UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS

2007 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Lyle W. Hillyard

House Sponsor: Fred R. Hunsaker

LONG TITLE

General Description:

This bill establishes standards and criteria for management of certain charitable funds held by certain institutions.

Highlighted Provisions:

This bill:

- establishes a standard of conduct for managing and investing institutional funds;
- establishes guidelines for appropriating institutional funds for expenditure or accumulation;
- establishes procedures and standards for modifying restrictions on a fund's management, investment, or purpose;
- authorizes institutions to delegate the management and investment of institutional funds to an agent and provides a standard of care and limited immunity for an institution that performs that delegation;
- establishes standards for the review of and implementation of the chapter; and
- incorporates certain additional provisions added by Utah to the current Uniform Act into this Act.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

51-8-101, Utah Code Annotated 1953

51-8-102, Utah Code Annotated 1953

51-8-201, Utah Code Annotated 1953

51-8-202, Utah Code Annotated 1953

51-8-301, Utah Code Annotated 1953

51-8-302, Utah Code Annotated 1953

51-8-303, Utah Code Annotated 1953

51-8-304, Utah Code Annotated 1953

51-8-401, Utah Code Annotated 1953

51-8-501, Utah Code Annotated 1953

51-8-601, Utah Code Annotated 1953

51-8-602, Utah Code Annotated 1953

51-8-603, Utah Code Annotated 1953

51-8-604, Utah Code Annotated 1953

REPEALS:

13-29-1, as enacted by Chapter 242, Laws of Utah 1997

13-29-2, as last amended by Chapter 178, Laws of Utah 2005

13-29-3, as enacted by Chapter 242, Laws of Utah 1997

13-29-4, as enacted by Chapter 242, Laws of Utah 1997

13-29-5, as last amended by Chapter 178, Laws of Utah 2005

13-29-6, as enacted by Chapter 242, Laws of Utah 1997

13-29-7, as last amended by Chapter 178, Laws of Utah 2005

13-29-8, as enacted by Chapter 242, Laws of Utah 1997

13-29-9, as enacted by Chapter 178, Laws of Utah 2005

13-29-10, as enacted by Chapter 178, Laws of Utah 2005

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **51-8-101** is enacted to read:

CHAPTER 8. UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

Part 1. General Provisions

51-8-101. Title.

This chapter is known as the "Uniform Prudent Management of Institutional Funds Act."

Section 2. Section **51-8-102** is enacted to read:

51-8-102. Definitions.

As used in this chapter:

(1) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of governmental purposes, and any other purpose the achievement of which is beneficial to the community.

(2) (a) "Endowment fund" means an institutional fund, or any part of an institutional fund, not wholly expendable by the institution on a current basis under the terms of a gift instrument.

(b) "Endowment fund" does not include assets of an institution designated by the institution as an endowment fund for its own use.

(3) "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.

(4) (a) "Governing board" means the body responsible for the management of an institution or of an institutional fund.

(b) "Governing board" means, for a higher education institution, the board of trustees of the higher education institution.

(5) "Higher education institution" means the institutions specified in Section 53B-1-102.

(6) "Institution" means:

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

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

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

(7) (a) "Institutional fund" means a fund held by an institution exclusively for charitable purposes.

(b) "Institutional fund" does not include:

(i) program-related assets;

(ii) a fund held for an institution by a trustee that is not an institution;

(iii) 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; or

(iv) operating funds.

(8) "Manager" means either:

(a) the state treasurer; or

(b) a higher education institution that accepts the responsibility for the management of the endowment funds of a different higher education institution.

(9) "Operating funds" means monies used for the general operation of a higher education institution that are received by the higher education institution from:

(a) state appropriations;

(b) government contracts;

(c) government grants; or

(d) tuition and fees collected from students.

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

(11) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for appreciation or the production of income.

(12) "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.

Section 3. Section **51-8-201** is enacted to read:

Part 2. Standard of Conduct in Managing and Investing Institutional Fund

51-8-201. General standard of care.

(1) 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.

(2) In addition to complying with the duty of loyalty imposed by law other than this chapter, 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.

Section 4. Section **51-8-202** is enacted to read:

51-8-202. Standards for managing and investing an institutional fund.

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

(a) 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

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

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

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

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

(i) general economic conditions;

(ii) the possible effect of inflation or deflation;

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

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

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

(vi) other resources of the institution;

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

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

(b) 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.

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

(d) 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.

(e) Within a reasonable time after receiving property, an institution shall make and implement 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, distribution requirements, and other circumstances of the institution and the requirements of this chapter.

(f) A person who 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 special skills or that expertise in managing and investing institutional funds.

Section 5. Section **51-8-301** is enacted to read:

Part 3. Appropriation for Expenditure or Accumulation of Endowment Fund - Rules of Construction

51-8-301. Appropriation for expenditure or accumulation of endowment fund.

(1) (a) Subject to the intent of a donor expressed in a gift instrument and to Subsection (4), an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines to be prudent for the uses, benefits, purposes, and duration for which the endowment fund is established.

(b) Unless stated otherwise in a gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution.

(c) 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:

(i) the duration and preservation of the endowment fund;

(ii) the purposes of the institution and the endowment fund;

(iii) general economic conditions;

(iv) the possible effect of inflation or deflation;

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

(vi) other resources of the institution; and

(vii) the investment policy of the institution.

(2) To limit the authority to appropriate for expenditure or accumulate under Subsection (1), a gift instrument must specifically state the limitation.

(3) 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 similar words:

(a) create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(b) do not otherwise limit the authority to appropriate for expenditure or accumulate under Subsection (1).

Section 6. Section **51-8-302** is enacted to read:

51-8-302. Transferring management of endowment funds.

(1) A higher education institution may only transfer the management of any institutional fund to a manager if the transferring higher education institution:

(a) retains sufficient funds to cover its cash requirements; and

(b) continues to be responsible for the proper collection, deposit, and disbursement of the institutional fund in the manner provided by law.

(2) The institutional funds transferred as provided in this section are subject to all applicable provisions of this chapter and are under the jurisdiction of the manager until the transferring higher education institution withdraws these institutional funds from the manager.

(3) A higher education institution may withdraw all or any part of the institutional funds transferred to the manager, subject to any rules established by the manager governing notice or limits on the amount of institutional funds that may be withdrawn.

Section 7. Section **51-8-303** is enacted to read:

51-8-303. Requirements of member institutions of the state system of higher

education.

(1) The State Board of Regents shall:

(a) establish asset allocations for the institutional funds;

(b) in consultation with the commissioner of higher education, establish guidelines for investing the funds; and

(c) establish a written policy governing conflicts of interest.

(2) (a) A higher education institution may not invest its institutional funds in violation of the State Board of Regents' guidelines unless the State Board of Regents approves an investment policy that has been adopted by the higher education institution's board of trustees.

(b) A higher education institution and its employees shall comply with the State Board of Regents' conflict of interest requirements unless the State Board of Regents approves the conflict of interest policy that has been adopted by the higher education institution's board of trustees.

(3) (a) The board of trustees of a higher education institution may adopt:

(i) an investment policy to govern the investment of the higher education institution's institutional funds; and

(ii) a conflict of interest policy.

(b) The investment policy shall:

(i) define the groups, and the responsibilities of those groups, that must be involved with investing the institutional funds;

(ii) ensure that the groups defined under Subsection (3)(b)(i) at least include the board of trustees, an investment committee, institutional staff, and a custodian bank;

(iii) create an investment committee that includes not more than two members of the board of trustees and no less than two independent investment management professionals;

(iv) determine an appropriate risk level for the institutional funds;

(v) establish allocation ranges for asset classes considered suitable for the institutional funds;

(vi) determine prudent diversification of the institutional funds; and

(vii) establish performance objectives and a regular review process.

(c) Each higher education institution that adopts an investment policy, a conflict of interest policy, or both, shall submit the policy, and any subsequent amendments, to the State

Board of Regents for its approval.

(4) Each higher education institution shall make monthly reports detailing the deposit and investment of funds in its custody or control to:

(a) its board of trustees; and

(b) the State Board of Regents.

(5) The state auditor may conduct or cause to be conducted an annual audit of the investment program of each higher education institution.

(6) The State Board of Regents shall submit an annual report to the governor and the Legislature summarizing all investments by higher education institutions under its jurisdiction.

Section 8. Section **51-8-304** is enacted to read:

51-8-304. Rebuttable presumption of imprudence -- Scope.

(1) 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 three years immediately preceding the year in which the appropriation for expenditure was made, creates a rebuttable presumption of imprudence.

(2) For an endowment fund in existence for fewer than three years, the fair market value of the endowment fund shall be calculated for the period of time the endowment fund has been in existence.

(3) This section does not:

(a) apply to an appropriation for expenditure permitted under law other than this chapter or the gift instrument; or

(b) 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.

Section 9. Section **51-8-401** is enacted to read:

Part 4. Delegation of Certain Fund Management and Investment Functions

51-8-401. Delegating management and investment functions.

(1) (a) Subject to any specific limitation set forth in a gift instrument or in law other than this chapter, 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.

(b) 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:

(i) selecting an agent;

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

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

(2) 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.

(3) An institution that complies with Subsection (1) is not liable for the decisions or actions of an agent to which the function was delegated.

(4) 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.

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

Section 10. Section **51-8-501** is enacted to read:

Part 5. Release or Modification of Restrictions on Management, Investment, or Purpose

51-8-501. Process to release or modify restrictions on management, investment, or purpose.

(1) (a) With the donor's consent 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.

(b) A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(2) (a) If a restriction contained in a gift instrument on the management or investment of an institutional fund becomes impracticable or wasteful or 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 court, upon application of the institution, may modify the restriction.

(b) The institution shall notify the attorney general, who must be given an opportunity to be heard.

(c) To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(3) (a) 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.

(b) The institution shall notify the attorney general, who must be given an opportunity to be heard.

(4) 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:

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

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

(c) the institution uses the property in a manner the institution reasonably determines to be consistent with the charitable purposes expressed in the gift instrument.

Section 11. Section **51-8-601** is enacted to read:

Part 6. Standards and Implementation of this Chapter

51-8-601. Reviewing compliance.

Compliance with this chapter 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.

Section 12. Section **51-8-602** is enacted to read:

51-8-602. Application to existing institutional funds.

(1) This chapter applies to institutional funds existing on or established after April 30, 2007.

(2) As applied to institutional funds existing on April 30, 2007, this chapter governs only decisions made or actions taken after that date.

Section 13. Section **51-8-603** is enacted to read:

51-8-603. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter 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).

Section 14. Section **51-8-604** is enacted to read:

51-8-604. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 15. **Repealer.**

This bill repeals:

Section **13-29-1, Title.**

Section **13-29-2, Definitions.**

Section **13-29-3, Appropriation of appreciation.**

Section **13-29-4, Rule of construction.**

Section **13-29-5, Investment authority.**

Section **13-29-6, Delegation of investment management.**

Section **13-29-7, Standard of conduct.**

Section **13-29-8, Release of restriction on use or investment.**

Section **13-29-9, Transfer of endowment funds.**

Section **13-29-10, Requirements of member institutions of the state system of higher education.**

Legislative Review Note
as of 1-19-07 11:16 AM

Office of Legislative Research and General Counsel

Fiscal Note

S.B. 60 - Uniform Prudent Management of Institutional Funds

2007 General Session

State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.

1/29/2007, 11:42:38 AM, Lead Analyst: Ricks, G.

Office of the Legislative Fiscal Analyst