

Senate, No. 1783

Presented by: O'Leary, Robert (SEN)

For legislation providing for the uniform prudent management of institutional funds

1/20/2009 S Referred to the Joint Committee on the Judiciary
1/20/2009 H House concurred
Public Hearing date 6/2 at 1:00 PM in Hearing Room A2
6/8/2009 S Accompanied a new draft, see S02078

Return to:
Bill inquiry screen,
General Court home page, or
Commonwealth of Massachusetts home page.

Senate, No. 2078

Presented by:

An Act providing for the uniform prudent management of institutional funds

6/8/2009 S Reported from the committee on Joint Committee on the Judiciary
6/8/2009 S New draft of S1783
6/8/2009 S Referred to the Senate Committee On Ways and Means
6/10/2009 S Committee recommended ought to be adopted with certain amendments
6/10/2009 S Rules suspended
6/10/2009 S Read second, amended (as recommended by the committee on Ways and Means) and ordered to a third reading
6/11/2009 S Read third
6/11/2009 S Passed to be engrossed - 39 YEAS to 0 NAYS (See Senate Roll Call, No. 82)
6/15/2009 H Read; and referred to the House Committee On Ways and Means
6/25/2009 H Committee recommended ought to pass and referred to the House Committee On Steering, Policy and Scheduling
6/29/2009 H Committee reported that the matter be placed in the Orders of the Day for the next sitting for a second reading
6/30/2009 H Read second and ordered to a third reading; Rules suspended, Read third; Amendment adopted; Passed to be engrossed - 152 YEAS to 0 NAYS (See Yea and Nay in Supplement, No. 163)
6/30/2009 S Rules suspended
6/30/2009 S Senate concurred in the House amendment - 38 YEAS to 0 NAYS (See Senate Roll Call, No. 87)
6/30/2009 S Emergency preamble adopted
6/30/2009 H Emergency preamble adopted
6/30/2009 H Enacted
6/30/2009 S Enacted and laid before the Governor
7/2/2009 G Signed by the Governor, Chapter 29 of the Acts of 2009

Return to:

Bill inquiry screen,

General Court home page, or

Commonwealth of Massachusetts home page.

SENATE No. 1783

The Commonwealth of Massachusetts

PRESENTED BY:

Robert A. O'Leary

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act Providing for the Uniform Prudent Management of Institutional Funds.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
O'Leary, Robert (SEN)	Cape and Islands
Susan C. Tucker	Second Essex and Middlesex

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT PROVIDING FOR THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 The general laws, as appearing in the 2006 official edition, is hereby amended by striking out chapter
2 180A and replacing it with the following section: -

3 Chapter 180A: Uniform Prudent Management of Institutional Funds

4 Section 1. Definitions. The following words as used in this chapter shall have the following meanings
5 unless a different meaning is clearly apparent from the language or context: - (1) "Charitable purpose"
6 means the relief of poverty, the advancement of education or

7 religion, the promotion of health, the promotion of a governmental purpose, or any other purpose
8 the achievement of which is beneficial to the community.

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

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

15 (4) "Institution" means:

16 (A) a person, other than an individual, organized and operated exclusively for

- 17 charitable purposes;
- 18 (B) a government or governmental subdivision, agency, or instrumentality, to the
- 19 extent that it holds funds exclusively for a charitable purpose; or
- 20 (C) a trust that had both charitable and noncharitable interests, after all
- 21 noncharitable interests have terminated.

22 (5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes or a fund

23 held by trustee for a charitable community trust.

24 The term does not include:

- 25 (A) program-related assets;
- 26 (B) a fund held for an institution by a trustee that is not an institution, other than a fund which is
- 27 held for a charitable community trust; or
- 28 (C) a fund in which a beneficiary that is not an institution has an interest, other
- 29 than an interest that could arise upon violation or failure of the purposes of the fund.

30 (6) "Person" means an individual, corporation, business trust, estate, trust, partnership,

31 limited liability company, association, joint venture, public corporation, government or

32 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

33 (7) "Program-related asset" means an asset held by an institution primarily to accomplish

34 a charitable purpose of the institution and not primarily for investment.

35 (8) "Record" means information that is inscribed on a tangible medium or that is stored

36 in an electronic or other medium and is retrievable in perceivable form.

37 Section 2. Standard of conduct in managing and investing institutional fund.

38 (A) Subject to the intent of a donor expressed in a gift instrument, an institution, in

39 managing and investing an institutional fund, shall consider the charitable purposes of the

40 institution and the purposes of the institutional fund.

41 (B) In addition to complying with the duty of loyalty imposed by law other than this

42 chapter, each person responsible for managing and investing an institutional fund shall manage and

43 invest the fund in good faith and with the care an ordinarily prudent person in a like position

44 would exercise under similar circumstances.

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

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

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

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

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

53 (1) In managing and investing an institutional fund, the following factors, if
54 relevant, must be considered:

55 (a) general economic conditions;

56 (b) the possible effect of inflation or deflation;

57 (c) the expected tax consequences, if any, of investment decisions or
58 strategies;

59 (d) the role that each investment or course of action plays within the
60 overall investment portfolio of the fund;

61 (e) the expected total return from income and the appreciation of
62 investments;

63 (f) other resources of the institution;

64 (g) the needs of the institution and the fund to make distributions and to
65 preserve capital; and

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

68 (2) Management and investment decisions about an individual asset must be
69 made not in isolation but rather in the context of the institutional fund's portfolio of investments
70 as a whole and as a part of an overall investment strategy having risk and return objectives
71 reasonably suited to the fund and to the institution.

72 (3) Except as otherwise provided by law other than this chapter, an institution may

73 invest in any kind of property or type of investment consistent with this section.

74 (4) An institution shall diversify the investments of an institutional fund unless

75 the institution reasonably determines that, because of special circumstances, the purposes of the
76 fund are better served without diversification.

77 (5) Within a reasonable time after receiving property, an institution shall make

78 and carry out decisions concerning the retention or disposition of the property or to rebalance a
79 portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and
80 distribution requirements of the institution as necessary to meet other circumstances of the
81 institution and the requirements of this chapter.

82 (6) A person that has special skills or expertise, or is selected in reliance upon the

83 person's representation that the person has special skills or expertise, has a duty to use those skills
84 or that expertise in managing and investing institutional funds.

85 Section 3. Appropriation for expenditure or accumulation of endowment fund.

86 (A) Subject to the intent of a donor expressed in the gift instrument and to subsection

87 (D), an institution may appropriate for expenditure or accumulate so much of an endowment

88 fund as the institution determines is prudent for the uses, benefits, purposes, and duration for

89 which the endowment fund is established. Unless stated otherwise in the gift instrument, the

90 assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the

91 institution. In making a determination to appropriate or accumulate, the institution shall act in

92 good faith, with the care that an ordinarily prudent person in a like position would exercise under

93 similar circumstances, and shall consider, if relevant, the following factors:

94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114

- (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).

(D) The appropriation for expenditure in any year of an amount greater than seven percent of the fair market value of an endowment fund, calculated on the basis of market values determined at least quarterly and averaged over a period of not less than three years immediately preceding the year in which the appropriation for expenditure is made, creates a rebuttable presumption of imprudence. For an endowment fund in existence for fewer than three years, the fair market value of the endowment fund must be calculated for the period the endowment fund

115 has been in existence. This subsection does not:

116 (1) apply to an appropriation for expenditure permitted under law other than this
117 chapter or by the gift instrument; or (2) create a presumption of prudence for an appropriation for
118 expenditure of an amount less than or equal to seven percent of the fair market value of the
119 endowment fund.

120 Section 4. Delegation of management and investment functions.

121 (A) Subject to any specific limitation set forth in a gift instrument or in law other than
122 this chapter, an institution may delegate to an external agent the management and investment of an
123 institutional fund to the extent that an institution could prudently delegate under the
124 circumstances. An institution shall act in good faith, with the care that an ordinarily prudent
125 person in a like position would exercise under similar circumstances, in:

126 (1) selecting an agent;
127 (2) establishing the scope and terms of the delegation, consistent with the
128 purposes of the institution and the institutional fund; and
129 (3) periodically reviewing the agent's actions in order to monitor the agent's
130 performance and compliance with the scope and terms of the delegation.

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

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

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

138 delegated function.

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

141 Section 5. Release or modification of restrictions on management, investment or purpose.

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

146 (B) The court, upon application of an institution, may modify a restriction contained in a
147 gift instrument regarding the management or investment of an institutional fund if the restriction
148 has become impracticable or wasteful, if it impairs the management or investment of the fund, or
149 if, because of circumstances not anticipated by the donor, a modification of a restriction will
150 further the purposes of the fund. The institution shall notify the Attorney General of the
151 application, and the Attorney General must be given an opportunity to be heard. To the extent
152 practicable, any modification must be made in accordance with the donor's probable intention.

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

159 (D) If an institution determines that a restriction contained in a gift instrument on the
160 management, investment, or purpose of an institutional fund is unlawful, impracticable,

161 impossible to achieve, or wasteful, the institution, 60 days after notification to the attorney
162 general, may release or modify the restriction, in whole or part, if:

- 163 (1) the institutional fund subject to the restriction has a total value of less than
164 \$25,000;
- 165 (2) more than 20 years have elapsed since the fund was established; and
- 166 (3) the institution uses the property in a manner consistent with the charitable
167 purposes expressed in the gift instrument.

168 Section 6. Reviewing compliance.

169 Compliance with this chapter is determined in light of the facts and circumstances existing at the time a
170 decision is made or action is taken, and not by hindsight.

171 Section 7. Application to existing institutional funds. This chapter applies to institutional funds existing on
172 or established after July 1, 2010. As applied to institutional funds existing on July 1, 2010 this chapter
173 governs only decisions made or actions taken on or after that date.

174 Section 8. Relation to the electronic signatures in global and national commerce act

175 This chapter modifies, limits, and supersedes the electronic signatures in global and national commerce
176 act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act, 15
177 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of
178 that act, 15 U.S.C. Section 7003(b).

179 Section 9. Uniformity of application and construction. In applying and construing this uniform act,
180 consideration must be given to the need to promote uniformity of the law with respect to its subject matter
181 among states that enact it.