



Enactment of the New York Prudent Management of Institutional Funds Act Affecting New York Not-For-Profit Institutions

September 20, 2010

On September 17, 2010, New York State enacted the New York Prudent Management of Institutional Funds Act (“NYPMIFA” or the “Act”), its version of the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”). UPMIFA was drafted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and has been enacted in 47 states, now including New York.

The intent of UPMIFA is to update those provisions of the Uniform Management of Institutional Funds Act (“UMIFA”), drafted in 1972 and incorporated into law in New York State in 1978, that have proven outdated or difficult to administer. UPMIFA applies to charitable institutions other than trusts (unless the trustee of the trust is a charity). UPMIFA retains some of UMIFA’s provisions, but updates sections on investment conduct, expenditure of funds, delegation of management and investment, and release or modification of restrictions. Both UPMIFA and UMIFA provide default rules for the construction and interpretation of gift instruments. As these are default rules, they can be overridden by an express provision in a gift instrument.

Under UMIFA, charitable institutions generally were required to maintain the “historic dollar value” of each endowment fund, meaning that the institution could appropriate for expenditure only a prudent portion of any appreciation in the endowment fund over the original dollar value, and of any income earned on the endowment fund, but could not appropriate the original dollar value of the endowment fund. Under UPMIFA, a detailed prudence standard governs appropriation from endowment funds, and there is no longer a requirement to maintain original dollar value.

This memorandum discusses the significant changes to the New York Not-For-Profit Corporation Law (the “N-PCL”) resulting from the enactment of the Act. In Appendix A, we provide several hypothetical situations illustrating the impact that enactment of the Act may have on institutions formed pursuant to New York law. In Appendix B, we provide sample Board minutes recording a hypothetical decision to appropriate from an endowment fund. In Appendix C, we provide a model letter for compliance with the notification provisions of the Act relating to appropriation.

I. NYPMIFA.

The Act applies to all organizations defined as “institutions” under the Act. An institution is (i) a person, other than an individual, organized and operated exclusively for charitable purposes; (ii) a trust that had both charitable and noncharitable interests, after all noncharitable interests

have terminated; or (iii) any corporation described in subparagraph five of paragraph (a) of section 102 (Definitions) of the N-PCL. Therefore, public charities, private foundations, social welfare organizations and other entities incorporated under the N-PCL will be governed by the Act. We believe that an institution not formed under the laws of New York State will not be subject to the Act because of the internal affairs doctrine. Instead, we believe a court would apply the version of UPMIFA enacted in the institution's state of formation. In addition, as discussed below, the Act only applies to funds held by charitable trusts where the trustee is itself an "institution."

Among other things, the Act provides (i) a standard of conduct for managing and delegating authority with respect to "institutional funds;" (ii) rules of construction for appropriating from an "endowment fund;" and (iii) rules for release or modification of restrictions on institutional funds.

An "institutional fund" is defined as a fund held by an institution, but does not include program-related assets, funds held by charitable trusts where the trustee itself is not an institution or 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). An "endowment fund" is defined as 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. An endowment fund does not include assets that an institution itself designates as not expendable on a current basis.

The Act makes clear that whenever it imposes any obligation on, or requires any action to be taken by, an institution, that obligation is imposed on, and that action must be authorized by, the governing board of the institution.¹

A. Section 552. Standard of Conduct in Managing and Investing an Institutional Fund.

1. Prudence Standard.

The Act requires that those responsible for managing an institutional fund act "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." This is similar to language in prior law. However, the Act provides far greater specificity and requires consideration of the following factors in managing and investing an institutional fund:

- general economic conditions;
- the possible effect of inflation or deflation;
- the expected tax consequences, if any, of investment decisions or strategies;

¹ Although the governing board retains responsibility for compliance with the provisions of the Act, the Act does allow for delegation both to external agents and to internal constituents such as committees and employees. The delegation provisions specify that appropriate delegation relieves the board of liability for acts or omissions of those to whom such responsibilities are delegated.

- the role that each investment or course of action plays within the overall investment portfolio of the fund;
- the expected total return from income and the appreciation of investments;
- other resources of the institution;
- the needs of the institution and the fund to make distributions and to preserve capital; and
- an asset's special relationship or special value, if any, to the charitable purposes of the institution.

In addition, an institution may incur only those costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution, and must make a reasonable effort to verify facts relevant to the management and investment of the institutional fund. This prudence standard and the required considerations may be modified by a specific direction in a written gift instrument. For example, a donor could require that the governing board consider additional factors in managing and investing an institutional fund.

The Act does not explicitly require an institution to keep a contemporaneous record describing the consideration that was given to each factor.² However, we believe that it would be appropriate for an institution to record that these factors were considered.

2. Diversification.

Except as otherwise provided in a gift instrument, the Act provides that an institution must diversify the investments of an institutional fund unless the institution prudently determines that, because of special circumstances, the purposes of the fund are better served without diversification. In addition, an institution must review a decision not to diversify an institutional fund as frequently as circumstances require, and at least annually.³

3. Investment Policy.

The Act requires institutions to adopt a written investment policy that reflects the requirements of the Act. As discussed below, the investment policy must be taken into consideration when appropriating funds for expenditure from an endowment fund.

B. Section 553. Appropriation for Expenditure or Accumulation of Endowment Fund; Rules of Construction.

One of the Act's most important changes to prior law is the elimination of the concept of "historic dollar value." Instead, the Act provides that an institution may appropriate so much

² Contrast with section 553 (Appropriation for Expenditure or Accumulation of Endowment Fund; Rules of Construction) of the Act. Section 553 requires an institution to keep a record of the factors considered when appropriating from an endowment fund.

³ Some commentators argue that it is unclear whether a court would enforce a provision in a gift instrument that requires non-diversification. See John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. Rev. 375 (2010).

of an endowment fund as the institution determines, subject to the intent of the donor expressed in a gift instrument, is prudent for the uses, benefits, purposes and duration for which the endowment fund is established. The Act provides the following eight factors that institutions must consider, if relevant, when making decisions as to expenditure or accumulation of endowment funds:

- the duration and preservation of the endowment fund;
- the purposes of the institution and the endowment fund;
- general economic conditions;
- the possible effect of inflation and deflation;
- the expected total return from income and the appreciation of investments;
- other resources of the institution;
- where appropriate and circumstances would otherwise warrant, alternatives to expenditure of the endowment fund, giving due consideration to the effect that such alternatives may have on the institution; and
- the investment policy of the institution.

We believe that the governing board (or a committee) may appropriate from multiple similarly-situated endowment funds simultaneously (e.g., by application of a specific spending rate to many funds).

The Act requires that an institution keep a contemporaneous record describing the consideration given by the governing board or committee to each of the factors enumerated. We believe that the record-keeping requirement may be met through a description in the minutes of the consideration given by the governing board or committee to the relevant factors.⁴ Where an institution applies a spending rate, we believe the minutes should reflect the consideration given to each of the factors in determining the spending rate to be applied to multiple endowment funds and need not repeat the factors for each separate fund.

1. Limitation on the Ability to appropriate for Expenditure.

A gift instrument may set forth a specific spending level, rate or amount, or otherwise explicitly modify or override the appropriation provisions of the Act. For example, a gift instrument could provide that the institution must spend 5% of the value of an institutional fund each year. Generally, under the Act an institution will continue to comply with specific restrictions contained in existing gift instruments.

2. Rebuttable Presumption of Imprudence.

Expenditure in any year of greater than 7% 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 five years immediately preceding the year of appropriation, creates a rebuttable presumption of imprudence. Appropriation permitted under law or under the terms

⁴ Please see Appendix B for sample board minutes relating to appropriation from an endowment fund.

of the specific gift instrument is exempt from this presumption. Appropriation of less than 7% of the fair market value of an endowment fund does not create a presumption of prudence. Although not clearly addressed in the Act, the comments to UPMIFA state that the presumption may be rebutted by the institution if circumstances in a particular year make expenditures above that amount prudent. Decisions to appropriate in an amount greater than 7% should be documented in detail in the minutes of the meeting at which the decision was taken.⁵ Notably, the presumption in the Act applies only to appropriation from gift instruments executed on or after the effective date of the Act.

3. Notification.

With respect to a gift instrument executed by the donor before the effective date of the Act, an institution must provide 90 days advance notice to the donor, if available, before appropriating from the applicable endowment fund for the first time. The Act specifies that notification should be substantially in the form of boxes that the donor may check providing either that (i) the institution may spend as much of the endowment gift as is prudent, or (ii) the institution may not spend below the original dollar value⁶ of the endowment gift.⁷ We believe that if the donor chooses the second option, the prudence standard of the Act applies, but the institution may not spend below the original dollar value. If the donor does not respond within 90 days from the date notice was given, the institution will not be subject to the original dollar value limitation. If the donor does respond, the institution must follow the donor's direction. Notice is not required where (i) the gift instrument permits appropriation without regard for original dollar value, (ii) the gift instrument limits the institution's ability to appropriate in accordance with the necessary limiting language (e.g., a specific spending rate), or (iii) the gift was received as the result of an institutional solicitation and was not accompanied by a separate statement from the donor expressing a limitation on the use of the funds (e.g., the donor sent a check in response to the institution's request that the donor contribute to a capital campaign).

For purposes of the Act, the term "donor" is defined as the person or entity that grants or transfers property to an institution pursuant to a gift instrument, or a person or entity designated in the applicable gift instrument to act in the place of the donor, but does not otherwise include the person's executors, heirs, successors, assigns, transferees or distributees. A donor is "available" if the donor (i) is living or, if the donor is not a natural person, is in existence and conducting activities, and (ii) can be identified and located with reasonable efforts.

C. Section 554. Delegation of Management and Investment Functions.

Under prior law and the Act, those responsible for managing institutional funds may delegate authority for investment decisions to external investment advisors or managers. The Act

⁵ We recommend that institutions review the comments attached to UPMIFA regarding the burden of production relating to the rebuttable presumption of imprudence.
See http://www.law.upenn.edu/bl/archives/ulc/umoifa/2006final_act.htm.

⁶ We note that the Act uses the term "original dollar value" which we believe is synonymous with "historic dollar value," the term used by prior law.

⁷ Please see Appendix C for a model notification letter relating to appropriation.

provides that an institution must act in good faith with the care that an ordinarily prudent person in a like position would exercise in (i) selecting, continuing or terminating an agent, and assessing the agent's independence; (ii) establishing the scope and terms of the delegation, including the payment of compensation; and (iii) monitoring the agent's performance and compliance with the scope and terms of the delegation. An agent must act with reasonable care, skill and caution. The requirement of prior law that each contract pursuant to which authority is delegated to an external agent may be terminated by the institution at any time, without penalty, upon not more than 60 days notice, has been retained.

A governing board also may delegate management and investment functions to its committees, officers or employees, in accordance with the prudence standard set forth in the Act.

D. Section 555. Release or Modification of Restrictions on Management, Investment or Purpose.

Under prior law, an institution could seek release of restrictions placed upon a gift by obtaining the authorization of the donor. Where release by the donor was not possible due to the donor's death, disability, unavailability or impossibility of identification, an institution, upon prior notice to the Attorney General, could seek court release if the restriction was obsolete, inappropriate or impracticable.

Under the Act, an institution may seek court release or modification of a restriction regarding the management or investment of an institutional fund, even if the donor is available, if the restriction is impracticable or wasteful, impairs management or investment, or if, because of circumstances not anticipated by the donor, a modification or release would further the purposes of the fund. To the extent practicable, any modification must be made in accordance with the donor's probable intention. In addition, if a particular purpose or restriction contained in a gift instrument becomes impossible, impracticable, unlawful or wasteful, a court may modify the purpose or restriction on use in a manner consistent with the purposes of the gift instrument. An institution seeking court release of a restriction must provide notice of the application to the Attorney General and donor, and the Attorney General and the donor will have an opportunity to be heard.

In addition, if an institution determines that a restriction on the management, investment or purpose of an institutional fund is unlawful, impracticable, impossible to achieve or wasteful, after 90 days notice to the Attorney General and the donor (if the donor is available), the institution may release or modify a restriction contained in a gift instrument if (i) the fund has a total value of less than \$100,000; (ii) more than 20 years have elapsed since the fund was established; and (iii) the institution uses the property in a manner consistent with the purposes expressed in the gift instrument. The Act provides that notice to the Attorney General must contain (A) an explanation of (i) the institution's determination that the restriction meets the requirements set forth in the Act (e.g., less than \$100,000, 20 years since the fund's establishment and use of the property consistent with the gift instrument) and (ii) the proposed release or modification; (B) a copy of a record of the institution approving the release or modification; and (C) a statement of the proposed use of the institutional fund after such release or modification.

E. Effective Date.

The Act went into effect on September 17, 2010. The new prudence factors apply to investment and appropriation decisions made after the effective date. In general, the Act applies to institutional funds created before, on or after the effective date. However, (i) the 7% rebuttable presumption of imprudence applies only to funds executed on or after the effective date of the statute; and (ii) notification of donors is required prior to appropriation only with respect to gift instruments executed by the donor prior to the effective date of the statute.

F. Accounting Concerns.

New guidelines issued by the Financial Accounting Standard Board for charitable institutions incorporated in states that have enacted UPMIFA require that, for financial statement purposes, all earnings on endowment funds are to be classified as temporarily restricted until appropriated.

Previously, such earnings were classified as “unrestricted.” In some instances, such reclassifications may impact debt covenants and have other implications. In addition, various disclosures regarding spending from endowment funds may need to be included in the financial statements. Institutions should discuss these implications and disclosures with their accountants.

G. Changes to Other Provisions of Law: Institutional Solicitations.

The Act amends subdivision 2 of section 174-b of the New York Executive Law to require that solicitations for an endowment fund include a statement that, unless otherwise restricted by the gift instrument, the institution may expend so much of an endowment fund as it deems prudent after considering the factors required by the Act.

II. **Action Steps.**

The following steps should be taken by all institutions subject to the Act:

A. Governing Board.

Governing boards should be educated as to the substance and impact of the Act. The governing board is ultimately responsible for compliance with the Act and must make decisions regarding the management and investment of institutional funds and appropriation from endowment funds.

B. Policies and Procedures.

Institutions should promptly update policies and procedures related to the investment and management of institutional funds to comply with the Act. All institutions should adopt and follow a written investment policy that reflects the prudence standards of the Act. Procedures should be put in place in order to (i) notify existing donors prior to appropriating below original dollar value from their endowment funds for the first time; (ii) appropriate funds in accordance with the prudence standards of the Act; (iii) comply with the rules regarding

delegation to external agents; and (iv) revise solicitation materials relating to endowment funds. Institutions may wish to develop or revise gift acceptance policies and model gift agreements in light of the requirements. In addition, institutions must maintain records and appropriately manage three new categories of endowment funds: (i) endowment funds governed by the default rules of the Act; (ii) endowment funds continuing to be subject to the concept of original dollar value; and (iii) endowment funds subject to specific donor restrictions, such as a specified spending rate.

C. Financial Statements.

Institutions should discuss with outside advisors the impact of any changes in the classification of endowment funds as (i) restricted; (ii) temporarily restricted; and (iii) unrestricted.

The text of the Act can be found at

http://assembly.state.ny.us/leg/?default_fld=&bn=A07907%09%09&Summary=Y&Text=Y.

Appendices:

- Appendix A: Hypothetical Examples of the Application of NYPMIFA
- Appendix B: Sample Board Minutes
- Appendix C: Model Notification Letter Relating to Appropriation

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Appendix A

Examples of the Application of the New York Prudent Management of Institutional Funds Act

1. Reporting.

Institution A is incorporated and operates in New York State. Institution A reports the value of its endowment fund as \$200 million. At the close of Institution A's fiscal year, the New York Attorney General asks Institution A to report on the spending rate applied to its endowment fund. While this question is phrased as if there is only one endowment fund, in fact an endowment consists of numerous funds which may be grouped by donor restrictions or spending rules.

Though many donors have given to Institution A's endowment fund, the specific terms of the individual gift instruments govern spending by each fund, and the New York Prudent Management of Institutional Funds Act ("NYPMIFA," or the "Act") provides the default spending rule when the gift instrument is silent. Some donors to Institution A's endowment fund included particular spending restrictions in their gift instruments with Institution A, and the Act's default terms will not apply to those gifts.⁸ With respect to gift instruments that do not contain specific spending restrictions, however, the default terms of the Act will govern. For those gifts, which make up \$125 million of the endowment fund, Institution A applied its general spending rate policy, and appropriated for expenditure at 5%. In its report to the Attorney General, therefore, Institution A reports that it applied its 5% spending rate with respect to \$125 million of its endowment fund. Institution A also reports that its appropriation from the remaining \$75 million of its endowment fund is in accordance with the terms of the donor restrictions contained in specific gift instruments.

2. Retroactivity.

In 1990, Donor D made a \$500,000 endowment fund gift to Institution C, incorporated in New York, then a UMIFA state. There are no specific restrictions on the gift, except that it is designated for the endowment fund. Donor D died in 2005, and New York enacted NYPMIFA in 2010. Through 2010, Institution C limited its spending of Donor D's fund in order to preserve intact the fund's historic dollar value. In 2011, Institution C prudently allocates for expenditure an amount that takes Donor D's gift below its original dollar value. Donor D's family files a complaint with the Attorney General's office alleging that Institution C has violated the terms of Donor D's gift by appropriating funds for expenditure such that the gift is reduced to below its original dollar value. Because the original gift instrument contained no specific provisions as to the spending rate to apply to Donor D's gift, and because Donor D passed away in 2005 so that

⁸ Note that the Act provides that 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, will create an endowment fund but will not otherwise limit the authority to appropriate for expenditure. See section 553(c).

no notice was required to be given before appropriating under the Act for the first time, the Attorney General's office correctly informs Donor D's family that the Act now governs the terms of Donor D's gift and that Institution C may prudently appropriate even if that prudent appropriation causes the value of the fund to decrease below its historic dollar value.

Donor E also made an endowment fund gift to Institution C in 1990. The facts are the same as above, except that the gift instrument between Donor E and Institution C contains a specific restriction on spending, limiting Institution C's spending on Donor E's gift to a maximum rate of 3% annually. The Act does not change the rate applicable to Donor E's fund, and Institution C may continue to spend in accordance with the terms of the gift instrument.

3. 7% Presumption of Imprudence.

The board of trustees of D University (chartered in New York) votes in 2008 to appropriate for expenditure funds from an endowment to construct a new building on D University's campus. D University maintains an endowment fund in which it has pooled contributions to support construction and operation of the building. In order properly to fund construction, the board of trustees prudently appropriates 8% from this endowment fund, and ensures that the appropriation will not take the endowment fund below its historic dollar value. Construction on the building begins, and the board of trustees remains careful to prudently appropriate for expenditure amounts that do not take the endowment fund below its historic dollar value, but total 8%, annually.

New York then enacts NYPMIFA, including the 7% presumption of imprudence for endowment spending. Although D University's board of trustees needs to appropriate for expenditure 8% of the endowment fund's value to continue construction of the new building, the appropriation will now be presumed imprudent, even though it will not take the endowment fund below original dollar value. The board of trustees prudently decides that, rather than stopping construction on the building or shifting funds from unrestricted funds, it will continue to appropriate for expenditure amounts from the construction endowment fund at a rate of 8% annually. In order to rebut the presumption of imprudence, the board of trustees records the reasons for its decision in writing. The board includes in contemporaneous minutes of its meeting its determination that this spending rate is prudent, including specific consideration of the eight factors set forth in section 553(a) of the Act.

4. Bond Covenants under the Act.

Assume that D University, chartered in New York, is planning a bond offering in connection with construction of the new building. Under the prior law of UMIFA, the income and appreciation earned on D University's endowment funds was treated, for accounting purposes, as an unrestricted asset of D University. When New York enacted NYPMIFA, the accounting treatment of these funds changed. After NCCUSL promulgated UPMIFA, the Financial Accounting Standards Board issued FASB Staff Position FAS 117.1⁹ ("FASB 117.1"), which includes an important change to accounting standards in response to the new provisions of UPMIFA. Under FASB 117.1, the income and appreciation earned on D University's

⁹ See http://www.fasb.org/pdf/fsp_fas117-1.pdf.

endowment fund is instead treated as temporarily restricted assets (and remain so classified until appropriated for expenditure by D University's board of trustees).

While this may appear to be a minor change, consider D University's planned bond offering. Many bond covenants contain language as to the issuer's "unrestricted" assets. Because a significant portion of D University's assets are held in endowment funds, the transition from UMIFA to NYPMIFA resulted in the reclassification for accounting purposes of a large amount of D University's assets from unrestricted to temporarily restricted and could affect the bond covenants in the planned offering.

D University should examine the specific language in its bond covenants for the planned offering, and seek advice from bond counsel to ensure that it can comply with the covenants given these changes.¹⁰

5. Notification Prior to Appropriation under the Act.

Institution L, incorporated in New York, has 6,000 donors who have contributed to its endowment fund since Institution L was formed in 1900. Following enactment of NYPMIFA, Institution L reviews the records of its 6,000 donors in order to address the notification requirements of the Act prior to the need to appropriate. 3,000 of its donors are known to have died. Of the 3,000 remaining donors, Institution L has on record addresses for 2,500 donors. Institution L sends notice as required under the Act to these 2,500 donors, and receives 1,500 responses within 90 days. 750 donors reply that the Act should apply, and 750 reply that the original dollar value should be maintained. Institution L makes a record of those 750 funds to which the original dollar value limitation still applies, and makes a record of the 1,750 funds to which the original dollar value limitation no longer applies. Institution L appropriates prudently when necessary from those endowment funds for which 750 respondents indicated that the Act should apply, and from those endowment funds for which 1,000 donors did not respond within the 90-day period. Institution L conducts internet searches for the current addresses of the 500 donors for which Institution L does not have an address on record. Where addresses can be found, Institution L sends notice as required under the Act, and follows the direction given in donor responses. Where addresses cannot be found through basic internet searches, Institution L appropriates prudently when necessary from the applicable endowment funds.

¹⁰ See National Association of College and University Business Officers, "NACUBO Webcast Addresses Underwater Endowments," available at <http://www.nacubo.org/x7427.xml>.

Appendix B

Sample Excerpt of Minutes of a Meeting of the Board of Directors Regarding Appropriation from an Endowment Fund

Hypothetical Example: A charity's determination to appropriate for expenditure from (i) an individual endowment fund established by a single donor prior to the enactment of NYPMIFA a total of \$500,000, and (ii) an endowment fund consisting of numerous individual endowment funds established by a variety of donors prior to the enactment of NYPMIFA a total of \$800,000.

[INSERT NAME OF ORGANIZATION]

Minutes from a Meeting of the Board of Directors

[INSERT DATE]

A meeting of the Board of Directors (the "Board") of [INSERT NAME OF ORGANIZATION] (the "Charity") was held on [INSERT DATE] at [INSERT LOCATION]. The following directors were present, constituting a quorum: [LIST ATTENDING DIRECTORS].

[INSERT OTHER BUSINESS ADDRESSED AT THE MEETING]

Appropriation from Donor A's Endowment Fund

The Treasurer of the Charity, [INSERT NAME OF INDIVIDUAL], presented to the Board the recommendation that the Board approve an appropriation for expenditure from the Donor A Scholarship Endowment Fund in the amount of \$500,000, by application of a spending rate of 6% to the Donor A Scholarship Endowment Fund.

First, the Treasurer explained the need of the Charity for the funds. The Treasurer reported that the funds were needed to fulfill the Charity's commitment to providing scholarships to qualified students. The Treasurer indicated there had been a decrease in the value of the Donor A Scholarship Endowment Fund. However, the Charity's scholarship commitments had not decreased. The Treasurer informed the Board that the restriction contained in the written gift instrument applicable to the Donor A Scholarship Endowment Fund stated that the fund could be used only for scholarship purposes, but did not include a specific spending rate. The Treasurer told the Board that the original donor of the Donor A Scholarship Endowment Fund died a number of years ago and is therefore not available to receive notice of this proposed first-time appropriation from the Donor A Scholarship Endowment Fund. The donor did not designate a person in the gift instrument to act in the place of the donor.

The Board then discussed the Treasurer's request for the appropriation. The Board considered the following eight factors in making its decision to appropriate from the endowment fund:

1. *The duration and preservation of the endowment fund:* The Board noted that the Donor A Scholarship Endowment Fund is of perpetual duration and that the current need to support students who have been awarded scholarships must be balanced against the need for scholarship funds in the future.
2. *The purposes of the Charity and the endowment fund:* The Board noted the educational purposes of the Charity, and its commitment to providing education to qualified students regardless of need. The Board noted that the applicable gift instrument limited Donor A Scholarship Endowment Fund's use to scholarships.
3. *General economic conditions:* The Board discussed the economic conditions that led to the recommendation that the funds be appropriated from the Donor A Scholarship Endowment Fund. The Board discussed the current market volatility and the fact that a market upswing in the near future is unlikely.
4. *The possible effect of inflation and deflation:* The Board discussed the possible effect of inflation and deflation on the Donor A Scholarship Endowment Fund and the purchasing power of the Donor A Scholarship Endowment Fund.
5. *The expected total return from income and the appreciation of investments:* The Board discussed the Treasurer's report on the performance of the Donor A Scholarship Endowment Fund. The Board discussed the impact the appropriation would have on the purchasing power of the Donor A Scholarship Endowment Fund.
6. *Other resources of the Charity:* The Board discussed the possibility of using resources from other funds to cover the Charity's current scholarship obligations, and the Treasurer reported on the limited availability of other funds.
7. *Where appropriate and circumstances would otherwise warrant, alternatives to expenditure of the endowment fund, giving due consideration to the effect that such alternatives may have on the Charity:* The Board discussed how costs had already been cut and determined that further cost-cutting would negatively impact programs. The Board then discussed the possibility of using a line of credit to cover the costs of the Charity's scholarship program, and of initiating a solicitation campaign to raise new funds for the scholarship program. The Board determined that no further lines of credit were likely to be available and that the initiation of a solicitation campaign would not address current needs, although it would be advisable to consider in the future when donors may be more receptive to new solicitations.
8. *The investment policy of the Charity:* The Board reviewed the Charity's investment policy, and determined that the proposed appropriation is consistent with the return goals of the investment policy.

After further discussion, upon motion duly made and seconded, the Board unanimously:

RESOLVED, that the Board of Directors hereby approves the appropriation of 6% of the average value of the Donor A Scholarship Endowment Fund, measured as of the last day of the

calendar quarter for the twenty calendar quarters preceding the date hereof, to provide student scholarships in the current fiscal year.

Appropriation from General Endowment Fund

Next, the Treasurer presented to the Board the recommendation that the Board approve an appropriation for expenditure from the Charity's General Endowment Fund in the amount of \$800,000, by application of a spending rate of 6.5% to the General Endowment Fund.

First, the Treasurer explained that the Charity's General Endowment Fund was comprised of 200 individual endowment funds the donors of which were available and had been given the required 90 days advance notice that the Charity wished prudently to appropriate. These donors responded to the notice with confirmation that the Charity could prudently appropriate from their individual endowment funds without regard to the original dollar value of those funds. Next, the Treasurer reported to the Board on the need of the Charity for the funds. The Treasurer indicated that the funds were needed to fund the Charity's operations for the current fiscal year. The Treasurer indicated that there had been a decrease in the value of the Charity's General Endowment Fund, and that the budget had been cut significantly. The Treasurer informed the Board that the restrictions contained in the written gift instruments applicable to the Charity's General Endowment Fund stated that the funds could be used for operational purposes, but did not include specific spending rates.

The Board then discussed the Treasurer's request for the appropriation. The Board considered the following eight factors in making its decision to appropriate from the Charity's General Endowment Fund:

1. *The duration and preservation of the endowment fund:* The Board noted that the Charity's General Endowment Fund is of perpetual duration and that the current need to support operations must be balanced against the need for funds in the future.
2. *The purposes of the Charity and the endowment fund:* The Board noted the charitable purposes of the Charity, and that the applicable gift instruments allowed the Charity's General Endowment Fund to be used for operations.
3. *General economic conditions:* The Board discussed the economic conditions that led to the recommendation that the funds be appropriated from the Charity's General Endowment Fund. The Board discussed the current market volatility, and the fact that a market upswing in the near future was unlikely.
4. *The possible effect of inflation and deflation:* The Board discussed the possible effect of inflation and deflation on the Charity's General Endowment Fund, and the purchasing power of the Charity's General Endowment Fund.
5. *The expected total return from income and the appreciation of investments:* The Board discussed the Treasurer's report on the performance of the

Charity's General Endowment Fund. The Board discussed the impact that the appropriation would have on the purchasing power of the General Endowment Fund.

6. *Other resources of the Charity:* The Board discussed the possibility of using resources from other funds to cover the Charity's current operations, and the Treasurer reported on the limited availability of other funds.
7. *Where appropriate and circumstances would otherwise warrant, alternatives to expenditure of the endowment fund, giving due consideration to the effect that such alternatives may have on the Charity:* The Board discussed how costs had already been cut and determined that further cost-cutting would negatively impact programs. The Board then discussed the possibility of using a line of credit to cover the costs of the Charity's operations, and of initiating a solicitation campaign to raise new funds for operations. The Board determined that no further lines of credit were likely to be available, and that the initiation of a solicitation campaign would not address current needs, although it would be advisable to consider in the future when donors may be more receptive to new solicitations.
8. *The investment policy of the Charity:* The Board reviewed the Charity's investment policy, and determined that the proposed appropriation is consistent with the return goals of the investment policy.

After further discussion, upon motion duly made and seconded, the Board unanimously:

RESOLVED, that the Board of Directors hereby approves the appropriation of 6.5% of the average value of the Charity's General Endowment Fund, measured as of the last day of the calendar quarter for the twenty calendar quarters preceding the date hereof, to fund operations in the current fiscal year.

Appendix C

Sample Notification Letter¹¹

[DONOR NAME]
[ADDRESS]
[CITY], [STATE] [ZIP]

Dear [NAME]:

The [NAME OF CHARITY] (“Charity”) has benefited greatly from your gift of an endowment fund. Your gift has enhanced our ability to offer our services and programs. We wish to inform you that on September 17, 2010, the Governor signed into law the New York Prudent Management of Institutional Funds Act (“NYPMIFA”). NYPMIFA contains important updates and changes to the law governing use of endowed funds by charitable institutions like Charity.

Under prior law, charitable institutions were prohibited from expending certain amounts from endowment funds when the value of those funds dropped below their “historic dollar value.” The “historic dollar value” of the endowment fund was defined as the dollar value of each of the contributions made to the endowment fund by the donor.

Under NYPMIFA, the “historic dollar value” concept has been eliminated. In its place, NYPMIFA states that a charitable institution may allocate for expenditure each year so much of the endowment fund as the charitable institution determines is prudent.

Charity plans to follow the terms of NYPMIFA in making decisions as to annual allocations for expenditure from endowment fund gifts. This would allow Charity to expend amounts from its endowment funds even when market values decline below the endowment funds’ historic dollar values.

Under the terms of NYPMIFA, Charity is required to notify you of the changes occasioned by NYPMIFA and provide you with the options below.

Please check the box next to your preferred option, below.

Charity may apply the terms of NYPMIFA to my gift and appropriate for expenditure so much of the gift as Charity determines is prudent.

Notwithstanding the provisions of NYPMIFA, I direct that Charity not spend below the original dollar value of my gift. I understand and agree that the terms of NYPMIFA will apply

¹¹ Please note that this notification letter only needs to be sent to donors of funds in existence prior to September 17, 2010, only once at least 90 days before appropriating from their institutional fund for the first time.

to the management and investment of my gift, and that Charity may spend the income and appreciation over the historic dollar value if it is prudent to do so.

Please return this letter to us within ninety days in the enclosed envelope. If you do not respond within ninety days, the terms of NYPMIFA will apply to your gift.

Should you have any questions about NYPMIFA, or about how the terms of NYPMIFA will apply to your endowment gift, please contact [NAME] at [PHONE NUMBER].

We thank you, again, for your support of Charity.

Sincerely yours,

[INSERT NAME, TITLE]

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