

HB 4080

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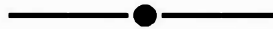
WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2008



ENROLLED

House Bill No. 4080

(By Delegates Pino, Blair, Guthrie, Reynolds,
Walters and Frederick)



Passed March 5, 2008

In Effect Ninety Days from Passage

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H. B. 4080

SECRETARY OF STATE

(BY DELEGATES PINO, BLAIR, GUTHRIE, REYNOLDS,
WALTERS AND FREDERICK)

[Passed March 5, 2008; in effect ninety days from passage.]

AN ACT to amend and reenact §44-6A-1, §44-6A-2, §44-6A-3, §44-6A-4, §44-6A-5, §44-6A-6, §44-6A-7 and §44-6A-8 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto two new sections, designated §44-6A-9 and §44-6A-10, all relating to funds held for charitable purposes by nonprofit, charitable institutions; repealing the Uniform Management of Institutional Funds Act (UMIFA); creating the Uniform Prudent Management of Institutional Funds Act (UPMIFA); standards of conduct in managing and investing institutional funds; appropriation of institutional funds for expenditures or accumulation; criteria for expenditure or accumulation of institutional funds; delegation to an external agent for the purpose of managing and investing of institutional funds; modifying or releasing donor restrictions on management, investment, or purpose of funds; reviewing compliance; application to existing institutional funds; relation to the federal Electronic Signatures in Global and National Commerce Act; and uniformity in the application and construction of the act.

Be it enacted by the Legislature of West Virginia:

That §44-6A-1, §44-6A-2, §44-6A-3, §44-6A-4, §44-6A-5, §44-6A-6, §44-6A-7 and §44-6A-8 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto two new sections, designated §44-6A-9 and §44-6A-10, all to read as follows:

**ARTICLE 6A. UNIFORM PRUDENT MANAGEMENT OF
INSTITUTIONAL FUNDS ACT.**

§44-6A-1. Short title.

1 This article may be cited as the “Uniform Prudent
2 Management of Institutional Funds Act.”

3 **§44-6A-2. Definitions.**

4 In this article:

5 (1) “Charitable purpose” means the relief of poverty, the
6 advancement of education or religion, the promotion of
7 health, the promotion of a governmental purpose, or any
8 other purpose the achievement of which is beneficial to the
9 community.

10 (2) “Endowment fund” means an institutional fund or part
11 thereof that, under the terms of a gift instrument, is not
12 wholly expendable by the institution on a current basis. The
13 term does not include assets that an institution designates as
14 an endowment fund for its own use.

15 (3) “Gift instrument” means a record or records,
16 including an institutional solicitation, under which property
17 is granted to, transferred to, or held by or on behalf of an
18 institution as an institutional fund.

19 (4) “Institution” means:

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

22 (B) A government or governmental subdivision, agency,
23 or instrumentality, to the extent that it holds funds
24 exclusively for a charitable purpose;

25 (C) A trust that had both charitable and noncharitable
26 interests, after all noncharitable interests have terminated;
27 and

28 (D) A community foundation or community trust.

29 (5) “Institutional fund” means a fund held by an
30 institution exclusively for charitable purposes. The term does
31 not include:

32 (A) Program-related assets;

33 (B) A fund held for an institution by a trustee that is not
34 an institution, unless the fund is held exclusively for the
35 benefit of either a community foundation or community trust
36 by a bank, a trust company or other similar fiduciary; or

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

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

45 (7) "Program-related asset" means an asset held by an
46 institution primarily to accomplish a charitable purpose of the
47 institution and not primarily for investment.

48 (8) "Record" means information that is inscribed on a
49 tangible medium or that is stored in an electronic or other
50 medium and is retrievable in perceivable form.

51 (9) "Community foundation" or "community trust"
52 means an institution that has been established to attract
53 contributions for the benefit of a particular community or
54 area whose contributions are often received and maintained
55 in the form of separate trusts or funds which are subject to
56 varying degrees of control by the governing body of the
57 community foundation or community trust and which the
58 governing body in good faith believes meets the requirements
59 of the regulations issued by the Internal Revenue Service,
60 United States Department of Treasury, presently codified as
61 26 CFR 1.170A-9(e)(10) and (11), to qualify as a "publicly
62 supported" organization and to be treated as a "single entity"
63 rather than as an aggregation of separate funds.

64 **§44-6A-3. Standard of conduct in managing and**
65 **investing institutional fund.**

66 (a) Subject to the intent of a donor expressed in a gift
67 instrument, an institution, in managing and investing an
68 institutional fund, shall consider the charitable purposes of
69 the institution and the purposes of the institutional fund.

70 (b) In addition to complying with the duty of loyalty
71 imposed by law other than this article, each person
72 responsible for managing and investing an institutional fund
73 shall manage and invest the fund in good faith and with the
74 care an ordinarily prudent person in a like position would
75 exercise under similar circumstances.

76 (c) In managing and investing an institutional fund, an
77 institution:

78 (1) May incur only costs that are appropriate and
79 reasonable in relation to the assets, the purposes of the
80 institution, and the skills available to the institution; and

81 (2) Shall make a reasonable effort to verify facts relevant
82 to the management and investment of the fund.

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

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

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

89 (A) General economic conditions;

90 (B) The possible effect of inflation or deflation;

91 (C) The expected tax consequences, if any, of investment
92 decisions or strategies;

93 (D) The role that each investment or course of action
94 plays within the overall investment portfolio of the fund;

95 (E) The expected total return from income and the
96 appreciation of investments;

97 (F) Other resources of the institution;

98 (G) The needs of the institution and the fund to make
99 distributions and to preserve capital; and

100 (H) An asset's special relationship or special value, if
101 any, to the charitable purposes of the institution.

102 (2) Management and investment decisions about an
103 individual asset must be made not in isolation but rather in
104 the context of the institutional fund's portfolio of investments
105 as a whole and as a part of an overall investment strategy
106 having risk and return objectives reasonably suited to the
107 fund and to the institution.

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

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

115 (5) Within a reasonable time after receiving property, an
116 institution shall make and carry out decisions concerning the
117 retention or disposition of the property or to rebalance a
118 portfolio, in order to bring the institutional fund into
119 compliance with the purposes, terms, and distribution
120 requirements of the institution as necessary to meet other
121 circumstances of the institution and the requirements of this
122 article.

123 (6) A person that has special skills or expertise, or is
124 selected in reliance upon the person's representation that the
125 person has special skills or expertise, has a duty to use those
126 skills or that expertise in managing and investing institutional
127 funds.

**§44-6A-4. Appropriation for expenditure or accumulation of
endowment fund; rules of construction.**

1 (a) Subject to the intent of a donor expressed in the gift
2 instrument, an institution may appropriate for expenditure or
3 accumulate so much of an endowment fund as the institution
4 determines is prudent for the uses, benefits, purposes, and
5 duration for which the endowment fund is established. This
6 section does not limit the authority of the institution to
7 expend funds as permitted under other law, the terms of the
8 gift instrument, or the charter of the institution. Unless stated
9 otherwise in the gift instrument, the assets in an endowment
10 fund are donor-restricted assets (regardless of their treatment
11 for accounting purposes) until appropriated for expenditure
12 by the institution. In making a determination to appropriate
13 or accumulate, the institution shall act in good faith, with the
14 care that an ordinarily prudent person in a like position would
15 exercise under similar circumstances, and shall consider, if
16 relevant, the following factors:

17 (1) The duration and preservation of the endowment
18 fund;

19 (2) The purposes of the institution and the endowment
20 fund;

21 (3) General economic conditions;

22 (4) The possible effect of inflation or deflation;

23 (5) The expected total return from income and the
24 appreciation of investments;

25 (6) Other resources of the institution; and

26 (7) The investment policy of the institution.

27 (b) To limit the authority to appropriate for expenditure
28 or accumulate under subsection (a), a gift instrument must
29 specifically state the limitation.

30 (c) Terms in a gift instrument designating a gift as an
31 endowment, or a direction or authorization in the gift
32 instrument to use only “income”, “interest”, “dividends”, or
33 “rents, issues, or profits”, or “to preserve the principal
34 intact”, or words of similar import:

35 (1) Create an endowment fund of permanent duration
36 unless other language in the gift instrument limits the
37 duration or purpose of the fund; and

38 (2) Do not otherwise limit the authority to appropriate for
39 expenditure or accumulate under subsection (a).

§44-6A-5. Delegation of management and investment functions.

1 (a) Subject to any specific limitation set forth in a gift
2 instrument or in law other than this article, an institution may
3 delegate to an external agent the management and investment
4 of an institutional fund to the extent that an institution could
5 prudently delegate under the circumstances. An institution
6 shall act in good faith, with the care that an ordinarily prudent
7 person in a like position would exercise under similar
8 circumstances, in:

9 (1) Selecting an agent;

10 (2) Establishing the scope and terms of the delegation,
11 consistent with the purposes of the institution and the
12 institutional fund; and

13 (3) Periodically reviewing the agent’s actions in order to
14 monitor the agent’s performance and compliance with the
15 scope and terms of the delegation.

16 (b) In performing a delegated function, an agent owes a
17 duty to the institution to exercise reasonable care to comply
18 with the scope and terms of the delegation.

19 (c) An institution that complies with subsection (a) is not
20 liable for the decisions or actions of an agent to which the
21 function was delegated.

22 (d) By accepting delegation of a management or
23 investment function from an institution that is subject to the
24 laws of this state, an agent submits to the jurisdiction of the
25 courts of this state in all proceedings arising from or related
26 to the delegation or the performance of the delegated
27 function.

28 (e) An institution may delegate management and
29 investment functions to its committees, officers, or
30 employees as authorized by law of this state other than this
31 article.

**§44-6A-6. Release or modification of restrictions on
management, investment, or purpose.**

1 Without limiting the options otherwise available to an
2 institution under applicable law, a restriction on the
3 management, investment, purpose or other provision of a gift
4 to an institutional fund may be released or modified in any
5 one or more of the following ways:

6 (1) If the donor consents in a record, an institution may
7 release or modify, in whole or in part, a restriction contained
8 in a gift instrument on the management, investment, or
9 purpose of an institutional fund. A release or modification
10 may not allow a fund to be used for a purpose other than a
11 charitable purpose of the institution.

12 (2) The court, upon application of an institution, may
13 modify a restriction contained in a gift instrument regarding
14 the management or investment of an institutional fund if the
15 restriction has become impracticable or wasteful, if it impairs
16 the management or investment of the fund, or if, because of

17 circumstances not anticipated by the donor, a modification of
18 a restriction will further the purposes of the fund. The
19 institution shall notify the Attorney General of the
20 application, and the Attorney General must be given an
21 opportunity to be heard. To the extent practicable, any
22 modification must be made in accordance with the donor's
23 probable intention.

24 (3) If a particular charitable purpose or a restriction
25 contained in a gift instrument on the use of an institutional
26 fund becomes unlawful, impracticable, impossible to achieve,
27 or wasteful, the court, upon application of an institution, may
28 modify the purpose of the fund or the restriction on the use of
29 the fund in a manner consistent with the charitable purposes
30 expressed in the gift instrument. The institution shall notify
31 the Attorney General of the application, and the Attorney
32 General must be given an opportunity to be heard.

33 (4) If an institution determines that a restriction contained
34 in a gift instrument on the management, investment, or
35 purpose of an institutional fund is unlawful, impracticable,
36 impossible to achieve, or wasteful, the institution, sixty days
37 after notification to the Attorney General, may release or
38 modify the restriction, in whole or in part, if:

39 (A) The institutional fund subject to the restriction has a
40 total value of less than twenty-five thousand dollars;

41 (B) More than twenty years have elapsed since the fund
42 was established; and

43 (C) The institution uses the property in a manner
44 consistent with the charitable purposes expressed in the gift
45 instrument.

46 (5) If the terms of a gift instrument, either specifically or
47 by being subject to the charter of the institution, confer a

48 power on the institution to release or modify a restriction on
49 the management or investment of an institutional fund or the
50 particular charitable purpose or restriction on the use of the
51 institutional fund, the institution shall have the power to so
52 modify or terminate that restriction and the other provisions
53 of this section shall not apply to that release or modification.
54 A release or modification under this subsection may not
55 allow a fund to be used for a purpose other than a charitable
56 purpose of the institution.

§44-6A-7. Reviewing compliance.

1 Compliance with this article is determined in light of the
2 facts and circumstances existing at the time a decision is
3 made or action is taken, and not by hindsight.

§44-6A-8. Application to existing institutional funds.

1 This article applies to institutional funds existing on or
2 established after the effective date of this article. As applied
3 to institutional funds existing on the effective date of this
4 article, this article governs only decisions made or actions
5 taken on or after that date.

**§44-6A-9. Relation to electronic signatures in Global and
National Commerce Act.**

1 This article modifies, limits, and supersedes the
2 Electronic Signatures in Global and National Commerce Act,
3 15 U.S.C. Section 7001 et seq., but does not modify, limit, or
4 supersede Section 101 of that act, 15 U.S.C. Section 7001(a),
5 or authorize electronic delivery of any of the notices
6 described in Section 103 of that act, 15 U.S.C. Section
7 7003(b).

§44-6A-10. Uniformity of application and construction.

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

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Randy White
Chairman Senate Committee

[Signature]
Chairman House Committee

Originating in the House.

In effect ninety days from passage.

Darrell Holmes
Clerk of the Senate

Gregory D. By
Clerk of the House of Delegates

Carl Roy Tomblin
President of the Senate

[Signature]
Speaker of the House of Delegates

The within *is approved* this the *15th*
day of *March*, 2008.

[Signature]
Governor

PRESENTED TO THE
GOVERNOR

MAR 10 2008

Time 4:30 pm