By: Representative Cockerham To: Judiciary A

HOUSE BILL NO. 1104

AN ACT TO CREATE THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT; TO ENACT A SHORT TITLE; TO CREATE DEFINITIONS; TO SET THE STANDARD OF CONDUCT IN MANAGING AND INVESTING INSTITUTIONAL FUNDS; TO ENACT DEFAULT RULES OF CONSTRUCTION; TO PROVIDE FOR THE DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS; TO PROVIDE FOR THE RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT OR PURPOSE; TO SPECIFY IN WHAT WAY COMPLIANCE WITH THE ACT WILL BE DETERMINED; TO MAKE TRANSITION PROVISIONS; TO PROVIDE FOR THE RELATIONSHIP OF THE ACT TO CERTAIN OTHER LAWS; TO PROVIDE FOR UNIFORMITY OF APPLICATION AND CONSTRUCTION; TO REPEAL SECTIONS 79-11-601 THROUGH 79-11-617, MISSISSIPPI CODE OF 1972, WHICH CONSTITUTE THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. **Short title.** This act may be cited as the Uniform Prudent Management of Institutional Funds Act.

SECTION 2. **Definitions.** In this act:

(a) "Charitable purpose" means either:

(i) Any purpose described in Section 501(c)(3) of the Internal Revenue Code; or

(ii) Any voluntary health and welfare, charitable, benevolent, philanthropic, patriotic, educational, humane, scientific, public health, environmental conservation, civic, or other eleemosynary purpose.

(b) "Endowment fund" means 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. The term does not include assets that an institution designates as an endowment fund for its own use.

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

(d) "Institution" means:

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

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

(iii) A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated; or

(iv) The term "institution" does not include any bank, trust company, or other regulated financial institution.

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

(i) Program-related assets;

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

(iii) 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.

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

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

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

SECTION 3. **Standard of conduct in managing and investing institutional fund.** (1) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(2) In addition to complying with the duty of loyalty imposed by law other than this act, each person responsible for managing and investing an institutional fund shall 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.

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

(a) May 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

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

(4) Subject to the intent of a donor expressed in a gift instrument, an institution may pool two (2) or more institutional funds for purposes of management and investment.

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

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

(i) General economic conditions;

(ii) The possible effect of inflation or deflation;

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

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

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

(vi) Other resources of the institution;

(vii) The needs of the institution and the fund to make distributions and to preserve capital; and

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

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

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

(d) An institution shall reasonably manage the risk of concentrated holdings of assets by diversifying the investments of the institutional fund or by using some other appropriate mechanism, except as provided as follows:

(i) The duty imposed by this subsection (5) shall not apply if the institution reasonably determines that, because of special circumstances, or because of the specific purposes, terms, distribution requirements, and other circumstances of the institutional fund, the purposes of such fund are better served without complying with the duty. For purposes of this subparagraph, special circumstances shall include an asset's special relationship or special value, if any, to the charitable purposes of the institution or to the donor;

(ii) No person responsible for managing and investing an institutional fund shall be liable for failing to comply with the duty imposed by this subsection (5) to the extent that the terms of the gift instrument or express written agreement between the donor and the institution limit or waive the duty; and

(iii) The governing board of an institution may retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable.

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

(f) A person who has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds. This paragraph does not apply to a volunteer who is not compensated beyond reimbursement for expenses.

SECTION 4. Appropriation for expenditure or accumulation of endowment fund; rules of construction. (1) Subject to the intent of a donor expressed in the gift instrument or to any express written agreement between a donor and an institution, an institution may 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. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(a) The duration and preservation of the endowment fund;

(b) The purposes of the institution and the endowment fund;

(c) General economic conditions;

(d) The possible effect of inflation or deflation;

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

(f) Other resources of the institution; and

(g) The investment policy of the institution.

(2) In order to limit the authority to appropriate for expenditure or accumulate under subsection (1) of this section, a gift instrument must specifically state the limitation.

(3) 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:

(a) Create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(b) Do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (1) of this section.

SECTION 5. **Delegation of management and investment functions.** (1) Except as otherwise provided in a gift instrument or by law other than this act, an institution may 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. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(a) Selecting an agent;

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

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

(2) 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.

(3) Absent gross negligence, wantonness, recklessness, or deliberate misconduct, an institution that complies with subsection (1) of this section is not liable for the decisions or actions of an agent to which the function was delegated.

(4) 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.

(5) An institution may delegate management and investment functions to its committees, officers, or employees as otherwise authorized by law.

SECTION 6. Release or modification of restrictions on management, investment, or purpose. (1) If the donor consents in a record, an institution may 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. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(2) The court, upon application of an institution, may 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, if it impairs the management or investment of the fund, or if, because of

circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(3) 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, the court, upon application of an institution, may 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.

(4) An application to the court under subsection (2) or (3) of this section shall be made in the name of the institution to the chancery court of the county in which the principal activities of the institution are conducted.

SECTION 7. **Reviewing compliance.** Compliance with this act is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

SECTION 8. **Application to existing institutional funds.** This act applies to institutional funds existing on or established after July 1, 2012. As applied to institutional funds existing on July 1, 2012, this act governs only decisions made or actions taken on or after that date.

SECTION 9. **Relation to Electronic Signatures in Global and National Commerce Act.** This act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 USCS Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 USCS Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 USCS Section 7003(b).

SECTION 10. **Uniformity of application and construction.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. Sections 79-11-601, 79-11-603, 79-11-605, 79-11-607, 79-11-609, 79-11-611, 79-11-613, 79-11-615 and 79-11-617, Mississippi Code of 1972, which constitute the Uniform Management of Institutional Funds Act, are repealed.

SECTION 12. This act shall take effect and be in force from and after July 1, 2012.