SENATE BILL No. 392

April 17, 2007, Introduced by Senators KUIPERS, WHITMER, PATTERSON, CROPSEY, PRUSI, CLARKE and SANBORN and referred to the Committee on Economic Development and Regulatory Reform.

A bill to establish duties and obligations of nonprofit, charitable institutions in the management and use of funds held for charitable purposes; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "uniform prudent management of institutional funds act".

Sec. 2. As used in this act:

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

(b) "Endowment fund" means an institutional fund or part of an institutional fund that, under the terms of a gift instrument, is

SENATE BILL No. 392

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.

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

(d) "Institution" means any of the following:

(*i*) A person, other than an individual, organized and operated exclusively for charitable purposes.

(*ii*) A government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose.

(*iii*) A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(e) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. Institutional fund does not include any of the following:

(*i*) Program-related assets.

(*ii*) A fund held for an institution by a trustee that is not an institution.

(*iii*) A fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise on violation or failure of the purposes of the fund.

(f) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

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

(h) "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.

Sec. 3. (1) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(2) In addition to complying with the duty of loyalty imposed by law other than this act, each person responsible for managing and investing an institutional fund shall 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.

(3) In managing and investing an institutional fund, both of the following apply:

(a) 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.

(b) An institution shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(4) An institution may pool 2 or more institutional funds for purposes of management and investment.

(5) Except as otherwise provided by a gift instrument, all of the following rules apply:

(a) In managing and investing an institutional fund, the following factors, if relevant, shall be considered:

(*i*) General economic conditions.

(*ii*) The possible effect of inflation or deflation.

(*iii*) The expected tax consequences, if any, of investment decisions or strategies.

(*iv*) The role that each investment or course of action plays within the overall investment portfolio of the fund.

(*v*) The expected total return from income and the appreciation of investments.

(*vi*) Other resources of the institution.

(*vii*) The needs of the institution and the fund to make distributions and to preserve capital.

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

(b) Management and investment decisions about an individual asset shall not be made 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.

(c) Except as otherwise provided by law other than this act, an institution may invest in any kind of property or type of investment consistent with this section.

(d) An institution shall 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.

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

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

Sec. 4. (1) Subject to the intent of a donor expressed in the gift instrument, 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 the endowment fund is established. 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 shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, all of the following factors:

(a) The duration and preservation of the endowment fund.

(b) The purposes of the institution and the endowment fund.

(c) General economic conditions.

(d) The possible effect of inflation or deflation.

(e) The expected total return from income and the appreciation of investments.

(f) Other resources of the institution.

(g) The investment policy of the institution.

(2) To limit the authority to appropriate for expenditure or accumulate under subsection (1), a gift instrument must specifically state the limitation.

(3) 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", "rents, issues, or profits", or "to preserve the principal intact", or words of similar import, do both of the following:

(a) Create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund.

(b) Do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (1).

Sec. 5. (1) Subject to any specific limitation set forth in a gift instrument or in law other than this act, 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 shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in doing any 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.

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

(2) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(3) An institution that complies with subsection (1) is not liable for the decisions or actions of an agent to which the function was delegated.

(4) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(5) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this act.

Sec. 6. (1) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification shall not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(2) A court, on 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 institution shall notify the attorney general of the application, and the attorney general shall be given an opportunity to be heard. To the extent practicable, any modification shall be made in accordance with the donor's probable intention.

(3) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, a court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the attorney general of the application, and the attorney general shall be given an opportunity to be heard.

(4) 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, 60 days after notification to the attorney general, may release or modify the restriction, in whole or in part, if all of the following apply:

(a) The institutional fund subject to the restriction has a total value of less than $25,000.00.

(b) More than 20 years have elapsed since the fund was established.

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

Sec. 7. Compliance with this act shall 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.

Sec. 8. This act applies to institutional funds existing on or established after the effective date of this act. As applied to institutional funds existing on the effective date of this act, this act governs only decisions made or actions taken on or after that date.

Sec. 9. This act modifies, limits, and supersedes the electronic signatures in the global and national commerce act, 15 USC 7001 to 7031, but does not modify, limit, or supersede 15 USC 7001(a) or authorize electronic delivery of any of the notices described in 15 USC 7003(b).

Sec. 10. In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Enacting section 1. The uniform management of institutional funds act, 1976 PA 157, MCL 451.1201 to 451.1210, is repealed.