

BILL ANALYSIS

Senate Research Center

H.B. 860
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State Affairs
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Committee Report (Amended)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The Uniform Management of Institutional Funds Act (UMIFA) was adopted by the Texas Legislature in 1989. It was developed by the National Conference of Commissioners on Uniform State Laws (conference) in 1972 and has provided guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations.

H.B. 860 replaces the UMIFA with the Uniform Prudent Management of Institutional Funds Act, adopted by the conference in 2006, in order to provide modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending. The bill also provides guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations and provides for additional duties for individuals who manage and invest such funds.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 163, Property Code, as follows:

CHAPTER 163. MANAGEMENT, INVESTMENT, AND EXPENDITURE OF INSTITUTIONAL FUNDS

Sec. 163.001. **SHORT TITLE.** Provides that this chapter may be cited as the Uniform Prudent Management of Institutional Funds Act.

Sec. 163.002. **LEGISLATIVE FINDINGS AND PURPOSE.** (a) Provides that the legislature finds that institutions organized and operated exclusively for a charitable purpose perform essential and needed services in the state, uncertainty exists regarding the prudence standards for the management and investment of charitable funds and for endowment spending by such institutions, and those institutions, their officers, directors, and trustees, and the citizens of this state will benefit from removal of the uncertainty regarding applicable prudence standards and by permitting endowment funds to be invested for the long-term goals of achieving growth and maintaining purchasing power without adversely affecting the availability of funds for current expenditure.

(b) Provides that the purpose of this chapter is to provide guidance and authority through modern articulations of prudence standards for the management and investment of charitable funds and for endowment spending by institutions organized and operated exclusively for a charitable purpose in order to provide uniformity and remove uncertainty regarding those standards.

Sec. 163.003. **DEFINITIONS.** Defines "charitable purpose," "endowment fund," "gift instrument," "institution," "institutional fund," "person," "program-related asset," and "record."

Sec. 163.004. **STANDARD OF CONDUCT IN MANAGING AND INVESTING INSTITUTIONAL FUND.** (a) Requires an institution, in managing and investing an

institutional fund, to consider the charitable purposes of the institution and the purposes of the institutional fund, subject to the intent of a donor expressed in a gift instrument.

(b) Requires each person responsible for managing and investing an institutional fund to 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, in addition to complying with the duty of loyalty imposed by law other than this chapter.

(c) Authorizes an institution, in managing and investing an institutional fund, to incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution and requires the institution to make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) Authorizes an institution to pool two or more institutional funds for purposes of management and investment.

(e) Provides that, except as otherwise provided by a gift instrument, rules set forth in this subsection apply to the management of and investment in an institutional fund.

Sec. 163.005. APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION. (a) Authorizes an institution, subject to the intent of a donor expressed in the gift instrument and to Subsections (d) and (e), to 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. Provides that, unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. Requires the institution, in making a determination to appropriate or accumulate, to act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and to consider, if relevant, certain factors set forth in this subsection.

(b) Requires a gift instrument to specifically state the limitation in order to limit the authority to appropriate for expenditure or accumulate under Subsection (a).

(c) Provides that certain language in a gift instrument creates an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund and do not otherwise limit the authority to appropriate for expenditure or accumulate under Subsection (a).

(d) Provides that the appropriation for expenditure in any year of an amount greater than seven percent of the fair market value of an endowment fund with an aggregate value of \$1 million or more, 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 was made, creates a rebuttable presumption of imprudence. Requires the fair market value for an endowment fund in existence for fewer than three years to be calculated for the period the fund has been in existence. Provides that this subsection does not apply to an appropriation for expenditure permitted under law other than this chapter or by the gift instrument or create a presumption of prudence for an appropriation for expenditure of an amount less than or equal to seven percent of the fair market value of the endowment fund.

(e) Provides that, for an institution with an endowment fund with an aggregate value of less than \$1 million, a rebuttable presumption of imprudence is created if more than five percent of the fair market value of the endowment fund is appropriated for expenditure in any year, 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

was made. Requires the fair market value for an endowment fund in existence for fewer than three years to be calculated for the period the fund has been in existence. Provides that this subsection does not apply to an appropriation for expenditure permitted under law other than this chapter or by the gift instrument or create a presumption of prudence for an appropriation for expenditure of an amount less than or equal to five percent of the fair market value of the endowment fund.

(f) Provides that, if an institution pools the assets of individual endowment funds for collective investment, this section applies to the pooled fund and does not apply to individual endowment funds, including individual endowment funds for which the nature of the underlying asset or donor restrictions preclude inclusion in a pool but which are managed by the institution in accordance with a collective investment policy.

Sec. 163.006. DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS. (a) Authorizes an institution to 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, subject to any specific limitation set forth in a gift instrument or in law other than this chapter. Requires an institution to act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in taking certain actions set forth in this subsection.

(b) Provides that, 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) Provide that an institution complying with Subsection (a) is not liable for the decisions or actions of an agent to which the function was delegated.

(d) Provides that, 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) Authorizes an institution to delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this chapter.

Sec. 163.007. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE. (a) Authorizes an institution to 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 if the donor consents in a record. Prohibits a release or modification from allowing a fund to be used for a purpose other than a charitable purpose of the institution.

(b) Authorizes the court, upon application of an institution, to 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, impairs the management or investment of the fund, or, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. Provides that Chapter 123 (Attorney General Participation in Proceedings Involving Charitable Trusts) applies to a proceeding under this subsection. Requires any modification to be made in accordance with the donor's probable intention to the extent practicable.

(c) Authorizes the court, upon application of an institution, to 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 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. Provides that Chapter 123 applies to a proceeding under this subsection.

(d) Authorizes the institution, if it makes certain determinations regarding a restriction contained in a certain gift instrument, 60 days after receipt of notice by the attorney general, to release or modify the restriction, in whole or part, if certain conditions set forth in this subsection are met.

(e) Requires the notification to the attorney general under Subsection (d) to be accompanied by a copy of the gift instrument and a statement of facts sufficient to evidence compliance with Subsection (d).

Sec. 163.008. REVIEWING COMPLIANCE. Provides that 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, not by hindsight.

Sec. 163.009. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. Provides that this chapter modifies, limits, and supersedes the provisions of 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)).

Sec. 163.010. UNIFORMITY OF APPLICATION AND CONSTRUCTION. Requires that consideration be given to the need to promote uniformity of the law with respect to the subject matter of this chapter among states that enact a law substantially similar to this chapter in applying and construing this chapter.

Sec. 163.011. APPLICABILITY OF OTHER PARTS OF CODE. Provides that Subtitle B, Title 9 (the Texas Trust Code), does not apply to any institutional fund subject to this chapter. Deletes existing text of Chapter 163.

SECTION 2. Amends Sections 43.006(a) and (k), Education Code, as follows:

(a) Authorizes the State Board of Education to delegate investment authority, rather than delegate such authority and contract, for the investment of the permanent school fund to the same extent as an institution, rather than the governing board of an institution of higher education, with respect to an institutional fund under Chapter 163, Property Code.

(k) Defines "institution." Deletes existing text defining "governing board" and "institution of higher education."

SECTION 3. Amends Section 66.08(a), Education Code, to make conforming changes.

SECTION 4. Amends Section 66.08(o)(2), Education Code, to define "institution" and "institutional fund." Deletes existing text defining "governing board" and "institution of higher education."

SECTION 5. (a) Provides that Chapter 163, Property Code, as amended by this Act, applies only to an institutional fund existing on or established after this Act's effective date.

(b) Makes application of this Act to an action taken or decision made relating to an institutional fund prospective.

SECTION 6. Effective date: September 1, 2007.

SUMMARY OF COMMITTEE CHANGES

Committee Amendment No. 1

(1) Amends SECTION 1 of H.B. 860, in added Section 163.005(d), Property Code (Engrossed Version, page 7, line 19), by adding an exception to that subsection as provided by Subsection (f) to conform it to this amendment.

(2) Amends SECTION 1 of H.B. 860, in added Section 163.005, Property Code (Engrossed Version, page 8, after line 25), by adding a new Subsection (f), to provide that the appropriation for expenditure in any year of an amount greater than nine percent of the fair market value of an endowment fund with an aggregate value of \$450 million or more, 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 was made, create a rebuttable presumption of imprudence. Requires the fair market value of an endowment fund in existence for fewer than three years to be calculated for the period the fund has been in existence. Provides that this subsection does not apply to or create a presumption of prudence for certain appropriations as set forth in the subsection. Provides that the subsection applies only to a university system, as defined by Section 61.003(10), education code [sic].

(3) Amends SECTION 1 of H.B. 860, in added Section 163.005, Property Code (Engrossed Version), to renumber the subsequent subsections of that section in accordance with the addition of the new Subsection (f), as added by this amendment.