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Bill Analysis
Legislative Service Commission

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(As Introduced)

Reps. Oelslager, J. McGregor, Combs

BILL SUMMARY

- Modifies the current Uniform Management of Institutional Funds Act, which governs the management and investment of institutional funds under the control of charitable institutions, by adopting a version of the Uniform Prudent Management of Institutional Funds Act.
- Requires an "institution," in managing and investing an "institutional fund," to consider the institution's and the fund's "charitable purposes" and requires each person responsible for managing and investing an institutional fund to manage and invest the fund in good faith and with the care an ordinarily prudent person in like position would exercise under similar circumstances.
- Specifies certain factors that must be considered, if relevant, in managing and investing an institutional fund and certain rules that generally apply regarding management and investment decisions.
- Modifies the expenditure authority of an institution to authorize the appropriation for expenditure or accumulation of so much of an institution's endowment fund as it determines is prudent for the uses, benefits, purposes, and duration for which the fund was established, requires the institution in making such determination to act in good faith and with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and specifies the factors that the institution must consider, if relevant, in making the determination.
- Provides that the appropriation for expenditure in any year of an amount not greater than 5% of the fair market value of an endowment fund calculated on the basis of market values determined at least quarterly and averaged over a period of not less than three years immediately preceding

the year in which the appropriation was made creates an irrebuttable presumption of prudence.

- Authorizes an institution to delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances and provides that an agent, in performing a delegated function, owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.
- Permits an institution to make an application to court to release (existing law) or modify under certain circumstances a restriction contained in a gift instrument regarding the management or investment of an institutional fund or to modify under certain circumstances the charitable purpose of an institutional fund or a restriction contained in a gift instrument on the use of the fund.
- Permits an institution itself, subject to specified conditions, to release or modify a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund that the institution determines to be unlawful, impracticable, impossible to achieve, or wasteful.

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CONTENT AND OPERATION

Overview of the bill; short title

The bill modifies the Uniform Management of Institutional Funds Act (UMIFA) (R.C. 1715.51 to 1715.59), which was adopted in Ohio in 1975 to govern the management and investment of endowment funds under the control of charitable institutions. The bill is a version of the Uniform Prudent Management of Institutional Funds Act (UPMIFA), which was adopted as an updated version of the UMIFA by the National Conference of Commissioners on Uniform State Laws. The bill's primary changes are in the statutory definitions, the standards of conduct in managing and investing an institutional fund, the appropriation for an expenditure or accumulation of part of an institution's endowment fund, the delegation of authority to manage and invest an investment fund, and the release or modification of restrictions contained in a gift instrument.

Current law is cited as the Uniform Management of Institutional Funds Act. The bill changes the citation to the Uniform Prudent Management of Institutional Funds Act. (R.C. 1715.59.)

Definitions

Existing law

The existing UMIFA defines the following terms as used in the Act (R.C. 1715.51):

"Institution" means an incorporated or unincorporated organization that is organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes or a governmental organization to the extent that it holds funds exclusively for any of those purposes.

"Institutional fund" means a fund that is held by an institution for its exclusive use, benefit, or purposes. "Institutional fund" does not include either of the following: (1) a fund held for an institution by a trustee that is not an institution, or (2) a fund in which a beneficiary that is not an institution has an

interest other than a right that may arise upon a violation of or the failure of the purposes of the fund.

"Endowment fund" means an institutional fund, or a part of an institutional fund, that is not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument.

"Governing board" means the body responsible for the management of an institution or an institutional fund.

"Historic dollar value" means the aggregate fair value in dollars of the following: (1) an endowment fund at the time it became an endowment fund, (2) each subsequent donation to an endowment fund at the time it is made, and (3) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to an endowment fund. A determination of historic dollar value made in good faith by an institution is conclusive.

"Gift instrument" means a will, deed, grant, conveyance, agreement, memorandum, writing, or other governing document, including the terms of any institutional solicitations from which an institutional fund resulted, under which property is transferred to or held by an institution as an institutional fund.

Operation of the bill

The bill modifies the definitions of "institution," "institutional fund," "endowment fund," and "gift instrument" as follows (new language is italicized) (R.C. 1715.51(B), (C), (D), and (E)):

"Institution" means any of the following: *(1) a person* (see definition below), *other than an individual*, organized and operated exclusively for charitable purposes (see definition below), (2) a governmental organization to the extent that it holds funds exclusively for *a charitable purpose*, or (3) *a trust that had both charitable and noncharitable interests and the noncharitable interests have terminated*.

"Institutional fund" means a fund that is held by an institution exclusively for *charitable purposes*. "Institutional fund" does not include any of the following: *(1) program related assets* (see definition below), (2) a fund held for an institution by a trustee that is not an institution, or (3) a fund in which a beneficiary that is not an institution has an interest other than *an interest* that may arise upon a violation of or the failure of the purposes of the fund.

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

a current basis. *"Endowment fund" does not include assets that an institution designates as an endowment fund for its own use.*

"Gift instrument" means a *record or records* (see definition below) (instead of "will, deed, grant, conveyance, agreement, memorandum, writing, or other governing document"), including an institutional solicitation, under which property is *granted to*, transferred to, or held by an institution as an institutional fund.

The bill adds the following new definitions (R.C. 1715.51(A), (F), (G), and (H)):

"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.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, governmental organization, or any other legal or commercial entity.

"Program related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

"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.

The bill deletes the definitions in existing law of "governing board" and "historic dollar value" and the references to those terms in the bill's provisions.

Standards of conduct

Existing law

Existing law provides that in the administration of the powers to appropriate appreciation, to make and retain investments, and to delegate investment management of institutional funds, "members of a governing board of an institution" must "exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision." *In so doing, they must consider the long and short term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, the expected total return on its investments, price level trends, and general economic conditions.* (R.C. 1715.56.)

Operation of the bill

The bill replaces existing law with the following provisions. Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, must consider the charitable purposes of the institution and the purposes of the institutional fund. In addition to complying with any other duty of loyalty imposed by law, each person responsible for managing and investing an institutional fund (instead of "members of a governing board of an institution") must 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 (instead of "exercise ordinary business care and prudence under circumstances prevailing at the time of the action or decision"). The bill deletes the italicized provisions described in "Existing law," above, and adds new provisions described in the following paragraphs. (R.C. 1715.52(A) and (B).)

In managing and investing an institutional fund, an institution 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 must make a reasonable effort to verify facts relevant to the management and investment of the fund. An institution may pool two or more institutional funds for purposes of management and investment. (R.C. 1715.52(C) and (D).)

Except as otherwise provided by a gift instrument, all of the following apply (R.C. 1715.52(E)):

(1) 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 need of the institution and of the fund to make distributions and preserve capital, and (h) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather 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.

(3) Except as otherwise provided by law, an institution may invest in any kind of property or type of investment consistent with these provisions.

(4) An institution must 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.

(5) Within a reasonable time after receiving property, an institution must make and carry out decisions concerning the retention or disposition of the property or the rebalancing of a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution and as necessary to meet other circumstances of the institution and the requirements of the bill.

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

Appropriation for expenditure or accumulation of endowment funds

Existing law

Under existing law, the "governing board of an institution" may appropriate for expenditure "for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of the endowment fund over the historic dollar value of the fund as is prudent under the standard established" as described in "**Existing law**" under "**Standards of conduct**," above. *This provision does not limit the authority of a governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution. (R.C. 1715.52.)*

Existing law further provides that the provision described in the preceding paragraph does not apply if the applicable gift instrument indicates the donor's intention that net appreciation cannot be expended. A restriction upon the expenditure of net appreciation may not be inferred from a designation of a gift as an endowment, from a direction or authorization in the applicable gift instrument to use only "income," "interest," "dividends," or "rents, issues, or profits," or "to preserve the principal intact," or from a direction that contains other words of a similar import. This rule of construction applies to gift instruments executed or in effect before, on, or after the effective date of this provision. (Current R.C. 1715.53.)

Operation of the bill

The bill modifies existing law as follows (new language is italicized). *Subject to the intent of a donor expressed in the gift instrument and to the*

provision pertaining to the appropriation for expenditure in any year as described in the last paragraph, below, an institution (instead of "governing board of an institution") may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which an endowment fund is established (instead of "for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of the endowment fund over the historic dollar value of the fund as is prudent under the standard established"). The bill provides that unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution must act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and must consider, if relevant, the following factors: (1) the duration and preservation of the endowment fund, (2) the purposes of the institution and the endowment fund, (3) general economic conditions, (4) the possible effect of inflation or deflation, (5) the expected total return from income and the appreciation of investments, (6) other resources of the institution, and (7) the investment policy of the institution. The bill deletes the italicized provision in the first paragraph under "Existing law," above, and instead provides that to limit the authority to appropriate for expenditure or accumulate under the provisions described in this paragraph, a gift instrument must specifically state the limitation. (R.C. 1715.53(A) and (B) in the bill.)

The bill outright repeals current R.C. 1715.53 described above in the second paragraph in "Existing law." It provides that terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income," "interest," "dividends," or "rents, issues, or profits" or "to preserve the principal intact," or words of similar import, create an endowment fund of permanent duration, unless other language in the gift instrument limits the duration or purpose of the fund, and do not otherwise limit the authority described in the preceding paragraph to appropriate for expenditure or accumulate.

Under the bill, the appropriation for expenditure in any year of an amount not greater than 5% of the fair market value of an endowment fund, whether or not the total expenditure from it exceeds 5%, calculated on the basis of market values that are determined at least quarterly and averaged over a period of not less than three years immediately preceding the year in which the appropriation for expenditure was made, creates an irrebuttable presumption of prudence. With respect to an endowment fund in existence for fewer than three years, the fair market value of the endowment fund must be calculated for the period the endowment fund has been in existence. Nothing in this provision is to be

construed to restrict an appropriation for expenditure permitted by the gift instrument or to create a presumption of imprudence or prudence for that part, if any, of an appropriation for expenditure that exceeds 5% of the fair market value of the endowment fund. (R.C. 1715.53(C) and (D) in the bill.)

Additional investment authority

Existing law provides that in addition to an investment otherwise authorized by law or by the applicable gift instrument and without restriction to investments that a fiduciary may make, the governing board of an institution, subject to any specific limitations set forth in the applicable gift instrument or in an applicable law other than law relating to investments by a fiduciary, may do all of the following (current R.C. 1715.54(A)):

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

(2) Retain property contributed by a donor to an institutional fund for as long as the governing board considers advisable;

(3) Include all or any part of an institutional fund in any pooled or common fund maintained by the institution;

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

Current law requires that all institutional funds held by a governmental organization be audited by the State Auditor (current R.C. 1715.54(B)).

The bill outright repeals R.C. 1715.54 as described above (see "**Operation of the bill**" under "**Standards of conduct**," above, for comparable provisions).

Delegation of management and investment functions

Existing law

Under existing law, "except as otherwise provided by the applicable gift instrument or by applicable law relating to governmental institutions or funds, the governing board of an institution" may do all of the following (R.C. 1715.55):

(1) Delegate to committees, officers, or employees of the institution or of an institutional fund, "or agents, including investment counsel," "the authority to act in place of the board in investment and reinvestment of institutional funds";

(2) Contract with independent investment advisors, investment counsel or managers, banks, or trust companies, to act in the manner described in (1), above;

(3) Authorize the payment of compensation for investment advisory or management services.

Operation of the bill

The bill deletes from existing law the reference to the "governing board" and the authority described in paragraphs (2) and (3), above, in "Existing law." It modifies existing law by providing that, subject to any specific limitation set forth in a gift instrument or in any other provision of law, an institution (instead of "except as otherwise provided by the applicable gift instrument or by applicable law relating to governmental institutions or funds, the governing board of an institution") may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution must act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in doing all of the following: (a) selecting an agent, (b) establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund, and (c) periodically reviewing the agent's actions to monitor the agent's performance and compliance with the scope and terms of the delegation. An institution that complies with the requirements described in this paragraph is not liable for the decisions or actions of an agent to which the function was delegated. (R.C. 1715.54(A)(1) and (3) in the bill.)

The bill provides that an agent, in performing a delegated function, owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation. By accepting delegation of a management or investment function from an institution that is subject to the laws of Ohio, an agent submits to the jurisdiction of the courts of Ohio in all proceedings arising from or related to the delegation or the performance of the delegated function.

The bill modifies paragraph (1) above in "*Existing law*" by providing that an institution may delegate *management and investment functions* (instead of "the authority to act in place of the board in investment and reinvestment of institutional funds") to its committees, officers, or employees (the bill deletes "or agents, including investment counsel," but see the 2nd preceding paragraph, above) *as otherwise provided by law* (added by the bill). (R.C. 1715.54(A)(2) and (B) in the bill.)

Release or modification of restrictions on management, investment, or purpose

Existing law

Current law provides that with the written consent of the donor, the "governing board of an institution" may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. *If a donor's written consent cannot be obtained by reason of the donor's death, disability, unavailability, or impossibility of identification, the governing board of an institution may apply in the name of the institution to the appropriate court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.* The Attorney General is a necessary party to and must be served with process in all proceedings pertaining to an application of that nature, and "a judgment rendered in those proceedings without the service of process upon the [A]ttorney [G]eneral is void." *If the court finds in proceedings pertaining to an application of that nature that the restriction involved is obsolete, inappropriate, impracticable, or impossible, it may order the release of the restriction in whole or in part.*

A release of a restriction by a court order as described above may not change an endowment fund to a fund that is not an endowment fund. A release of a restriction may not allow a fund to be used for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution involved. These provisions on the release of a restriction do not limit the application of the doctrine of cy pres. (R.C. 1715.57.)

Operation of the bill

The bill modifies existing law (italicized provisions are added by the bill) by providing that if a donor *consents in a record* (instead of "[w]ith the written consent of the donor"), an institution may release *or modify*, in whole or in part, a restriction contained in a gift instrument on the *management, investment, or purpose* (the bill deletes "use") of an institutional fund. *A release or modification cannot, however, permit a fund to be used for a purpose other than a charitable purpose of the institution.* (R.C. 1715.55(A).)

Application to court to modify restriction on the management or investment of institutional fund. The bill replaces the italicized provisions described in the first paragraph in "**Existing law**," above, with the provision described in the next sentence. The appropriate court, upon application of an institution, may modify a "restriction contained in a gift instrument regarding the management or investment of an institutional fund" if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The Attorney General is a necessary party to and must be served with process in all proceedings pertaining to an application of that nature. The bill removes the provision that a judgment rendered in those proceedings without the service process upon the Attorney General is void. The bill further provides that to the extent practicable, any modification must be made in accordance with the donor's probable intention. (R.C. 1715.55(B).)

The bill deletes the italicized provision described in the second paragraph under "**Existing law**," above.

Application to court to modify charitable purpose of institutional fund or restriction on use of the fund. The bill provides that the court, upon application of an institution, may "modify the charitable purpose of an institutional fund or a restriction contained in a gift instrument on the use of the fund" if the particular charitable purpose or restriction becomes unlawful, impracticable, impossible to achieve, or wasteful. The Attorney General is a necessary party to and must be served with process in all proceedings pertaining to an application of that nature. Any modification must be made in a manner consistent with the charitable purposes expressed in the gift instrument. (R.C. 1715.55(C).)

Release or modification by institution of restriction on the management, investment, or purpose of institutional fund. Under the bill, if an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution may, after providing 60-days advanced notice to the Attorney General, release or modify the restriction, in whole or in part, if all of the following conditions are met: (1) the institutional fund subject to the restriction has a total value of less than \$250,000, (2) more than ten years have elapsed since the fund was established, and (3) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument. (R.C. 1715.55(D).)

Compliance

The bill provides that compliance with its provisions must be determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight (R.C. 1715.56).

Relation to Electronic Signatures in Global and National Commerce Act

The bill requires that its provisions must be construed as modifying, limiting, and superseding section 7001 of the federal "Electronic Signatures in Global and National Commerce Act," 114 Stat. 464, 15 U.S.C.A. 7001, other than division (a) of that section (see **COMMENT 1**). The bill is not to be construed as authorizing electronic delivery of any of the orders, notices, or documents described in division (b) of section 7003 of that Act (see **COMMENT 2**). (R.C. 1715.57.)

Effectivity and applicability; construction

The bill takes effect January 1, 2009, and applies only to the following: (1) institutional funds established after that date and (2) institutional funds existing on that date, but only with respect to decisions made or actions taken on or after that date (Section 3). In so far as is possible on and after *January 1, 2009* (instead of the effective date of current law), the bill must be applied and construed to effectuate the general purpose to make uniform the law with respect to the subject of the bill's provisions among the states that enact the UPMIFA (R.C. 1715.58).

Renumbering of R.C. sections

The bill modifies, as described in this analysis, and renumbers certain existing R.C. sections that constitute the UMIFA and adopts new section numbers as indicated in parentheses: R.C. 1715.52 (1715.53), 1715.55 (1715.54), 1715.56 (1715.52), and 1715.57 (1715.55). It makes a cross-reference change in existing R.C. 3345.05.

Relation to Institutional Trust Funds Act/Ohio Trust Code

Existing law provides that nothing in R.C. 5813.01 to 5813.05 (Institutional Trust Funds Act) affects the construction or interpretation of R.C. 1715.51 to 1715.59 relating to the Uniform Management of Institutional Funds Act. The bill changes the reference to R.C. 1715.51 to 1715.59 to the Uniform *Prudent* Management of Institutional Funds Act. It also makes technical, cross-reference changes in existing law. (R.C. 5813.06.)

COMMENT

1. Section 7001 of the "Electronic Signatures in Global and National Commerce Act," 15 U.S.C.A. 7001, pertains to the general validity of electronic signatures, contracts, or other records relating to transactions in or affecting interstate or foreign commerce. Division (a) of that section provides as follows:

(a) In general

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce--

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

2. Division (b) of section 7003 of the Electronic Signatures in Global and National Commerce Act provides as follows:

(b) Additional exceptions

The provisions of section 7001 of this title shall not apply to--

(1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;

(2) any notice of--

(A) the cancellation or termination of utility services (including water, heat, and power);

(B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a

credit agreement secured by, or a rental agreement for, a primary residence of an individual;

(C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or

(D) recall of a product, or material failure of a product, that risks endangering health or safety; or

(3) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

HISTORY

ACTION	DATE
Introduced	04-02-08

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