

SENATE No.

The Commonwealth of Massachusetts

PRESENTED BY:

O'Leary, Robert (SEN)

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.

PETITION OF:

NAME:

O'Leary, Robert (SEN)

DISTRICT/ADDRESS:

Cape and Islands

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

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:

1 The general laws, as appearing in the 2006 official edition, is hereby amended by striking out chapter
2 180A and replacing it with the following section: -

3 Chapter 180A: Uniform Prudent Management of Institutional Funds

4 Section 1. Definitions. The following words as used in this chapter shall have the following meanings
5 unless a different meaning is clearly apparent from the language or context: - (1) "Charitable purpose"
6 means the relief of poverty, the advancement of education or

7 religion, the promotion of health, the promotion of a governmental purpose, or any other purpose
8 the achievement of which is beneficial to the community.

9

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

13

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

17

18 (4) "Institution" means:

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

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

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

25 (5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes or a fund
26 held by trustee for a charitable community trust.

27

28 The term does not include:

29 (A) program-related assets;

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

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

34

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

38

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

41

42 (8) "Record" means information that is inscribed on a tangible medium or that is stored
43 in an electronic or other medium and is retrievable in perceivable form.

44

45 Section 2. Standard of conduct in managing and investing institutional fund.

46

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

50

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

55

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

- 57 (1) may incur only costs that are appropriate and reasonable in relation to the
- 58 assets, the purposes of the institution, and the skills available to the institution; and
- 59 (2) shall make a reasonable effort to verify facts relevant to the management and
- 60 investment of the fund.

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

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

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

- 66 (a) general economic conditions;
- 67 (b) the possible effect of inflation or deflation;
- 68 (c) the expected tax consequences, if any, of investment decisions or
- 69 strategies;
- 70 (d) the role that each investment or course of action plays within the
- 71 overall investment portfolio of the fund;
- 72 (e) the expected total return from income and the appreciation of
- 73 investments;
- 74 (f) other resources of the institution;
- 75 (g) the needs of the institution and the fund to make distributions and to

76 preserve capital; and
77 (h) an asset's special relationship or special value, if any, to the
78 charitable purposes of the institution.

79 (2) Management and investment decisions about an individual asset must be
80 made not in isolation but rather in the context of the institutional fund's portfolio of investments
81 as a whole and as a part of an overall investment strategy having risk and return objectives
82 reasonably suited to the fund and to the institution.

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

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

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

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

96

97 Section 3. Appropriation for expenditure or accumulation of endowment fund.

98

99 (A) Subject to the intent of a donor expressed in the gift instrument and to subsection

100 (D), an institution may appropriate for expenditure or accumulate so much of an endowment

101 fund as the institution determines is prudent for the uses, benefits, purposes, and duration for

102 which the endowment fund is established. Unless stated otherwise in the gift instrument, the

103 assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the

104 institution. In making a determination to appropriate or accumulate, the institution shall act in
105 good faith, with the care that an ordinarily prudent person in a like position would exercise under
106 similar circumstances, and shall consider, if relevant, the following factors:

- 107 (1) the duration and preservation of the endowment fund;
- 108 (2) the purposes of the institution and the endowment fund;
- 109 (3) general economic conditions;
- 110 (4) the possible effect of inflation or deflation;
- 111 (5) the expected total return from income and the appreciation of investments;
- 112 (6) other resources of the institution; and
- 113 (7) the investment policy of the institution.

114

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

117

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

- 121 (1) create an endowment fund of permanent duration unless other language in the
122 gift instrument limits the duration or purpose of the fund; and (2) do not otherwise limit the
123 authority to appropriate for expenditure or accumulate under subsection (a).

124

125 (D) The appropriation for expenditure in any year of an amount greater than seven
126 percent of the fair market value of an endowment fund, calculated on the basis of market values
127 determined at least quarterly and averaged over a period of not less than three years immediately

128 preceding the year in which the appropriation for expenditure is made, creates a rebuttable
129 presumption of imprudence. For an endowment fund in existence for fewer than three years, the
130 fair market value of the endowment fund must be calculated for the period the endowment fund
131 has been in existence. This subsection does not:

132 (1) apply to an appropriation for expenditure permitted under law other than this
133 chapter or by the gift instrument; or (2) create a presumption of prudence for an appropriation for
134 expenditure of an amount less than or equal to seven percent of the fair market value of the
135 endowment fund.

136

137 Section 4. Delegation of management and investment functions.

138

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

144 (1) selecting an agent;

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

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

149

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

152

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

155

156 (D) By accepting delegation of a management or investment function from an institution
157 that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this
158 state in all proceedings arising from or related to the delegation or the performance of the
159 delegated function.

160

161 (E) An institution may delegate management and investment functions to its committees,
162 officers, or employees as authorized by law of this state other than this chapter.

163

164 Section 5. Release or modification of restrictions on management, investment or purpose.

165

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

170

171 (B) The court, upon application of an institution, may modify a restriction contained in a
172 gift instrument regarding the management or investment of an institutional fund if the restriction
173 has become impracticable or wasteful, if it impairs the management or investment of the fund, or
174 if, because of circumstances not anticipated by the donor, a modification of a restriction will

175 further the purposes of the fund. The institution shall notify the Attorney General of the
176 application, and the Attorney General must be given an opportunity to be heard. To the extent
177 practicable, any modification must be made in accordance with the donor's probable intention.

178
179 (C) If a particular charitable purpose or a restriction contained in a gift instrument on the
180 use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful,
181 the court, upon application of an institution, may modify the purpose of the fund or the
182 restriction on the use of the fund in a manner consistent with the charitable purposes expressed in
183 the gift instrument. The institution shall notify the attorney general of the application, and the
184 attorney general must be given an opportunity to be heard.

185
186 (D) If an institution determines that a restriction contained in a gift instrument on the
187 management, investment, or purpose of an institutional fund is unlawful, impracticable,
188 impossible to achieve, or wasteful, the institution, 60 days after notification to the attorney
189 general, may release or modify the restriction, in whole or part, if:

- 190 (1) the institutional fund subject to the restriction has a total value of less than
191 \$25,000;
192 (2) more than 20 years have elapsed since the fund was established; and
193 (3) the institution uses the property in a manner consistent with the charitable
194 purposes expressed in the gift instrument.

195
196 Section 6. Reviewing compliance.

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198 Compliance with this chapter is determined in light of the facts and circumstances existing at the time a
199 decision is made or action is taken, and not by hindsight.

200

201 Section 7. Application to existing institutional funds. This chapter applies to institutional funds existing on
202 or established after July 1, 2010. As applied to institutional funds existing on July 1, 2010 this chapter
203 governs only decisions made or actions taken on or after that date.

204

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

206

207 This chapter modifies, limits, and supersedes the electronic signatures in global and national commerce
208 act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act, 15
209 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of
210 that act, 15 U.S.C. Section 7003(b).

211

212 Section 9. Uniformity of application and construction. In applying and construing this uniform act,
213 consideration must be given to the need to promote

214 uniformity of the law with respect to its subject matter among states that enact it.