SENATE DOCKET, NO. FILED ON: 1/12/2009

**SENATE . . . . . . . . . . . . . . No.**

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The Commonwealth of Massachusetts

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PRESENTED BY:

**O'Leary, Robert (SEN)**

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*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General
 Court assembled:*

 The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act Providing for the Uniform Prudent Management of Institutional Funds.

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PETITION OF:

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| Name: | District/Address: |
| O'Leary, Robert (SEN) | Cape and Islands |

The Commonwealth of Massachusetts

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**In the Year Two Thousand and Nine**

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An Act Providing for the Uniform Prudent Management of Institutional Funds.

 *Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

The general laws, as appearing in the 2006 official edition, is hereby amended by striking out chapter 180A and replacing it with the following section: -

Chapter 180A: Uniform Prudent Management of Institutional Funds

Section 1. Definitions. The following words as used in this chapter shall have the following meanings unless a different meaning is clearly apparent from the language or context: - (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 or a fund held by trustee for a charitable community trust.

The term does not include:

(A) program-related assets;

(B) a fund held for an institution by a trustee that is not an institution, other than a fund which is held for a charitable community trust; 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.

Section 2. 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

chapter, 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 chapter, 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 chapter.

(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 3. Appropriation for expenditure or accumulation of endowment fund.

(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

chapter 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 4. Delegation of management and investment functions.

(A) Subject to any specific limitation set forth in a gift instrument or in law other than

this chapter, 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 chapter.

Section 5. 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.

Section 6. Reviewing compliance.

Compliance with this chapter 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 7. Application to existing institutional funds. This chapterapplies to institutional funds existing on or established after July 1, 2010. As applied to institutional funds existing on July 1, 2010 this chapter governs only decisions made or actions taken on or after that date.

Section 8. Relation to the electronic signatures in global and national commerce act

This chapter 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 9. 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.