State of Wisconsin
2009 - 2010 LEGISLATURE

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2009 SENATE BILL 31

February 3, 2009 - Introduced by Senators RISSER, LEHMAN, COWLES, PLALE, LASSA, MILLER, ROBSON, TAYLOR and WIRCH, cosponsored by Representatives CULLEN, FIELDS, STONE, DAVIS, SMITH, ZEPNICK, TURNER, BERCEAU, A. OTT, KAUFERT, KESTELL, BENEDICT, TOWNSEND and SHILLING. Referred to Committee on Veterans and Military Affairs, Biotechnology, and Financial Institutions.

AN ACT ***to repeal*** 112.10; ***to amend*** 25.15 (3), 43.58 (7) (b) and 881.01 (2) (a); and ***to create*** 112.11 of the statutes; **relating to:** the Uniform Prudent Management of Institutional Funds Act, as approved by the National Conference of Commissioners on Uniform State Laws.

Analysis by the Legislative Reference Bureau

Currently, the management and investment of assets in funds held by institutions that are organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes, is governed by the Uniform Management of Institutional Funds Act (UMIFA). This act, approved and recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL), was enacted into Wisconsin law in 1976.

This bill replaces UMIFA with the Uniform Prudent Management of Institutional Funds Act (UPMIFA), as approved and recommended by NCCUSL in 2006. Significantly, UPMIFA updates the prudence standard established in UMIFA to govern the management and investment of the above-mentioned funds, providing that one of the enumerated prudence factors is the preservation of the funds, a factor not contained in UMIFA. UPMIFA applies to funds held by institutions exclusively for charitable purposes. A charitable purpose under UPMIFA specifically 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.

With respect to the management and investment of assets in these funds, UPMIFA requires those who manage and invest assets to do all of the following:

1. Consider the charitable purposes of the institution and the purposes of the institutional fund.

2. 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.

3. 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.

4. Make a reasonable effort to verify facts relevant to the management and investment of the fund.

5. Generally consider general economic conditions; the possible effect of inflation or deflation; the expected tax consequences, if any, of investment decisions or strategies; the role that each investment or course of action plays within the overall investment portfolio of the fund; the expected total return from income and the appreciation of investments; other resources of the institution; the needs of the institution and the fund to make distributions and to preserve capital; and an asset's special relationship or special value, if any, to the charitable purposes of the institution.

Further, with respect to endowment funds held by these institutions, UPMIFA authorizes an institution to 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. In making a determination to appropriate or accumulate, an institution must act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and must consider, if relevant, the duration and preservation of the endowment fund; the purposes of the institution and the endowment fund; general economic conditions; the possible effect of inflation or deflation; the expected total return from income and the appreciation of investments; other resources of the institution; and the investment policy of the institution.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 25.15 (3) of the statutes is amended to read:

25.15 **(3)** EXEMPTION. ~~Section~~ <u>Sections 112.11 and</u> 881.01 ~~does~~ <u>do</u> not apply to investments by the board.

SECTION 2. 43.58 (7) (b) of the statutes is amended to read:

43.58 **(7)** (b) If a gift, bequest, or endowment is made to any public library, the library board may pay or transfer the gift, bequest, or endowment, or its proceeds, to the treasurer of the municipality or county in which the public library is situated; may entrust the gift, bequest, or endowment to a public depository under ch. 34; may pay or transfer the gift, bequest, or endowment to the library board's financial secretary; or may pay or transfer the gift, bequest, or endowment to a charitable organization, described in section 501 (c) (3) of the Internal Revenue Code and exempt from federal income tax under section 501 (a) of the Internal Revenue Code, the purpose of which is providing financial or material support to the public library. A payment or transfer of a gift, bequest, or endowment by a library board to a charitable organization described in this paragraph made prior to March 19, 2008, is not invalid as lacking statutory authority to make the payment or transfer. If the library board pays or transfers the gift, bequest, or endowment to the financial secretary, the financial secretary may invest the gift, bequest, or endowment as permitted under s. 66.0603 (1m) or ~~112.10 (4)~~ 112.11 (3); or may delegate investment authority for the gift, bequest, or endowment as permitted under s. 66.0603 (2) or ~~112.10~~ 112.11 (5). The financial secretary shall hold office only during membership on the library board and shall be elected annually at the same time and in the same manner as the other officers of the library board.

SECTION 3. 112.10 of the statutes is repealed.

SECTION 4. 112.11 of the statutes is created to read:

112.11 Uniform Prudent Management of Institutional Funds Act. (1) SHORT TITLE. This section may be cited as the "Uniform Prudent Management of Institutional Funds Act."

(2) DEFINITIONS. In this section:

(a) "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.

(b) "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. "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, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(d) "Institution" means any of the following:

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.

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, but does not include any of the following:

1. Program–related assets.

2. A fund held for an institution by a trustee that is not an institution.

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.

(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.

(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 this section, 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.

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

(d) An institution may pool 2 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.

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 not be made 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 section, 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 section.

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.

(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, 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.

7. The investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under par. (a), 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.

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

(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 section, 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 all of the following:

1. Selecting an agent.

2. Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund.

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 par. (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 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 shall 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 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, 60 days after notification to the attorney general, may release or modify the restriction, in whole or part, if all of the following occur:

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.

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

(7) REVIEWING COMPLIANCE. Compliance with this section 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.

(8) APPLICATION TO EXISTING INSTITUTIONAL FUNDS. This section applies to institutional funds existing on or established after the effective date of this subsection .... [LRB inserts date]. As applied to institutional funds existing on the effective date of this subsection .... [LRB inserts date], this section governs only decisions made or actions taken on or after that date.

(9) RELATION TO FEDERAL ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This section modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 USC 7001 et seq., but does not modify, limit, or supersede section 101 of that act, 15 USC 7001 (a), or authorize electronic delivery of any of the notices described in section 103 of that act, 15 USC 7003 (b).

(10) UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this section, 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 5. 881.01 (2) (a) of the statutes is amended to read:

881.01 **(2)** (a) Except as provided in s. ~~112.10~~ 112.11 and except as otherwise provided in par. (b), a fiduciary who invests and manages assets owes a duty to the beneficiaries to comply with the prudent investor rule set forth in this section.

(END)