in these Comments a discussion of the advantages and disadvantages of including a presumption in the Act.

Some who commented on the Act viewed the presumption as linked to the retroactive application of the rule of construction of subsection (c). A donor who contributed to an endowment fund under UMIFA may have assumed that the historic dollar value of the gift would be subject to a no-spending rule under the statute. Because UPMIFA removes the concept of historic dollar value, the bracketed presumption of imprudence would assure the donor that spending from an endowment fund will be so limited.

Those in favor of the presumption of imprudence argued that the presumption would curb the temptation that a charity might have to spend endowment assets too rapidly. Although the presumption would be rebuttable, and spending above the identified percentage might, in some years and for some charities, be prudent, institutions would likely be reluctant to authorize spending above seven percent. In addition, the presumption would give the attorney general a benchmark of sorts.

A variety of considerations cut against including a presumption of imprudence in the statute. A fixed percentage in the statute might be perceived as a safe harbor that could lead institutions to spend more than is prudent. Although the provision should not be read to imply that spending below seven percent will be considered prudent, some charities might interpret the statute in that way. Decision makers might be pressured to spend up to the percentage, and in

doing so spend more than is prudent, without adequate review of the prudence factors as required under the Act.

Perhaps the biggest problem with including a presumption in the statute is the difficulty of picking a number that will be appropriate in view of the range of institutions and charitable purposes and the fact that economic conditions will change over time. Under recent economic conditions, a spending rate of seven percent is too high for most funds, but in a period of high inflation, seven percent might be too low. In making a prudent decision regarding how much to spend from an endowment fund, each institution must consider a variety of factors, including the particular purposes of the fund, the wishes of the donors, changing economic factors, and whether the fund will receive future donations.

Whether or not a statute includes the presumption, institutions must remember that prudence controls decision making. Each institution must make decisions on expenditures based on the circumstances of the particular charity.

Application of Presumption. For a state wishing to adopt a presumption of imprudence, subsection (d) provides language. Under subsection (d), a rebuttable presumption of imprudence will arise if expenditures in one year exceed seven percent of the assets of an endowment fund. The subsection applies a rolling average of three or more years in determining the value of the fund for purposes of calculating the seven-percent amount. An institution can rebut the presumption of imprudence if circumstances in a particular year make expenditures above that amount prudent. The concept and the language for the presumption of imprudence comes from Mass. Gen. L. ch. 180A, § 2 (2004). Massachusetts enacted this rule in 1975 as part of its UMIFA statute. New Mexico adopted the same presumption in 1978. N.M.S.A. § 46-9-2 (C) (2004). New Hampshire has a similar provision. N.H. Rev. Stat. § 292-B:6.

The period that a charity uses to calculate the presumption (three or more years) and the frequency of valuation (at least quarterly) will be binding in any determination of whether the presumption applies. For example, if a charity values an endowment fund on a quarterly basis and averages the quarterly values over three years to determine the fair market value of the fund for purposes calculating seven percent of the fund, the charity's choices of three years as a smoothing period and quarterly as a valuation period cannot be challenged. If the charity makes an appropriation that is less than seven percent of this value, then the presumption of imprudence does not arise even if the appropriation would exceed seven percent of the value of the fund calculated based on monthly valuations averaged over five years.

If sufficient evidence establishes, by the preponderance of the evidence, the facts necessary to raise the presumption of imprudence, then the institution will have to carry the burden of production of (i.e., the burden of going forward with) other evidence that would tend to demonstrate that its decision was prudent. The existence of the presumption does not shift the burden of persuasion to the charity.

Expenditures from an endowment fund may include distributions for charitable purposes and amounts used for the management and administration of the fund, including annual charges

for fundraising. The value of a fund, as calculated for purposes of determining the seven percent amount, will reflect increases due to contributions and investment gains and decreases due to distributions and investment losses. The seven percent figure includes charges for fundraising and administrative expenses other than investment management expenses. All costs or fees associated with an endowment fund are factors that prudent decision makers consider. High costs or fees of investment management could be considered imprudent regardless of whether spending exceeds seven percent of the fund's value.

The presumption of imprudence does not create an automatic safe harbor. Expenditures at six percent might well be imprudently high. *See* James P. Garland, *The Fecundity of Endowments and Long-Duration Trusts*, The Journal of Portfolio Management (2005). Evidence reviewed by the Drafting Committee suggests that at present few funds can sustain spending at a rate above five percent. *See* Roger G. Ibbotson & Rex A. Sinquefield, Stocks, Bonds, Bills, and Inflation: Historical Returns (1926-1987) (Research Foundation of the Institute of Chartered Financial Analysts, 1989). Indeed, under current conditions five percent can be too high. *See* Joel C. Dobris, *Why Five? The Strange, Magnetic, and Mesmerizing Affect of the Five Percent Unitrust and Spending Rate on Settlors, Their Advisers, and Retirees*, 40 Real Prop. Prob. & Tr. J. 39 (2005). Further, spending at a lower rate, particularly in the early years of an endowment, may result in greater distributions over time. *See* DeMarche Associates, Inc, Spending Policies and Investment Planning for Foundations: A Structure for Determining a Foundation's Asset Mix (Council on Foundations: 3d ed. 1999). A presumption of imprudence can serve as a reminder that spending at too high a rate will jeopardize the long-term nature of an endowment fund. If an endowment fund is intended to continue permanently, the institution should take special care to limit annual spending to a level that protects the purchasing power of the fund.

Subsection (d) provides that the terms of the gift instrument can provide additional spending authority. For example, if a gift instrument directs that an institution expend a fund over a ten-year period, exhausting the fund after ten years, spending at a rate higher than seven percent will be necessary.

Subsection (d) does not require an institution to spend a minimum amount each year. The prudence standard and the needs of the institution will supply sufficient guidance regarding whether to accumulate rather than to spend in a particular year.

Spending above seven percent in any one year will not necessarily be imprudent. For some endowment funds fluctuating spending rates may be appropriate. Although the Act does not apply the percentage for the presumption on a rolling basis (e.g., 21 percent over three years), some endowment funds may prudently spend little or nothing in some years and more than seven percent in other years. For example, a charity planning a construction project might decide to spend nothing from an endowment for three years and then in the fourth year might spend 20 percent of the value of the fund for construction costs. The decision to accumulate in years one through three and then to spend 20 percent in the fourth year might be prudent for the charity, depending on the other factors. The charity should maintain adequate records during the accumulation period and should document the decision-making process in the fourth year to be able to meet the burden of production associated with the presumption. Another charity might

prudently spend 20 percent in year one and nothing for the following three years. That charity would also need to document the decision-making process through which the decision to spend occurred and maintain records explaining why the decision was prudent under the circumstances.

A charity might establish a "capital replacement fund" designed to provide funds to the institution for repair or replacement of major items of equipment. Disbursements from such a fund will likely fluctuate, with limited expenditures in some years and big expenditures in others. The fund would not exhibit a uniform spending rate. Indeed, an advantage of a capital replacement fund is the ability to absorb a significant capital expenditure in a single year without a negative impact on the operating budget of the institution. Disbursements might average five percent per year but would vary, with spending in some years more and in some years less. Even if this fund is an endowment fund subject to Section 4, spending above seven percent in a particular year could well be prudent. Subsection (d) does not preclude spending above seven percent.

A charity creating a capital replacement fund or a building fund might chose to adopt spending rules for the fund that would not be subject to UPMIFA. Specific donor intent can supersede the rules of UPMIFA. If the charity creates a gift instrument that establishes appropriate rules on spending for the fund, and if donors agree to those restrictions, then the UPMIFA rules on spending, including the bracketed presumption, will not apply.

Institutions with Limited Investment and Spending Experience. Several attorneys general and other charity officials raised concerns about whether small institutions would be able to adjust to a spending rule based solely on prudence, without the bright-line guidance of historic dollar value. Some charity regulators who spoke with the Drafting Committee noted that large institutions have sophisticated investment strategies, access to good investment advisors, and experience with spending rules that maintain purchasing power for endowment funds. For these institutions, the rules of UPMIFA should work well. For smaller institutions, however, the state regulators thought that additional guidance could be helpful. After discussing strategies to address this concern, the Drafting Committee decided to include in these comments an additional optional provision that a state could choose to include in its UPMIFA statute.

The optional provision focuses on institutions with endowment funds valued, in the aggregate, at less than $2,000,000. The number is in brackets to indicate that it could be set higher or lower. The number was chosen to address the concern of the state regulators that some small charities might be more likely to spend imprudently than large charities. The Drafting Committee selected $2,000,000 as the value that might include most unsophisticated institutions but would not be overinclusive.

The optional provision creates a notification requirement for an institution with a small endowment that plans to spend below historic dollar value. If an institution subject to the provision decides to appropriate an amount that would cause the value of its endowment funds to drop below the aggregate historic dollar value for all of its endowment funds, then the institution will have to notify the attorney general before proceeding with the expenditure. The provision does not require that the institution obtain the approval of the attorney general before making the

distribution. Rather, the notification requirement gives the attorney general the opportunity to take a closer look at the institution and its spending decision, to educate the institution on prudent decision making for endowment funds, and to intervene if the attorney general determines that the spending would be imprudent for the institution. Although the Drafting Committee thinks that the prudence standard in UPMIFA provides adequate guidance to all institutions within the scope of the Act, if a state chooses to adopt a notification provision for institutions with small endowments, the Drafting Committee recommends the following language:

> (-) If an institution has endowment funds with an aggregate value of less than [$2,000,000], the institution shall notify the [Attorney General] at least [60 days] prior to an appropriation for expenditure of an amount that would cause the value of the institution's endowment funds to fall below the aggregate historic dollar value of the institution's endowment funds, unless the expenditure is permitted or required under law other than this [act] or in the gift instrument. For purposes of this subsection, "historic dollar value" means the aggregate value in dollars of (i) each endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time the donation 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 institution's determination of historic dollar value made in good faith is conclusive.

[SECTION 5. DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS.

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this [act], an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(1) selecting an agent;

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

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

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

(c) An institution that complies with subsection (a) is not liable for the decisions or actions of an agent to which the function was delegated.

(d) By accepting delegation of a management or investment function from 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 proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this [act].]

Comment

The prudent investor standard in Section 4 presupposes the power to delegate. For some types of investment, prudence requires diversification, and diversification may best be accomplished through the use of pooled investment vehicles that entail delegation. The Drafting Committee decided to put Section 5 in brackets because many states already provide sufficient authority to delegate authority through other statutes. If such authority exists, then an enacting state should enact UPMIFA without Section 5. Enacting delegation rules that duplicate existing rules could be confusing and might create conflicts. For charitable trusts, UPIA provides the same delegation rules as those in Section 5. For nonprofit corporations, nonprofit corporation statutes often provide comparable rules. A state enacting UPMIFA must be certain that its laws authorize delegation, either through other statutes or by enacting Section 5.

Section 5 incorporates the delegation rule found in UPIA § 9, updating the delegation rules in UMIFA § 5. Section 5 permits the decision makers in an institution to delegate management and investment functions to external agents if the decision makers exercise reasonable skill, care, and caution in selecting the agent, defining the scope of the delegation and reviewing the performance of the agent. In some circumstances, the scope of the delegation may include redelegation. For example, an institution may select an investment manager to assist with investment decisions. The delegation may include the authority to redelegate to investment managers with expertise in particular investment areas. All decisions to delegate require the exercise of reasonable care, skill, and caution in selecting, instructing, and monitoring agents. Further, decision makers cannot delegate the authority to make decisions concerning expenditures and can only delegate management and investment functions. Subsection (c)

protects decision makers who comply with the requirement for proper delegation from liability for actions or decisions of the agents. In making decisions concerning delegation, the institution must be mindful of Section 3(c)(1) of UPMIFA, the provision that directs the institution to incur only reasonable costs in managing and investing an institutional fund.

Section 5 does not address issues of internal delegation and potential liability for internal delegation, and subsection (c) does not affect laws that govern personal liability of directors or trustees for matters outside the scope of Section 5. Directors will look to nonprofit corporation laws for these rules, while trustees will look to trust law. *See, e.g.*, RMNCA, § 8.30(b) (permitting directors to rely on information prepared by an officer or employee of the institution if the director reasonably believes the officer or employee to be reliable and competent in the matters presented).

The language of subsection (c) is similar to that of UPIA § 9(c) and RMNCA § 8.30(d). The decision not to include the terms "beneficiaries" or "members" in subsection (c) does not indicate a decision that this section does not create immunity from claims brought by beneficiaries or members. Instead, a decision maker who complies with section 5 will be protected from any liability resulting from actions or decisions made by an external agent.

Subsection (d) creates personal jurisdiction over the agent. This subsection is not a choice of law rule.

Subsection (e) notes that law other than this Act governs internal delegation. Section 5 of UMIFA included internal delegation as well as external delegation, due to a concern at that time that trust law concepts might govern internal delegation in nonprofit corporations. With the widespread adoption of nonprofit corporation statutes, that concern no longer exists. The decision not to address internal delegation in UPMIFA does not suggest that a governing board of a nonprofit corporation cannot delegate to committees, officers, or employees. Rather, a nonprofit corporation must look to other law, typically a nonprofit corporation statute, for the rules governing internal delegation.

SECTION 6. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.

(a) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the [Attorney General] of the application, and the [Attorney General] must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the [Attorney General] of the application, and the [Attorney General] must be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, [60 days] after notification to the [Attorney General], may release or modify the restriction, in whole or part, if:

(1) the institutional fund subject to the restriction has a total value of less than [$25,000];

(2) more than [20] years have elapsed since the fund was established; and

(3) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

Comment

Section 6 expands the rules on releasing or modifying restrictions that are found in Section 7 of UMIFA. Subsection (a) restates the rule from UMIFA allowing the release of a restriction with donor consent. Subsections (b) and (c) make clear that an institution can always ask a court to apply equitable deviation or cy pres to modify or release a restriction, under appropriate circumstances. Subsection (d), a new provision, permits an institution to apply cy pres on its own for small funds that have existed for a substantial period of time, after giving notice to the state attorney general.

Although UMIFA stated that it did not "limit the application of the doctrine of *cy pres*", UMIFA § 7(d), what that statement meant under the Act was unclear. UMIFA itself appeared to permit only a release of a restriction and not a modification. That all-or-nothing approach did not adequately protect donor intent. *See* Yale Univ. v. Blumenthal, 621 A.2d 1304 (Conn. 1993). By expressly including deviation and cy pres, UPMIFA requires an institution to seek modifications that are "in accordance with the donor's probable intention" for deviation and "in a manner consistent with the charitable purposes expressed in the gift instrument" for cy pres.

Individual Funds. The rules on modification require that the institution, or a court applying a court-ordered doctrine, review each institutional fund separately. Although an institution may manage institutional funds collectively, for purposes of this Section each fund must be considered individually.

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

Subsection (b). Equitable Deviation. Subsection (b) applies the rule of equitable deviation, adapting the language of UTC § 412 to this section. *See also* Restatement (Third) of Trusts § 66 (2003). Under the deviation doctrine, a court may modify restrictions on the way an institution manages or administers a fund in a manner that furthers the purposes of the fund. Deviation implements the donor's intent. A donor commonly has a predominating purpose for a gift and, secondarily, an intent that the purpose be carried out in a particular manner. Deviation does not alter the purpose but rather modifies the means in order to carry out the purpose.

Sometimes deviation is needed on account of circumstances unanticipated when the donor created the restriction. In other situations the restriction may impair the management or investment of the fund. Modification of the restriction may permit the institution to carry out the donor's purposes in a more effective manner. A court applying deviation should attempt to follow the donor's probable intention in deciding how to modify the restriction. Consistent with the doctrine of equitable deviation in trust law, subsection (b) does not require an institution to

notify donors of the proposed modification. Good practice dictates notifying any donors who are alive and can be located with a reasonable expenditure of time and money. Consistent with the doctrine of deviation under trust law, the institution must notify the attorney general who may choose to participate in the court proceeding. The attorney general protects donor intent as well as the public's interest in charitable assets. Attorney general is in brackets in the Act because in some states another official enforces the law of charities.

Subsection (c). Cy Pres. Subsection (c) applies the rule of cy pres from trust law, authorizing the court to modify the purpose of an institutional fund. The term "modify" encompasses the release of a restriction as well as an alteration of a restriction and also permits a court to order that the fund be paid to another institution. A court can apply the doctrine of cy pres only if the restriction in question has become unlawful, impracticable, impossible to achieve, or wasteful. This standard, which comes from UTC § 413, updates the circumstances under which cy pres may be applied by adding "wasteful" to the usual common law articulation of the doctrine. Any change must be made in a manner consistent with the charitable purposes expressed in the gift instrument. *See also* Restatement (Third) of Trusts § 67 (2003). Consistent with the doctrine of cy pres, subsection (c) does not require an institution seeking cy pres to notify donors. Good practice will be to notify donors whenever possible. As with deviation, the institution must notify the attorney general who must have the opportunity to be heard in the proceeding.

Subsection (d). Modification of Small, Old Funds. Subsection (d) permits an institution to release or modify a restriction according to cy pres principles but without court approval if the amount of the institutional fund involved is small and if the institutional fund has been in existence for more than 20 years. The rationale is that under some circumstances a restriction may no longer make sense but the cost of a judicial cy pres proceeding will be too great to warrant a change in the restriction. The Drafting Committee discussed at length the parameters for allowing an institution to apply cy pres without court supervision. The Committee drafted subsection (d) to balance the needs of an institution to serve its charitable purposes efficiently with the policy of enforcing donor intent. The Committee concluded that an institutional fund with a value of $25,000 or less is sufficiently small that the cost of a judicial proceeding will be out of proportion to its protective purpose. The Committee included a requirement that the institutional fund be in existence at least 20 years, as a further safeguard for fidelity to donor intent. The 20-year period begins to run from the date of inception of the fund and not from the date of each gift to the fund. The amount and the number of years have been placed in brackets to signal to an enacting jurisdiction that it may wish to designate a higher or lower figure. Because the amount should reflect the cost of a judicial proceeding to obtain a modification, the number may be higher in some states and lower in others.

As under judicial cy pres, an institution acting under subsection (d) must change the restriction in a manner that is in keeping with the intent of the donor and the purpose of the fund. For example, if the value of a fund is too small to justify the cost of administration of the fund as a separate fund, the term "wasteful" would allow the institution to combine the fund with another fund with similar purposes. If a fund has been created for nursing scholarships and the institution closes its nursing school, the institution might appropriately decide to use the fund for other

scholarships at the institution. In using the authority granted under subsection (d), the institution must determine which alternative use for the fund reasonably approximates the original intent of the donor. The institution cannot divert the fund to an entirely different use. For example, the fund for nursing scholarships could not be used to build a football stadium.

An institution seeking to modify a provision under subsection (d) must notify the attorney general of the planned modification. The institution must wait 60 days before proceeding; the attorney general may take action if the proposed modification appears inappropriate.

Notice to Donors. The Drafting Committee decided not to require notification of donors under subsections (b), (c), and (d). The trust law rules of equitable deviation and cy pres do not require donor notification and instead depend on the court and the attorney general to protect donor intent and the public's interest in charitable assets.

With regard to subsection (d), the Drafting Committee concluded that an institution should not be required to give notice to donors. Subsection (d) can only be used for an old and small fund. Locating a donor who contributed to the fund more than 20 years earlier may be difficult and expensive. If multiple donors each gave a small amount to create a fund 20 years earlier, the task of locating all of those donors would be harder still. The Drafting Committee concluded that an institution's concern for donor relations would serve as a sufficient incentive for notifying donors when donors can be located.

SECTION 7. REVIEWING COMPLIANCE. Compliance with this [act] is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

SECTION 8. APPLICATION TO EXISTING INSTITUTIONAL FUNDS. This [act] applies to institutional funds existing on or established after [the effective date of this act]. As applied to institutional funds existing on [the effective date of this act] this [act] governs only decisions made or actions taken on or after that date.

SECTION 9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize

electronic delivery of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).

SECTION 10. UNIFORMITY OF APPLICATION 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 that enact it.

SECTION 11. EFFECTIVE DATE. This [act] takes effect . . . .

SECTION 12. REPEAL. The following acts and parts of acts are repealed:

(a) [The Uniform Management of Institutional Funds Act]

NDANO NORTH DAKOTA ASSOCIATION OF NONPROFIT ORGANIZATIONS

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Testimony of Gerald Skogley

To
Senate Government and Veterans Affairs Committee
In Support of HB 1074
Friday, March 20, 2009

Chairman Dever and Members of the Committee, my name is Gerald Skogley. I am testifying today in support of HB 1074 on behalf of the North Dakota Association of Nonprofit Organizations (NDANO), of which I am a Board Member.

NDANO represents more than 150 members from all parts of the state working in many different areas – from human services and the environment to education and the arts. As a membership organization dedicated to strengthening North Dakota nonprofits, NDANO encourages best practices and accountability in nonprofit management.

The Uniform Prudent Management of Institutional Funds Act (UPMIFA) sets fair and reasonable standards of accountability for management of funds in the North Dakota nonprofit sector. In particular, the bill does three things: 1) provides guidance on prudent investing by providing more detail to nonprofits about investment of their funds; 2) sets rules for the spending of endowments, moving away from a "historic" dollar value limitation into a "prudent" spending rule based on donor intent and permanent duration of the endowment; and 3) modifies restrictions on gifts made to nonprofits when amounts are small and older than 20 years.

As the Vice-President for Finance of the University of North Dakota in 1975, I was instrumental in the passage of the present statute. I believe that the proposed changes do much to modernize the original intent of the legislation. We support a DO PASS on HB 1074.

Thank you for your consideration. I would be happy to answer any questions.

Testimony in Support of House Bill 1074
By District Judge Gail Hagerty
Senate Government and Veterans Affairs Committee
March 20, 2009

Chair Dever, Members of the Committee:

The Uniform Prudent Management of Institutional Funds Act (UPMIFA) was promulgated by the Uniform Law Commission in 2006 to update and replace the older 1972 Uniform Management of Institutional Funds Act (UMIFA). Although UMIFA has provided useful guidance, prudence norms have evolved over the past 37 years, and UPMIFA provides a modern statement of prudence standards for the management and investment of charitable funds and the expenditure of endowment funds.

UPMIFA draws upon the Revised Model Nonprofit Corporation Act (RMNCA), as well as the 1994 Uniform Prudent Investor Act (UPIA) and its updated rules for investment decisions, duties, and protections related to trusts (including charitable trusts), and harmonizes the application of these standards for charitable organizations, whether organized as a trust (unless the trustees are non-charitable, in which case trust law governs), nonprofit corporation, or other entity. Finally, the act updates provisions governing the release and modification of restrictions on institutional funds for more efficient management while preserving the historic authority of states' Attorneys General.

UMIFA had been adopted in 48 jurisdictions, including North Dakota, and 29 jurisdictions have adopted UPMIFA since 2007. Additionally, 16 states (including North Dakota) have active UPMIFA legislation in 2009, with a seventeenth expected soon. Accordingly, Senate Bill 1074 would replace North Dakota's version of UMIFA with the new UPMIFA.

Key highlights of SB 1074, section-by-section, include:

Section 1: Definitions. Section 1 sets the operating definitions for the act.

Section 2: Standard of Conduct In Managing And Investing An Institutional Fund.
Section 2 adopts the "prudence standard" for investment decision making. UPMIFA's prudence standard is consistent with the "business judgment rule" as applied to charitable institutions, and derived from the RMNCA and UPIA. By drawing in both sources, the new law clarifies that commonly accepted standards of prudent investment apply to all charitable organizations.

Section 2 outlines the duties expected in conducting and managing investment

activity, including the overarching duty to comply with donor intent and the terms of the gift instrument. Section 2 also expressly includes the duty of loyalty and care (as would be exercised by an ordinarily prudent person in a like position under similar circumstances), the duty to minimize costs, and the duty to investigate the accuracy of information used for investment decisions. The section also allows for pooling of funds for investment and management purposes.

Finally, section 2 outlines factors that must be considered in the prudent management and investing of funds, and gives direction to diversify and make decisions in context of the portfolio and overall investment strategy.

The prudence factors for management and investment of institutional funds are: general economic conditions; possible effects of inflation or deflation; expected tax consequences (if any) of investment decisions or strategies; the role of each investment or course of action in the overall investment portfolio of the fund; expected total return from income and the appreciation of investments; other institutional resources; needs of the institution and fund to make distributions and preserve capital; and an asset's special relationship or value to the charitable purposes of the institution.

Section 3: Appropriation For Expenditure Or Accumulation – Rules Of Construction.

UMIFA permitted the expenditure of appreciation of an endowment fund to the extent that it had appreciated above the fund's historic dollar value ("HDV") (meaning the aggregate fair value of a fund when created, subsequent donations, and accumulations made at the direction of a gift instrument). UPMIFA replaces the concept of HDV with a more carefully articulated prudence standard for the process of making decisions about expenditures (in lieu of specific instructions from the donor's gift instrument or other agreement, of course). The seven prudence factors outlined in section 3 provide greater ability and flexibility to meet and effectuate donor intent than an arbitrary number fixed in time, and the factors continue to focus on and protect the purpose and duration of the endowment fund in question in accordance with the intent of the donor. UPMIFA's prudence factors encourage spending policies that will be responsive to fluctuations in fund values, maintain appropriate expenditures and accumulations during economic downturns and strengths, and guard against inappropriate depletion of endowment funds while still meeting the core "mission" of the funds. (Also, other safeguards for funds still exist, from donor restrictions to fiduciary duties of decision makers.)

The seven prudence factors for expenditure decisions are:

- the duration and preservation of the endowment fund;
- the purposes of the institution and the endowment fund;
- general economic conditions;

- possible effects of inflation and deflation;
- expected total return from income and the appreciation of investments;
- other resources of the institution;
- and the investment policy of the institution.

Section 4: Management and Investment Functions.

Section 4 continues to permit institutions' decision makers to delegate management and investment functions to external agents, but expands upon the standards for doing so. Under UPMIFA, decision makers must use reasonable skill, care, and caution in selecting the external agent, defining the scope of the delegation, and reviewing agent performance. The agent owes a duty of reasonable care to the institution in complying with the scope and terms of the delegation, and is subject to court jurisdiction in North Dakota for issues arising from the delegation or performance. Decisions regarding expenditures cannot be delegated.

Section 5: Release Or Modification of Restrictions On Management, Investment, Or Purpose.

Section 5 governs the release or modification of restrictions in a gift instrument on the management, investment, or overall purpose of an institutional fund. Under section 5, a donor may consent to a release or modification of restrictions, but funds must still be used for the charitable purposes of the institution. Courts may modify **restrictions** if they are impracticable or wasteful, impair the management or investment of a fund, or if the modification will further the purposes of the fund in a manner unanticipated by the donor. Modifications must be made in accordance with the donor's likely intentions in mind. The court may also modify the **purpose** of a fund if it has become unlawful, wasteful, or impossible. Notice and opportunity to be heard must be given to the Attorney General in either court action.

If the institution itself finds that it has a qualified fund with restrictions that are impracticable, wasteful, or impossible, then the institution can modify that restriction without court action by giving 60-days notice to the Attorney General. This provision is only applicable to smaller and older funds, defined as 20 years or older and under $25,000.00, and the property must still be used consistently with the charitable purposes expressed in the gift

Section 6: Compliance-Determination.

Section 6 states that compliance with the act is judged on the facts and circumstances at hand when a particular decision is made, and hindsight is not applicable.

Section 7: Application To Existing Institutional Funds.

Section 7 states that the new act will apply to funds created after August 1, 2009 or established after July 31, 2009. For those funds existing on August 1, 2009, the act applies only to decisions or actions made or taken after that date.

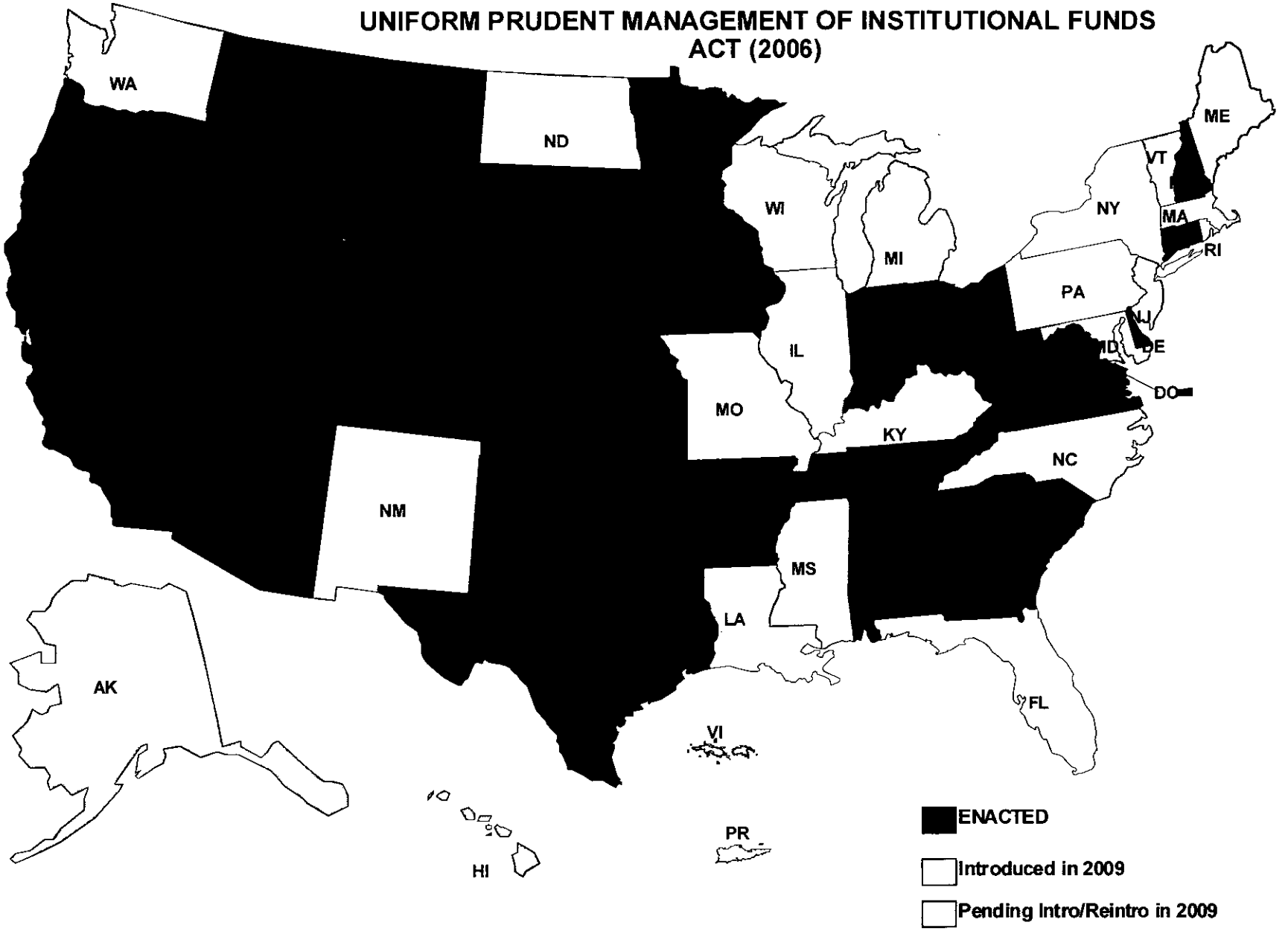
Section 8: Relation to ESIGN.

Section 8 is standard boilerplate in most uniform acts following passage by Congress of the federal Electronic Signatures in Global and National Commerce Act (ESIGN). ESIGN expressly allows state electronic transactions law to control in many circumstances, and this represents the agreed upon language within the ULC to invoke this for uniform acts that may contemplate electronic transactions or records.

Section 9: Repeal.

Section 9 repeals North Dakota's version of UMIFA, Chapter 15-67 of the North Dakota Century Code.

UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (2006)



Hagerty/Buringrud Amendment

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1074

Page 7, line 8, remove "August 1, 2009," and replace "July 31, 2009" with "the effective date of this Act"

Page 7, line 9, replace "August 1, 2009" with "the effective date of this Act"

Renumber accordingly