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HOUSE BILL 454

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Luciano "Lucky" Varela

FOR THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

AN ACT

RELATING TO INSTITUTIONAL FUNDS; ENACTING THE UNIFORM PRUDENT
MANAGEMENT OF INSTITUTIONAL FUNDS ACT; ESTABLISHING GUIDELINES
FOR THE INVESTMENT AND EXPENDITURE OF ENDOWMENT FUNDS;
REPEALING THE UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Uniform Prudent Management of Institutional Funds Act".

Section 2. DEFINITIONS.--As used in the Uniform Prudent
Management of Institutional Funds Act:

A. "charitable purpose" means the relief of
poverty, advancement of education or religion, promotion of
health, promotion of a governmental purpose or any other
purpose the achievement of which is beneficial to the
community;

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1 B. "endowment fund" means an institutional fund or
2 part thereof that, pursuant to the terms of a gift instrument,
3 is not wholly expendable by the institution on a current basis.
4 "Endowment fund" does not include assets that an institution
5 designates as an endowment fund for its own use;

6 C. "gift instrument" means a record or records,
7 including an institutional solicitation, pursuant to which
8 property is granted to, transferred to or held by an
9 institution as an institutional fund;

10 D. "institution" means:

11 (1) a person, other than an individual,
12 organized and operated exclusively for charitable purposes;

13 (2) a government or governmental subdivision,
14 agency or instrumentality, to the extent that it holds funds
15 exclusively for a charitable purpose; or

16 (3) a trust that had both charitable and
17 noncharitable interests, after all noncharitable interests have
18 terminated;

19 E. "institutional fund" means a fund held by an
20 institution exclusively for charitable purposes.

21 "Institutional fund" does not include:

22 (1) program-related assets;

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

25 (3) a fund in which a beneficiary that is not

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1 an institution has an interest, other than an interest that
2 could arise upon violation or failure of the purposes of the
3 fund;

4 (4) a fund established pursuant to the
5 provisions of Article 8, Section 10 of the constitution of New
6 Mexico; or

7 (5) a fund established pursuant to the
8 provisions of Article 12, Section 2 of the constitution of New
9 Mexico;

10 F. "person" means an individual, corporation,
11 business trust, estate, trust, partnership, limited liability
12 company, association, joint venture, public corporation,
13 government or governmental subdivision, agency or
14 instrumentality or any other legal or commercial entity;

15 G. "program-related asset" means an asset held by
16 an institution primarily to accomplish a charitable purpose of
17 the institution and not primarily for investment; and

18 H. "record" means information that is inscribed on
19 a tangible medium or that is stored in an electronic or other
20 medium and is retrievable in perceivable form.

21 Section 3. STANDARD OF CONDUCT IN MANAGING AND INVESTING
22 AN INSTITUTIONAL FUND.--

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

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1 the institution and the purposes of the institutional fund.

2 B. In addition to complying with the duty of
3 loyalty imposed by law other than the Uniform Prudent
4 Management of Institutional Funds Act, each person responsible
5 for managing and investing an institutional fund shall manage
6 and invest the fund in good faith and with the care an
7 ordinarily prudent person in a like position would exercise
8 under similar circumstances.

9 C. In managing and investing an institutional fund,
10 an institution:

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

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

16 D. An institution may pool two or more
17 institutional funds for purposes of management and investment.

18 E. Except as otherwise provided by a gift
19 instrument, the following rules apply:

20 (1) in managing and investing an institutional
21 fund, the following factors, if relevant, shall be considered:

- 22 (a) general economic conditions;
23 (b) the possible effect of inflation or
24 deflation;
25 (c) the expected tax consequences, if

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1 any, of investment decisions or strategies;

2 (d) the role that each investment or
3 course of action plays within the overall investment portfolio
4 of the fund;

5 (e) the expected total return from
6 income and the appreciation of investments;

7 (f) other resources of the institution;

8 (g) the needs of the institution and the
9 fund to make distributions and to preserve capital; and

10 (h) an asset's special relationship or
11 special value, if any, to the charitable purposes of the
12 institution;

13 (2) management and investment decisions about
14 an individual asset shall be made not in isolation but rather
15 in the context of the institutional fund's portfolio of
16 investments as a whole and as a part of an overall investment
17 strategy having risk and return objectives reasonably suited to
18 the fund and to the institution;

19 (3) except as otherwise provided by law other
20 than the Uniform Prudent Management of Institutional Funds Act,
21 an institution may invest in any kind of property or type of
22 investment consistent with this section;

23 (4) an institution shall diversify the
24 investments of an institutional fund unless the institution
25 reasonably determines that, because of special circumstances,

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1 the purposes of the fund are better served without
2 diversification;

3 (5) within a reasonable time after receiving
4 property, an institution shall make and carry out decisions
5 concerning the retention or disposition of the property or to
6 rebalance a portfolio, in order to bring the institutional fund
7 into compliance with the purposes, terms and distribution
8 requirements of the institution as necessary to meet other
9 circumstances of the institution and the requirements of the
10 Uniform Prudent Management of Institutional Funds Act; and

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

16 Section 4. APPROPRIATION FOR EXPENDITURE OR ACCUMULATION
17 OF AN ENDOWMENT FUND--RULES OF CONSTRUCTION.--

18 A. Subject to the intent of a donor expressed in
19 the gift instrument and subject to Subsection D of this
20 section, an institution may appropriate for expenditure or
21 accumulate so much of an endowment fund as the institution
22 determines is prudent for the uses, benefits, purposes and
23 duration for which the endowment fund is established. Unless
24 stated otherwise in the gift instrument, the assets in an
25 endowment fund are donor-restricted assets until appropriated

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1 for expenditure by the institution. In making a determination
2 to appropriate or accumulate, the institution shall act in good
3 faith, with the care that an ordinarily prudent person in a
4 like position would exercise under similar circumstances, and
5 shall consider, if relevant, the following factors:

- 6 (1) the duration and preservation of the
7 endowment fund;
- 8 (2) the purposes of the institution and the
9 endowment fund;
- 10 (3) general economic conditions;
- 11 (4) the possible effect of inflation or
12 deflation;
- 13 (5) the expected total return from income and
14 the appreciation of investments;
- 15 (6) other resources of the institution; and
- 16 (7) the investment policy of the institution.

17 B. To limit the authority to appropriate for
18 expenditure or accumulate pursuant to Subsection A of this
19 section, a gift instrument shall specifically state the
20 limitation.

21 C. Terms in a gift instrument designating a gift as
22 an endowment, or a direction or authorization in the gift
23 instrument to use only "income", "interest", "dividends" or
24 "rents, issues or profits", or "to preserve the principal
25 intact", or words of similar import:

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

4 (2) do not otherwise limit the authority to
5 appropriate for expenditure or accumulate pursuant to
6 Subsection A of this section.

7 Section 5. DELEGATION OF MANAGEMENT AND INVESTMENT
8 FUNCTIONS.--

9 A. Subject to any specific limitation set forth in
10 a gift instrument or in any law other than the Uniform Prudent
11 Management of Institutional Funds Act, an institution may
12 delegate to an external agent the management and investment of
13 an institutional fund to the extent that an institution could
14 prudently delegate under the circumstances. An institution
15 shall act in good faith, with the care that an ordinarily
16 prudent person in a like position would exercise under similar
17 circumstances, in:

18 (1) selecting an agent;

19 (2) establishing the scope and terms of the
20 delegation, consistent with the purposes of the institution and
21 the institutional fund; and

22 (3) periodically reviewing the agent's actions
23 in order to monitor the agent's performance and compliance with
24 the scope and terms of the delegation.

25 B. In performing a delegated function, an agent

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1 owes a duty to the institution to exercise reasonable care to
2 comply with the scope and terms of the delegation.

3 C. An institution that complies with Subsection A
4 of this section is not liable for the decisions or actions of
5 an agent to which the function was delegated.

6 D. By accepting delegation of a management or
7 investment function from an institution that is subject to the
8 laws of this state, an agent submits to the jurisdiction of the
9 courts of this state in all proceedings arising from or related
10 to the delegation or the performance of the delegated function.

11 E. An institution may delegate management and
12 investment functions to its committees, officers or employees
13 as authorized by law of this state other than the Uniform
14 Prudent Management of Institutional Funds Act.

15 Section 6. RELEASE OR MODIFICATION OF RESTRICTIONS ON
16 MANAGEMENT, INVESTMENT OR PURPOSE.--

17 A. If the donor consents in a record, an
18 institution may release or modify, in whole or in part, a
19 restriction contained in a gift instrument on the management,
20 investment or purpose of an institutional fund. A release or
21 modification may not allow a fund to be used for a purpose
22 other than a charitable purpose of the institution.

23 B. The court, upon application of an institution,
24 may modify a restriction contained in a gift instrument
25 regarding the management or investment of an institutional fund

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1 if the restriction has become impracticable or wasteful, if the
2 restriction impairs the management or investment of the fund,
3 or if, because of circumstances not anticipated by the donor, a
4 modification of a restriction will further the purposes of the
5 fund. The institution shall notify the attorney general of the
6 application, and the attorney general shall be given an
7 opportunity to be heard. To the extent practicable, any
8 modification shall be made in accordance with the donor's
9 probable intention.

10 C. If a particular charitable purpose or a
11 restriction contained in a gift instrument on the use of an
12 institutional fund becomes unlawful, impracticable, impossible
13 to achieve or wasteful, the court, upon application of an
14 institution, may modify the purpose of the fund or the
15 restriction on the use of the fund in a manner consistent with
16 the charitable purposes expressed in the gift instrument. The
17 institution shall notify the attorney general of the
18 application, and the attorney general shall be given an
19 opportunity to be heard.

20 D. If an institution determines that a restriction
21 contained in a gift instrument on the management, investment or
22 purpose of an institutional fund is unlawful, impracticable,
23 impossible to achieve or wasteful, the institution, sixty days
24 after notification to the attorney general, may release or
25 modify the restriction, in whole or part, if:

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

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

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

9 Section 7. REVIEWING COMPLIANCE.--Compliance with the
10 Uniform Prudent Management of Institutional Funds Act is
11 determined in light of the facts and circumstances existing at
12 the time a decision is made or action is taken and not by
13 hindsight.

14 Section 8. APPLICATION TO EXISTING INSTITUTIONAL FUNDS.--
15 The Uniform Prudent Management of Institutional Funds Act
16 applies to institutional funds existing on or established after
17 July 1, 2009. As applied to institutional funds existing on
18 July 1, 2009, the Uniform Prudent Management of Institutional
19 Funds Act governs only decisions made or actions taken on or
20 after July 1, 2009. Decisions made and actions taken before
21 July 1, 2009 are governed by the Uniform Management of
22 Institutional Funds Act as if that act had not been repealed.

23 Section 9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
24 AND NATIONAL COMMERCE ACT.--The Uniform Prudent Management of
25 Institutional Funds Act modifies, limits and supersedes the

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1 federal Electronic Signatures in Global and National Commerce
2 Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit
3 or supersede Section 101 of that act, 15 U.S.C. Section
4 7001(a), or authorize electronic delivery of any of the notices
5 described in Section 103 of that act, 15 U.S.C. Section
6 7003(b).

7 Section 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.--
8 In applying and construing the Uniform Prudent Management of
9 Institutional Funds Act, consideration shall be given to the
10 need to promote uniformity of the law with respect to its
11 subject matter among states that enact it.

12 Section 11. REPEAL.--Sections 46-9-1 through 46-9-12 NMSA
13 1978 (being Laws 1997, Chapter 199, Sections 1 through 12) are
14 repealed.

15 Section 12. EFFECTIVE DATE.--The effective date of the
16 provisions of this act is July 1, 2009.