

House Bill 2905

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Delegation of National Conference of Commissioners on Uniform State Laws)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Enacts revised Uniform Prudent Management of Institutional Funds Act.

A BILL FOR AN ACT

1
2 Relating to Uniform Prudent Management of Institutional Funds Act; creating new provisions; and
3 repealing ORS 128.310, 128.315, 128.320, 128.325, 128.330, 128.335, 128.340, 128.345, 128.350 and
4 128.355.

5 **Be It Enacted by the People of the State of Oregon:**

6 **SECTION 1. Definitions. As used in sections 1 to 10 of this 2007 Act:**

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

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

14 (3) **“Gift instrument” means a record or records, including an institutional solicitation,**
15 **under which property is granted to, transferred to or held by an institution as an institu-**
16 **tional fund.**

17 (4) **“Institution” means:**

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

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

22 (c) **A trust that had both charitable and noncharitable interests, after all noncharitable**
23 **interests have terminated.**

24 (5) **“Institutional fund” means a fund held by an institution exclusively for charitable**
25 **purposes. “Institutional fund” does not include:**

26 (a) **Program-related assets;**

27 (b) **A fund held for an institution by a trustee that is not an institution; or**

28 (c) **A fund in which a beneficiary that is not an institution has an interest, other than**
29 **an interest that could arise upon violation or failure of the purposes of the fund.**

30 (6) **“Person” means an individual, corporation, business trust, estate, trust, partnership,**
31 **limited liability company, association, joint venture, public corporation, government or gov-**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

ernmental subdivision, agency or instrumentality, or any other legal or commercial entity.

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

(8) “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 2. Standard of conduct in managing and investing institutional fund. (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 sections 1 to 10 of this 2007 Act, 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.

(3) 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.

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

(5) 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:

(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 charitable purposes of the institution.

(b) Management and investment decisions about an individual asset must be made not in isolation, but instead 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 sections 1 to 10 of this 2007 Act, an institution may invest in any kind of property or type of investment consistent with 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 carry

1 out decisions concerning the retention or disposition of the property or to rebalance a port-
 2 folio, in order to bring the institutional fund into compliance with the purposes, terms and
 3 distribution requirements of the institution as necessary to meet other circumstances of the
 4 institution and the requirements of sections 1 to 10 of this 2007 Act.

5 (f) A person that has special skills or expertise, or is selected in reliance upon the per-
 6 son's representation that the person has special skills or expertise, has a duty to use those
 7 skills or that expertise in managing and investing institutional funds.

8 **SECTION 3. Appropriation for expenditure or accumulation of endowment fund; rules of**

9 **construction.** (1) Subject to the intent of a donor expressed in the gift instrument, an insti-
 10 tution may appropriate for expenditure or accumulate so much of an endowment fund as the
 11 institution determines is prudent for the uses, benefits, purposes and duration for which the
 12 endowment fund is established. Unless stated otherwise in the gift instrument, the assets in
 13 an endowment fund are donor-restricted assets until appropriated for expenditure by the
 14 institution. In making a determination to appropriate or accumulate, the institution shall
 15 act in good faith, with the care that an ordinarily prudent person in a like position would
 16 exercise under similar circumstances, and shall consider, if relevant, the following factors:

- 17 (a) The duration and preservation of the endowment fund;
- 18 (b) The purposes of the institution and the endowment fund;
- 19 (c) General economic conditions;
- 20 (d) The possible effect of inflation or deflation;
- 21 (e) The expected total return from income and the appreciation of investments;
- 22 (f) Other resources of the institution; and
- 23 (g) The investment policy of the institution.

24 (2) To limit the authority to appropriate for expenditure or accumulate under subsection
 25 (1) of this section, a gift instrument must specifically state the limitation.

26 (3) Terms in a gift instrument designating a gift as an endowment, or a direction or au-
 27 thorization in the gift instrument to use only "income," "interest," "dividends" or "rents,
 28 issues or profits," or "to preserve the principal intact," or words of similar import:

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

31 (b) Do not otherwise limit the authority to appropriate for expenditure or accumulate
 32 under subsection (1) of this section.

33 (4) The appropriation for expenditure in any year of an amount greater than seven per-
 34 cent of the fair market value of an endowment fund, calculated on the basis of market values
 35 determined at least quarterly and averaged over a period of not less than three years im-
 36 mediately preceding the year in which the appropriation for expenditure was made, creates
 37 a rebuttable presumption of imprudence. For an endowment fund in existence for fewer than
 38 three years, the fair market value of the endowment fund must be calculated for the period
 39 the endowment fund has been in existence. This subsection does not:

40 (a) Apply to an appropriation for expenditure permitted under law other than sections 1
 41 to 10 of this 2007 Act or by the gift instrument; or

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

44 **SECTION 4. Delegation of management and investment functions.** (1) Subject to any

45 specific limitation set forth in a gift instrument or in law other than sections 1 to 10 of this

1 2007 Act, an institution may delegate to an external agent the management and investment
 2 of an institutional fund to the extent that an institution could prudently delegate under the
 3 circumstances. An institution shall act in good faith, with the care that an ordinarily pru-
 4 dent person in a like position would exercise under similar circumstances, in:

5 (a) Selecting an agent;

6 (b) Establishing the scope and terms of the delegation, consistent with the purposes of
 7 the institution and the institutional fund; and

8 (c) Periodically reviewing the agent's actions in order to monitor the agent's perform-
 9 ance and compliance with the scope and terms of the delegation.

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

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

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

18 (5) An institution may delegate management and investment functions to its committees,
 19 officers or employees as authorized by law of this state other than sections 1 to 10 of this
 20 2007 Act.

21 **SECTION 5. Release or modification of restrictions on management, investment or pur-**
 22 **pose.** (1) If the donor consents in a record, an institution may release or modify, in whole
 23 or in part, a restriction contained in a gift instrument on the management, investment or
 24 purpose of an institutional fund. A release or modification may not allow a fund to be used
 25 for a purpose other than a charitable purpose of the institution.

26 (2) The court, upon application of an institution, may modify a restriction contained in
 27 a gift instrument regarding the management or investment of an institutional fund if the
 28 restriction has become impracticable or wasteful, the restriction impairs the management
 29 or investment of the fund or, because of circumstances not anticipated by the donor, a
 30 modification of a restriction will further the purposes of the fund. The institution shall notify
 31 the Attorney General of the application, and the Attorney General must be given an oppor-
 32 tunity to be heard. To the extent practicable, any modification must be made in accordance
 33 with the donor's probable intention.

34 (3) If a particular charitable purpose or a restriction contained in a gift instrument on
 35 the use of an institutional fund becomes unlawful, impracticable, impossible to achieve or
 36 wasteful, the court, upon application of an institution, may modify the purpose of the fund
 37 or the restriction on the use of the fund in a manner consistent with the charitable purposes
 38 expressed in the gift instrument. The institution shall notify the Attorney General of the
 39 application, and the Attorney General must be given an opportunity to be heard.

40 (4) If an institution determines that a restriction contained in a gift instrument on the
 41 management, investment or purpose of an institutional fund is unlawful, impracticable, im-
 42 possible to achieve or wasteful, the institution, within 60 days after notification to the At-
 43 torney General, may release or modify the restriction, in whole or part, if:

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

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

1 (c) The institution uses the property in a manner consistent with the charitable purposes
2 expressed in the gift instrument.

3 **SECTION 6. Reviewing compliance.** Compliance with sections 1 to 10 of this 2007 Act is
4 determined in light of the facts and circumstances existing at the time a decision is made
5 or action is taken, and not by hindsight.

6 **SECTION 7. Application to existing institutional funds.** Sections 1 to 10 of this 2007 Act
7 apply to institutional funds existing on or established after the effective date of this 2007 Act.
8 As applied to institutional funds existing before the effective date of this 2007 Act, sections
9 1 to 10 of this 2007 Act governs only decisions made or actions taken on or after the effective
10 date of this 2007 Act.

11 **SECTION 8. Relation to Electronic Signatures in Global and National Commerce Act.**
12 Sections 1 to 10 of this 2007 Act modify, limit and supersede the Electronic Signatures in
13 Global and National Commerce Act, 15 U.S.C. 7001 et seq., but do not modify, limit or su-
14 persede 15 U.S.C. 7001(a), or authorize electronic delivery of any of the notices described in
15 15 U.S.C. 7003(b).

16 **SECTION 9. Uniformity of application and construction.** In applying and construing
17 sections 1 to 10 of this 2007 Act, consideration must be given to the need to promote uni-
18 formity of the law with respect to its subject matter among states that enact the Uniform
19 Prudent Management of Institutional Funds Act.

20 **SECTION 10. Short title.** Sections 1 to 10 of this 2007 Act may be cited as the Uniform
21 Prudent Management of Institutional Funds Act.

22 **SECTION 11.** ORS 128.310, 128.315, 128.320, 128.325, 128.330, 128.335, 128.340, 128.345, 128.350
23 and 128.355 are repealed.

24 **SECTION 12.** The section captions used in this 2007 Act are provided only for the con-
25 venience of the reader and do not become part of the statutory law of this state or express
26 any legislative intent in the enactment of this 2007 Act.

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