

Regular Session, 2010

SENATE BILL NO. 79

BY SENATOR RISER

COMMERCIAL REGULATIONS. Provides with respect to the prudent management of institutional funds. (1/1/2011)

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AN ACT

To enact Part VI of Chapter 2 of Code Title 2 of Code Book 3 of Title 9 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 9:2338.1 through 2338.10, and to repeal Part V of Chapter 2 of Code Title 2 of Code Book 3 of said Title, comprised of R.S. 9:2337.1 through 2337.8, relative to the prudent management of institutional funds; to provide for a short title; to provide for definitions; to provide a standard of conduct in managing and investing institutional funds; to provide with respect to the appropriation of funds for expenditure or accumulation of an endowment fund; to provide for the release or modification of restrictions regarding a fund; to provide a standard of review for compliance; to provide for the application to existing institutional funds; to provide with relation to electronic signatures; to provide for the uniformity of application and construction; to provide for an effective date; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Part VI of Chapter 2 of Code Title 2 of Code Book 3 of Title 9 of the Louisiana Revised Statutes of 1950, comprised of R.S. 9:2338.1 through 2338.10 is hereby enacted to read as follows:

1 **§2338.1. Short title**

2 This Part may be cited as the "Uniform Prudent Management of
3 Institutional Funds Act."

4 **§2338.2. Definitions**

5 In this Part the following terms shall have the following meanings
6 ascribed to them, unless the context clearly indicates otherwise:

7 (1) "Charitable purpose" means the relief of poverty, the advancement
8 of education or religion, the promotion of health, the promotion of a
9 governmental purpose, or any other purpose the achievement of which is
10 beneficial to the community.

11 (2) "Endowment fund" means an institutional fund or part thereof that,
12 under the terms of the gift instrument, is not wholly expendable by the
13 institution on a current basis. The term does not include assets that an
14 institution designates as an endowment fund for its own use.

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

18 (4) "Institution" means either of the following:

19 (a) A person, other than an individual, organized and operated
20 exclusively for charitable purposes.

21 (b) A government or governmental subdivision, agency, or
22 instrumentality, to the extent that it holds funds exclusively for a charitable
23 purpose.

24 (5) "Institutional fund" means a fund held by an institution exclusively
25 for charitable purposes. This term does not include the following:

26 (a) Program-related assets.

27 (b) A fund held for an institution by a trustee that is not an institution.

28 (c) A fund in which a beneficiary that is not an institution has an
29 interest, other than an interest that could arise upon violation or failure of the

1 purposes of the fund.

2 (6) "Person" means an individual, any legal or commercial entity,
3 including a corporation, business trust, partnership, limited liability company,
4 association, joint venture, public corporation, government or governmental
5 subdivision, agency, or instrumentality, the trustee of a trust, or the succession
6 representative of a succession.

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

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

13 §2338.3. Standard of conduct in managing and investing an institutional fund

14 A. Subject to the intent of a donor expressed in a gift instrument, an
15 institution, in managing and investing an institutional fund, shall consider the
16 charitable purposes of the institution and the purposes of the institutional fund.

17 B. In addition to complying with fiduciary duties imposed by law other
18 than this Part, each person responsible for managing and investing an
19 institutional fund shall manage and invest the fund in good faith and with the
20 care an ordinary prudent person in a like position would exercise under similar
21 circumstances.

22 C. In managing and investing an institutional fund, an institution may
23 incur only costs that are appropriate and reasonable in relation to the assets, the
24 purposes of the institution, and the skills available to the institution.

25 D. In managing and investing an institutional fund, an institution shall
26 make a reasonable effort to verify the facts relevant to the management and
27 investment of the fund.

28 E. An institution may pool two or more institutional funds for purposes
29 of management and investment.

1 **F. Except as otherwise provided by a gift instrument, the following rules**
2 **apply:**

3 **(1) In managing and investing an institutional fund, the following**
4 **factors, if relevant, shall be considered:**

5 **(a) General economic conditions.**

6 **(b) Possible effect of inflation or deflation.**

7 **(c) Expected tax consequences, if any, of investment decisions or**
8 **strategies.**

9 **(d) Role that each investment or course of action plays within the overall**
10 **investment portfolio of the fund.**

11 **(e) Expected total return from income and the appreciation of**
12 **investments.**

13 **(f) Needs of the institution and the fund to make distributions and to**
14 **preserve capital.**

15 **(g) An asset's special relationship or value, if any to the charitable**
16 **purposes of the institution.**

17 **(h) Other resources of the institution.**

18 **(2) Management and investment decisions about an individual asset**
19 **shall be made not in isolation, but rather in the context of the portfolio of**
20 **investments belonging to the fund as a whole and as a part of an overall**
21 **investment strategy having risk and return objectives reasonably suited to the**
22 **fund and the institution.**

23 **(3) Except as otherwise provided by law other than this Part, an**
24 **institution may invest in any kind of property or type of investment consistent**
25 **with this Part.**

26 **(4) An institution shall diversify the investments of an institutional fund**
27 **unless the institution reasonably determines that, because of special**
28 **circumstances, the purposes of the fund are better served without**
29 **diversification.**

1 **(5) Within a reasonable time after receiving property, an institution**
2 **shall make and carry out decisions concerning the retention or disposition of**
3 **the property or to rebalance a portfolio in order to bring the institutional fund**
4 **into compliance with the purposes, terms, and distribution requirements of the**
5 **institution as necessary to meet other circumstances of the institution and the**
6 **requirements of this Part.**

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

11 **§2338.4. Appropriation for expenditure or accumulation of endowment fund;**
12 **rules of construction**

13 **A. Subject to the intent of a donor expressed in the gift instrument and**
14 **to Subsection D of this Section, an institution may appropriate for expenditure**
15 **or accumulate so much of an endowment fund as the institution determines is**
16 **prudent for the uses, benefits, purposes, and duration for which the endowment**
17 **fund is established. Unless otherwise stated in the gift instrument, the assets in**
18 **an endowment fund are donor-restricted assets until appropriated for**
19 **expenditure by the institution. In making a determination to appropriate or**
20 **accumulate, the institution shall act in good faith with the care that an ordinary**
21 **prudent person in a like position would exercise under similar circumstances,**
22 **and shall consider, if relevant, the factors which follow:**

23 **(1) Duration and preservation of the endowment fund.**

24 **(2) Purposes of the institution and the endowment fund.**

25 **(3) General economic conditions.**

26 **(4) Possible effect of inflation or deflation.**

27 **(5) Expected total return from income and appreciation of investments.**

28 **(6) Investment policy of the institution.**

29 **(7) Other resources of the institution.**

1 B. To limit the authority to appropriate for expenditure or to
2 accumulate under Subsection A of this Section, a gift instrument shall
3 specifically state the limitation.

4 C. Terms in a gift instrument designating a gift as an endowment or a
5 direction or authorization in the gift instrument to use only "income,"
6 "interest," "dividends," "usufruct," "rents, issues, or profits," "to preserve the
7 principal intact," "to preserve the naked ownership," or words of similar
8 import, shall be interpreted to accomplish both of the following:

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 (2) Not otherwise limit the authority to appropriate for expenditure or
12 to accumulate under Subsection A of this Section.

13 D.(1) The appropriation for expenditure in any one year of an amount
14 greater than seven percent of the fair market value of an endowment fund,
15 calculated on the basis of market values determined at least quarterly and
16 averaged over a period of not less than three years immediately preceding the
17 year in which the appropriation for expenditure is made, creates a rebuttable
18 presumption of imprudence.

19 (2) For an endowment fund in existence for fewer than three years, the
20 fair market value of the endowment fund shall be calculated for the period the
21 endowment fund has been in existence.

22 (3) This Subsection does neither of the following:

23 (a) Apply to an appropriation for expenditure permitted under law
24 other than this Part or by the gift instrument itself.

25 (b) Create a presumption of prudence for an appropriation for
26 expenditure of an amount less than or equal to seven percent of the fair market
27 value of the endowment fund.

28 §2338.5. Delegation of management and investment functions

29 A. Subject to any specific limitation set forth in a gift instrument or in

1 law other than this Part, an institution may delegate to an external agent the
2 management and investment of an institutional fund to the extent that an
3 institution may prudently delegate under the circumstances.

4 B. An institution shall act in good faith, with the care that an ordinarily
5 prudent person in a like position would exercise under similar circumstances,
6 in taking the following actions:

7 (1) Selecting an agent.

8 (2) Establishing the scope and terms of the delegation, consistent with
9 the purposes of the institution and the institutional fund.

10 (3) Periodically reviewing the actions of the agent in order to monitor
11 the performance and compliance of the agent within the scope and terms of the
12 delegation.

13 C. In performing a delegated function, an agent shall owe a duty to the
14 institution to exercise reasonable care to comply with the scope and terms of the
15 delegation.

16 D. An institution that complies with Subsections A and B of this Section
17 shall not be responsible for the decisions or actions of an agent to which the
18 function was delegated.

19 E. By accepting delegation of a management or investment function
20 from an institution that is subject to the laws of Louisiana, an agent submits to
21 the jurisdiction of the courts of Louisiana in all proceedings arising from or
22 relating to the delegation or the performance of the delegated function.

23 F. An institution may delegate management and investment functions
24 to its committees, officers, or employees as authorized by Louisiana law in
25 addition to this Part.

26 §2338.6. Release or modification of restrictions on management, investment, or
27 purpose

28 A. If the donor consents in a record, an institution may release or
29 modify, in whole or in part, a restriction contained in a gift instrument on the

1 management, investment, or purpose of an institutional fund. A release or
2 modification may not allow a fund to be used for a purpose other than a
3 charitable purpose of that institution.

4 B. The court, upon application of an institution, may modify a
5 restriction contained in a gift instrument regarding the management or
6 investment of an institutional fund if the restriction has become impracticable
7 or wasteful, if it impairs the management or investment of the fund, or if,
8 because of circumstances not anticipated by the donor, a modification of a
9 restriction will further the purposes of the fund. Notice and citation shall be
10 made as provided in Subsection D of this Section. To the extent practicable, any
11 modification shall be made in accordance with the donor's probable intention.

12 C. If a particular charitable purpose or a restriction contained in a gift
13 instrument on the use of an institutional fund becomes unlawful, impracticable,
14 impossible to achieve, or wasteful, the court, upon application of an institution,
15 may modify the purpose of the fund or the restriction on the use of the fund in
16 a manner consistent with the charitable purposes expressed in the gift
17 instrument. Notice and citation shall be made as provided in Subsection D of
18 this Section.

19 D. The proceeding for modification shall be by summary process in
20 accordance with all of the following special requirements:

21 (1) Service shall be made upon all existing donors who do not join in the
22 petition. If there is no existing donor, service shall be made upon at least one
23 person who has succeeded to any rights that a donor would have had to the
24 return of property, if the donation had failed, and who did not join in the
25 petition. Alternatively, in any case, service may be made solely upon the
26 attorney general.

27 (2) The court shall set the date for the hearing at not less than thirty
28 days from the date of the order assigning the date of the hearing.

29 (3) Service shall be made as aforesaid not later than fifteen days prior

1 to the date set for the hearing.

2 E. If all of the following conditions are met, the institution, sixty days
3 after notification as provided in Subsection F of this Section, may release or
4 modify the restriction, in whole or in part:

5 (1) The institutional fund subject to the restriction has a total value of
6 less than one hundred thousand dollars.

7 (2) More than twenty years have elapsed since the fund was established.

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

10 (4) An institution determines that a restriction contained in a gift
11 instrument on the management, investment, or purpose of an institutional fund
12 is unlawful, impracticable, impossible to achieve, or wasteful.

13 F. Notice by certified mail shall be made upon all existing donors. If
14 there is no existing donor, notice shall be made upon at least one person who has
15 succeeded to any rights that a donor would have had to the return of the
16 property, if the donation had failed. Alternatively, in any case, notice by
17 certified mail may be made solely upon the attorney general.

18 §2338.7. Reviewing compliance

19 Compliance with this Part shall be determined in light of the facts and
20 circumstances existing at the time a decision is made or action is taken, and not
21 by hindsight.

22 §2338.8. Application to existing institutional funds

23 This Part shall apply to institutional funds existing on or established
24 after January 1, 2011. As applied to institutional funds existing on January 1,
25 2011, this Part governs only decisions made or actions taken on or after that
26 date.

27 §2338.9. Relation to Electronic Signatures in Global and National Commerce

28 Act

29 This Part modifies, limits, and supersedes the federal Electronic

1 **Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et**
 2 **seq., but does not modify, limit, or supersede Section 101(c) of that Act, 15**
 3 **U.S.C. 7001(c), or authorize electronic delivery of any of the notices described**
 4 **in Section 103(b) of that Act, 15 U.S.C. 7003(b).**

5 **§2338.10. Uniformity of application and construction**

6 **In applying and construing this Part, consideration shall be given to the**
 7 **need to promote uniformity of the law with respect to its subject matter among**
 8 **states that enact it.**

9 Section 2. Part V of Chapter 2 of Code Title 2 of Code Book 3 of Title 9 of the
 10 Louisiana Revised Statutes of 1950, comprised of R.S. 9:2337.1 through 2337.8, and which
 11 may be cited as the "Uniform Management of Institutional Funds Act" is hereby repealed.

12 Section 3. This Act shall take effect on January 1, 2011.

The original instrument and the following digest, which constitutes no part
 of the legislative instrument, were prepared by Mary Dozier O'Brien.

DIGEST

Present law, "Uniform Management of Institutional Funds Act," defines the following terms relative to the management of institutional funds: "institution," "institutional fund," "endowment fund," "governing board," "historic dollar value," and "gift instrument."

Proposed law, "Uniform Prudent Management of Institutional Funds Act", defines the following terms: "charitable purpose," "endowment fund," "gift instrument," "institution," "institutional fund," "person," "program-related asset," and "record."

Present law provides for authority of the governing board to invest in a specific list of investment instruments.

Proposed law provides for a standard of conduct of good faith and with the care of an ordinarily prudent person for managing and investing an institutional fund.

Proposed law provides relative to appropriate and reasonable costs to be incurred by such a fund, allows the pooling of more than one institutional fund, and provides specific factors which may be considered in evaluating the managing and investing of an institutional fund.

Present law provides a general standard of care, using ordinary business care and prudence, in the management and investing of institutional funds.

Proposed law provides that management and investment decisions not be evaluated in isolation, that an institution may invest in any kind of property or type of investment that is consistent with the provisions of proposed law, and provides for the diversification of investments of an institution fund, except in specified circumstances.

Present law provides that the governing board may appropriate for expenditure for the uses and purposes of the fund and assesses these actions in light of the historic dollar value of the

fund.

Present law provides for the interpretation of the Section relative to the appropriation of appreciation, and states that a restriction upon the expenditure of net appreciation shall not be implied from the use of certain terms, including: "income," "dividends," "usufruct," "rents, issues, or profits," or terms stating that certain items shall be held "intact."

Proposed law provides with respect to the expenditure or accumulation of endowment funds, providing that unless stated otherwise in the gift instrument, assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution, sets a standard of good faith and with the care of a ordinarily prudent person, and sets out the following factors to be considered when relevant:

- (1) Duration and preservation of the endowment fund.
- (2) The purposes of the institution and the endowment fund.
- (3) General economic conditions.
- (4) The possible effects of inflation or deflation.
- (5) The expected total return from income and appreciation of investments.
- (6) The investment policy of the institution.
- (7) The other resources of the institution.

Proposed law further provides that relative to appropriation for expenditure in any given year of more than 7% of the fair market value of a fund shall create a rebuttable presumption of imprudence, while if less than 7% is expended in any given year does not create a rebuttable presumption of prudence.

Present law provides that the governing board may, unless precluded in the gift instrument, delegate to its committees, officers, or employees the ability to act in place of the board; to contract with independent investment advisors, among others; and to authorize the payment of compensation for any of these services to the board.

Proposed law provides that an institution may delegate to an external agent the management and investment of the fund, unless precluded by the gift instrument or any other state law.

Proposed law provides that in such a delegation the institution shall act in good faith and with the care that an ordinarily prudent person would exercise and requires the external agent to operate in good faith and with the same standard of care.

Present law provides that release of use or investment restrictions shall be by written consent of the donor or, if the written consent of the donor is impossible by reason of death, disability, unavailability, or impossibility of identification, by order of a court, only.

Proposed law provides that if a release or modification of restrictions is desired, it may be sought from the donor in a record or by petition to the court.

Proposed law provides that if the request is to be made of the court, service shall be made on all existing donors or their successors or, alternatively, service may be made solely upon the attorney general.

Proposed law provides that such modification shall be by summary process, once the following special requirements are met:

- (1) Service on all existing donors or their successors, or, alternatively service may be made solely upon the attorney general.
- (2) The court is to set a date not less than 30 days from the date of assigning the date of the hearing.
- (3) Service is to be made not later than 15 days prior to the date set for the hearing.

Proposed law further provides that if the institutional fund has a total value of less than \$100,000, more than 20 years have elapsed since the fund was established, and the institution has used the property in a manner consistent with the expressed purposes of the gift instrument, and if the institution determines that a restriction is unlawful, impracticable, impossible to achieve, or wasteful, the institution may release or modify the restriction not less than 60 days after notifying all existing donors or their successors by certified mail or, alternatively, notice by certified mail upon the attorney general.

Proposed law provides proposed law regarding the review of compliance with the law, the application of this law to existing institutional funds, provisions regarding electronic signatures, and the uniformity of the application and construction of uniform laws.

Effective January 1, 2011.

(Adds R.S. 9:2338.1-10; repeals 9:2337.1-8)