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SENATE BILL 618

43RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1997

INTRODUCED BY

DON KIDD

FOR THE COURTS, CORRECTIONS AND CRIMINAL JUSTICE COMMITTEE

AN ACT

RELATING TO INSTITUTIONAL FUNDS; ENACTING THE UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT; REGARDING AUTHORITY TO INVEST FUNDS; PROVIDING FOR DELEGATION OF AUTHORITY TO MANAGE FUNDS; PROVIDING A STANDARD OF CONDUCT AND PORTFOLIO STRATEGY FOR MANAGEMENT OF FUNDS; AMENDING AND ENACTING SECTIONS OF THE NMSA 1978.

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

Section 1. [NEW MATERIAL] DEFINITIONS. --As used in the Uniform Management of Institutional Funds Act:

A. "institution" means:

(1) an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable or other eleemosynary purposes;

(2) a government, a governmental subdivision or agency or other governmental organization to the extent that it

1 holds funds exclusively for educational, religious, charitable
2 or other eleemosynary purposes; or

3 (3) an organization described in Section
4 501(c)(3) of the Internal Revenue Code organized and operated
5 exclusively to support one or more organizations described in
6 Paragraphs (1) and (2) of Subsection A of this section;

7 B. "institutional fund" means a fund held by an
8 institution for its exclusive use, benefit or purposes, or for
9 the exclusive use, benefit or purposes of one or more other
10 institutions, but does not include:

11 (1) a fund held for an institution by a trustee
12 that is not an institution;

13 (2) a fund in which a beneficiary that is not
14 an institution has an interest, other than possible rights that
15 could arise upon violation or failure of the purposes of the
16 fund;

17 (3) a fund established pursuant to the
18 provisions of Article 8, Section 10 of the constitution of New
19 Mexico; or

20 (4) a fund established pursuant to the
21 provisions of Article 12, Section 2 of the constitution of New
22 Mexico;

23 C. "endowment fund" means an institutional fund, or
24 any part thereof, not wholly expendable by the institution on a
25 current basis under the terms of the applicable gift instrument;

Underscored material = new
[bracketed material] = delete

1 D. "governing board" means the body responsible for
2 the management of an institution or of an institutional fund;

3 E. "historic dollar value" means the aggregate fair
4 value in dollars of:

5 (1) an endowment fund at the time it became an
6 endowment fund;

7 (2) each subsequent donation to the fund at the
8 time it is made; and

9 (3) each accumulation made pursuant to a
10 direction in the applicable gift instrument at the time the
11 accumulation is added to the fund. The determination of
12 historic dollar value made in good faith by the institution is
13 conclusive; and

14 F. "gift instrument" means a will, deed, grant,
15 conveyance, agreement, memorandum, writing, articles, bylaws,
16 charter, declaration, agreement, constitutional provision, law,
17 rule, regulation or other governing document under which
18 property is transferred to or held by an institution as an
19 institutional fund.

20 Section 2. [NEW MATERIAL] ACCUMULATION OF ANNUAL NET
21 INCOME--RESERVE--APPROPRIATION OF APPRECIATION. --

22 A. The governing board may accumulate so much of the
23 annual net income of an institutional fund as is prudent under
24 the standard established by Section 6 of the Uniform Management
25 of Institutional Funds Act. The governing board may hold any or

Underscored material = new
[bracketed material] = delete

1 all of the accumulated annual net income in an income reserve
2 for subsequent expenditure for the uses and purposes for which
3 the institutional fund is established or may add any or all of
4 the accumulated annual net income to the principal of the
5 institutional fund as is prudent under the standard established
6 by Section 6 of the Uniform Management of Institutional Funds
7 Act.

8 B. Subject to the limitation set forth in Subsection
9 C of this section, the governing board may appropriate for
10 expenditure for the uses and purposes for which an endowment
11 fund is established so much of the net appreciation, realized
12 and unrealized, in the fair value of the assets of an endowment
13 fund over the historic dollar value of the fund as is prudent
14 under the standard established by Section 6 of the Uniform
15 Management of Institutional Funds Act.

16 C. The appropriation for expenditure by the
17 governing board of the net appreciation of an endowment fund in
18 any one year in an amount greater than seven percent of the fair
19 market value of the endowment fund, calculated on the basis of
20 market values determined at least quarterly and averaged over a
21 period of three or more years, shall create a rebuttable
22 presumption of imprudence on the part of the governing board.

23 D. This section does not limit the authority of the
24 governing board to expend funds as permitted under other law,
25 the terms of the applicable gift instrument or charter, or the

Underscored material = new
[bracketed material] = delete

1 articles of incorporation or other governing instrument of the
2 institution.

3 Section 3. [NEW MATERIAL] RULES OF CONSTRUCTION. --

4 A. Section 2 of the Uniform Management of
5 Institutional Funds Act does not apply if, and to the extent
6 that, the applicable gift instrument indicates the donor's
7 intention that annual net income shall not be accumulated or
8 added to the principal or that net appreciation shall not be
9 expended. A restriction upon accumulation of annual net income
10 or addition of such income to the principal or the expenditure
11 of net appreciation may not be implied from a designation of a
12 gift as an endowment or from a direction or authorization in the
13 applicable gift instrument to use only "income", "interest",
14 "dividends" or "rents, issues or profits", or "to preserve the
15 principal intact", or a direction that contains other words of
16 similar import.

17 B. Except as otherwise provided in Subsection A of
18 this section, the following terms or comparable language in the
19 provisions of a gift instrument, unless otherwise limited or
20 modified, authorizes any investment strategy permitted under the
21 Uniform Management of Institutional Funds Act: "investments
22 permitted by law for investment of trust funds", "legal
23 investments", "authorized investments", "using the judgment and
24 care under the circumstances then prevailing that persons of
25 prudence, discretion and intelligence exercise in the management

Underscored material = new
[bracketed material] = delete

1 of their own affairs, not in regard to speculation, but in
2 regard to the permanent disposition of their funds, considering
3 the probable income as well as the probable safety of their
4 capital", "prudent man rule", "prudent trustee rule", "prudent
5 person rule" and "prudent investor rule".

6 Section 4. [NEW MATERIAL] INVESTMENT AUTHORITY. -- In
7 addition to an investment otherwise authorized by law or by the
8 applicable gift instrument, and without restriction to
9 investments a fiduciary may make, but subject to any specific
10 limitations set forth in the applicable gift instrument or in
11 the applicable law other than law relating to investments by a
12 fiduciary, the governing board may:

13 A. invest and reinvest an institutional fund in kind
14 of property or type of investment consistent with the standards
15 of the Uniform Management of Institutional Funds Act, including
16 any real or personal property deemed advisable by the governing
17 board, whether or not it produces a current return, including
18 mortgages, stocks, bonds, debentures and other securities of
19 profit or nonprofit corporations, shares in or obligations of
20 associations, limited liability companies, partnerships or
21 individuals and obligations of any government or subdivision or
22 instrumentality thereof;

23 B. retain property contributed by a donor to an
24 institutional fund for as long as the governing board deems
25 advisable;

Underscored material = new
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1 C. include all or any part of an institutional fund
2 in any pooled or common fund maintained by the institution; or

3 D. invest all or any part of an institutional fund
4 in any other pooled or common fund available for investment,
5 including shares or interests in regulated investment companies,
6 mutual funds, common trust funds, investment partnerships, real
7 estate investment trusts or similar organizations in which funds
8 are commingled and investment determinations are made by persons
9 other than the governing board.

10 Section 5. [NEW MATERIAL] DELEGATION OF INVESTMENT AND
11 MANAGEMENT FUNCTIONS. --

12 A. Except as otherwise provided by applicable law
13 relating to governmental institutions or funds, a governing
14 board may delegate investment and management functions that a
15 prudent governing body could delegate under the circumstances.
16 A governing board shall exercise reasonable care, skill and
17 caution in:

- 18 (1) selecting an agent;
19 (2) establishing the scope and terms of the
20 delegation, consistent with the purposes of the institutional
21 fund; and
22 (3) periodically reviewing the agent's actions
23 in order to monitor the agent's performance and the agent's
24 compliance with the terms of the delegation.

25 B. In performing a delegated function, an agent owes

Underscored material = new
[bracketed material] = delete

1 a duty to the governing board to exercise reasonable care to
2 comply with the terms of the delegation.

3 C. The members of a governing board who comply with
4 the requirements of Subsection B of this section are not liable
5 for the decisions or actions of the agent to whom the function
6 was delegated.

7 D. By accepting the delegation of an investment or
8 management function from a governing board of an institution
9 that is subject to the laws of New Mexico, an agent submits to
10 the jurisdiction of the courts of New Mexico in all actions
11 arising from the delegation.

12 E. The governing board may authorize the payment of
13 compensation for investment advisory or management services.

14 Section 6. [NEW MATERIAL] STANDARD OF CONDUCT--PORTFOLIO
15 STRATEGY. --

16 A. Members of a governing board shall invest and
17 manage an institutional fund as a prudent investor would, by
18 considering the purposes, distribution requirements and other
19 circumstances of the fund. In satisfying this standard, the
20 governing board shall exercise reasonable care, skill and
21 caution.

22 B. Among the circumstances that a governing board
23 shall consider are:

24 (1) long- and short-term needs of the
25 institution in carrying out its educational, religious,

1 charitable or other eleemosynary purposes;

2 (2) its present and anticipated financial
3 requirements;

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

6 (4) general economic conditions;

7 (5) the possible effect of inflation or
8 deflation;

9 (6) the expected tax consequence, if any, of
10 investment decisions or strategies;

11 (7) the role that each investment or course of
12 action plays within the overall investment portfolio of the
13 institutional fund;

14 (8) other resources of the institution;

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

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

21 C. A governing board's investment and management
22 decisions about individual assets shall be made not in isolation
23 but in the context of the institutional fund's portfolio of
24 investments as a whole and as a part of an overall investment
25 strategy having risk and return objectives reasonably suited to

Underscored material = new
[bracketed material] = delete

1 the institution.

2 D. A governing board shall make a reasonable effort
3 to verify the facts relevant to the investment and management of
4 institutional fund assets.

5 E. A governing board shall diversify the investments
6 of an institutional fund unless the board reasonably determines
7 that, because of special circumstances, the purposes of the fund
8 are better served without diversifying.

9 F. Subject to the provisions of Subsection B of
10 Section 4 of the Uniform Management of Institutional Funds Act,
11 within a reasonable time after receiving donated assets, a
12 governing board shall review the donated assets and make and
13 implement decisions concerning the retention and disposition of
14 assets in order to bring the portfolio of the institutional fund
15 into compliance with the purposes, terms, distribution
16 requirements and other circumstances of the institutional fund
17 and with the requirements of the Uniform Management of
18 Institutional Funds Act.

19 G. A governing board shall invest and manage the
20 assets of an institutional fund solely in the interest of the
21 institution.

22 H. In investing and managing assets of an
23 institutional fund, a governing board may incur only costs that
24 are appropriate and reasonable in relation to the assets, the
25 purposes of the fund and the terms of the gift instrument.

Underscored material = new
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1 Section 7. [NEW MATERIAL] RELEASE OF RESTRICTIONS ON USE
2 OR INVESTMENT. --

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

7 B. If written consent of the donor cannot be
8 obtained by reason of his death, disability, unavailability or
9 impossibility of identification, the governing board may apply
10 in the name of the institution to the district court for release
11 of a restriction imposed by the applicable gift instrument on
12 the use or investment of an institutional fund. The attorney
13 general shall be notified of the application and shall be given
14 an opportunity to be heard. If the district court finds that
15 the restriction is obsolete, inappropriate or impracticable, it
16 may by order release the restriction in whole or in part. A
17 release under this subsection may not change an endowment fund
18 to a fund that is not an endowment fund.

19 C. A release under this section may not allow a fund
20 to be used for purposes other than the educational, religious,
21 charitable or other eleemosynary purposes of the institution
22 affected.

23 D. This section does not limit the application of
24 the doctrine of cy-pres.

25 Section 8. [NEW MATERIAL] REVIEWING COMPLIANCE. --

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1 Compliance with the Uniform Management of Institutional Funds
2 Act is determined in light of the facts and circumstances
3 existing at the time of a governing board's decision and not by
4 hindsight.

5 Section 9. [NEW MATERIAL] SEVERABILITY. -- If any provision
6 of the Uniform Management of Institutional Funds Act or the
7 application thereof to any person or circumstances is held
8 invalid, the invalidity shall not affect other provisions or
9 applications of that act that can be given effect without the
10 invalid provision or application, and to this end the provisions
11 of the Uniform Management of Institutional Funds Act are
12 declared severable.

13 Section 10. [NEW MATERIAL] APPLICATION. -- The Uniform
14 Management of Institutional Funds Act applies to gift
15 instruments executed or in effect on or after its effective date
16 and to institutional funds existing on and created after its
17 effective date. The Uniform Management of Institutional Funds
18 Act governs any decisions and actions taken after its effective
19 date.

20 Section 11. [NEW MATERIAL] UNIFORMITY OF APPLICATION AND
21 CONSTRUCTION. -- The Uniform Management of Institutional Funds Act
22 shall be so applied and construed as to effectuate its general
23 purpose to make uniform the law with respect to the subject of
24 that act among those states that enact it.

25 Section 12. [NEW MATERIAL] SHORT TITLE. -- Sections 1

Underscored material = new
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1 through 12 of this act may be cited as the "Uniform Management
2 of Institutional Funds Act".

3 Section 13. Section 21-1-38 NMSA 1978 (being Laws 1991,
4 Chapter 69, Section 1) is amended to read:

5 "21-1-38. DEFINITION--REQUIREMENTS FOR ADOPTION OF
6 INVESTMENT POLICY FOR INVESTING ENDOWMENT FUNDS.--

7 A. As used in this section:

8 (1) "endowment funds" means funds:

9 (a) acquired by gift by an educational
10 institution with respect to which the donors or other outside
11 agencies have stipulated as a condition of the gift, and the
12 stipulation is expressed specifically in the gift instrument,
13 that the principal is to be maintained and invested for the
14 purpose of producing [~~present~~] current and future income that
15 may either be added to the principal or expended, and the
16 maintenance of the principal may be either: 1) held inviolate
17 and in perpetuity; or 2) expended after the passage of a stated
18 period of time or upon the happening of a specified event; and

19 (b) notwithstanding the source of
20 acquisition, that the governing board of the educational
21 institution [~~have~~] has determined and [~~have~~] has designated by a
22 written instrument, either revocable or irrevocable, to be
23 retained for long-term investment; and

24 (2) "educational institution" means an
25 educational institution designated in Article 12, Section 11 of

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1 the constitution of New Mexico and any post-secondary
2 educational institution, which term includes, but is not limited
3 to, an academic, vocational, technical, business, professional
4 or other school, college or university or other organization or
5 person offering or purporting to offer courses, instruction,
6 training or education through correspondence or in person, to
7 any individual within this state over the compulsory school
8 attendance age, if that post-secondary educational institution
9 is directly supported in whole or in part by state or local
10 taxation.

11 B. The board of finance, as that term is defined in
12 Section 6-10-9 NMSA 1978, for each of the educational
13 institutions:

14 (1) shall adopt regulations governing the
15 investment of endowment funds by the institution's board of
16 finance, which regulations shall provide at least for:

17 (a) the application of the investment
18 standard of conduct described in Section 6-8-10 NMSA 1978 and
19 the Uniform Management of Institutional Funds Act as the
20 standard for evaluating an investment;

21 (b) the appointment of an investment
22 advisory committee made up of individuals having demonstrated
23 experience and skill in the field of the investment of endowment
24 funds; and

25 (c) the development of a comprehensive

Underscored material = new
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1 investment policy for the investment of endowment funds by the
2 institution, with the advice and upon the recommendation of the
3 investment committee; and

4 (2) may employ an institutional endowment funds
5 investment manager and delegate to him the power to make
6 purchases, sales exchanges, investments and reinvestments of
7 endowment funds. "

8 Section 14. EFFECTIVE DATE. --The effective date of the
9 provisions of this act is July 1, 1997.

10 - 15 -

1 FORTY-THIRD LEGISLATURE

2 FIRST SESSION, 1997

3
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5
6 February 13, 1997

7
8 Mr. President:

9
10 Your CORPORATIONS & TRANSPORTATION COMMITTEE, to
11 whom has been referred

12
13 SENATE BILL 618

14
15 has had it under consideration and reports same with
16 recommendation that it DO PASS, and thence referred to the
17 FINANCE COMMITTEE.
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20 Respectfully submitted,

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24 _____
25 Roman M. Maes, III, Chairman

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(Chief Clerk)

(Chief Clerk)

Date _____

The roll call vote was 6 For 0 Against

Yes: 6

No: None

Excused: Fidel, Kidd, McKibben, Robinson

Absent: None

S0618CT1

1 FORTY-THIRD LEGISLATURE

2 FIRST SESSION, 1997

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5
6 February 26, 1997

7
8 Mr. President:

9
10 Your FINANCE COMMITTEE, to whom has been referred

11
12 SENATE BILL 618

13
14 has had it under consideration and reports same with
15 recommendation that it DO PASS.
16

17
18 Respectfully submitted,

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23 Ben D. Altamirano, Chairman
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Adopted _____ Not Adopted _____

(Chief Clerk)

(Chief Clerk)

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Date _____

The roll call vote was 6 For 0 Against

Yes: 6

No: None

Excused: Aragon, Eisenstadt, Ingle, Lyons, McKibben

Absent: None

S0618FC1

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~~[bracketed material] = delete~~

FORTY-THIRD LEGISLATURE

FIRST SESSION

February 28, 1997

SENATE FLOOR AMENDMENT number _____ to SENATE BILL 618

Amendment sponsored by Senator Don Kidd

1. On page 2, line 6, strike the semicolon and insert in lieu thereof a period.

2. On page 2, between lines 6 and 7, insert:

"Institution" does not include an institution with assets of more than ten million dollars (\$10,000,000) and that is organized and operated for private educational purposes;".

FORTY-THIRD LEGISLATURE
FIRST SESSION

SB 618

Page 21

Don Kidd

Adopted _____ Not Adopted _____
(Chief Clerk) (Chief Clerk)

Date _____

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State of New Mexico
House of Representatives

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FORTY-THIRD LEGISLATURE
FIRST SESSION, 1997

March 14, 1997

Mr. Speaker:

Your **TAXATION AND REVENUE COMMITTEE**, to whom has
been referred

SENATE BILL 618, as amended

has had it under consideration and reports same with
recommendation that it **DO PASS**, and thence referred to the
APPROPRIATIONS AND FINANCE COMMITTEE.

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FORTY-THIRD LEGISLATURE
FIRST SESSION, 1997

SFC/HB 618

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Respectfully submitted,

Jerry W. Sandel, Chairman

Adopted _____ Not Adopted _____

(Chief Clerk)

(Chief Clerk)

Date _____

The roll call vote was 11 For 0 Against

Yes: 11

Excused: Sandoval, Stell

Absent: None

M \S0618

Underscored material = new
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**State of New Mexico
House of Representatives**

**FORTY-THIRD LEGISLATURE
FIRST SESSION, 1997**

March 20, 1997

Mr. Speaker:

**Your APPROPRIATIONS AND FINANCE COMMITTEE, to
whom has been referred**

SENATE BILL 618, as amended

**has had it under consideration and reports same with
recommendation that it DO PASS.**

Respectfully submitted,

Max Coll, Chairman

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FORTY-THIRD LEGISLATURE
FIRST SESSION, 1997

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Adopted _____ Not Adopted _____

(Chief Clerk)

(Chief Clerk)

Date _____

The roll call vote was 14 For 0 Against

Yes: 14

Excused: Knowles, Marquardt, Wallace

Absent: None

ME \S0618

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