

SENATE No. 2078

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

3 Chapter 180A: Uniform Prudent Management of Institutional Funds

4 Section 1. Definitions.

5 The following words as used in this chapter shall have the following meanings unless a
6 different meaning is clearly apparent from the language or context: -

7 (1) “Charitable purpose” means the relief of poverty, the advancement of education or
8 religion, the promotion of health, the promotion of a governmental purpose, or any other 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 of
11 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 (3) “Gift instrument” means a record or records, including an institutional solicitation,
14 under which property is granted to, transferred to, or held by an institution as an institutional
15 fund.

16 (4) “Institution” means:

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

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

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

23 (5) “Institutional fund” means a fund held by an institution exclusively for charitable
24 purposes or a fund held by trustee for a charitable community trust.

25 The term does not include:

26 (A) program-related assets;

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

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

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

34 (7) “Program-related asset” means an asset held by an institution primarily to accomplish
35 a charitable purpose of the institution and not primarily for investment.

36 (8) “Record” means information that is inscribed on a tangible medium or that is stored in
37 an electronic or other medium and is retrievable in perceivable form.

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

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

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

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

47 (1) may incur only costs that are appropriate and reasonable in relation to the assets, the
48 purposes of the institution, and the skills available to the institution;

49 (2) except as otherwise provided by a gift instrument, shall allocate those costs on a
50 reasonable basis to each institutional fund prior to any appropriation; and

51 (3) shall make a reasonable effort to verify facts relevant to the management and
52 investment of the fund.

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

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

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

58 (a) general economic conditions;

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

60 (c) the expected tax consequences, if any, of investment decisions or strategies;

61 (d) the role that each investment or course of action plays within the overall investment
62 portfolio of the fund;

63 (e) the expected total return from income and the appreciation of investments;

64 (f) other resources of the institution;

65 (g) the needs of the institution and the fund to make distributions and to preserve capital;

66 and

67 (h) an asset's special relationship or special value, if any, to the charitable purposes of the
68 institution.

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

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

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

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

83 (6) A person that has special skills or expertise, or is selected in reliance upon the
84 person’s representation that the person has special skills or expertise, has a duty to use those
85 skills or that expertise in managing and investing institutional funds.

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

87 (A) Subject to the intent of a donor expressed in the gift instrument, an institution may
88 appropriate for expenditure or accumulate so much of an endowment fund as the institution
89 determines is prudent for the uses, benefits, purposes, and duration for which the endowment

90 fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment
91 fund are donor-restricted assets until appropriated for expenditure by the institution. In making a
92 determination to appropriate or accumulate, the institution shall act in good faith, with the care
93 that an ordinarily prudent person in a like position would exercise under similar circumstances,
94 and shall consider, if relevant, the following factors:

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

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

97 (3) general economic conditions;

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

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

100 (6) other resources of the institution; and

101 (7) the investment policy of the institution.

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

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

104 (C) Terms in a gift instrument designating a gift as an endowment, or a direction or
105 authorization in the gift instrument to use only “income”, “interest”, “dividends”, or “rents,
106 issues, or profits”, or “to preserve the principal intact”, or words of similar import:

107 (1) create an endowment fund of permanent duration unless other language in the gift
108 instrument limits the duration of the fund; and

109 (2) do not, standing alone, limit the authority to appropriate for expenditure or
110 accumulate under subsection (A).

111 Section 4. Delegation of management and investment functions.

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

117 (1) selecting an agent;

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

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

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

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

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

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

132 Section 5. Release or modification of restrictions on management, investment, duration,
133 or purpose.

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

138 (B) The court, upon application of an institution, may modify a restriction contained in a
139 gift instrument regarding the management, investment, or duration of an institutional fund if the
140 restriction has become impracticable or wasteful, if it impairs the management or investment of
141 the fund, or if, because of circumstances not anticipated by the donor, a modification of a
142 restriction will further the purposes of the fund. The attorney general shall be made a party to any
143 such application and resulting proceeding. To the extent practicable, any modification must be
144 made in accordance with the donor's probable intention.

145 (C) If a particular charitable purpose or a restriction contained in a gift instrument on the
146 use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful,
147 the court, upon application of an institution, may modify the purpose of the fund or the
148 restriction on the use of the fund in a manner consistent with the charitable purposes expressed in
149 the gift instrument. The attorney general shall be made a party to any such application and
150 resulting proceeding.

151 (D) The supreme judicial court may by rule or order provide that any application
152 otherwise subject to court approval pursuant to subsections (B) and (C) above, may be approved
153 by the attorney general if the value of the fund is not greater than such amount as the court may
154 provide or in such other situations as the court may so provide.

155 Section 6. Reviewing compliance.

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

158 Section 7. Application to existing institutional funds.

159 This chapter applies to institutional funds existing on or established after June 30, 2009.
160 As applied to institutional funds existing on June 30, 2009, this chapter governs only decisions
161 made or actions taken on or after that date.

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

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

167 Section 9. Uniformity of application and construction.

168 In applying and construing this uniform act, consideration must be given to the need to
169 promote uniformity of the law with respect to its subject matter among states that enact it. To the
170 extent that any provision of the law, rule or regulation is in conflict with this chapter, specifically
171 to the extent that any such conflict would operate to defeat or otherwise interfere with the

172 purposes of this chapter, this chapter shall supersede and take precedence over any such, law,
173 rule or regulation. This act shall be construed to the maximum extent possible so as to not
174 constitute an impairment of contract.