

Presented:
31st Annual Nonprofit Organizations Institute

January 15-17, 2014
Austin, TX

UPMIFA: Endowment Management in the Modern Age

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UPMIFA Generally

The Uniform Prudent Management of Institutional Funds Act, or "UPMIFA," is a model act promulgated by the Uniform Law Commission.² It has been adopted by the District of Columbia and all states other than Pennsylvania.³ In most states, UPMIFA displaced that state's version of the prior uniform law in this sphere, the Uniform Management of Institutional Funds Act, or "UMIFA."

What Is Covered by UPMIFA?

Broadly speaking, UPMIFA addresses three main topics:

- (1) management and investment of "institutional funds"
- (2) appropriations from "endowment funds"
- (3) release of donor restrictions on institutional funds.

¹ The author is a partner in the tax-exempt organizations group of the New York law firm of Patterson Belknap Webb & Tyler LLP. He gratefully acknowledges the assistance of his colleague Lauren Simpson in the preparation of this outline.

² See "Uniform Prudent Management of Institutional Funds Act with Prefatory Note and Comments," National Conference of Commissioners on Uniform State Laws ("UPMIF A Text with Comments") (available at http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf) (last viewed on December 14, 2013). Practitioners in each state should familiarize themselves with the ways, if any, in which UPMIFA as enacted in that state differs from the Uniform Act.

³ In New York, UPMIFA was adopted in 2010 (with numerous modifications) as the New York Prudent Management of Institutional Funds Act, or "NYPMIFA." See Article 5-A, N.Y. Not-for-Profit Corporation Law ("NPCL"). The Office of the New York State Attorney General (the "NYAG") is the author of guidance that addresses both the New York-specific modifications and the more general application of UPMIFA. See "A Practical Guide to the New York Prudent Management of Institutional Funds Act," Attorney General Eric T. Schneiderman, New York Charities Bureau ("NYAG Guidance") (available at <http://www.charitiesnys.com/pdfs/NYPMIFA-Guidance-March-2011.pdf>) (last viewed on December 14, 2013). NYPMIFA and the NYAG Guidance represent the most extensive effort by any state to grapple with UPMIFA. Even though some NYPMIFA provisions are best viewed as unique to New York, other aspects of NYPMIFA as well as commentary contained in the NYAG Guidance may inform the broader discussion of UPMIFA and how institutions might wish to think about the implications of the uniform act. Hence, this outline cites frequently to NYPMIFA and the NYAG Guidance.

- "Institution": The term "institution" generally includes not-for-profit corporations organized and operated exclusively for charitable purposes, a government or governmental subdivision, agency or instrumentality to the extent it holds funds exclusively for a charitable purpose, and a trust such as a charitable remainder trust after the non-charitable interests have terminated. UPMIFA's definition of "institution" does not appear to extend to charitable lead trusts, charitable remainder trusts before the non-charitable interest has terminated, pooled income funds, or to those wholly charitable trusts whose trustees are individuals or corporate fiduciaries. Trusts of that nature continue to be governed by trust law with respect to such issues as prudent investing and the expenditure of principal. However, UPMIFA's drafters did intend the uniform law to apply to wholly charitable trusts of which a charity acts as trustee.⁴ With regard to state universities, the UPMIFA drafters stated that "[b]ecause state arrangements are so varied, creating a definition [of institution] that encompasses all charitable entities created by states is not feasible." The drafters continued:

For example, the control over a state university may be held by a State Board of Regents. In that situation, the state may have created a governing structure by statute or in the state constitution so that the university is, in effect, privately chartered. The Drafting Committee does not intend to exclude these universities from the definition of institution, but additional state legislation may be necessary to address particular situations.⁵

- "Institutional Fund": This term is defined broadly as a "fund held by an institution exclusively for charitable purposes."⁶ However, there are exclusions:
 - o program-related assets (*e.g.*, buildings or facilities being used by the institution or an institution's collections or archives).
 - o a fund held for an institution by a trustee that is not itself an institution (*i.e.*, a charitable trust with an individual, bank, or trust company as trustee).
 - o a fund in which a beneficiary that is not an institution has an interest (*e.g.*, a charitable gift annuity fund or a pooled income fund).⁷

⁴ UPMIFA Text and Comments at 9. This aspect of UPMIFA is made explicit in the definition of "institutional fund" (discussed below).

⁵ *Id.*

⁶ UPMIFA Section 2(5).

⁷ The exclusion for funds with a non-institutional beneficiary is not applicable if the beneficiary's interest is one that "could arise upon violation or failure of the purposes of the fund." *See* UPMIFA section 2(5)(C). Thus, the existence of a non-charity's gift-over or reversionary interest in the event of violation of the terms of the gift instrument would not cause a fund that is otherwise wholly charitable in nature to fall outside the definition of institutional fund.

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First appeared as part of the conference materials for the
31st Annual Nonprofit Organizations Institute session
"Endowments"