

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

Act 262 of the Regular Session

1 State of Arkansas
2 87th General Assembly
3 Regular Session, 2009
4

A Bill

SENATE BILL 254

5 By: Senator D. Johnson
6 By: Representatives Harrelson, Barnett, D. Hutchinson
7

For An Act To Be Entitled

10 AN ACT TO ENACT THE UNIFORM PRUDENT MANAGEMENT OF
11 INSTITUTIONAL FUNDS ACT (2006); AND FOR OTHER
12 PURPOSES.
13

Subtitle

14 TO ENACT THE UNIFORM PRUDENT MANAGEMENT
15 OF INSTITUTIONAL FUNDS ACT (2006).
16
17
18

19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
20

21 SECTION 1. Arkansas Code Title 28, Chapter 69 is amended to add an
22 additional subchapter to read as follows:

23 28-69-801. Short title.

24 This subchapter may be cited as the Uniform Prudent Management of
25 Institutional Funds Act (2006).
26

27 28-69-802. Definitions.

28 In this subchapter:

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

33 (2) "Endowment fund" means an institutional fund or part thereof
34 that, under the terms of a gift instrument, is not wholly expendable by the
35 institution on a current basis. The term does not include assets that an



1 institution designates as an endowment fund for its own use.

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

5 (4) "Institution" means:

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

8 (B) a government or governmental subdivision, agency, or
9 instrumentality, to the extent that it holds funds exclusively for a
10 charitable purpose; or

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

13 (5) "Institutional fund" means a fund held by an institution
14 exclusively for charitable purposes. The term does not include:

15 (A) program-related assets;

16 (B) a fund held for an institution by a trustee that is
17 not an institution; or

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

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

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

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

31
32 28-69-803. Standard of conduct in managing and investing institutional
33 fund.

34 (a) Subject to the intent of a donor expressed in a gift instrument,
35 an institution, in managing and investing an institutional fund, shall
36 consider the charitable purposes of the institution and the purposes of the

1 institutional fund.

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

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

8 (1) may incur only costs that are appropriate and reasonable in
 9 relation to the assets, the purposes of the institution, and the skills
 10 available to the institution; and

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

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

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

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

19 (A) general economic conditions;

20 (B) the possible effect of inflation or deflation;

21 (C) the expected tax consequences, if any, of investment
 22 decisions or strategies;

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

25 (E) the expected total return from income and the
 26 appreciation of investments;

27 (F) other resources of the institution;

28 (G) the needs of the institution and the fund to make
 29 distributions and to preserve capital; and

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

32 (2) Management and investment decisions about an individual
 33 asset must be made not in isolation but rather in the context of the
 34 institutional fund's portfolio of investments as a whole and as a part of an
 35 overall investment strategy having risk and return objectives reasonably
 36 suited to the fund and to the institution.

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

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

8 (5) Within a reasonable time after receiving property, an
 9 institution shall make and carry out decisions concerning the retention or
 10 disposition of the property or to rebalance a portfolio, in order to bring
 11 the institutional fund into compliance with the purposes, terms, and
 12 distribution requirements of the institution as necessary to meet other
 13 circumstances of the institution and the requirements of this subchapter.

14 (6) A person that has special skills or expertise, or is
 15 selected in reliance upon the person’s representation that the person has
 16 special skills or expertise, has a duty to use those skills or that expertise
 17 in managing and investing institutional funds.

18
 19 28-69-804. Appropriation for expenditure or accumulation of endowment
 20 fund – Rules of construction.

21 (a) Subject to the intent of a donor expressed in the gift instrument,
 22 an institution may appropriate for expenditure or accumulate so much of an
 23 endowment fund as the institution determines is prudent for the uses,
 24 benefits, purposes, and duration for which the endowment fund is established.
 25 Unless stated otherwise in the gift instrument, the assets in an endowment
 26 fund are donor-restricted assets until appropriated for expenditure by the
 27 institution. In making a determination to appropriate or accumulate, the
 28 institution shall act in good faith, with the care that an ordinarily prudent
 29 person in a like position would exercise under similar circumstances, and
 30 shall consider, if relevant, the following factors:

- 31 (1) the duration and preservation of the endowment fund;
- 32 (2) the purposes of the institution and the endowment fund;
- 33 (3) general economic conditions;
- 34 (4) the possible effect of inflation or deflation;
- 35 (5) the expected total return from income and the appreciation
 36 of investments;

1 (6) other resources of the institution; and

2 (7) the investment policy of the institution.

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

6 (c) Terms in a gift instrument designating a gift as an endowment, or
7 a direction or authorization in the gift instrument to use only "income",
8 "interest", "dividends", or "rents, issues, or profits", or "to preserve the
9 principal intact", or words of similar import:

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

13 (2) do not otherwise limit the authority to appropriate for
14 expenditure or accumulate under subsection (a).

15
16 28-69-805. Delegation of management and investment functions.

17 (a) Subject to any specific limitation set forth in a gift instrument
18 or in law other than this subchapter, an institution may delegate to an
19 external agent the management and investment of an institutional fund to the
20 extent that an institution could prudently delegate under the circumstances.
21 An institution shall act in good faith, with the care that an ordinarily
22 prudent person in a like position would exercise under similar circumstances,
23 in:

24 (1) selecting an agent;

25 (2) establishing the scope and terms of the delegation,
26 consistent with the purposes of the institution and the institutional fund;
27 and

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

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

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

36 (d) By accepting delegation of a management or investment function

1 from an institution that is subject to the laws of this state, an agent
2 submits to the jurisdiction of the courts of this state in all proceedings
3 arising from or related to the delegation or the performance of the delegated
4 function.

5 (e) An institution may delegate management and investment functions to
6 its committees, officers, or employees as authorized by law of this state
7 other than this subchapter.

8
9 28-69-806. Release or modification of restrictions on management,
10 investment, or purpose.

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

16 (b) The court, upon application of an institution, may modify a
17 restriction contained in a gift instrument regarding the management or
18 investment of an institutional fund if the restriction has become
19 impracticable or wasteful, if it impairs the management or investment of the
20 fund, or if, because of circumstances not anticipated by the donor, a
21 modification of a restriction will further the purposes of the fund. The
22 institution shall notify the Attorney General of the application, and the
23 Attorney General must be given an opportunity to be heard. To the extent
24 practicable, any modification must be made in accordance with the donor's
25 probable intention.

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

34 (d) If an institution determines that a restriction contained in a
35 gift instrument on the management, investment, or purpose of an institutional
36 fund is unlawful, impracticable, impossible to achieve, or wasteful, the

1 institution, 60 days after notification to the Attorney General, may release
 2 or modify the restriction, in whole or part, if:

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

5 (2) more than 20 years have elapsed since the fund was
 6 established; and

7 (3) the institution uses the property in a manner consistent
 8 with the charitable purposes expressed in the gift instrument.

9
 10 28-69-807. Reviewing compliance.

11 Compliance with this subchapter is determined in light of the facts and
 12 circumstances existing at the time a decision is made or action is taken, and
 13 not by hindsight.

14
 15 28-69-808. Application to existing institutional funds.

16 This subchapter applies to institutional funds existing on or
 17 established after the effective date of this subchapter. As applied to
 18 institutional funds existing on the effective date of this subchapter this
 19 subchapter governs only decisions made or actions taken on or after that
 20 date.

21
 22 28-69-809. Relation to Electronic Signatures in Global and National
 23 Commerce Act.

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

29
 30 28-69-810. Uniformity of application and construction.

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

34
 35 28-69-811. [Reserved.]
 36

1 28-69-812. [Reserved.]

2
3 SECTION 2. Arkansas Code Title 28, Chapter 69, Subchapter 6 is
4 repealed.

5 ~~28-69-601.—Short title.~~

6 ~~This subchapter may be cited as the “Uniform Management of~~
7 ~~Institutional Funds Act.”~~

8
9 ~~28-69-602.—Definitions.~~

10 ~~As used in this subchapter:~~

11 ~~(1) “Institution” means an incorporated or unincorporated~~
12 ~~organization organized and operated exclusively for educational, religious,~~
13 ~~charitable, or other eleemosynary purposes, or a governmental organization,~~
14 ~~including, without limitation, a public institution of higher education, to~~
15 ~~the extent that it holds funds exclusively for any of these purposes;~~

16 ~~(2) “Institutional fund” means a fund held by an institution for its~~
17 ~~exclusive use, benefit, or purposes, but does not include (i) a fund held for~~
18 ~~an institution by a trustee that is not an institution or (ii) a fund in~~
19 ~~which a beneficiary that is not an institution has an interest, other than~~
20 ~~possible rights that could arise upon violation or failure of the purposes of~~
21 ~~the fund;~~

22 ~~(3) “Endowment fund” means an institutional fund, or any part~~
23 ~~thereof, not wholly expendable by the institution on a current basis under~~
24 ~~the terms of the applicable gift instrument;~~

25 ~~(4) “Governing board” means the body responsible for the management~~
26 ~~of an institution or of an institutional fund;~~

27 ~~(5) “Gift instrument” means a will, deed, grant, conveyance,~~
28 ~~agreement, memorandum, writing, or other governing document (including the~~
29 ~~terms of any institutional solicitations from which an institutional fund~~
30 ~~resulted) under which property is transferred to or held by an institution as~~
31 ~~an institutional fund.~~

32
33 ~~28-69-603.—Expenditure of endowment funds.~~

34 ~~(a) The governing board may expend so much of the endowment fund or~~
35 ~~an aggregation of the endowment fund as the governing body determines to be~~
36 ~~prudent under the standard established by § 28-69-607 for the uses and~~

1 purposes for which an endowment fund is established. This section does not
2 limit the authority of the governing board to expend funds as permitted under
3 other law, the terms of the applicable gift instrument, or the charter of the
4 institution.

5 (b) Except as otherwise specified, this section applies to endowment
6 funds established and instruments executed or in effect before or after July
7 16, 2003.

8
9 ~~28-69-604. Rule of construction.~~

10 (a) A restriction upon the expenditure of an endowment fund may not
11 be implied from a designation of a gift as an endowment, or from a direction
12 or authorization in the applicable gift instrument to use only "income,"
13 "interest," "dividends," "net appreciation in the fair value of the assets of
14 an endowment fund over the historic dollar value of the endowment," or
15 "rents, issues or profits," or "to preserve the principal intact," or a
16 direction which contains other words of similar import.

17 (b) The rule of construction under subsection (a) of this section
18 applies to endowment funds and gift instruments executed or in effect before
19 or after July 16, 2003.

20 (c) The provisions of § 28-69-603(a) shall not apply to instruments
21 if the instrument indicates by saying "I direct that the expenditure
22 provisions of Arkansas Code § 28-69-603(a) not apply to this gift" or words
23 of similar import reflecting a donor's specific intent that § 28-69-603(a)
24 not apply to the gift.

25
26 ~~28-69-605. Investment authority.~~

27 In addition to an investment otherwise authorized by law or by the
28 applicable gift instrument, and without restriction to investments a
29 fiduciary may make, the governing board, subject to any specific limitations
30 set forth in the applicable gift instrument or in the applicable law other
31 than law relating to investments by a fiduciary, may:

32 (1) invest and reinvest an institutional fund in any real or personal
33 property deemed advisable by the governing board, whether or not it produces
34 a current return, including mortgages, stocks, bonds, debentures, and other
35 securities of profit or nonprofit corporations, shares in or obligations of
36 associations, partnerships, or individuals, or obligations of any government

1 ~~or subdivision or instrumentality thereof;~~

2 ~~(2) retain property contributed by a donor to an institutional fund~~
3 ~~for as long as the governing board deems advisable;~~

4 ~~(3) include all or any part of an institutional fund in any pooled or~~
5 ~~common fund maintained by the institution; and~~

6 ~~(4) invest all or any part of an institutional fund in any other~~
7 ~~pooled or common fund available for investment, including shares or interests~~
8 ~~in regulated investment companies, mutual funds, common trust funds,~~
9 ~~investment partnerships, real estate investment trusts, or similar~~
10 ~~organizations in which funds are commingled and investment determinations are~~
11 ~~made by persons other than the governing board.~~

12
13 ~~28-69-606. Delegation of investment management.~~

14 ~~Except as otherwise provided by the applicable gift instrument or by~~
15 ~~applicable law relating to governmental institutions or funds, the governing~~
16 ~~board may (1) delegate to its committees, officers or employees of the~~
17 ~~institution or the fund, or agents, including investment counsel, the~~
18 ~~authority to act in place of the board in investment and reinvestment of~~
19 ~~institutional funds, (2) contract with independent investment advisors,~~
20 ~~investment counsel or managers, banks, or trust companies, so to act, and (3)~~
21 ~~authorize the payment of compensation for investment advisory or management~~
22 ~~services.~~

23
24 ~~28-69-607. Standard of conduct.~~

25 ~~In the administration of the powers to expend endowment funds, to make~~
26 ~~and retain investments, and to delegate investment management of~~
27 ~~institutional funds, members of a governing board shall exercise ordinary~~
28 ~~business care and prudence under the facts and circumstances prevailing at~~
29 ~~the time of the action or decision. In so doing they shall consider long and~~
30 ~~short term needs of the institution in carrying out its educational,~~
31 ~~religious, charitable, or other eleemosynary purposes, its present and~~
32 ~~anticipated financial requirements, expected total return on its investments,~~
33 ~~price level trends, general economic conditions, and the aggregate value of~~
34 ~~all endowment funds held by the institution.~~

35
36 ~~28-69-608. Release of restrictions on use or investment.~~

