

## **NYPMIFA for Endowment Funds Signed Into Law in NYS**

On September 17, 2010 New York State enacted the New York Prudent Management of Institutional Funds Act (NYPMIFA) into law, the 48th state to do so. NYPMIFA amended current state law (NY's 1978 UMIFA) relating to institutional funds (e.g.- endowment funds) that had proven outdated or difficult to administer, and applies to charitable institutions and other entities incorporated under New York Not-for-Profit Corporation Law. These would include public charities, private foundations, religious corporations, social welfare organizations, and others. Although NYPMIFA retains some of UMIFA's provisions, it offers updated sections on investment conduct, expenditure of "endowment" funds, delegation of management and investing activities, and release or modification of restrictions.

### Managing and Investing Institutional Funds

NYPMIFA imposes a duty on institutional fund managers to act "in good faith and with the care of an ordinary prudent person in a like position would exercise under similar circumstances." This includes the governing body's required consideration of the eight factors of the new enhanced prudent standard:

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

Board Adopted Written Investment Policy is now required by NYPMIFA and must address investment diversification, strategy, and delegation of investment management. Diversification of a fund's investments is a requirement of the NYPMIFA, unless the organization's governing board determines that, due to special circumstances, the purposes of the fund are better served without diversification. A decision not to diversify must be reviewed at least annually.

Delegation of Management and Investment Function - NYPMIFA requires that an organization "act in good faith with the care of an ordinary prudent person" in "selecting, continuing or terminating an agent, including assessing the agent's independence," "establishing the scope and terms of the delegation, including the payment of compensation," and monitoring the agent's performance and compliance. An organization that acts in compliance with these provisions will not be liable for an agent's actions or decisions.

Modification of Restrictions on Small, Old Funds - If a fund is older than 20 years, with a value less than \$100,000, and the fund's restriction is unlawful, impossible to achieve or wasteful, NYPMIFA allows for the modification of the gift's restriction without obtaining either donor consent or judicial approval. The organization must provide an explanatory notice to the New York State Attorney General inclusive of the proposed use of the

modified fund and the governing body's record of modification approval (e.g.-minutes). If the Attorney General does not respond within 90 days, the organization may proceed with the proposed release or modification.

#### Expending or Accumulating Endowment Funds

Unless the donor has provided specific instructions in a written gift agreement, the eight factors of the new enhanced prudent standard referred to above should be applied in determining how much an organization may expend from an endowment fund. Historic Dollar Value was the aggregate fair value of the endowment fund at the time of the original gift plus the value of any subsequent gifts that needed to be preserved. For any endowment funds established on or after September 17, 2010, historic dollar value has been eliminated. NYPMIFA permits expenditures from a fund's principal, provided that the governing body has considered the eight-factor prudence standard. Donor Notification is required of an organization for those endowment funds that existed prior to NYPMIFA's enactment date. "Available" donors of previously existing endowment funds must be given an opportunity to object to the expenditure of historic dollar value the first time such expenditure is to be made. If the donor consents or fails to respond to an organization's notice within 90 days, the organization may appropriate for expenditure out of historic dollar value (if otherwise prudent); if the donor objects, the institution must continue to refrain from doing so. A contemporaneous record (e.g.-meeting minutes) of each decision to appropriate endowment funds must be kept. A Reputable Presumption of Imprudence is created for an organization expending more than 7% of the average fair market value of an endowment fund in any given year. Spending less than 7% of the average fair market value in any given year does not create a presumption of prudence.

Even with NYPMIFA's enactment, it's still all about donor intent. If a donor, in a gift instrument, has enumerated certain directives or limitations, they must be adhered to. Any and all default rules provided by NYPMIFA can still be overridden by a donor's express provision in a gift instrument. Difficult economic times have forced not-for-profit organizations to make difficult decisions about whether and to what extent to expend endowment assets and appreciation, or to replenish "under water" funds that have fallen below their "historical dollar value." Although NYPMIFA imposes several new obligations, organizations may find that the increased flexibility in investing and managing endowments will outweigh the initial burdens of complying with the new law.