

SENATE No. 1783

The Commonwealth of Massachusetts

In the Year Two Thousand 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
2 out chapter 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
5 following meanings unless a different meaning is clearly apparent from the language or context:

6 - (1) “Charitable purpose” 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
8 purpose

9 the achievement of which is beneficial to the community.

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
12 term does

13 not include assets that an institution designates as an endowment fund for its own use.

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

16 institutional

17 fund.

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

26 purposes or a fund held by trustee for a charitable community trust.

27 The term does not include:

28 (A) program-related assets;

29 (B) a fund held for an institution by a trustee that is not an institution, other than a fund

30 which is held for a charitable community trust; or

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

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

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

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

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

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

45 (B) In addition to complying with the duty of loyalty imposed by law other than this
46 chapter, each person responsible for managing and investing an institutional fund shall
47 manage and

48 invest the fund in good faith and with the care an ordinarily prudent person in a like
49 position

50 would exercise under similar circumstances.

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

52 (1) may incur only costs that are appropriate and reasonable in relation to the

53 assets, the purposes of the institution, and the skills available to the institution; and

54 (2) shall make a reasonable effort to verify facts relevant to the management and

55 investment of the fund.

56 (D) An institution may pool two or more institutional funds for purposes of management

57 and investment.

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

59 (1) In managing and investing an institutional fund, the following factors, if

60 relevant, must be considered:

61 (a) general economic conditions;

62 (b) the possible effect of inflation or deflation;

63 (c) the expected tax consequences, if any, of investment decisions or

64 strategies;

65 (d) the role that each investment or course of action plays within the

66 overall investment portfolio of the fund;

67 (e) the expected total return from income and the appreciation of

68 investments;

69 (f) other resources of the institution;

70 (g) the needs of the institution and the fund to make distributions and to

71 preserve capital; and

72 (h) an asset's special relationship or special value, if any, to the

73 charitable purposes of the institution.

74 (2) Management and investment decisions about an individual asset must be

75 made not in isolation but rather in the context of the institutional fund's portfolio of

76 investments as a whole and as a part of an overall investment strategy having risk and return

77 objectives reasonably suited to the fund and to the institution.

78 (3) Except as otherwise provided by law other than this chapter, an institution may

79 invest in any kind of property or type of investment consistent with this section.

80 (4) An institution shall diversify the investments of an institutional fund unless

81 the institution reasonably determines that, because of special circumstances, the purposes

82 of the fund are better served without diversification.

83 (5) Within a reasonable time after receiving property, an institution shall make

84 and carry out decisions concerning the retention or disposition of the property or to
85 rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes,
86 terms, and distribution requirements of the institution as necessary to meet other circumstances
87 of the institution and the requirements of this chapter.

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

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

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

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

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

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

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

101 institution. In making a determination to appropriate or accumulate, the institution shall
102 act in

103 good faith, with the care that an ordinarily prudent person in a like position would
104 exercise under

105 similar circumstances, and shall consider, if relevant, the following factors:

106 (1) the duration and preservation of the endowment fund;

107 (2) the purposes of the institution and the endowment fund;

108 (3) general economic conditions;

109 (4) the possible effect of inflation or deflation;

110 (5) the expected total return from income and the appreciation of investments;

111 (6) other resources of the institution; and

112 (7) the investment policy of the institution.

113 (B) To limit the authority to appropriate for expenditure or accumulate under subsection

114 (a), a gift instrument must specifically state the limitation.

115 (C) Terms in a gift instrument designating a gift as an endowment, or a direction or

116 authorization in the gift instrument to use only “income”, “interest”, “dividends”, or

117 “rents,

118 issues, or profits”, or “to preserve the principal intact”, or words of similar import:

119 (1) create an endowment fund of permanent duration unless other language in the

120 gift instrument limits the duration or purpose of the fund; and (2) do not otherwise limit
121 the authority to appropriate for expenditure or accumulate under subsection (a).

122 (D) The appropriation for expenditure in any year of an amount greater than seven
123 percent of the fair market value of an endowment fund, calculated on the basis of market
124 values

125 determined at least quarterly and averaged over a period of not less than three years
126 immediately

127 preceding the year in which the appropriation for expenditure is made, creates a
128 rebuttable

129 presumption of imprudence. For an endowment fund in existence for fewer than three
130 years, the

131 fair market value of the endowment fund must be calculated for the period the
132 endowment fund

133 has been in existence. This subsection does not:

134 (1) apply to an appropriation for expenditure permitted under law other than this

135 chapter or by the gift instrument; or (2) create a presumption of prudence for an

136 appropriation for expenditure of an amount less than or equal to seven percent of the fair market
137 value of the endowment fund.

138 Section 4. Delegation of management and investment functions.

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
141 investment of an
142 institutional fund to the extent that an institution could prudently delegate under the
143 circumstances. An institution shall act in good faith, with the care that an ordinarily
144 prudent

145 person in a like position would exercise under similar circumstances, in:

146 (1) selecting an agent;

147 (2) establishing the scope and terms of the delegation, consistent with the

148 purposes of the institution and the institutional fund; and

149 (3) periodically reviewing the agent's actions in order to monitor the agent's

150 performance and compliance with the scope and terms of the delegation.

151 (B) In performing a delegated function, an agent owes a duty to the institution to exercise

152 reasonable care to comply with the scope and terms of the delegation.

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 (D) By accepting delegation of a management or investment function from an institution

156 that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of
157 this
158 state in all proceedings arising from or related to the delegation or the performance of the
159 delegated function.

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

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

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

169 (B) The court, upon application of an institution, may modify a restriction contained in a
170 gift instrument regarding the management or investment of an institutional fund if the
171 restriction
172 has become impracticable or wasteful, if it impairs the management or investment of the
173 fund, or

174 if, because of circumstances not anticipated by the donor, a modification of a restriction
175 will
176 further the purposes of the fund. The institution shall notify the Attorney General of the
177 application, and the Attorney General must be given an opportunity to be heard. To the
178 extent
179 practicable, any modification must be made in accordance with the donor's probable
180 intention.

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

190 (D) If an institution determines that a restriction contained in a gift instrument on the
191 management, investment, or purpose of an institutional fund is unlawful, impracticable,

192 impossible to achieve, or wasteful, the institution, 60 days after notification to the
193 attorney

194 general, may release or modify the restriction, in whole or part, if:

195 (1) the institutional fund subject to the restriction has a total value of less than
196 \$25,000;

197 (2) more than 20 years have elapsed since the fund was established; and

198 (3) the institution uses the property in a manner consistent with the charitable
199 purposes expressed in the gift instrument.

200 Section 6. Reviewing compliance.

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

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

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

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

211 Section 9. Uniformity of application and construction. In applying and construing this
212 uniform act, consideration must be given to the need to promote
213 uniformity of the law with respect to its subject matter among states that enact it.