ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Senate Higher Education Committee
2010 Interim Hearing on Endowments

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Timeline of Relevant State Laws

- 1972 – The National Conference of Commissioners on Uniform State Laws (NCCUSL) developed the Uniform Management of Institutional Funds Act (UMIFA)
- 1989 – UMIFA adopted by the Texas Legislature includes private & public institutions of higher education.
- 1995 – Public Funds Investment Act
- 1996 – UT Board of Regents authorized the nonprofit University of Texas Investment Management Company (UTIMCO) to manage UT System assets.
- 2001-2003 – A general rider is adopted & appears in each General Appropriations Act providing accountability to donors.
- 2007 – HB 860 replaced UMIFA with the Uniform Prudent Management of Institutional Funds Act (UPMIFA) adopted by the NCCUSL in 2006.

Enacted in 42 states & the District of Columbia & introduced in 5 other states.

Standard of Conduct:

- In managing & investing an institutional fund, subject to the donor's intent expressed in a gift instrument, an institution is required to consider the charitable purposes of the institution and the purposes of the institutional fund. (§163.004(a))
- Each person responsible for managing & investing an institutional fund, in addition to complying with the duty of loyalty imposed by law, must manage & invest the fund in good faith & with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

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Except as otherwise provided in a gift instrument, in managing & investing an institutional fund, the following factors, if relevant, must be considered:

- General economic conditions;
- Possible effect of inflation or deflation;
- Expected tax consequences of investment decisions or strategies;
- The role that each investment or course of action plays within the overall investment portfolio of the fund;
- The expected total return from income & appreciation of investments;
- Other resources of the institution;
- The needs of the institution & the fund to make distributions & to preserve capital;
- An asset's special relationship or special value to the charitable purposes of the institution.

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An institution may pool 2 or more institutional funds for investment purposes.

Investment decisions about an individual asset must be made in the context of the fund's portfolio of investments as a whole & as part of an overall investment strategy.

An institution is required to diversify its investments unless, due to special circumstances, the purposes of the fund are better served without diversification.

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Within a reasonable time after receiving property an institution is required to make decisions regarding retention or disposition of the property.

In managing an institutional fund, an institution may incur only costs that are appropriate & reasonable in relation to the assets, the purposes of the institution & the skills available to the institution, and must make a reasonable effort to verify facts relevant to the management & investment of the fund.

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- Subject to the donor's intent expressed in a gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund it determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established.
- Unless stated otherwise in the gift instrument, assets in an endowment fund are donor-restricted assets until appropriated for expenditures by the institution.

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In making a determination to appropriate or accumulate, the institution must consider, if relevant, the following factors:

- The duration & preservation of the endowment fund;
- The purposes of the institution and the endowment fund;
- General economic conditions;
- The possible effect of inflation or deflation;
- The expected total return from income and the appreciation of investments;
- Other resources of the institution; and
- The investment policy of the institution.

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Rebuttable presumption of imprudence:

1. Expenditure of an amount greater than 7% of the fair market value of an endowment fund with aggregate value of $1 million or more, calculated on basis of market values determined quarterly & averaged over at least 3 years immediately preceding the year the appropriation for expenditure was made.

2. If more than 5% of the fair market value of an endowment fund with the aggregate value of less than $1 million is appropriated for expenditure, calculated the same way as above.

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3. Applicable only to a university system, appropriation for expenditure of any amount greater than 9% of the fair market value of an endowment fund with an aggregate value of $450 million or more, calculated the same as above.

If the percentages or less than the percentages above are expended, there is no presumption of prudence.

The presumptions do not apply to appropriations for expenditures permitted by other law or by the gift instrument.

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An institution may delegate to an external agent the management & investment of an institutional fund. The institution must act in good faith, with the care an ordinarily prudent person would exercise under similar circumstances, in:

- Selecting an Agent
- Establishing the scope & terms of the delegation, consistent with purposes of the institution & its fund
- Periodically review the agent's actions to monitor the agent's performance & compliance with the scope & terms of the delegation

The Agent owes a duty to the institution to exercise reasonable care to comply with the terms of the delegation and by accepting that delegation, submits to the jurisdiction of the courts of this state.

An institution which complies with 1-3 above is not liable for the decisions or actions of the agent.

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Donor consents in a record:

- An institution may release or modify, in whole or part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund.
- The fund must still be used for a charitable purpose of the institution.

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- A court may modify a restriction regarding management or investment of an institutional fund if the restriction has become unlawful, impracticable, impossible to achieve or wasteful, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund.

- Any modification must be made in accordance with the donor's probable intention.
  Notice to the Attorney General of the proceeding is required.

If such a fund has a total value less than $25,000, has existed more than 20 years, and uses the property consistent with the charitable purposes expressed in the gift instrument, after 60 days notice to the attorney general, the institution may modify the restriction.

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Special Section for Higher Education:

The Nonprofit Corporation Act (formerly Art. 1396-1.01, et.seq.), now the Business Organizations Code Ch. 22 Nonprofit Corporations

Books, records & reports of private, independent or public institutions of higher education or a foundation chartered for the benefit of the institution or any component part of the institution, are exempted from public inspection under §22.353 by §22.355.

However, § 22.356 makes the books & records of a supporting corporation subject to audit at the discretion of the state auditor.

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