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# ("NYPMIFA") Impact on Managing, Investing and Spending of Endowment Funds

November 2, 2010

NYPMIFA (or "Act"), effective September 17, 2010, is a modified version of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"). This Advisory will provide a summary of the Act's highlights and provide Action Items for compliance by affected organizations and their governing boards.

## The Act in a Nutshell

A. NYPMIFA creates a new standard of conduct for managing and investing institutional funds (other than quasi or board-mandated endowments); and

B. Provides institutions with more flexibility in spending from endowment funds, subject to certain factors.

1. Removes prohibition against spending below historic dollar value ("HDV") unless the donor directs otherwise.
2. Requires institutions to notify available donors of pre-September 17, 2010 gifts of new spending rules and right to opt out.

## Managing and Investing Institutional Funds Under NYPMIFA

As with UPMIFA, NYPMIFA requires governing boards to manage and invest a fund "in good faith and with the care, an ordinarily prudent person would exercise under similar circumstances." The Act provides specific factors for investing in a prudent manner. Now, when investing, governing boards are required to consider the following factors:

- general economic conditions;
- possible effect of inflation or deflation;
- expected tax consequences;
- the role that each investment or course of action plays within the overall portfolio of the fund;
- expected total return from the income and appreciation of investments;
- other resources of the organization;
- the needs of the organization and the fund to make distributions and preserve capital; and
- an asset's special relationship or special value to the organization's purposes.

The Act also requires that a fund's investments be diversified unless the governing board can justify non-diversification under special circumstances. A decision for non-diversification must be reviewed at least annually.

Finally, institutions may delegate the management and investment of an institutional fund to outside managers or investment advisors, unless doing so is restricted by a gift instrument. Such delegation must be done prudently.

**Action Items:** (1) Governing boards should create or update written investment policies to comply with NYPMIFA; (2) governing boards should be educated on the new prudence standard for investing; and (3) clear and accurate minutes should be kept by governing boards detailing how each factor was considered when making an investment decision.

# Spending from Endowment Funds under NYPMIFA

## A. New spending rules

As mentioned above, under NYPMIFA, institutions are no longer subject to the HDV limitation. Now, they may spend as much of the endowment fund, including principal, as the governing board finds prudent, after considering the following 8 factors:

- the duration and preservation of the endowment fund;
- purposes of the organization and the fund;
- general economic conditions;
- possible effect of inflation or deflation;
- expected total return from income and appreciation of investments;
- other resources of the organization;
- the organization's investment policy;
- where appropriate, alternatives to spending from the endowment fund and possible effects of those alternatives on the organization.

Note that a donor's intent may trump this new prudent spending rule. For instance, there may be a restriction in the donor's gift instrument limiting spending to 5% of the fund's value. For funds created on or after September 17, 2010, NYPMIFA creates a rebuttable presumption of imprudence for spending above 7% of the fair market value of a fund in one year. However, note that spending 7% or less does not create a presumption of prudence.

**Action Items:** (1) Solicitation and endowment fundraising materials should be updated to reflect the new spending rules; (2) governing boards should be educated on the new prudence standard for spending; (3) clear and accurate minutes should be kept by governing boards detailing how each factor was considered when making a spending decision; and (4) institutions should consider any donor-imposed restrictions prior to accepting gifts.

## B. Notifying donors of new spending rules

As mentioned above, NYPMIFA requires institutions to notify available donors of pre-September 17, 2010 funds in writing of the new spending rules and the right to opt out. Specifically, institutions must provide 90 days' notice to a donor before applying the new NYPMIFA spending rules to a fund for the first time, subject to limited exceptions. The donor must indicate whether the institution (a) may use as much of the fund as it finds prudent, or (b) must maintain the HDV of the fund. If the donor does not respond to the notice within the 90 days, the new spending rules will apply to the fund.

**Action Items:** Institutions should carefully craft the notice to donors and consider the correct way to approach the donor (e.g. personal contact may be appropriate in some instances, prior to the written notice).

## Practices

- Corporate
- Corporate Finance

## Industries

- Financial Institutions