

1 **UNIFORM PRUDENT MANAGEMENT OF**
2 **INSTITUTIONAL FUNDS**

3 2007 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Lyle W. Hillyard**

6 House Sponsor: Fred R. Hunsaker

8 **LONG TITLE**

9 **General Description:**

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

12 **Highlighted Provisions:**

13 This bill:

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

25 **Monies Appropriated in this Bill:**

26 None

27 **Other Special Clauses:**

28 None

29 **Utah Code Sections Affected:**

30 ENACTS:

31 **51-8-101**, Utah Code Annotated 1953

32 **51-8-102**, Utah Code Annotated 1953

33 **51-8-201**, Utah Code Annotated 1953

34 **51-8-202**, Utah Code Annotated 1953

35 **51-8-301**, Utah Code Annotated 1953

36 **51-8-302**, Utah Code Annotated 1953

37 **51-8-303**, Utah Code Annotated 1953

38 **51-8-304**, Utah Code Annotated 1953

39 **51-8-401**, Utah Code Annotated 1953

40 **51-8-501**, Utah Code Annotated 1953

41 **51-8-601**, Utah Code Annotated 1953

42 **51-8-602**, Utah Code Annotated 1953

43 **51-8-603**, Utah Code Annotated 1953

44 **51-8-604**, Utah Code Annotated 1953

45 REPEALS:

46 **13-29-1**, as enacted by Chapter 242, Laws of Utah 1997

47 **13-29-2**, as last amended by Chapter 178, Laws of Utah 2005

48 **13-29-3**, as enacted by Chapter 242, Laws of Utah 1997

49 **13-29-4**, as enacted by Chapter 242, Laws of Utah 1997

50 **13-29-5**, as last amended by Chapter 178, Laws of Utah 2005

51 **13-29-6**, as enacted by Chapter 242, Laws of Utah 1997

52 **13-29-7**, as last amended by Chapter 178, Laws of Utah 2005

53 **13-29-8**, as enacted by Chapter 242, Laws of Utah 1997

54 **13-29-9**, as enacted by Chapter 178, Laws of Utah 2005

55 **13-29-10**, as enacted by Chapter 178, Laws of Utah 2005

56

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

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

59 **CHAPTER 8. UNIFORM PRUDENT MANAGEMENT OF**
60 **INSTITUTIONAL FUNDS ACT**

61 **Part 1. General Provisions**

62 **51-8-101. Title.**

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

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

66 **51-8-102. Definitions.**

67 As used in this chapter:

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

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

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

76 (3) "Gift instrument" means a record or records, including an institutional solicitation,
77 under which property is granted to, transferred to, or held by an institution as an institutional
78 fund.

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

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

83 (5) "Higher education institution" means the institutions specified in Section
84 53B-1-102.

85 (6) "Institution" means:

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

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

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

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

94 (b) "Institutional fund" does not include:

95 (i) program-related assets;

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

97 (iii) a fund in which a beneficiary that is not an institution has an interest, other than an
98 interest that could arise upon violation or failure of the purposes of the fund; or

99 (iv) operating funds.

100 (8) "Manager" means either:

101 (a) the state treasurer; or

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

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

106 (a) state appropriations;

107 (b) government contracts;

108 (c) government grants; or

109 (d) tuition and fees collected from students.

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

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

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

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

120 **Part 2. Standard of Conduct in Managing and Investing Institutional Fund**
121 **51-8-201. General standard of care.**

122 (1) Subject to the intent of a donor expressed in a gift instrument, an institution, in
123 managing and investing an institutional fund, shall consider the charitable purposes of the
124 institution and the purposes of the institutional fund.

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

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

130 **51-8-202. Standards for managing and investing an institutional fund.**

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

132 (a) may incur only costs that are appropriate and reasonable in relation to the assets, the
133 purposes of the institution, and the skills available to the institution; and

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

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

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

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

141 (i) general economic conditions;

- 142 (ii) the possible effect of inflation or deflation;
- 143 (iii) the expected tax consequences, if any, of investment decisions or strategies;
- 144 (iv) the role that each investment or course of action plays within the overall
145 investment portfolio of the fund;
- 146 (v) the expected total return from income and the appreciation of investments;
- 147 (vi) other resources of the institution;
- 148 (vii) the needs of the institution and the fund to make distributions and to preserve
149 capital; and
- 150 (viii) an asset's special relationship or special value, if any, to the charitable purposes
151 of the institution.
- 152 (b) Management and investment decisions about an individual asset must be made not
153 in isolation but rather in the context of the institutional fund's portfolio of investments as a
154 whole and as a part of an overall investment strategy having risk and return objectives
155 reasonably suited to the fund and to the institution.
- 156 (c) Except as otherwise provided by law other than this chapter, an institution may
157 invest in any kind of property or type of investment consistent with the standards of this
158 section.
- 159 (d) An institution shall diversify the investments of an institutional fund unless the
160 institution reasonably determines that, because of special circumstances, the purposes of the
161 fund are better served without diversification.
- 162 (e) Within a reasonable time after receiving property, an institution shall make and
163 implement decisions concerning the retention or disposition of the property or to rebalance a
164 portfolio, in order to bring the institutional fund into compliance with the purposes, terms,
165 distribution requirements, and other circumstances of the institution and the requirements of
166 this chapter.
- 167 (f) A person who has special skills or expertise, or is selected in reliance upon the
168 person's representation that the person has special skills or expertise, has a duty to use those
169 special skills or that expertise in managing and investing institutional funds.

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

171 **Part 3. Management of Endowment Funds**

172 **51-8-301. Appropriation for expenditure or accumulation of endowment fund.**

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

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

179 (c) In making a determination to appropriate or accumulate, the institution shall act in
180 good faith, with the care that an ordinarily prudent person in a like position would exercise
181 under similar circumstances, and shall consider, if relevant, the following factors:

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

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

184 (iii) general economic conditions;

185 (iv) the possible effect of inflation or deflation;

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

187 (vi) other resources of the institution; and

188 (vii) the investment policy of the institution.

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

191 (3) Terms in a gift instrument designating a gift as an endowment, or a direction or
192 authorization in the gift instrument to use only "income," "interest," "dividends," or "rents,
193 issues, or profits," or "to preserve the principal intact," or similar words:

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

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

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

199 **51-8-302. Transferring management of endowment funds.**

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

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

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

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

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

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

212 **51-8-303. Requirements of member institutions of the state system of higher**
213 **education.**

214 (1) The State Board of Regents shall:

215 (a) establish asset allocations for the institutional funds;

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

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

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

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

226 (3) (a) The board of trustees of a higher education institution may adopt:
227 (i) an investment policy to govern the investment of the higher education institution's
228 institutional funds; and
229 (ii) a conflict of interest policy.
230 (b) The investment policy shall:
231 (i) define the groups, and the responsibilities of those groups, that must be involved
232 with investing the institutional funds;
233 (ii) ensure that the groups defined under Subsection (3)(b)(i) at least include the board
234 of trustees, an investment committee, institutional staff, and a custodian bank;
235 (iii) create an investment committee that includes not more than two members of the
236 board of trustees and no less than two independent investment management professionals;
237 (iv) determine an appropriate risk level for the institutional funds;
238 (v) establish allocation ranges for asset classes considered suitable for the institutional
239 funds;
240 (vi) determine prudent diversification of the institutional funds; and
241 (vii) establish performance objectives and a regular review process.
242 (c) Each higher education institution that adopts an investment policy, a conflict of
243 interest policy, or both, shall submit the policy, and any subsequent amendments, to the State
244 Board of Regents for its approval.
245 (4) Each higher education institution shall make monthly reports detailing the deposit
246 and investment of funds in its custody or control to:
247 (a) its board of trustees; and
248 (b) the State Board of Regents.
249 (5) The state auditor may conduct or cause to be conducted an annual audit of the
250 investment program of each higher education institution.
251 (6) The State Board of Regents shall submit an annual report to the governor and the
252 Legislature summarizing all investments by higher education institutions under its jurisdiction.
253 Section 8. Section **51-8-304** is enacted to read:

254 **51-8-304. Rebuttable presumption of imprudence -- Scope.**

255 (1) The appropriation for expenditure in any year of an amount greater than seven
256 percent of the fair market value of an endowment fund, calculated on the basis of market values
257 determined at least quarterly and averaged over a period of not less than three years
258 immediately preceding the year in which the appropriation for expenditure was made, creates a
259 rebuttable presumption of imprudence.

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

263 (3) This section does not:

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

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

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

269 **Part 4. Delegation of Certain Fund Management and Investment Functions**

270 **51-8-401. Delegating management and investment functions.**

271 (1) (a) Subject to any specific limitation set forth in a gift instrument or in law other
272 than this chapter, an institution may delegate to an external agent the management and
273 investment of an institutional fund to the extent that an institution could prudently delegate
274 under the circumstances.

275 (b) An institution shall act in good faith, with the care that an ordinarily prudent person
276 in a like position would exercise under similar circumstances, in:

277 (i) selecting an agent;

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

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

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

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

286 (4) By accepting delegation of a management or investment function from an
287 institution that is subject to the laws of this state, an agent submits to the jurisdiction of the
288 courts of this state in all proceedings arising from or related to the delegation or the
289 performance of the delegated function.

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

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

293 **Part 5. Release or Modification of Restrictions on Management, Investment, or Purpose**
294 **51-8-501. Process to release or modify restrictions on management, investment, or**
295 **purpose.**

296 (1) (a) With the donor's consent in a record, an institution may release or modify, in
297 whole or in part, a restriction contained in a gift instrument on the management, investment, or
298 purpose of an institutional fund.

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

301 (2) (a) If a restriction contained in a gift instrument on the management or investment
302 of an institutional fund becomes impracticable or wasteful or impairs the management or
303 investment of the fund, or if because of circumstances not anticipated by the donor a
304 modification of a restriction will further the purposes of the fund, the court, upon application of
305 the institution, may modify the restriction.

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

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

310 (3) (a) If a particular charitable purpose or a restriction contained in a gift instrument
311 on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or
312 wasteful, the court, upon application of an institution, may modify the purpose of the fund or
313 the restriction on the use of the fund in a manner consistent with the charitable purposes
314 expressed in the gift instrument.

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

317 (4) If an institution determines that a restriction contained in a gift instrument on the
318 management, investment, or purpose of an institutional fund is unlawful, impracticable,
319 impossible to achieve, or wasteful, the institution, 60 days after notification to the attorney
320 general, may release or modify the restriction, in whole or part, if:

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

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

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

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

326 **Part 6. Standards and Implementation of this Chapter**

327 **51-8-601. Reviewing compliance.**

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

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

331 **51-8-602. Application to existing institutional funds.**

332 (1) This chapter applies to institutional funds existing on or established after April 30,
333 2007.

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

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

337 **51-8-603. Relation to Electronic Signatures in Global and National Commerce**

338 Act.

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

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

344 **51-8-604. Uniformity of application and construction.**

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

347 Section 15. **Repealer.**

348 This bill repeals:

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

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

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

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

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

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

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

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

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

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