



UPMIFA and You – New Rules on Nonprofit Endowments & Investments

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What is UPMIFA?

- Uniform ***Prudent*** Management of Institutional Funds Act (13 MRSA ch. 99)
- Replaces UMIFA – Uniform Management of Institutional Funds Act (13 MRSA ch. 97)
- (More on the origins later.)

Scope of UPMIFA

- Other organizational law still applies to matters not governed by UPMIFA:
 - Nonprofit Corporation Act (Title 13-B) for nonprofit corporations
 - Uniform Trust Code (Title 18-B) for charitable trusts

Scope of UPMIFA

- UPMIFA governs the management, investment, and expenditure of ***institutional funds*** ...
 - . . . absent explicit donor instructions
- (We may use “funds” to describe institutional funds or, later in the presentation, endowment funds – a special kind of institutional fund.)

“Institutional fund”

- a fund held by an *institution* exclusively for *charitable purposes*
- Not:
 - program-related assets
 - “split interest” trusts
 - funds held by an individual or for-profit corporation

“Institution”

- Includes corporations, trusts, LLCs, unincorporated associations, certain governmental entities, etc.
- Not individuals

“Charitable Purposes”

- 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.

Retroactive Effect

- UPMIFA will become law on September 12 but will be effective retroactively to July 1.
- UPMIFA applies to decisions made or actions taken after July with respect to all institutional funds, including those established prior to July 1.

Managing and Investing: Standard of Conduct

- Must consider the charitable purposes of the institution and the fund.
- Fiduciary duties:
 - loyalty
 - good faith
 - with the care an ordinarily prudent person in a like position would exercise under similar circumstances.
 - Special skills or expertise must be used
- Compliance with all UPMIFA provisions 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.

Managing and Investing: Standard of Conduct

- Costs: appropriate and reasonable
- Can pool funds for management and investment purposes (but not all purposes)

Managing and Investing: Standard of Conduct

- Overall investment strategy having risk and return objectives reasonably suited to the fund and the institution.

Managing and Investing: Standard of Conduct

- May invest in any type of property
- Must diversify the investments of a fund “unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.”
 - Must evaluate property within a reasonable time after it’s received.

Managing and Investing: Standard of Conduct

- Factors – the following, if relevant, must be considered:
 - General economic conditions
 - Inflation or deflation
 - Tax consequences, if any
 - 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 appreciation
 - Other resources of the institution
 - The needs of the institution and the fund to make distributions and to preserve capital
 - An asset's special relationship or special value, if any, to the charitable purposes of the institution.

Managing and Investing: Delegation

- Can delegate to an “external agent” if prudent
- Agent owes duty of care or the institution
- Institution is not liable for agent’s decisions or actions if its board and officers acted in good faith and with due care (prudent person) in
 - selecting the agent
 - establishing the scope and terms of the delegation
 - periodically reviewing the agent’s actions to monitor performance

Origins of UPMIFA

- Model Act
 - Drafted by National Conference of Commissioners on Uniform State Laws (Uniform Law Commission, or “ULC”)

Origins of UPMIFA

- Impetus for Maine's enactment

Origins of UPMIFA

- Legislative process

Origins of UPMIFA

- Amendments and compromise

Origins of UPMIFA – Maine quirks

- AG notification of UPMIFA adoption:
 - An institution administering endowment funds with an aggregate value of \$2,000,000 or more must notify the AG upon its adoption of the provisions of UPMIFA.
 - An institution administering endowment funds with an aggregate value of less than \$2,000,000 must notify the AG at least 60 days before appropriating an amount that would cause the value of the institution's endowment funds to fall below the aggregate historic dollar value of the institution's endowment funds. During the 60-day period, the AG may require the institution to obtain court approval for the proposed expenditure.

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“Endowment fund”

- an institutional fund (or part thereof) that, under the terms of a *gift instrument*, is not wholly expendable on a current basis.
 - “retain principal and spend income”
 - “hold the fund as an endowment”
- **Not** board-restricted funds.
- An endowment fund is **donor restricted**.

“Gift instrument”

- a record or records under which property is granted to, transferred to, or held by an institution as an institutional fund.
- Evidence of donor restrictions and the institution’s acceptance of the restrictions.
- Anything the donor and institution were or should have been aware of at the time of the gift.

“Gift instrument”

- Examples:
 - written agreement
 - note on a check
 - written or email correspondence
 - will
 - solicitation materials or ad
 - bylaws
- Matching funds?

Appropriation from endowment funds

- Prior law: A fund's "historic dollar value" (HDV) is commonly called its "principal" and is the aggregate of:
 - the initial donation that created the endowment fund,
 - each subsequent donation to the fund, and
 - each accumulation added to "principal" as required by the gift instrument.

Appropriation from endowment funds

- Prior law: UMIFA prohibited appropriation from an endowment fund that would cause the fund to fall below (or further below) its HDV.

Appropriation from endowment funds

- UPMIFA:
 - eliminates the concept of HDV (though Maine's UPMIFA requires that it be tracked) and
 - provides better guidance on the prudence standard

Appropriation from endowment funds

- “[A]n 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.”

Appropriation from endowment funds

- To limit the authority to appropriate or accumulate, a gift instrument must specifically state the limitation.
- The following will create a permanent endowment fund but will not otherwise limit the authority to appropriate for expenditure:
 - designation as an endowment
 - a direction to use only “income,” “interest,” “dividends” or “rents, issues or profits,” or “to preserve the principal intact” or words of similar import.

Appropriation from endowment funds

- Factors – the following, if relevant, must be considered in making a determination to appropriate:
 - 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.

Appropriation from endowment funds

- Rebuttable presumption of imprudence.
Appropriation in any year of more than 7% of an endowment fund's *fair market value* creates a rebuttable presumption of imprudence.
- Fair market value is the average value, determined at least quarterly, over a period of at least 3 years immediately preceding the year of the appropriation.

Release of modification of donor restrictions

- Applicable to all donor restrictions – not just endowment restriction
- 4 methods:
 - Donor consent
 - Equitable deviation
 - *Cy pres*
 - Streamlined process for small, old funds

Release of modification of donor restrictions

- **Donor consent:** If the donor consents in writing, an institution may release or modify, in whole or in part, a restriction on the management, investment or purpose of an institutional fund.
 - Need a living individual or existing entity

Release of modification of donor restrictions

- **Equitable deviation:** A court may modify a restriction 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.
- AG must be notified and given an opportunity to be heard.

Release of modification of donor restrictions

- **Cy pres:** If a restriction on the purpose or use of an institutional fund becomes unlawful, impracticable, impossible to achieve or wasteful, a court may modify the restriction.
- AG must be notified and given an opportunity to be heard.

Release of modification of donor restrictions

- **Streamlined process for small, old funds:** If an institution determines that a restriction on the management, investment or purpose of an institutional fund is unlawful, impracticable, impossible to achieve or wasteful, the institution may release or modify the restriction, in whole or part, 60 days after notifying the AG if the Attorney General does not object IF:
 - The fund has a total value of less than \$25,000 (threshold will be adjusted for inflation),
 - More than 20 years have elapsed since the fund was established, and
 - The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.