SENATE BILL 135

48TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2008

INTRODUCED BY

Carroll H. Leavell

FOR THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

AN ACT

RELATING TO INSTITUTIONAL FUNDS; ENACTING THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT; ESTABLISHING GUIDELINES FOR THE INVESTMENT AND EXPENDITURE OF ENDOWMENT FUNDS; REPEALING THE UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the "Uniform Prudent Management of Institutional Funds Act".

Section 2. DEFINITIONS.--As used in the Uniform Prudent Management of Institutional Funds Act:

A. "charitable purpose" means the relief of poverty, advancement of education or religion, promotion of health, promotion of a governmental purpose or any other purpose the achievement of which is beneficial to the community;

.169960.4

B. "endowment fund" means an institutional fund or part thereof that, pursuant to the terms of a gift instrument, is not wholly expendable by the institution on a current basis. "Endowment fund" does not include assets that an institution designates as an endowment fund for its own use;

C. "gift instrument" means a record or records, including an institutional solicitation, pursuant to which property is granted to, transferred to or held by an institution as an institutional fund;

D. "institution" means:

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

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

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

E. "institutional fund" means a fund held by an institution exclusively for charitable purposes. "Institutional fund" does not include:

(1) program-related assets;

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

(3) 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;

F. "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;

G. "program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment; and

H. "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.

Section 3. STANDARD OF CONDUCT IN MANAGING AND INVESTING AN 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 the Uniform Prudent Management of Institutional Funds 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, shall 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 shall 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 the Uniform Prudent Management of Institutional Funds 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 the Uniform Prudent Management of Institutional Funds Act; and

(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.

Section 4. APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF AN ENDOWMENT FUND--RULES OF CONSTRUCTION.--

A. Subject to the intent of a donor expressed in the gift instrument and subject to Subsection D of this section, 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 pursuant to Subsection A of this section, a gift instrument shall 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 pursuant to Subsection A of this section.

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 shall be calculated for the period the endowment fund has been in existence. This subsection does not:

(1) apply to an appropriation for expenditure permitted pursuant to law other than the Uniform Prudent Management of Institutional Funds 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.

Section 5. DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS.--

A. Subject to any specific limitation set forth in a gift instrument or in any law other than the Uniform Prudent Management of Institutional Funds 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 of this section 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 the Uniform

Prudent Management of Institutional Funds Act.

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 the restriction 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 shall be given an opportunity to be heard. To the extent practicable, any modification shall 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 shall 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, sixty 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 twenty-five thousand dollars ($25,000);

(2) more than twenty 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.

Section 7. REVIEWING COMPLIANCE.--Compliance with the Uniform Prudent Management of Institutional Funds 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.--The Uniform Prudent Management of Institutional Funds Act applies to institutional funds existing on or established after July 1, 2008. As applied to institutional funds existing on July 1, 2008, the Uniform Prudent Management of Institutional Funds Act governs only decisions made or actions taken on or after July 1, 2008. Decisions made and actions taken before July 1, 2008 are governed by the Uniform Management of Institutional Funds Act as if that act had not been repealed.

Section 9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Uniform Prudent Management of Institutional Funds Act modifies, limits and supersedes the federal 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 the Uniform Prudent Management of Institutional Funds Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 11. REPEAL.--Sections 46-9-1 through 46-9-12 NMSA 1978 (being Laws 1997, Chapter 199, Sections 1 through 12) are repealed.

Section 12. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2008.

underscored material = new
[~~bracketed material~~] = delete