



New York Adopts the New York Prudent Management of Institutional Funds Act

Kevin J. McCoy

Thomas W. Donovan

Frank S. Venezia

James E. Amell

Carol A. Hausamann

Benjamin R. Lasher

Daniel J. Litz

Karl F. Newton

Kevin P. O'Leary

Timothy A. Reynolds

New York adopted its version of the Uniform Prudent Management of Institutional Funds Act (NYPMIFA) on September 17, 2010. NYPMIFA impacts the solicitation, management, investment and expenditure of certain charitable funds generally applies to not-for-profit organizations that maintain endowments or permanently restricted net assets.

Many not-for-profit organizations are in favor of the new requirements as it will provide them with the ability, where appropriate, to spend from an endowment even though the endowment may be worth less than the original value of the gift that created the endowment.

NYPMIFA contains six requirements for the not-for-profit organization to consider:

When Making Appropriations from Endowment Funds:

- Communicating with "available" donors: Generally, if the endowment donor is still available and the endowment fund or amount is governed by a gift document executed by the donor before the enactment of the law, September 17, 2010, the organization may not make an appropriation under NYPMIFA unless a statutory notice procedure is followed or a specific agreement is reached with the donor.
- Documenting appropriation decisions: Because NYPMIFA requires documentation of decisions to make an appropriation from an endowment fund, organizations should develop a system for analyzing the eight statutory factors that must be considered before making the appropriation and documenting the consideration given to each factor.

11 British American Blvd.

Latham, NY 12110

Ph: 518-785-0134

Fx: 518-785-0299

Email:

webmaster@marvincpa.com

Web:

<http://www.marvincpa.com>

- Addressing the presumption of imprudence: For new endowment fund gifts, organizations should consider whether and how to modify their forms of gift agreements to limit the effect of the presumption of imprudence that is now applicable to the appropriation. Generally, appropriations during the year of more than 7% of the value of an endowment fund, created after September 17, 2010 will be deemed imprudent.
- Updating fundraising materials: Organization should update their endowment fundraising materials to include new language required by NYPMIFA.

Prudent Investing of Funds:

- Updating investment policies: Because not-for-profit organizations are now required to have investment policies that meet certain statutory standards, organizations should review existing policies to confirm that they are in compliance. An organization with no investment policy must develop one that is consistent with NYPMIFA requirements.
- Assessing the independence of agents: Organizations that delegate the management or investment of assets to a third party must develop a protocol for assessing the Agent's independence.

Provisions Governing Appropriations from Endowment Funds:

NYPMIFA has an opt in, opt out system, which is unique to New York. An organization may not make appropriations, in particular appropriations that dip into the original dollar value of the fund, from any endowment fund governed by a gift instrument executed by the donor before September 17, 2010, if the donor is "available", unless, at least 90 days before doing so the organization gives the donor a form of notice containing specified language that allows the donor to:

- (1) "opt in" and accept NYPMIFA which will allow the institution to spend as much of the gift as may be prudent, or
- (2) "opt out" not accept NYPMIFA and require the institution not spend below the original dollar value of the gift.

If the donor does not respond to the notice within 90 days or if the donor responds by accepting the terms of NYPMIFA, then the organization may follow the rules for making appropriations from the endowment fund created by the donor.

This notice procedure is not necessary if the gift expressly permits spending below the original dollar value of the endowment fund.

Organizations should be aware that NYPMIFA applies automatically and does not require the “opt in opt out” procedure to an endowment established by donors who are no longer available and to gifts established under an instrument executed by the donor on or after September 17, 2010.

Factors Affecting Appropriations from Endowment Funds:

Under NYPMIFA organizations must consider eight factors, if relevant, when determining the amount it will appropriate from an endowment fund.

Those factors are:

1. The duration and preservation of the endowment fund
2. The purposes of the organization 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 organization
7. The investment policy of the organization
8. 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 organization.

Presumption of Imprudence:

New York adopted the rebuttable presumption that an appropriation from an endowment greater than 7% of its fair market value is imprudent with respect to gift instruments executed on or after September 17, 2010. New York also adopted a requirement that the fair market value of an endowment fund must be calculated as a quarterly (or more frequent) average over a five-year period or the period of the fund's existence, if shorter.

One additional factor related to imprudence, there is no safe harbor of prudence for appropriations of 7% or less, so organizations should not assume that appropriations below the 7% level are deemed to be prudent.

There are many facets of NYPMIFA that will affect not-for-profit organizations with endowments or permanently restricted net assets. Organizations should review NYPMIFA to ensure compliance with this new law. If you would like to review the provisions of the new law with us, please contact your Marvin and Company, PC representative.