

PROPOSAL OF THE FIDUCIARY LAW SECTION

RE: REVISION OF THE UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

1. Proposed Legislation: Specific legislation has been prepared and is attached hereto as Exhibit A. The proposed legislation amends Title 44 of the Official Code of Georgia by repealing Chapter 15 of that Title (the “Uniform Management of Institutional Funds Act”) and replacing it with a new Chapter 15 (the “Uniform Prudent Management of Institutional Funds Act”). The proposed legislation is the product of an eight-month study by the Uniform Management of Institutional Funds Act Revision Committee of the Fiduciary Law Section of the State Bar of Georgia. The Committee was chaired by W. Marshall Sanders. Members of the Committee were: Stephanie B. Casteel (Atlanta), Sandra Champion (Savannah), Debye Alderman (Atlanta), Nikola R. Djuric (Atlanta), Olen Earl (Atlanta), Anne S. Emanuel (Atlanta), Adam R. Gaslowitz (Atlanta), Matthew J. Gries (Atlanta), Sheffield Hale (Atlanta), Mark Long (Atlanta), Edward M. Manigault (Atlanta), W. Fray McCormick (Columbus), Dale Palmer (Atlanta), Stephen E. Parker (Atlanta), and Alan F. Rothschild (Columbus).

2. Summary of the Proposed Legislation: The new legislation adopts, with some variations, the Uniform *Prudent* Management of Institutional Funds Act (“UPMIFA”) approved by the National Conference of Commissioners on Uniform State Laws in July, 2006. UPMIFA will clarify, expand, and modernize the current Uniform Management of Institutional Funds Act (“UMIFA”). (As of this date, UPMIFA has been adopted by 13 states and has been introduced in the legislatures of 8 other jurisdictions.) A summary of the legislation is attached hereto as Exhibit B.

3. Summary of Existing Law: Georgia enacted UMIFA in 1984. UMIFA guides charities on the management and investment of funds, provides rules on spending from endowment funds, and permits the release of restrictions on the use and management of charitable funds. Since promulgation of UMIFA, a significant evolution has occurred in the prudence standards for management and investment of funds by fiduciaries (articulated, for example, in Uniform Prudent Investor Act). Additionally, the experience of the last twenty-five years has demonstrated the need to modernize rules governing both the expenditure from endowment funds and the modification and release of restrictions to permit more efficient management of funds.

4. Proponents/opponents: None.

5. Other sections that may have an interest in the legislation: None. (A copy of this legislation has been provided to the Attorney General of the State of Georgia. Note that UPMIFA does not apply to charitable trusts managed by banks or other corporate trustees.)

6. Recommendation: The Fiduciary Law Section recommends that this proposal be adopted by the State Bar of Georgia.

EXHIBIT A

Chapter 15

PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

44-15-1. SHORT TITLE. This chapter shall be known and may be cited as the “Uniform Prudent Management of Institutional Funds Act.”

44-15-2. DEFINITIONS. In this chapter:

(1) “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.

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

(3) “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.

(4) “Institution” means:

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

(B) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; and

(C) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(5) “Institutional fund” means a fund held by an institution exclusively for charitable purposes. The term does not include:

(A) program-related assets;

(B) a fund held for an institution by a trustee that is not an institution; or
(C) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) “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.

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

(8) “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.

44-15-3. STANDARD OF CONDUCT IN MANAGING AND INVESTING INSTITUTIONAL FUND.

(a) Subject to the intent of a donor expressed in a gift instrument or any express written agreement between the donor and the institution, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this chapter, 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, considering the purposes, terms, distribution requirements, and other circumstances of the institutional fund.

(c) In managing and investing an institutional fund, an institution:

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

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

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

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

(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 needs of the institution and the fund to make distributions and to preserve capital; and

(H) an asset's special relationship or special value, if any, to the charitable purposes of the institution or to the donor.

(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 other than this chapter, an institution may invest in any kind of property or type of investment consistent with this section.

(4) Except as provided in paragraphs (A), (B) or (C) of this subsection, an institution shall reasonably manage the risk of concentrated holdings of assets by diversifying the investments of the institutional fund or by using some other appropriate mechanism.

(A) The duty imposed by this subsection shall not apply if the institution reasonably determines that, because of special circumstances, or because of the specific purposes, terms, distribution requirements, and other circumstances of the institutional fund, the purposes of the fund are better served without complying with the duty. For purposes of this paragraph, special circumstances shall include (but are not limited to) an asset's special relationship or special value, if any, to the charitable purposes of the institution or to the donor.

(B) No person responsible for managing and investing an institutional fund shall be liable for failing to comply with the duty imposed by this subsection to the extent that the terms of the gift instrument or express written agreement between the donor and the institution limits or waives the duty (by express reference to this Code section or otherwise).

(C) The governing board of an institution may retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable.

(5) 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 or the institutional fund

as necessary to meet other circumstances of the institution or the institutional fund and the requirements of this chapter.

(6) 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.

44-15-4. APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION.

(a) Subject to the intent of a donor expressed in the gift instrument or to any express written agreement between a donor and an institution, 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, 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.

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

(c) 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:

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

(2) do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (a).

44-15-5. DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS.

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this chapter, 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:

(1) selecting an agent;

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

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

(b) 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.

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

(d) 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.

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

44-15-6. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.

(a) If the donor or a donor's designee 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 may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(b) The 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 institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) 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, the 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 must be given an opportunity to be heard.

(d) 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 part, if:

(1) the institutional fund subject to the restriction has a total value of less than \$100,000;

(2) more than 20 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.

44-15-7. REVIEWING COMPLIANCE. Compliance with this chapter is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

44-15-8. APPLICATION TO EXISTING INSTITUTIONAL FUNDS. This chapter applies to institutional funds existing on or established after [the effective date of this chapter]. As applied to institutional funds existing on [the effective date of this chapter] this chapter governs only decisions made or actions taken on or after that date.

44-15-9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

This chapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).

44-15-10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

44-15-11. EFFECTIVE DATE. This chapter takes effect on [the effective date].

EXHIBIT B

Summary of Uniform Prudent Management of Institutional Funds Act

The Uniform Management of Institutional Funds (“UMIFA”) was originally approved by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1972 and was considered highly successful in providing standards for charities to use in managing their investments and spending from endowments. It was subsequently adopted, with some variations, in 47 states and the District of Columbia. Georgia adopted UMIFA in 1984.

In the summer of 2006, NCCUSL approved major revisions to UMIFA. The new Act, named the Uniform *Prudent* Management of Institutional Funds Act (“UPMIFA”), adopts more modern standards for prudent investing and allows more flexibility in spending endowment funds.

UPMIFA, like UMIFA, applies to funds held by charitable entities, whether nonprofit corporations, unincorporated associations or trusts. It does not apply to charitable funds held by a bank or individual trustee.

Standards for Management of Charitable Funds

Section 44-15-3 of the Act sets forth the standards for managing and investing charitable funds. The overarching duty of the charity’s managers is to comply with donor intent with respect to gift funds as expressed in the gift instrument. The managers must comply with the duty of loyalty and must manage and invest the funds “in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.” They may incur only costs that are “appropriate and reasonable” and must “make a reasonable effort to verify facts relevant” to the management of the funds. They may pool separate funds for management and investment.

Unless otherwise provided by a gift instrument, the managers must consider the following factors in their investment decisions, if relevant: (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 action plays within the overall investment portfolio; (E) the expected total return of investments; (F) other resources of the institution; (G) the needs of the institution to make distributions and to preserve capital; and (H) an asset's special relationship or special value, if any, to the donor and the charitable purpose of the institution.

UPMIFA specifically provides that decisions about an individual asset must be made (and therefore measured) not in isolation, but in the context of the total portfolio and as part of an overall investment strategy. An institution may invest in any type of property. An institution has a duty to diversify investments unless the institution

reasonably determines that "because of special circumstances the purposes of the fund are better served" without diversification or unless otherwise provided in a gift instrument. Additionally, in the case of originally contributed property, the institution may retain such property for so long as the governing board deems "advisable".

Standards for Expenditure from Endowment Funds

Under UMIFA, institutional investors could spend capital appreciation from an endowed fund when they deemed it appropriate to do so, but could never spend principal of the fund if its value fell below its "historic dollar value," which was defined as the value of the property when originally given to the institution. An endowment fund is defined as one which, by terms of a gift instrument, may not be wholly expended by the institution on a current basis, typically a gift to be held in perpetuity with only the income to be spent for charitable purposes.

Under Section 44-15-4 of the new Act, the concept of historic dollar value has been eliminated and the institution, subject to the intent of the donor expressed in a gift instrument, "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." However, the institution must act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances. UPMIFA substantially expands the criteria to be considered in making such a prudent decision. The institution "shall consider, if relevant": (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 of investments; (F) other resources of the institution; and (G) the investment policy of the institution.

Other Provisions

Section 44-15-6 of UPMIFA provides that a donor or a donor's designee may release or modify a restriction contained in a gift instrument so long as it does not allow a fund to be used for a purpose other than a charitable purpose of the institution.

It also provides that a court may modify a restriction or change the purpose under certain conditions, such as impracticality or illegality. The institution must notify the Attorney General of any such request to a court.

In addition, the new Act contains a provision permitting the institution to modify restrictions for similar reasons in relatively small (less than \$100,000) and old (more than 20 years) funds upon notice to the Attorney General.