

As Reported by the House Civil and Commercial Law Committee

127th General Assembly

Regular Session

2007-2008

Am. H. B. No. 522

Representative Oelslager

Cosponsors: Representatives McGregor, J., Combs, Coley

—

A B I L L

To amend sections 1715.51, 1715.52, 1715.55, 1715.56, 1
1715.57, 1715.58, 1715.59, 3345.05, and 5813.06; 2
to amend, for the purpose of adopting new section 3
numbers as indicated in parentheses, sections 4
1715.52 (1715.53), 1715.55 (1715.54), 1715.56 5
(1715.52), and 1715.57 (1715.55); to enact new 6
sections 1715.56 and 1715.57; and to repeal 7
sections 1715.53 and 1715.54 of the Revised Code 8
for the purpose of adopting the Uniform Prudent 9
Management of Institutional Funds Act by revising 10
the Ohio Uniform Management of Institutional Funds 11
Act. 12

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 1715.51, 1715.52, 1715.55, 1715.56, 13
1715.57, 1715.58, 1715.59, 3345.05, and 5813.06 be amended; 14
sections 1715.52 (1715.53), 1715.55 (1715.54), 1715.56 (1715.52), 15
and 1715.57 (1715.55) be amended for the purpose of adopting new 16
section numbers as indicated in parentheses; and new sections 17
1715.56 and 1715.57 of the Revised Code be enacted to read as 18
follows: 19

Sec. 1715.51. As used in sections 1715.51 to 1715.59 of the Revised Code:

(A) "Charitable purpose" means any purpose the achievement of which is beneficial to the community, including the relief of poverty, the advancement of education or religion, the promotion of health, and the promotion of a governmental purpose.

(B) "Institution" means ~~an incorporated or unincorporated organization that is~~ any of the following:

(1) A person, other than an individual, organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes or a

(2) A governmental organization to the extent that it holds funds exclusively for any of those purposes a charitable purpose;

(3) A trust that had both charitable and noncharitable interests and the noncharitable interests have terminated.

~~(B)~~(C) "Institutional fund" means a fund that is held by an institution exclusively for ~~its exclusive use, benefit, or charitable~~ purposes. "Institutional fund" does not include ~~either~~ any of the following:

(1) Program related assets;

(2) A fund held for an institution by a trustee that is not an institution;

~~(2)~~(3) A fund in which a beneficiary that is not an institution has an interest other than ~~a right~~ an interest that may arise upon a violation of or the failure of the purposes of the fund.

~~(C)~~(D) "Endowment fund" means an institutional fund, ~~or a~~ any part of an institutional fund, thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a

current basis under the terms of the applicable gift instrument, 49
"Endowment fund" does not include assets that an institution 50
designates as an endowment fund for its own use. 51

~~(D) "Governing board" means the body responsible for the~~ 52
~~management of an institution or an institutional fund.~~ 53

~~(E)(1) "Historic dollar value" means the aggregate fair value~~ 54
~~in dollars of the following:~~ 55

~~(a) An endowment fund at the time it became an endowment~~ 56
~~fund;~~ 57

~~(b) Each subsequent donation to an endowment fund at the time~~ 58
~~it is made;~~ 59

~~(c) Each accumulation made pursuant to a direction in the~~ 60
~~applicable gift instrument at the time the accumulation is added~~ 61
~~to an endowment fund.~~ 62

~~(2) A determination of historic dollar value made in good~~ 63
~~faith by an institution is conclusive.~~ 64

~~(F) "Gift instrument" means a will, deed, grant, conveyance,~~ 65
~~agreement, memorandum, writing, or other governing document~~ 66
~~record~~ 67
~~or records, including the terms of any an institutional~~ 68
~~solicitations from which an institutional fund resulted~~ 69
~~solicitation, under which property is granted to, transferred to,~~ 70
~~or held by an institution as an institutional fund.~~

(F) "Person" means an individual, corporation, business 71
trust, estate, trust, partnership, limited liability company, 72
association, joint venture, public corporation, governmental 73
organization, or any other legal or commercial entity. 74

(G) "Program related asset" means an asset held by an 75
institution primarily to accomplish a charitable purpose of the 76
institution and not primarily for investment. 77

(H) "Record" means information that is inscribed on a 78

tangible medium or that is stored in an electronic or other medium 79
and is retrievable in perceivable form. 80

~~Sec. 1715.56~~ 1715.52. ~~In the administration of the powers to~~ 81
~~appropriate appreciation, to make and retain investments, and to~~ 82
~~delegate investment management of~~ (A) Subject to the intent of a 83
donor expressed in a gift instrument, an institution, in managing 84
and investing an institutional fund, shall consider the charitable 85
purposes of the institution and the purposes of the institutional 86
fund. 87

(B) In addition to complying with any other duty of loyalty 88
imposed by law, each person responsible for managing and investing 89
an institutional funds, members of a governing board of an 90
institution fund shall exercise ordinary business manage and 91
invest the fund in good faith and with the care and prudence an 92
ordinarily prudent person in a like position would exercise under 93
the facts and similar circumstances prevailing at the time of the 94
action or decision. In so doing, they shall consider the long and 95
short term needs of the institution in carrying out its 96
educational, religious, charitable, or other eleemosynary 97
purposes, its present and anticipated financial requirements, the 98
expected total return on its investments, price level trends, and 99
general 100

(C) In managing and investing an institutional fund, an 101
institution may incur only costs that are appropriate and 102
reasonable in relation to the assets, the purposes of the 103
institution, and the skills available to the institution, and 104
shall make a reasonable effort to verify facts relevant to the 105
management and investment of the fund. 106

(D) An institution may pool two or more institutional funds 107
for purposes of management and investment. 108

(E) Except as otherwise provided by a gift instrument, all of 109

| | |
|---|-----|
| <u>the following apply:</u> | 110 |
| <u>(1) In managing and investing an institutional fund, the</u> | 111 |
| <u>following factors, if relevant, shall be considered:</u> | 112 |
| <u>(a) General economic conditions;</u> | 113 |
| <u>(b) The possible effect of inflation or deflation;</u> | 114 |
| <u>(c) The expected tax consequences, if any, of investment</u> | 115 |
| <u>decisions or strategies;</u> | 116 |
| <u>(d) The role that each investment or course of action plays</u> | 117 |
| <u>within the overall investment portfolio of the fund;</u> | 118 |
| <u>(e) The expected total return from income and the</u> | 119 |
| <u>appreciation of investments;</u> | 120 |
| <u>(f) Other resources of the institution;</u> | 121 |
| <u>(g) The need of the institution and of the fund to make</u> | 122 |
| <u>distributions and preserve capital;</u> | 123 |
| <u>(h) An asset's special relationship or special value, if any,</u> | 124 |
| <u>to the charitable purposes of the institution.</u> | 125 |
| <u>(2) Management and investment decisions about an individual</u> | 126 |
| <u>asset shall be made not in isolation but rather in the context of</u> | 127 |
| <u>the institutional fund's portfolio of investments as a whole and</u> | 128 |
| <u>as a part of an overall investment strategy having risk and return</u> | 129 |
| <u>objectives reasonably suited to the fund and to the institution.</u> | 130 |
| <u>(3) Except as otherwise provided by law, an institution may</u> | 131 |
| <u>invest in any kind of property or type of investment consistent</u> | 132 |
| <u>with this section.</u> | 133 |
| <u>(4) An institution shall diversify the investments of an</u> | 134 |
| <u>institutional fund unless the institution reasonably determines</u> | 135 |
| <u>that, because of special circumstances, the purposes of the fund</u> | 136 |
| <u>are better served without diversification.</u> | 137 |
| <u>(5) Within a reasonable time after receiving property, an</u> | 138 |

institution shall make and carry out decisions concerning the 139
retention or disposition of the property or the rebalancing of a 140
portfolio, in order to bring the institutional fund into 141
compliance with the purposes, terms, and distribution requirements 142
of the institution and as necessary to meet other circumstances of 143
the institution and the requirements of sections 1715.51 to 144
1715.59 of the Revised Code. 145

(6) A person that has special skills or expertise, or is 146
selected in reliance upon the person's representation of the 147
person's special skills or expertise, has a duty to use those 148
skills or that expertise in managing and investing institutional 149
funds. 150

Sec. 1715.52 1715.53. ~~The governing board of~~ (A) Subject to 151
the intent of a donor expressed in the gift instrument and to 152
division (D) of this section, an institution may appropriate for 153
expenditure or accumulate so much of an endowment fund as the 154
institution determines is prudent for the uses and, benefits, 155
purposes, and duration for which an endowment fund is established 156
~~so much of the net appreciation, realized and unrealized, in the~~ 157
~~fair value of. Unless stated otherwise in the gift instrument, the~~ 158
~~assets of the in an endowment fund over the historic dollar value~~ 159
~~of the fund as is~~ are donor-restricted assets until appropriated 160
for expenditure by the institution. In making a determination to 161
appropriate or accumulate, the institution shall act in good 162
faith, with the care that an ordinarily prudent under the standard 163
~~established by section 1715.56 of the Revised Code. This section~~ 164
~~does not limit the authority of a governing board to expend funds~~ 165
~~as permitted under other law, the terms of the applicable gift~~ 166
~~instrument, or the charter of the institution~~ person in a like 167
position would exercise under similar circumstances, and shall 168
consider, if relevant, the following factors: 169

| | |
|---|--|
| <u>(1) The duration and preservation of the endowment fund;</u> | 170 |
| <u>(2) The purposes of the institution and the endowment fund;</u> | 171 |
| <u>(3) General economic conditions;</u> | 172 |
| <u>(4) The possible effect of inflation or deflation;</u> | 173 |
| <u>(5) The expected total return from income and the</u> <u>appreciation of investments;</u> | 174 175 |
| <u>(6) Other resources of the institution;</u> | 176 |
| <u>(7) The investment policy of the institution.</u> | 177 |
| <u>(B) To limit the authority to appropriate for expenditure or</u> <u>accumulate under division (A) of this section, a gift instrument</u> <u>shall specifically state the limitation.</u> | 178 179 180 |
| <u>(C) Terms in a gift instrument designating a gift as an</u> <u>endowment, or a direction or authorization in the gift instrument</u> <u>to use only "income," "interest," "dividends," or "rents, issues,</u> <u>or profits" or "to preserve the principal intact," or words of</u> <u>similar import, create an endowment fund of permanent duration,</u> <u>unless other language in the gift instrument limits the duration</u> <u>or purpose of the fund, and do not otherwise limit the authority</u> <u>under division (A) of this section to appropriate for expenditure</u> <u>or accumulate.</u> | 181 182 183 184 185 186 187 188 189 |
| <u>(D)(1) The appropriation for expenditure in any year of an</u> <u>amount not greater than five per cent of the fair market value of</u> <u>an endowment fund, whether or not the total expenditure from it</u> <u>exceeds five per cent, calculated on the basis of market values</u> <u>that are determined at least quarterly and averaged over a period</u> <u>of not less than three years immediately preceding the year in</u> <u>which the appropriation for expenditure was made, creates an</u> <u>irrebuttable presumption of prudence. With respect to an endowment</u> <u>fund in existence for fewer than three years, the fair market</u> <u>value of the endowment fund shall be calculated for the period the</u> | 190 191 192 193 194 195 196 197 198 199 |

endowment fund has been in existence. 200

(2) Nothing in division (D)(1) of this section shall be 201
construed to restrict an appropriation for expenditure permitted 202
by the gift instrument or to create a presumption of imprudence or 203
prudence for that part, if any, of an appropriation for 204
expenditure that exceeds five per cent of the fair market value of 205
the endowment fund. 206

Sec. 1715.55 1715.54. ~~Except as otherwise provided by the~~ 207
~~applicable (A)(1) Subject to any specific limitation set forth in~~ 208
~~a gift instrument or by applicable in any other provision of law~~ 209
~~relating to governmental institutions or funds, the governing~~ 210
~~board of an institution may do all of the following:~~ 211

~~(A) Delegate~~ delegate to an external agent the management and 212
investment of an institutional fund to the extent that an 213
institution could prudently delegate under the circumstances. An 214
institution shall act in good faith, with the care that an 215
ordinarily prudent person in a like position would exercise under 216
similar circumstances, in doing all of the following: 217

(a) Selecting an agent; 218

(b) Establishing the scope and terms of the delegation, 219
consistent with the purposes of the institution and the 220
institutional fund; 221

(c) Periodically reviewing the agent's actions to monitor the 222
agent's performance and compliance with the scope and terms of the 223
delegation. 224

(2) An agent, in performing a delegated function, shall owe a 225
duty to the institution to exercise reasonable care to comply with 226
the scope and terms of the delegation. By accepting delegation of 227
a management or investment function from an institution that is 228
subject to the laws of this state, an agent submits to the 229

jurisdiction of the courts of this state in all proceedings 230
arising from or related to the delegation or the performance of 231
the delegated function. 232

(3) An institution that complies with division (A)(1) of this 233
section is not liable for the decisions or actions of an agent to 234
which the function was delegated. 235

(B) An institution may delegate management and investment 236
functions to its committees, officers, or employees ~~of the~~ 237
~~institution or of an institutional fund, or agents, including~~ 238
~~investment counsel, the authority to act in place of the board in~~ 239
~~investment and reinvestment of institutional funds;~~ 240

~~(B) Contract with independent investment advisors, investment~~ 241
~~counsel or managers, banks, or trust companies, to act in the~~ 242
~~manner described in division (A) of this section;~~ 243

~~(C) Authorize the payment of compensation for investment~~ 244
~~advisory or management services as otherwise provided by law.~~ 245

Sec. 1715.57 1715.55. ~~(A) With the written consent of the~~ If 246
a donor consents in a record, the governing board of an 247
institution may release or modify, in whole or in part, a 248
restriction imposed by the applicable contained in a gift 249
instrument on the use or management, investment, or purpose of an 250
institutional fund. A release or modification shall not, however, 251
permit a fund to be used for a purpose other than a charitable 252
purpose of the institution. 253

~~(B) If written consent of a donor as described in division~~ 254
~~(A) of this section cannot be obtained by reason of the donor's~~ 255
~~death, disability, unavailability, or impossibility of~~ 256
~~identification, the governing board of an institution may apply in~~ 257
~~the name of the institution to the~~ The appropriate court ~~for~~ 258
~~release of, upon application of an institution, may modify a~~ 259

restriction ~~imposed by the applicable~~ contained in a gift 260
instrument ~~on~~ regarding the use management or investment of an 261
institutional fund if the restriction has become impracticable or 262
wasteful, if it impairs the management or investment of the fund, 263
or if, because of circumstances not anticipated by the donor, a 264
modification of a restriction will further the purposes of the 265
fund. The attorney general is a necessary party to and shall be 266
served with process in all proceedings pertaining to an 267
application of that nature, ~~and a judgment rendered in proceedings~~ 268
~~pertaining to an application of that nature without the service of~~ 269
~~process upon the attorney general is void.~~ To the extent 270
practicable, any modification shall be made in accordance with the 271
donor's probable intention. 272

~~If the court finds in proceedings pertaining to an~~ 273
~~application of that nature that the restriction involved is~~ 274
~~obsolete, inappropriate, impracticable, or impossible, it may~~ 275
~~order the release of the restriction in whole or in part.~~ 276

(C) ~~A release of a restriction by a court order under~~ 277
~~division (B) of this section may not change an endowment fund to a~~ 278
~~fund that is not an endowment fund. A release of a restriction~~ 279
~~under division (A) or (B) of this section may not allow a fund to~~ 280
~~be used for purposes other than the educational, religious,~~ 281
~~charitable, or other eleemosynary purposes of the institution~~ 282
~~involved~~ The court, upon application of an institution, may modify 283
the charitable purpose of an institutional fund or a restriction 284
contained in a gift instrument on the use of the fund if the 285
particular charitable purpose or restriction becomes unlawful, 286
impracticable, impossible to achieve, or wasteful. The attorney 287
general is a necessary party to and shall be served with process 288
in all proceedings pertaining to an application of that nature. 289
Any modification shall be made in a manner consistent with the 290
charitable purposes expressed in the gift instrument. 291

(D) ~~This section does not limit the application of the~~ 292
~~doctrine of cy pres~~ If an institution determines that a 293
restriction contained in a gift instrument on the management, 294
investment, or purpose of an institutional fund is unlawful, 295
impracticable, impossible to achieve, or wasteful, the institution 296
may, after providing sixty-days advanced notice to the attorney 297
general, release or modify the restriction, in whole or in part, 298
if all of the following conditions are met: 299

(1) The institutional fund subject to the restriction has a 300
total value of less than two hundred fifty thousand dollars; 301

(2) More than ten years have elapsed since the fund was 302
established; 303

(3) The institution uses the property in a manner consistent 304
with the charitable purposes expressed in the gift instrument. 305

Sec. 1715.56. Compliance with sections 1715.51 to 1715.59 of 306
the Revised Code shall be determined in light of the facts and 307
circumstances existing at the time a decision is made or action is 308
taken, and not by hindsight. 309

Sec. 1715.57. (A) Sections 1715.51 to 1715.59 of the Revised 310
Code shall be construed as modifying, limiting, and superseding 311
the "Electronic Signatures in Global and National Commerce Act," 312
114 Stat. 464, 15 U.S.C. 7001 et seq., with the exception of 313
section 101 of that act, 15 U.S.C. 7001(a). 314

(B) Sections 1715.51 to 1715.59 of the Revised Code shall not 315
be construed as authorizing electronic delivery of any of the 316
orders, notices, or documents described in section 103 of that 317
act, 15 U.S.C. 7003(b). 318

Sec. 1715.58. In so far as is possible on and after the 319
effective date of this amendment January 1, 2009, sections 1715.51 320

to 1715.59 of the Revised Code shall be applied and construed to 321
effectuate the general purpose to make uniform the law with 322
respect to the subject of those sections among the states that 323
enact the uniform prudent management of institutional funds act. 324

Sec. 1715.59. Sections 1715.51 to 1715.59 of the Revised Code 325
may be cited as the uniform prudent management of institutional 326
funds act. 327

Sec. 3345.05. (A) All registration fees, nonresident tuition 328
fees, academic fees for the support of off-campus instruction, 329
laboratory and course fees when so assessed and collected, student 330
health fees for the support of a student health service, all other 331
fees, deposits, charges, receipts, and income from all or part of 332
the students, all subsidy or other payments from state 333
appropriations, and all other fees, deposits, charges, receipts, 334
income, and revenue received by each state institution of higher 335
education, the Ohio state university hospitals and their ancillary 336
facilities, the Ohio agricultural research and development center, 337
and the Ohio state university cooperative extension service shall 338
be held and administered by the respective boards of trustees of 339
the state institution of higher education; provided, that such 340
fees, deposits, charges, receipts, income and revenue, to the 341
extent required by resolutions, trust agreements, indentures, 342
leases, and agreements adopted, made, or entered into under 343
Chapter 154. or section 3345.07, 3345.11, or 3345.12 of the 344
Revised Code, shall be held, administered, transferred, and 345
applied in accordance therewith. 346

(B) The Ohio board of regents shall require annual reporting 347
by the Ohio agricultural research and development center and by 348
each university and college receiving state aid in such form and 349
detail as determined by the board in consultation with such 350
center, universities and colleges, and the director of budget and 351

management. 352

(C) Notwithstanding any provision of the Revised Code to the 353
contrary, the title to investments made by the board of trustees 354
of a state institution of higher education with funds derived from 355
any of the sources described in division (A) of this section shall 356
not be vested in the state or the political subdivision but shall 357
be held in trust by the board. Such investments shall be made 358
pursuant to an investment policy adopted by the board in public 359
session that requires all fiduciaries to discharge their duties 360
with the care, skill, prudence, and diligence under the 361
circumstances then prevailing that a prudent person acting in like 362
capacity and familiar with such matters would use in the conduct 363
of an enterprise of a like character and with like aims. The 364
policy also shall require at least the following: 365

(1) A stipulation that investment of at least twenty-five per 366
cent of the average amount of the investment portfolio over the 367
course of the previous fiscal year be invested in securities of 368
the United States government or of its agencies or 369
instrumentalities, the treasurer of state's pooled investment 370
program, obligations of this state or any political subdivision of 371
this state, certificates of deposit of any national bank located 372
in this state, written repurchase agreements with any eligible 373
Ohio financial institution that is a member of the federal reserve 374
system or federal home loan bank, money market funds, or bankers 375
acceptances maturing in two hundred seventy days or less which are 376
eligible for purchase by the federal reserve system, as a reserve; 377
378

(2) Eligible funds above those that meet the conditions of 379
division (C)(1) of this section may be pooled with other 380
institutional funds and invested in accordance with section 381
~~1715.54~~ 1715.52 of the Revised Code. 382

(3) The establishment of an investment committee. 383

(D) The investment committee established under division 384
(C)(3) of this section shall meet at least quarterly. The 385
committee shall review and recommend revisions to the board's 386
investment policy and shall advise the board on its investments 387
made under division (C) of this section in an effort to assist it 388
in meeting its obligations as a fiduciary as described in division 389
(C) of this section. The committee shall be authorized to retain 390
the services of an investment advisor who meets both of the 391
following qualifications: 392

(1) The advisor is either: 393

(a) Licensed by the division of securities under section 394
1707.141 of the Revised Code; 395

(b) Registered with the securities and exchange commission. 396

(2) The advisor either: 397

(a) Has experience in the management of investments of public 398
funds, especially in the investment of state-government investment 399
portfolios; 400

(b) Is an eligible institution referenced in section 135.03 401
of the Revised Code. 402

(E) As used in this section, "state institution of higher 403
education" means a state institution of higher education as 404
defined in section 3345.011 of the Revised Code. 405

Sec. 5813.06. (A) Nothing in sections 5813.01 to 5813.05 of 406
the Revised Code affects the construction or interpretation of 407
sections 1715.51 to 1715.59 of the Revised Code relating to the 408
uniform prudent management of institutional funds act. 409
Specifically, neither the percentage set forth in division (B) of 410
section ~~1340.32~~ 5813.02 of the Revised Code nor the amount 411
actually requested by a governing board pursuant to that section 412
~~5813.02 of the Revised Code~~ shall be construed or interpreted to 413

limit or expand what is a prudent amount that can be expended by a 414
governing board of an institution under sections 1715.51 to 415
1715.59 of the Revised Code. 416

(B) If an institutional trust fund is also an institutional 417
fund as defined in division ~~(B)~~(C) of section 1715.51 of the 418
Revised Code with the result that sections 1715.51 to 1715.59 of 419
the Revised Code also are applicable to the institutional trust 420
fund, then sections 1715.51 to 1715.59 of the Revised Code apply 421
to the institutional trust fund, and sections 5813.01 to 5813.07 422
of the Revised Code do not apply to the institutional trust fund. 423

Section 2. That existing sections 1715.51, 1715.52, 1715.55, 424
1715.56, 1715.57, 1715.58, 1715.59, 3345.05, and 5813.06 and 425
sections 1715.53 and 1715.54 of the Revised Code are hereby 426
repealed. 427

Section 3. Sections 1 and 2 of this act shall take effect 428
January 1, 2009, and apply only to the following: 429

(A) Institutional funds established after that date. 430

(B) Institutional funds existing on that date, but only with 431
respect to decisions made or actions taken on or after that date. 432