

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.

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

8
9
10 AN ACT TO ENACT THE UNIFORM PRUDENT MANAGEMENT OF
11 INSTITUTIONAL FUNDS ACT (2006); AND FOR OTHER
12 PURPOSES.
13

Subtitle

14
15 TO ENACT THE UNIFORM PRUDENT MANAGEMENT
16 OF INSTITUTIONAL FUNDS ACT (2006).
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
36 institution designates as an endowment fund for its own use.



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

4 (4) "Institution" means:

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

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

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

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

14 (A) program-related assets;

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

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

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

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

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

30
 31 28-69-803. Standard of conduct in managing and investing institutional
 32 fund.

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

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

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

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

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

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

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

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

18 (A) general economic conditions;

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

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

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

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

26 (F) other resources of the institution;

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

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

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

36 (3) Except as otherwise provided by law other than this

1 subchapter, an institution may invest in any kind of property or type of
2 investment consistent with this section.

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

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

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

17
18 28-69-804. Appropriation for expenditure or accumulation of endowment
19 fund – Rules of construction.

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

30 (1) the duration and preservation of the endowment fund;

31 (2) the purposes of the institution and the endowment fund;

32 (3) general economic conditions;

33 (4) the possible effect of inflation or deflation;

34 (5) the expected total return from income and the appreciation
35 of investments;

36 (6) other resources of the institution; and

1 (7) the investment policy of the institution.

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

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

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

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

14
 15 28-69-805. Delegation of management and investment functions.

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

23 (1) selecting an agent;

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

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

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

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

35 (d) By accepting delegation of a management or investment function
 36 from an institution that is subject to the laws of this state, an agent

1 submits to the jurisdiction of the courts of this state in all proceedings
2 arising from or related to the delegation or the performance of the delegated
3 function.

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

7
8 28-69-806. Release or modification of restrictions on management,
9 investment, or purpose.

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

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

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

33 (d) If an institution determines that a restriction contained in a
34 gift instrument on the management, investment, or purpose of an institutional
35 fund is unlawful, impracticable, impossible to achieve, or wasteful, the
36 institution, 60 days after notification to the Attorney General, may release

1 or modify the restriction, in whole or part, if:

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

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

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

8
9 28-69-807. Reviewing compliance.

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

13
14 28-69-808. Application to existing institutional funds.

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

20
21 28-69-809. Relation to Electronic Signatures in Global and National
22 Commerce Act.

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

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

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

33
34 28-69-811. [Reserved.]

35
36 28-69-812. [Reserved.]

1
 2 SECTION 2. Arkansas Code Title 28, Chapter 69, Subchapter 6 is
 3 repealed.

4 ~~28-69-601.—Short title.~~

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

7
 8 ~~28-69-602.—Definitions.~~

9 ~~As used in this subchapter:~~

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

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

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

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

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

31
 32 ~~28-69-603.—Expenditure of endowment funds.~~

33 ~~(a) The governing board may expend so much of the endowment fund or~~
 34 ~~an aggregation of the endowment fund as the governing body determines to be~~
 35 ~~prudent under the standard established by § 28-69-607 for the uses and~~
 36 ~~purposes for which an endowment fund is established. This section does not~~

1 ~~limit the authority of the governing board to expend funds as permitted under~~
 2 ~~other law, the terms of the applicable gift instrument, or the charter of the~~
 3 ~~institution.~~

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

7
 8 ~~28-69-604. Rule of construction.~~

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

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

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

24
 25 ~~28-69-605. Investment authority.~~

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

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

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

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

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

11
12 ~~28-69-606. Delegation of investment management.~~

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

22
23 ~~28-69-607. Standard of conduct.~~

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

34
35 ~~28-69-608. Release of restrictions on use or investment.~~

36 ~~(a) With the written consent of the donor, the governing board may~~

1 ~~release, in whole or in part, a restriction imposed by the applicable gift~~
2 ~~instrument on the use or investment of an institutional fund.~~

3 ~~(b) If written consent of the donor cannot be obtained by reason of~~
4 ~~his or her death, disability, unavailability, or impossibility of~~
5 ~~identification, the governing board may apply in the name of the institution~~
6 ~~to the circuit court of the county where the institution is located or other~~
7 ~~court of appropriate jurisdiction for a release of a restriction imposed by~~
8 ~~the applicable gift instrument on the use or investment of an institutional~~
9 ~~fund. The Attorney General shall be notified of the application and shall be~~
10 ~~given an opportunity to be heard. If the court finds that the restriction is~~
11 ~~obsolete, inappropriate, or impracticable, it may by order release the~~
12 ~~restriction in whole or in part. A release under this subsection may not~~
13 ~~change an endowment fund to a fund that is not an endowment fund.~~

14 ~~(c) A release under this section may not allow a fund to be used for~~
15 ~~purposes other than the educational, religious, charitable, or other~~
16 ~~eleemosynary purposes of the institution affected.~~

17 ~~(d) This section does not limit the application of the doctrine of~~
18 ~~ex-pres.~~

19
20 ~~28-69-609. Uniformity of application and construction.~~

21 ~~This subchapter shall be so applied and construed as to effectuate its~~
22 ~~general purpose to make uniform the law with respect to the subject of this~~
23 ~~subchapter among those states which enact it.~~

24
25 ~~28-69-610. Severability.~~

26 ~~If any provision of this act or the application thereof to any person~~
27 ~~or circumstances is held invalid, the invalidity shall not affect other~~
28 ~~provisions or applications of the act which can be given effect without the~~
29 ~~invalid provision or application, and to this end the provisions of this act~~
30 ~~are declared severable.~~

31
32 ~~28-69-611. Repeal.~~

33 ~~All laws and parts of laws in conflict with this act are hereby~~
34 ~~repealed.~~

35
36