

New York Prudent Management of Institutional Funds Act (NYPMIFA)

Article 5-A of the New York Not-for-Profit Corporation Law

§ 550. Short title

This article may be known and may be cited as the “New York prudent management of institutional funds act”.

§ 551. Definitions

As used in this article:

(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 including any purpose that is charitable under the laws of the state of New York.

(a-1) “Donor” means the person who grants or transfers property to an institution pursuant to a gift instrument, or a person designated in the applicable gift instrument to act in the place of the donor, but does not otherwise include the person’s executors, heirs, successors, assigns, transferees, or distributees.

(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. The term does not include assets that an institution may designate as an endowment fund for its own use, consistent with the terms of the applicable gift instrument.

(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: (1) a person, other than an individual, organized and operated exclusively for charitable purposes; (2) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated; or (3) any corporation described in subparagraph five of paragraph (a) of section 102 (Definitions). Whenever any provision of this article imposes any obligation on, or requires any action to be taken by, an institution, such obligation is imposed on, and such action shall be authorized by, the governing board of such institution.

(e) “Institutional fund” means a fund held by an institution. This term shall not include: (1) program-related assets; (2) a fund held for an institution by a trustee that is not an institution; or (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) “Notice” means information given by an institution as required by this article. An institution will be considered to have given notice if notice is given personally in writing or sent to the recipient’s last known address on record with the institution, or, if no address is on record with the institution, if the institution makes reasonable efforts to attempt to find and notify the recipient. If the notice is mailed, such notice is given when deposited in the United States mail, with postage thereon prepaid. If the notice is delivered by electronic means, such as via facsimile or email, such notice is given when the notice is sent.

- (g) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal entity.
- (h) “Program-related asset” means an asset held by an institution not for investment under the terms of the gift instrument, but primarily to accomplish a programmatic purpose of the institution.
- (i) “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.
- (j) A donor is “available” if such donor (1) is living or, if the donor is not a natural person, is in existence and conducting activities; and (2) can be identified and located with reasonable efforts.
- (k) “External agent” means an independent investment advisor, investment counsel or manager, bank, or trust company.

§ 552. 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 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 article, 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 consistent with section 717 (Duty of Directors and Officers):
- (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; and
 - (2) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.
- (d) An institution may pool two 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, must 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; and (H) an asset’s special relationship or special value, if any, to the purposes of the institution.
 - (2) Management and investment decisions about an individual asset must be made not 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 article, an institution may invest in any kind of property or type of investment consistent with this article.

(4) An institution shall diversify the investments of an institutional fund unless the institution prudently determines that, because of special circumstances, the purposes of the fund are better served without diversification. An institution shall review a decision not to diversify as frequently as circumstances require, but at least annually.

(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 article.

(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.

(f) Each institution shall adopt a written investment policy setting forth guidelines on investments and delegation of management and investment functions in accord with the standards of this article.

§ 553. 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) where appropriate and circumstances would otherwise warrant, alternatives to expenditure of the endowment fund, giving due consideration to the effect that such alternatives may have on the institution; and
- (8) the investment policy of the institution.

For each determination to appropriate for expenditure, the institution shall keep a contemporaneous record describing the consideration that was given by the governing board to each of the factors enumerated in this paragraph.

(b) To limit the authority to appropriate for expenditure or accumulate under paragraph (a) of this section, a gift instrument must specifically state the limitation. Terms in a gift instrument setting forth a specific spending level, rate, or amount, or explicitly modifying or overriding the provisions of paragraph (a) of this section, will limit the authority of the institution to appropriate for expenditure or accumulate under paragraph (a) of this section.

(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; and

(2) do not otherwise limit the authority to appropriate for expenditure or accumulate under paragraph (a) of this section.

(d) A rebuttable presumption of imprudence shall apply to gift instruments executed upon or after the effective date of this article as follows: The appropriation for expenditure in any year of an amount greater than seven percent of the fair market value of an endowment fund, calculated on the basis of market values determined at least quarterly and averaged over a period of not less than five years immediately preceding the year in which the appropriation for expenditure is made, creates a rebuttable presumption of imprudence. For an endowment fund in existence for fewer than five years, the fair market value of the endowment fund must be calculated for the period the endowment fund has been in existence. This subsection does not:

(1) apply to an appropriation for expenditure permitted under law other than the chapter of the laws of 2010 that enacted this article or by the gift instrument; or

(2) create a presumption of prudence for an appropriation for expenditure of an amount less than or equal to seven percent of the fair market value of the endowment fund.

(e)

(1) With respect to a gift instrument executed by the donor before the effective date of this article an institution must provide ninety days notice to the donor, if the donor is then available, before applying paragraph (a) of this section for the first time, during which time the donor may clarify or amend the gift instrument to prohibit the application of paragraph (a) of this section. Such notice shall include a form for use by the donor, which shall contain language substantially as follows:

Attention, Donor:

Please check Box #1 or #2 below and return to the address shown above.

#1 The institution may spend as much of my gift as may be prudent.

#2 The institution may not spend below the original dollar value of my gift.

If you check Box #1 above, the institution may spend as much of your endowment gift (including all or part of the original value of your gift) as may be prudent under the criteria set forth in Article 5-A of the Not-for-Profit Corporation Law (The Prudent Management of Institutional Funds Act).

If you check Box #2 above, the institution may not spend below the original dollar value of your endowment gift but may spend the income and the appreciation over the original

dollar value if it is prudent to do so. The criteria for the expenditure of endowment funds set forth in Article 5-A of the Not-for-Profit Corporation Law (The Prudent Management of Institutional Funds Act) will not apply to your gift.

If the donor does not respond within ninety days from the date notice was given, paragraphs (a), (b), and (c) of this section shall be applied.

(2) This paragraph shall not apply if: (A) the gift instrument permits appropriation for expenditure from the endowment fund without regard for the fund's historic dollar value; (B) the gift instrument limits the institution's authority to appropriate for expenditure in accordance with paragraph (b) of this section; or (C) the gift consists of funds received as a result of an institutional solicitation without a separate statement by the donor expressing a restriction on the use of funds.

(f) When an institution acts pursuant to paragraph (a) or (e) of this section, it shall keep a record of such action.

§ 554. Delegation of management and investment functions

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this article, 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 as required by section seven hundred seventeen of this chapter, in:

(1) selecting, continuing or terminating an agent, including assessing the agent's independence including any conflicts of interest such agent has or may have;

(2) establishing the scope and terms of the delegation, including the payment of compensation, consistent with the purposes of the institution and the institutional fund; and

(3) monitoring 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, skill and caution to comply with the scope and terms of the delegation.

(c) An institution that complies with paragraph (a) of this section 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) Each contract, if any, pursuant to which authority is so delegated shall provide that it may be terminated by the institution at any time, without penalty, upon not more than sixty days notice.

(f) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by the laws of this state other than this article, as set forth in, inter alia, section 514 (Delegation of investment management).

(g) Nothing in this article shall impair the operation of section 717 (Duty of directors and officers).

§ 555. 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) A 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 donor, if available, and the attorney general of the application, and the attorney general and such donor must 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 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 purposes expressed in the gift instrument. The institution shall notify the donor, if available, and the attorney general of the application, and the attorney general and such donor must be given an opportunity to be heard.

(d)

(1) 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, ninety days after notification to the attorney general, may release or modify the restriction, in whole or part, if:

(A) the institutional fund subject to the restriction has a total value of less than one hundred thousand dollars;

(B) more than twenty years have elapsed since the fund was established; and

(C) the institution uses the property in a manner consistent with the purposes expressed in the gift instrument.

(2) Notice to the attorney general shall contain: (A) an explanation of (i) the institution's determination that the restriction meets the requirements set forth in subparagraph one of this paragraph and (ii) the proposed release or modification; (B) a copy of a record of the institution approving the release or modification; and (C) a statement of the proposed use of the institutional fund after such release or modification.

(3) If the attorney general does not notify the institution within ninety days, the institution may proceed with the release or modification.

(4) Notice shall also be given to the donor, as defined in paragraph (a-1) of section 551 (Definitions), if available, provided, however, that such notice shall not be required for

funds described in clause (B) of subparagraph two of paragraph (e) of section 553 (Appropriation for expenditure or accumulation of endowment fund; rules of construction).

(e) For purposes of this section, an institution may apply to the following courts to release or modify a restriction contained in a gift instrument:

(1) to the supreme court of the judicial district wherein the institution has its office or principal place of carrying out the purposes for which it was formed; or

(2) where the applicable gift instrument is a will, to the surrogate's court in which such will is probated.

(f) This chapter shall not limit the application of the doctrines of cy pres and deviation.

§ 556. Reviewing compliance

Compliance with this article shall be determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not retrospectively.

§ 557. Application to existing institutional funds

This article shall apply to institutional funds existing on or established after the effective date of this article. As applied to institutional funds existing on the effective date of this article, this article shall govern only decisions made or actions taken on or after that date.

§ 558. Relation to Electronic Signatures in Global and National Commerce Act

This article modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).