

State of South Dakota

EIGHTY-SECOND SESSION
LEGISLATIVE ASSEMBLY, 2007

445N0172

SENATE BILL NO. 89

Introduced by: Senators Knudson and Heidepriem and Representatives Lust, Cutler, and Engels

1 FOR AN ACT ENTITLED, An Act to adopt the Uniform Prudent Management of Institutional
2 Funds Act.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. This Act may be cited as the Uniform Prudent Management of Institutional Funds
5 Act.

6 Section 2. In this Act:

7 (1) "Charitable purpose" means the relief of poverty, the advancement of education or
8 religion, the promotion of health, the promotion of a governmental purpose, or any
9 other purpose the achievement of which is beneficial to the community.

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

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



1 institutional fund.

2 (4) "Institution" means:

3 (A) A person, other than an individual, organized and operated exclusively for
4 charitable purposes;

5 (B) A government or governmental subdivision, agency, or instrumentality, to the
6 extent that it holds funds exclusively for a charitable purpose; and

7 (C) A trust that had both charitable and noncharitable interests, after all
8 noncharitable interests have terminated.

9 (5) "Institutional fund" means a fund held by an institution exclusively for charitable
10 purposes. The term does not include:

11 (A) Program-related assets;

12 (B) A fund held for an institution by a trustee that is not an institution; or

13 (C) A fund in which a beneficiary that is not an institution has an interest, other
14 than an interest that could arise upon violation or failure of the purposes of the
15 fund.

16 (6) "Person" means an individual, corporation, business trust, estate, trust, partnership,
17 limited liability company, association, joint venture, public corporation, government
18 or governmental subdivision, agency, or instrumentality, or any other legal or
19 commercial entity.

20 (7) "Program-related asset" means an asset held by an institution primarily to accomplish
21 a charitable purpose of the institution and not primarily for investment.

22 (8) "Record" means information that is inscribed on a tangible medium or that is stored
23 in an electronic or other medium and is retrievable in perceivable form.

24 Section 3. (a) Subject to the intent of a donor expressed in a gift instrument, an institution,

1 in managing and investing an institutional fund, shall consider the charitable purposes of the
2 institution and the purposes of the institutional fund.

3 (b) In addition to complying with the duty of loyalty imposed by law other than this Act,
4 each person responsible for managing and investing an institutional fund shall manage and
5 invest the fund in good faith and with the care an ordinarily prudent person in a like position
6 would exercise under similar circumstances.

7 (c) In managing and investing an institutional fund, an institution:

8 (1) May incur only costs that are appropriate and reasonable in relation to the assets, the
9 purposes of the institution, and the skills available to the institution; and

10 (2) Shall make a reasonable effort to verify facts relevant to the management and
11 investment of the fund.

12 (d) An institution may pool two or more institutional funds for purposes of management and
13 investment.

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

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

17 (A) General economic conditions;

18 (B) The possible effect of inflation or deflation;

19 (C) The expected tax consequences, if any, of investment decisions or strategies;

20 (D) The role that each investment or course of action plays within the overall
21 investment portfolio of the fund;

22 (E) The expected total return from income and the appreciation of investments;

23 (F) Other resources of the institution;

24 (G) The needs of the institution and the fund to make distributions and to preserve

1 capital; and

2 (H) An asset's special relationship or special value, if any, to the charitable
3 purposes of the institution.

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

8 (3) Except as otherwise provided by law other than this Act, an institution may invest in
9 any kind of property or type of investment consistent with this section.

10 (4) An institution shall diversify the investments of an institutional fund unless the
11 institution reasonably determines that, because of special circumstances, the purposes
12 of the fund are better served without diversification.

13 (5) Within a reasonable time after receiving property, an institution shall make and carry
14 out decisions concerning the retention or disposition of the property or to rebalance
15 a portfolio, in order to bring the institutional fund into compliance with the purposes,
16 terms, and distribution requirements of the institution as necessary to meet other
17 circumstances of the institution and the requirements of this Act.

18 (6) A person that has special skills or expertise, or is selected in reliance upon the
19 person's representation that the person has special skills or expertise, has a duty to
20 use those skills or that expertise in managing and investing institutional funds.

21 Section 4. (a) Subject to the intent of a donor expressed in the gift instrument, an institution
22 may appropriate for expenditure or accumulate so much of an endowment fund as the institution
23 determines is prudent for the uses, benefits, purposes, and duration for which the endowment
24 fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment

1 fund are donor-restricted assets until appropriated for expenditure by the institution. In making
2 a determination to appropriate or accumulate, the institution shall act in good faith, with the care
3 that an ordinarily prudent person in a like position would exercise under similar circumstances,
4 and shall consider, if relevant, the following factors:

- 5 (1) The duration and preservation of the endowment fund;
- 6 (2) The purposes of the institution and the endowment fund;
- 7 (3) General economic conditions;
- 8 (4) The possible effect of inflation or deflation;
- 9 (5) The expected total return from income and the appreciation of investments;
- 10 (6) Other resources of the institution; and
- 11 (7) The investment policy of the institution.

12 (b) To limit the authority to appropriate for expenditure or accumulate under subsection (a),
13 a gift instrument must specifically state the limitation.

14 (c) Terms in a gift instrument designating a gift as an endowment, or a direction or
15 authorization in the gift instrument to use only "income", "interest", "dividends", or "rents,
16 issues, or profits", or "to preserve the principal intact", or words of similar import:

- 17 (1) Create an endowment fund of permanent duration unless other language in the gift
18 instrument limits the duration or purpose of the fund; and
- 19 (2) Do not otherwise limit the authority to appropriate for expenditure or accumulate
20 under subsection (a).

21 Section 5. (a) Subject to any specific limitation set forth in a gift instrument or in law other
22 than this Act, an institution may delegate to an external agent the management and investment
23 of an institutional fund to the extent that an institution could prudently delegate under the
24 circumstances. An institution shall act in good faith, with the care that an ordinarily prudent

1 person in a like position would exercise under similar circumstances, in:

2 (1) Selecting an agent;

3 (2) Establishing the scope and terms of the delegation, consistent with the purposes of
4 the institution and the institutional fund; and

5 (3) Periodically reviewing the agent's actions in order to monitor the agent's performance
6 and compliance with the scope and terms of the delegation.

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

9 (c) An institution that complies with subsection (a) is not liable for the decisions or actions
10 of an agent to which the function was delegated.

11 (d) By accepting delegation of a management or investment function from an institution that
12 is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state
13 in all proceedings arising from or related to the delegation or the performance of the delegated
14 function.

15 (e) An institution may delegate management and investment functions to its committees,
16 officers, or employees as authorized by law of this state other than this Act.

17 Section 6. (a) If the donor consents in a record, an institution may release or modify, in
18 whole or in part, a restriction contained in a gift instrument on the management, investment, or
19 purpose of an institutional fund. A release or modification may not allow a fund to be used for
20 a purpose other than a charitable purpose of the institution.

21 (b) The court, upon application of an institution, may modify a restriction contained in a gift
22 instrument regarding the management or investment of an institutional fund if the restriction has
23 become impracticable or wasteful, if it impairs the management or investment of the fund, or
24 if, because of circumstances not anticipated by the donor, a modification of a restriction will

1 further the purposes of the fund. To the extent practicable, any modification must be made in
2 accordance with the donor's probable intention.

3 (c) If a particular charitable purpose or a restriction contained in a gift instrument on the use
4 of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful,
5 the court, upon application of an institution, may modify the purpose of the fund or the
6 restriction on the use of the fund in a manner consistent with the charitable purposes expressed
7 in the gift instrument.

8 (d) If an institution determines that a restriction contained in a gift instrument on the
9 management, investment, or purpose of an institutional fund is unlawful, impracticable,
10 impossible to achieve, or wasteful, the institution may release or modify the restriction, in whole
11 or part, if:

- 12 (1) The institutional fund subject to the restriction has a total value of less than twenty-
13 five thousand dollars;
- 14 (2) More than twenty years have elapsed since the fund was established; and
- 15 (3) The institution uses the property in a manner consistent with the charitable purposes
16 expressed in the gift instrument.

17 Section 7. Compliance with this Act is determined in light of the facts and circumstances
18 existing at the time a decision is made or action is taken, and not by hindsight.

19 Section 8. This Act applies to institutional funds existing on or established after July 1,
20 2007. As applied to institutional funds existing on July 1, 2007, this Act governs only decisions
21 made or actions taken on or after that date.

22 Section 9. This Act modifies, limits, and supersedes the Electronic Signatures in Global and
23 National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or
24 supersede Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize electronic delivery

1 of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).

2 Section 10. In applying and construing this uniform act, consideration shall be given to the
3 need to promote uniformity of the law with respect to its subject matter among states that enact
4 it.

5 Section 11. That §§ 55-14-1 to 55-14-7, inclusive, be repealed.